

Burgos, Alexander N

Subject: FW: rules RRC staff pre-reviews

From: Gannon, Rich
Sent: Friday, July 29, 2022 5:33 PM
To: alex.burgos@oah.nc.gov
Subject: rules RRC staff pre-reviews

Alex,
My staff hasn't taken rules through recently, but we will be taking several sets through in the next few years, and I've found RRC staff assistance extremely valuable in the past, so I offer these thoughts.

How have you helped us? Going back to the days of Joe DeLuca and Bobby Bryan, they would meet with us as we honed draft rules preceding the formal APA process. They would provide invaluable help with interpreting statutory language as it related to rules objectives and content, providing guidance on spare rules design and the important challenge of providing sufficient standards or criteria to provide latitude to regulated parties and facilitate subsequent interpretation by the agency that avoided the need for amending rules.

On criteria for declining pre-reviews, I don't really know how the process has evolved, but I think Amanda Reeder gave us helpful text reviews on our readoptions in the 2018-2019 timeframe. If it has become something of copy edit grind, not sure what to say since if you don't catch it beforehand, you face it later – maybe more rule craft training on common mistakes. Agency attorneys are notoriously overloaded with more pressing work. Maybe it would help for RRC attorneys to offer front-end rules development meetings with agency staff.

I hope this is helpful.

Regards,
-Rich Gannon

Richard W. Gannon, MEM
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Note as of Feb 14, 2022, my schedule is office Monday – Thursday and remote work on Fridays.

Burgos, Alexander N

From: Anna Choi <Anna@ncl-law.com>
Sent: Thursday, July 28, 2022 12:06 PM
To: Burgos, Alexander N
Subject: [External] FW: Rules Review Commission - Seeking Comments on Pre-Reviews
Attachments: ATT00001.txt

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Alex,
Thank you – and thanks to Ashley and the RRC – for the opportunity to respond. I serve as the rulemaking coordinator for one occupational licensing board and counsel to several more who regularly engage my services regarding rule drafting and the rulemaking process. As you are also aware, I also served as a member of the RRC for nine years. The opinions expressed below are my own.

The pre-review process is vital to me and my clients for several reasons:

- It gives us an opportunity to identify, discuss and fix issues identified by RRC counsel in a relaxed way (without any impending deadline), rather than scrambling at the end of the process when rules have been filed with RRC and are awaiting review at the next RRC meeting. Although I am aware of rulemaking requirements (formatting, etc.), often what is “clear and unambiguous” to me and the agency is not as clear to RRC counsel. Thus, pre-review provides for an opportunity to address counsel’s concerns at the beginning of the process, rather than at the end.
- By addressing concerns before filing a notice of text, rules that have gone through the pre-review process often require very few technical corrections at the end of the process. This is extremely helpful with workload management, both for myself and Board staff whose expertise is required when there are questions related to subject matter of the rules.
- I acknowledge that if technical corrections cannot be resolved prior to the scheduled RRC meeting, rulemaking agencies can request extensions of time. However, the chosen effective date for many rules that I draft and file is often significant (and one that the rulemaking agency doesn’t want to extend) due to issues related to continuing education deadlines license renewal deadlines, etc. Thus, when the agency starts the rulemaking process with a specific effective date, they often want to stick with that date whenever possible. As such, pre-review gives my clients the opportunity to file a rule that will have very few technical corrections at the end of the rulemaking process.
- Though I have been involved with rulemaking for many years, many of the appointed board members of my licensing board clients are less familiar with the process and requirements. Thus, pre-review provides the opportunity for these rules to be reviewed ahead of time and provides an opportunity to educate board members regarding the rule drafting process and the requirements set forth in Art. 2A, G.S. 150B.

Thank you again.

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From: rulers-bounces@lists.ncmail.net <rulers-bounces@lists.ncmail.net> **On Behalf Of** Snyder, Ashley B
Sent: Monday, July 25, 2022 11:27 AM
To: OAH.rulers <rulers@lists.ncmail.net>
Subject: [Rulers] Rules Review Commission - Seeking Comments on Pre-Reviews

Good morning Rulemaking Coordinators,

At the July Rules Review Commission meeting, the Commission discussed updating the pre-review process. Pre-reviews are a voluntary service provided to agencies where RRC staff attorneys review draft rules prior to filing. Over time, staff attorneys have been receiving draft rules of a lesser quality, causing a drain on staff time and resources. The Commission discussed continuing pre-reviews, but suggested staff attorneys stop reviewing submissions of a poor quality. The Commission discussed setting parameters to guide staff attorneys on when to accept a pre-review submission. The Commission wants to be deliberate about any changes to the process and will be soliciting input and having discussions on this topic over the coming months.

The Commission is seeking input from agencies on (1) whether and why you find pre-reviews helpful and (2) if staff attorneys stop accepting pre-reviews of rules of poor quality, what factors should the staff attorney consider when not accepting a pre-review? Please direct all written comments and any requests to speak to Alex Burgos at alex.burgos@oah.nc.gov by Friday, September 9. The Commission will consider the comments and recognize any speakers at its September 15 meeting. The Commission will be discussing pre-reviews further in August but is kindly asking you hold requests to speak until the September meeting because we anticipate a lengthy agenda in August.

Thank you,

Ashley Snyder
Codifier of Rules
Office of Administrative Hearings
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Burgos, Alexander N

From: becky ncbtrl.org <becky@ncbtrl.org>
Sent: Tuesday, July 26, 2022 10:03 AM
To: Burgos, Alexander N
Subject: [External] Rules Process comments

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Alex,
I am sure that I am in the category of those “less than quality submissions” so perhaps my comments would be helpful.
-I would find the rule process helpful if it were listed in Step 1 Step 2 etc. RRC flow charts, dates are daunting and confusing at times.
-Our Board infrequently submit Rules so it is not an automatic process for us. RRC staff is incredibly helpful.
-Our Board does not have a staff attorney to assist in this process so perhaps if there were one identified to assist that would be helpful. I find that no matter what amendments are submitted, the staff attorney at that time, wants changes despite the Rule has been that way for years. So, RRC staff review will always catch and want changes for older Rules and as I stated earlier, our Rules are changed very infrequently.
Hopefully these may shed light from our perspective.
Becky

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Burgos, Alexander N

Subject: FW: [External] RE: [Rulers] Rules Review Commission - Seeking Comments on Pre-Reviews

From: cdiehl@ncalb.org <cdiehl@ncalb.org>

Sent: Monday, July 25, 2022 4:09 PM

To: alex.burgos@oah.nc.gov

Cc: Burgos, Alexander N <alexander.burgos@oah.nc.gov>

Subject: [External] RE: [Rulers] Rules Review Commission - Seeking Comments on Pre-Reviews

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Good afternoon, Alex.

I am responding to the message below, sent today by Ms. Snyder.

1. Unequivocally, YES. Pre-reviews are critical and very much appreciated. I shudder to think how difficult this agency's recent complete rules overhaul (July 2020 readoption) would have been without the Pre-review assistance I was graciously afforded. I worked very hard throughout, but I needed help and am ever grateful to have received it. I am less concerned about future rules activity or even future readoptions because this agency's rules are in such great shape now, thanks in huge part to the assistance received from RRC staff.
2. As a voluntary service, Pre-reviews are a gift, so whatever standard the RRC and its staff want to set for submissions is reasonable. Just please at least continue to provide training and online guidelines for coordinators to use. Some affected agencies are large and thus are able to employ full-time or most-time rules coordinators, along with support staff. Other agencies have small staffs with very diverse areas of responsibility. The agency I work for has two full-time employees and no part-time employees. Though all rules coordinators should perform competently, the specialization disparity should be noted.

Thank you for providing training and resources. Thank you for voluntarily providing pre-review assistance. And thank you for soliciting my thoughts.

Be well,

Charlie

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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