

MINUTES
JOINT MEETING
SENATE STATE AFFAIRS COMMITTEE
HOUSE STATE AFFAIRS COMMITTEE

DATE: Thursday, January 30, 2014

TIME: 8:30 A.M.

PLACE: WW02

MEMBERS PRESENT: Chairman McKenzie, Senators Davis, Winder, Lodge, Stennett and Werk

Chairman Loertscher, Vice Chairman Batt, Representatives Anderson, Andrus, Luker, Sims, Barbieri, Holtzclaw, McMillan, Monks, Packer, Smith, Gannon, and Woodings

ABSENT/ EXCUSED: Senators Fulcher, Hill and Siddoway
Representatives Crane and Palmer

NOTE: The sign-in sheet, testimonies and other related materials will be retained with the minutes in the committee's office until the end of the session and will then be located on file with the minutes in the Legislative Services Library.

CONVENED: **Chairman Loertscher** called the joint meeting of the Senate and House of Representatives State Affairs Committees to order at 8:30 a.m. Several agencies will discuss their experience with the negotiated rulemaking process.

Dennis Stevenson, Administrative Rules Coordinator, Department of Administration, opened the discussion about the negotiated rulemaking process by providing an overview of how the process works. During the years of 2012 and 2013, the Office of the Rules Coordinator conducted workshops where emphasis was placed on changes made to the provisions in the Administrative Procedures Act (APA). In addition, a memorandum was sent out to agency directors and rule writers to clarify the statutory changes. After the 2013 Session, meetings were held with individual agency staff, board members and commissioners to discuss requirements incumbent upon them once it was determined that negotiated rulemaking would be a feasible undertaking for their particular entity. During 2010, 14 out of 259 pending and pending fee rules were negotiated; during 2014, 48 out of 171 pending rules and pending fee rules went through the negotiated rulemaking process. About one-half of all rules fall into a category where there is no reason to negotiate because the nature of the change is relatively straight forward or it is by statute. **Mr. Stevenson** said the agencies provide information to the public and stakeholders by putting it on their websites.

Michael Chakarun, Tax Policy Manager, Idaho State Tax Commission (Commission), shared the Commission's experiences with the negotiated rulemaking process. **Mr. Chakarun** stated that negotiated rulemaking results in the development of better agency rules by involving the public and governmental stakeholders early in the development process so that differences could be identified and resolved before a rule moves into the formal stage and progresses to legislative review. All tax types started using the negotiated rulemaking process in 2012 although the property tax group had been using a version of that process for some time. The Commission has 13 different tax types that they administer. Most rulemaking is in the property tax, income tax and sales tax areas.

Mr. Chakarun explained that the rules committees are staffed by subject matter experts within the agency, policy people, auditors, individuals from the processing unit and those from the taxpayer services unit. The committees are chaired by experienced tax policy specialists with oversight provided by the Tax Policy Manager. The Property Tax Rules Committee, chaired by Alan Dornfest, Property Tax Policy Bureau Chief, is unique in that it includes 3 individuals that represent county government: one person from the Assessors' offices, one from the Treasurers' offices and one from the county clerks. Between 2010 and 2012, about 23 percent of the pending rules were the result of negotiated rulemaking. During the current review year, negotiated rulemaking has increased to 58 percent. The Commission does not do any fee rules. **Mr. Chakarun** outlined the process that they use from the start to the time they are ready for legislative review including how consensus is reached. This process includes input from stakeholders, the public, and other agencies. The final decision regarding whether or not to proceed with moving a draft rule to a formal rule is left to the Commissioners.

Mr. Chakarun concluded stating that the Commission embraces negotiated rulemaking; it is a good idea. **Senator Werk** inquired if it would require an increase in the Commission's budget to hire additional personnel to assist with the rulemaking to allow agency staff to get their regular work completed. **Mr. Chakarun** stated that negotiated rulemaking is an added burden involving policy specialists who also have regular duties. Those duties become backlogged during the rulemaking process.

Curt Fransen, Director, Idaho Department of Environmental Quality (DEQ), introduced Doug Conde, Section Chief, Deputy Attorney General for the DEQ and Paula Wilson, Paralegal and Rulemaking Coordinator for the DEQ. About 20 years ago, DEQ made the decision that both the rulemaking process and DEQ activities were controversial enough that they involved the Attorney General's office in the entire rulemaking process. However, they maintained control of the procedures within that process. **Mr. Fransen** provided a detailed description of the numbers and types of rules the DEQ has submitted for legislative review for the years 2010-2014, as well as the steps used in the rulemaking process. Negotiated rulemaking has been the default for DEQ although there are some instances when they do not go through the negotiated rulemaking process. Those instances are posted on an extensive and well developed website that is used to keep all interested parties advised of the status and actions for any given rule in progress at any time. Over the past 5 years, DEQ used negotiated rulemaking 21 times out of 39 opportunities. There are 3 typical times when negotiated rulemaking is not used:

1. Rule change to conform to legislative direction.
2. Housekeeping or simple change to a rule.
3. Federal regulations are incorporated into a rule by reference.

For all rulemaking, regardless of whether they are negotiated or not, DEQ makes every effort to notify the public and provide opportunities for comment consistent with and beyond the requirements of the APA. **Mr. Fransen** explained in detail the DEQ's procedures, the process for identifying interested parties and the DEQ's views on consensus. Participants in the process are generally well informed and express their support or opposition to a particular draft rule and openly discuss their concerns. Neither voting nor polling participants is allowed during the rulemaking. General agreement on the rule is determined by considering the comments that are given or submitted. There are times when DEQ must proceed when there is opposition to a rule. In most cases, that is related to a federal regulation. For the DEQ, the process helps educate the public and the DEQ, and builds consensus.

Sharon Keifer, Deputy Director, Idaho Department of Fish and Game (IDFG), stated her appreciation to the DEQ for their briefing and for a workshop they coordinated regarding negotiated rulemaking. Those efforts helped the agency and policy makers understand the process, value and benefits of negotiated rulemaking. The IDFG generates a lot of rules. From 2010 to 2014, IDFG submitted a total of 56 rule dockets about a variety of subjects. Some, such as trapping wolves, are very controversial. IDFG does not have fee rule authority. Only one rule docket during that period was actually promulgated. However, in January of this year the IDFG published 3 Notices of Intent in the Administrative Bulletin and just submitted another notice for publication in the February issue. The public comment period that just concluded had 122 responses for a relatively controversial subject. The IDFG is evaluating how to integrate existing public input processes with the negotiated rulemaking process. IDFG, using the system model that DEQ created, has a much more formalized section of their website for public comment and information to meet APA requirements. Like other agencies, IDFG develops a draft rule to provide a framework that everyone can work within. This has proven to be beneficial with the negotiated rulemaking process as well. **Ms. Keifer** explained that they identified those groups, people, agencies and others that have expertise in the pertinent areas the rule would impact. It is more difficult when a rule affects a broad range of unaffiliated sportsmen; that is more of a challenge whether it is commissioned rulemaking or negotiated rulemaking. The negotiated rulemaking process allows anyone to declare themselves an interested party. Both types of rulemaking allow the agency the discretion to filter out comments that are either off topic or not relevant to the rule. The IDFG is new at the process and will have to evaluate how best to identify consensus depending on the nature and scope of a particular rule. There was a question as to whether IDFG could choose to adopt a rule that is different than the negotiated, consensus rule. They do have that authority. The Idaho Fish and Game Commission (Commission) has the final say on the rule. However, the Commission does recognize the benefits of consensus.

Ms. Keifer noted that the IDFG has a quasi leadership committee to evaluate rule proposals and whether or not they are feasible. When a rule is a very simple change or when there is very little discretion because of law, it is not necessary to initiate negotiated rulemaking and they would provide the Commission with that guidance. Ultimately, the Commission will make the final decisions.

Tamara Prisock is the Administrator for the Division of Licensing and Certification and Manager of the Administrative Rules Unit for the Idaho Department of Health and Welfare (DHW). **Ms. Prisock** stated that the DHW has 76 chapters in the Idaho Administrative Code which support approximately 70 diverse programs involving many partners and stakeholders from public health services, child protection services, welfare and health benefits, criminal history background checks, mental health and substance abuse services, medicaid, and licensing of nursing/residential and day care facilities. All of these will be impacted by changes in the rules and are deeply involved when rules are being considered that are not driven by federal or state mandates. The DHW believes in engaging stakeholders and the public in the development of rules and policies because it results in effective administration of the programs. Both formal and informal negotiations are often conducted. Formal negotiations are those that are announced in the Idaho Administrative Bulletin which is accessible through the DHW website. Informal negotiations are those that the participation program targets as interested persons or impacted stakeholders. Those parties are directly contacted to work on a specific rule change. The DHW does not conduct rulemaking negotiations when there is no room for negotiation in a proposed rule. Most of the DHW's rules apply to federal regulations and laws, state statutes, grant guidelines or cost containment efforts. Because of the diversity of programs, services and stakeholders, the DHW doesn't require a standard set

of procedures. However, the DHW's efforts do meet the requirements of Idaho Code. The Administrative Rules Unit has developed a guide to assist programs and divisions in determining how to best engage stakeholders and the public when working on a specific rule or policy change. They have a short guide to negotiated rulemaking and a comprehensive guide for public participation.

Ms. Prisock outlined the basics of the processes they use to develop solutions and reach consensus. Decisions on the final version of the proposed rule are made by the DHW while considering stakeholder input and other factors such as program requirements and available funding. Having flexibility to use processes that work for any particular rule change or a particular group of stakeholders is important to the DHW. **Ms. Prisock** emphasized the importance of engaging the public in the development of their rules and policies. There has been a heightened awareness in the DHW about the preference to do the formal negotiated rulemaking unless there is a good reason not to do it. The 2014 rules were the result of more formal negotiated rulemaking.

ADJOURNED: **Chairman Loertscher** welcomed the Tax Commissioners who were in attendance. The efforts of the agencies is appreciated and it has been gratifying to see the progress they are making in this process. There being no further business before the Joint Committee, **Chairman Loertscher** adjourned the meeting at 10:14 a.m.

Senator McKenzie
Chair

Twyla Melton
Secretary