

## Burgos, Alexander N

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**Subject:** FW: Agency Communication  
**Attachments:** SOS letter.pdf

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**From:** Liebman, Brian R <brian.liebman@oah.nc.gov>  
**Sent:** Wednesday, July 20, 2022 4:17 PM  
**To:** OAH.RRC.Commissioners <RRC.Commissioners@lists.ncmail.net>  
**Cc:** Duke, Lawrence <lawrence.duke@oah.nc.gov>; Peaslee, William W <bill.peaslee@oah.nc.gov>; Burgos, Alexander N <alexander.burgos@oah.nc.gov>  
**Subject:** Agency Communication

Good afternoon,

Earlier today, you each received a hand-delivered letter from Ann Wall at the Secretary of State's office. For the benefit of those not physically present at tomorrow's meeting, we thought it was prudent to scan the letter, and it is attached here for your review. Additionally, as this letter relates to Commission business, it will be posted on the online agenda.

Thank you,  
Brian Liebman

Brian Liebman  
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*State of North Carolina  
Department of the Secretary of State*

ELAINE F. MARSHALL  
SECRETARY OF STATE

ANN B. WALL  
General Counsel

By Hand Delivery

Jeanette Doran, Chair  
Andrew P. Atkins, Vice Chair  
Robert A. Bryan, Second Vice Chair

Rules Review Commission  
1711 New Hope Church Road  
Raleigh, North Carolina 27609

July 19, 2022

Re: Pre-Review

Dear Chair Doran, Vice Chairs Atkins and Bryan:

The agenda for your July 21, 2022 RRC meeting suggests the possibility of elimination of pre-reviews of draft rules by your staff attorneys. I have been involved with the APA since 1977. I write to you from the perspective of someone who has almost always operated in the APA rulemaking process as a legal representative of small government agencies. I write to encourage you to continue pre-reviews, at least for the small agencies with limited access to legal expertise.

By way of background, I think I drafted my first administrative rule in the mid-1970s. At that time, I was a law student working with the NC Department of Labor. I later returned to State government after eight and a half years as a federal litigator. In the 1990s, I again drafted rules for the Department of Labor. As an attorney in the Department of Justice from 2001-2006, I advised another agency client with regard to drafts of rules for its oversight commission. And, subsequently, as General Counsel for the Department of the Secretary of State, I have drafted rules for significant, newly-enacted laws, as well as amended existing rules.

Most of my APA rulemaking career has been with small agencies. In my present position, our department operates with lean resources; I have neither a paralegal nor other clerical support assigned to assist me full-time.

I have also chaired both the North Carolina Bar Association Administrative Law and Government and Public Sector Sections, where rulemaking has been a frequent topic of discussion.

I have considerable first-hand knowledge of the quality of the attorneys employed by OAH to represent the RRC over the years. As far as I have observed, they have professionally advised agencies, the public, and the RRC itself, without bias. Based on my experience, they have strictly adhered to the requirements of the APA and associated OAH and RRC rules and procedures.

Pre-review comments by RRC staff attorneys have been a godsend over the years for me, my clients, and the public (even when I disagreed with their comments). On more than one occasion, immersed in days and months of drafting rules with departmental experts, I have drafted a proposed rule that we were sure was necessary and met APA requirements. Then, when I submitted it to the RRC attorneys for pre-review, their response did not support that conclusion. In those instances, their pre-review helped me more effectively identify a better path forward, saving both time and money. I have learned a great deal over the years from RRC attorney pre-review comments.

Pre-review by RRC staff attorneys adds real value to rulemaking for both sets of RRC customers – the agencies and the public we all serve:

- \* Pre-review comments have helped me identify what people new to a regulated field may not initially recognize (and that we thought we had drafted clearly).

- \* Pre-reviews have enabled revisions to draft proposed rules to address non-substantive issues before publication.

  - \* This means that the public would not be distracted by those inadvertent mistakes, but can instead focus on the actual intended substance of a proposed rule. This saves them time, and positions them to more effectively articulate their bottom line interests.

  - \* This means that with non-substantive and inadvertent mistakes fixed in draft rules pre-publication, the number of technical corrections in the published and later-adopted rules are fewer. This should mean that RRC staff attorneys' technical corrections review of rules submitted to RRC should be reduced, allowing everyone to instead focus on the RRC's other review responsibilities.

One might ask: Why do proposed rules need review before publication? The answers are, of course, going to vary. Here are but a few:

- \* In the agencies for which I have done rulemaking, I have usually been the only person with any expertise on the rulemaking process. Sometimes, I needed the RRC attorney pre-review comments to educate agency employees unfamiliar with the process.

- \* Generally, experts use words and phrases common to a field of endeavor or profession. As one example, our securities employees – and apparently the entire industry – regularly use the term “broker-dealer,” the term they asked me to use in a proposed rule draft. It was only through pre-review that I realized the term was not the one that should be used, and that I was able to make timely clarifications to the draft rules.

\* Sometimes, we interpret jurisdiction differently. On one occasion, rules I was drafting impacted another agency's domain, but we thought we had clear authority for the draft rules. It was at a pre-review discussion that RRC attorneys said they would have to object to a particular rule as they disagreed with our conclusion regarding jurisdiction. It was that pre-review comment that enabled me to withdraw the proposed rule pre-publication. This avoided extra work for our staff, for the RRC staff attorneys who would have otherwise had to write the objection recommendation, for RRC Commissioners, and for the other agency.

\* Having known many rulemaking coordinators for other departments, boards, and commissions, I am confident in saying that many are not attorneys. Smaller state government entities may not have attorneys available to review their rules or the attorneys may even lack APA expertise. And for many small agencies, employee turnover can lead to errors as new coordinators come in between the times when the Rulemaking 101 class is offered by OAH. And, lacking that formal instruction, they commit otherwise avoidable errors.

In sum, I value and rely on the expertise of RRC staff attorneys. I am self-aware enough to realize that they often recognize what I am too close to the process to see. Finally, in the context of smaller agencies with limited access to legal resources, their pre-reviews are an integral and important part of the rulemaking process that should not be eliminated.

I thank you for your consideration of my comments.

Regards,



Ann B. Wall  
General Counsel

Cc: Wayne Ronald Boyles, III, Commissioner  
Barbara A. Jackson, Commissioner  
Jeffrey T. Hyde, Commissioner  
Randy O. Overton, Commissioner  
Robert A. Rucho, Commissioner  
Wm. Paul Powell, Jr., Commissioner  
Margaret Currin, Commissioner