

ARIZONA STATE LEGISLATURE
Forty-sixth Legislature – First Regular Session

REGULATORY REFORM AND ENFORCEMENT STUDY COMMITTEE

Minutes of Meeting
Thursday, November 13, 2003
House Hearing Room 1 -- 9:30 a.m.

Chairman Burns called the meeting to order at 9:40 a.m. and the secretary noted the attendance.

Members Present

Senator Robert Burns, Cochair
Senator Ken Bennett
Senator Victor Soltero
Ronald Dalrymple
Kevin Kinsall
Bruce Tennenbaum

Representative Steve Huffman, Cochair
Representative Randy Graf
Steve Barclay
David P. Kimball III
George Tsiolis
Mary Wiley

Members Absent

Senator Linda Aguirre
Andrew W. Kunasek

Representative Meg Burton Cahill
Sandy Williams

Speakers Present

Mike Huckins, Legislative Research Analyst
Patrick Cunningham, Deputy Director, Arizona Department of Environmental Quality (ADEQ)
Henry Darwin, Enforcement Coordinator, Arizona Department of Environmental Quality (ADEQ)
Dennis Ehrhart, Assistant Director, Department of Weights and Measures
Mary Wiley, Assistant Director, Department of Health Services
Elaine Hogan, Childcare Director, Arizona Childcare Centers

Review of Committee Charge and History

Mike Huckins, Legislative Research Analyst, addressed the committee. Mr. Huckins offered a brief overview of the committee and discussed significant regulatory reform legislation that has occurred in the past. He informed the committee that significant regulatory reform began in 1992 with the passage of H.B. 2257, which established the Joint Legislative Committee on Regulatory Reform. The committee has met almost annually since 1993 and yearly recommendations have been incorporated into several bills.

Highlights of some of those bills include the following:

- S.B. 1236 was enacted during the 1994 legislative session and was also known as the Administration Procedure Act. It required publication of the full text administrative pools and delegation agreements in the state registrar, placed the attorney general certification of rules with an extended rule for the governor's regulatory review council and the approval of the rules.
- S.B. 1056 was enacted during the 1996 legislative session and it established current time frames for state agencies to dispose of agency fines and penalties into the state general fund instead of state agency funds and established the uniform administration appeals process. The bill also redefined the scope of judicial review for appeals of administrative decisions.
- Laws 1998, chapter 57 continued the Joint Study Committee on Regulatory Reform and also established the regulatory bill of rights, which provided for inspection fees and reporting requirements for agencies and boards and also established deadlines for accepting or rejecting administrative law judge decisions.
- In 2001, H.B. 2537 would have extended the committee. However, due to an engrossing mishap, the Governor vetoed the bill. The Speaker of the House and the President of the Senate then formed an ad hoc committee, which made several recommendations that were opposed in S.B. 1339 during the 2002 legislative session. The bill made adjustments when making guidelines to substantive policy statements and required annual regulatory agendas. The bill also established the regulatory reform and enforcement study committee. The committee has not met since 2001.

Mr. Huckins explained the purpose of the committee is to conduct hearings and inquire into: (1) the conditions under which State agencies comply with federal guidelines and requirements, submit to federal preemption, enforce a State statute or regulation implementing a federal program, and comply with federal mandates; (2) the development of a uniform methodology for the calculation of fees; (3) the availability of State and county laws and substantive policy statements online; (4) the criminal enforcement of regulatory law and effectiveness of this enforcement; (5) the right to recover attorney fees and costs in administrative appeal processes; (6) compliance with past State and county regulatory reform legislation and their application; (7) statutory exemptions from the Administrative Procedures Act (APA); (8) the coordination of agencies on permits, or other government approvals, for the type of activities that need them from more than one agency or level of government; (9) the extent that this State and political subdivisions have adopted unnecessary, duplicative or inconsistent regulations; (10) the effectiveness of agency ombudsmen and other compliance assistance programs; (11) the application of the APA to programs delegated to political subdivisions; and (12) methods to increase the reliability of economic impact statements of proposed rule makings. The Committee shall submit a written report of its findings and recommendations to the Speaker of the House of Representatives, the President of the Senate and the Governor on or before December 15, 2003, and provide a copy of its report to the Secretary of State and the Director of the Arizona State Library, Archives and Public Records.

Presentation by the Department of Environmental Quality

Patrick Cunningham, Deputy Director, Arizona Department of Environmental Quality (ADEQ), addressed the committee.

He discussed additions to the handbook and informed the committee that Arizona Revised Statute 41-1009 includes a provision passed in 1998 that deals with the Notice of Opportunity to Correct (NOC). He explained that when a NOC is sent to the regulated party with a timeline and compliance is achieved, the matter is then resolved. He added that substantial changes have been made to their handbook that lists all the violations enforced and that much more has been added to the NOC category instead of the Notice of Violation (NOV) category.

Mr. Cunningham explained that every NOV is reviewed by a division director prior to being sent out, the intent being that the appropriate party receives proper notification. He stated upon completion of the handbook revisions, a memo will be posted to the web page along with the handbook, and public comment will be taken regarding the changes.

In response to inquiry from Kevin Kinsall, Mr. Cunningham explained there was no printout of the violations available because there are over 5,000 violations listed. However, the list is accessible on the web page.

Henry Darwin, Enforcement Coordinator, Arizona Department of Environmental Quality (ADEQ), addressed the committee. Mr. Darwin explained that immediately after the adoption of regulatory reform in 1988, ADEQ developed a written policy applying ARS 41-1009 to all onsite visits. In 2001, ADEQ adopted the Compliance and Enforcement Handbook (Attachment 1), which was developed to address four issues, the first being to develop and guide staff on the implementation of enforcement policy. The second issue addresses the development of boilerplate letters and forms for implementation of the policy. The handbook also establishes a tracking system that helps management determine whether or not staff is adhering to the policy. The handbook also provides a basis for training. It is separated into various chapters that deal with specific compliance enforcement processes including inspections.

Mr. Darwin discussed chapter 3 of the handbook, which covers inspection procedures and rights. In particular, it describes the process for providing inspection rights before an inspection is conducted, including a notice of Inspection Rights Form. It describes the situations under which an Opportunity to Correct Deficiencies would be provided. It describes the need to provide inspection reports every 45 calendar days, which is actually shorter than the 30 working day requirement that is within the law. It also describes the need to provide action update letters as a result of inspection. Every 30 days the update is provided on any activities the agency will be undertaking as a result of the inspection and that is done until the decision is made to not pursue action or until action is taken.

Mr. Darwin explained that in developing the handbook, a very comprehensive database was generated, which is used as a tracking tool to ensure adherence to the handbook. The handbook has been designed to allow for and to communicate changes in ADEQ policy both to staff and to the public. The department has recently changed some of its policies implementing ARS 41-1009, which has resulted in the shift of agency focus from minor violations to more egregious violations and has resulted in the issuance of more NOC's through two changes in process. The first change is that over 150 violations have been moved from the category that would receive a NOV to the category that would receive the NOC. Furthermore, the determination of whether or not a facility would receive a NOV or NOC was a purely objective determination based upon those lists and is made by the division director.

He added the handbook is currently being updated and will reflect the most recent changes. He offered to answer any questions from the committee.

David Kimball pointed out that the change is consistent with a very important provision that is in statute regarding an inspection procedure. Once the inspection identifies a problem, it is brought to the attention of a corporation or a small business and that corporation or small business then addresses the problem. They do not have to receive a Notice of Violation (NOV). He pointed out that NOV's issued by other agencies, in particular by the Environmental Protection Agency (EPA), are considered very serious matters. They have to be reported to the Securities and Exchange Commission and the lending status of the business, as well as their ability to obtain capital, are affected. He stated he was very appreciative that the agency has recognized the importance of issuing NOCs in an effort to bring companies into compliance. The concern is that the handbook issued was heavily focused on issuing NOV's and that it was an objective determination. The list consists of every identifiable requirement of a statute or rule and if any one is violated, the NOV is automatically issued and that procedure is not consistent with the intent and purpose behind the statute, which encourages NOCs as opposed to encouraging NOV's.

Mr. Kimball inquired as to the legal status of the handbook and pointed out that it has never gone through rulemaking. He asked if it was deemed by the agency to be a substantive policy statement. Mr. Darwin responded and explained that it has been published through the Secretary of State and it has the appropriate stamp that reads *as a substantive policy statement, this is only advisory*.

Mr. Darwin clarified that the policy was being implemented in a very objective manner. He pointed out it is a fine line between giving staff sufficient guidance and allowing them to move forward on the vast majority of the work versus having an upper level manager make decisions on day-to-day operations. He stated this is a better way to distribute the important decision making responsibilities between staff and division directors. He clarified that although the handbook is far more subjective than it used to be, it is not a direct result of it being a substantive policy statement. It is actually a reflection of comments and feedback received from the regulated community.

Mr. Darwin responded to inquiry from Mr. Kimball and clarified that all minor violations automatically go to the NOC list. However, major violations go to the division director and he decides whether it is a NOV or a NOC. Mr. Kimball stated that from his perspective, he would have assumed, particularly because it is advisory only and the intent is to focus on NOC, every violation should be NOC unless it meets the statutory identified categories that would justify a NOV. Mr. Darwin explained the decision making process for placing a violation on one list rather than the other is based upon one criteria in ARS 41-1009, which is a risk to public health or the environment. Although there may be a presumption that there is a risk associated with a certain violation, there still will be a case by case determination made by the division director with consultation with staff. Mr. Kimball asked if the agency puts all substantive policy statements on their web site. Mr. Darwin stated the publishing of the policies on the web site is on the agenda.

Senator Burns inquired as to inspection rights and how a citizen would protect himself from a “renegade inspector.” Mr. Darwin explained that unless complaints are received, the department has no way of knowing about any problems. He explained further that self-addressed cards are provided for anyone who has had contact with the agency. The card can be completed and sent to the agency anonymously. He added that the card includes information such as the phone number for the ADEQ ombudsman as well as the state ombudsman.

Senator Bennett inquired as to whether or not inspectors are asked whether they have a potential conflict of interest with inspections they might make. Mr. Darwin explained there is no way to determine that independently. Inspectors very rarely make any type of decision on an issue. They are merely the fact finder and must go to management and hopefully, a manager would determine whether or not it was an objective determination of the compliance status of the facility. Mr. Bennett asked that if in the process of conducting an inspection and then reporting that to their supervisor, is there any element therein where the employee is asked to either disclaim or disclose a potential conflict of interest with the facility. Mr. Darwin answered there is not. He added that while there may be a policy that implements the conflict of interest requirements that apply to the agency, there is no affirmation each time an inspection is conducted regarding the conflict of interest.

Mr. Darwin responded to further inquiry from the committee and explained that there is a fee for the inspection but that the amount varies based on the nature of the inspection. Certain programs have a fee associated with them. However, that happens rarely since the agency moved from inspection fees to annual fees. In response to further inquiry, Mr. Darwin explained that there are certain site visits conducted that do not apply under the statute but ARS 49-1009 has been applied to all on site inspections.

Presentation by the Department of Weights and Measures

Dennis Ehrhart, Assistant Director, Department of Weights and Measures, addressed the committee. Mr. Ehrhart informed the committee that S.B. 1034 was signed by the Governor and filed with the Secretary of State May 7, 1998 and it contains the regulatory reform statute ARS 41-1009. It speaks to the conduct of an inspector and notification that needs to be given prior to an inspection. He stated that after passage of the statute, the department asked the assistant attorney general for an opinion about what needed to be done to bring the department into compliance with the statute. On August 5, 1998, the attorney general’s office released an attorney/client privileged document regarding S.B. 1034 and according to the report, the purpose of the statute was to make inspections less intimidating, more informative and more cooperative while not allowing regulating parties to use the law to shield themselves. Furthermore, the document concluded that the intent was to extend protection to this section of persons who have or are applying for a license. He stated that an inspection cannot be conducted on every new device placed into service each year and the department must rely heavily on licensed service representatives to start the licensing process. He stated that ARS 41-2065(E) mandates that inspections by the department are conducted in a random fashion and without prior notice. ARS 41-1291(A) states a commercial device cannot be used without it being certified or licensed.

Mr. Ehrhart provided a copy of a form used by the Department of Weights and Measures for compliance with ARS 49-1009(A), (B), (C), (D) and (H). He discussed the form (Attachment 2) and explained it was established shortly after receipt of the work product from the Office of the Attorney General. He explained that copies of test reports are left with each and every inspection and that undercover inspections are also conducted from time to time at places such as grocery store deli counters. He assured Senator Burns that the agency is very education oriented and offered that the web site is informative for consumers as well as businesses.

In response to inquiry from Mr. Barclay, Mr. Erhart explained that there is a series of tags involved in the inspections. A yellow tag indicates a warning where the device would be giving product away to the detriment of the owner/operator. A red tag is an out of service tag and the blue tag relates to an administrative order, which means use and sale of the commodity must be stopped. He pointed out that when a blue tag is on a device, even a registered service agent who is licensed through the department couldn't remove the tag and place that device back into service. A blue tag is a serious violation. All of the inspections are conducted in accordance with the National Institute of Standards Technology Handbooks, whether it is a gas dispenser or grocery store scale.

At the request of Representative Huffman, Mr. Erhart discussed the agency implementation of ARS 41-1009 regarding the correction of inspection deficiencies. He stated that the initial inspection for any establishment is of an educational nature. For those who have devices and are found to be in error, they will be tagged appropriately. However, the managers at those retail sites are taken through the store and shown the errors found and are offered cost effect methods to come into compliance. Additionally, people are directed to the website for assistance. All types of weighing and measuring devices are licensed and the best known is probably the gas pump and the grocery store scale. Scales of all sizes and capacities are inspected, from gram and karat scales use to weigh gems and precious metals to railroad track scales that are tested with test cars weighing hundreds of thousands of pounds. Through all of the inspections it is determined that either the device is accurate and correct, it is operating in favor of the owner/operator or it is operating in favor of the public. When the device is approved it receives a green sticker. A red sticker indicates the device is out of service and cannot be used until it is repaired and certified as accurate and correct. A yellow tag indicates a warning and the owner/operator has 30 days to bring it to compliance. Mr. Erhart stated scanners are not licensed in Arizona, although there are some jurisdictions in the country that do.

He pointed out that 3,000 inspections are conducted in the retail arena and although it is the least compliant program in the department, compliance is encouraged through education and through enforcement actions. He stated that frequency re-inspection is a lower level enforcement action and as those violations become more egregious and frequent, civil penalties are considered. Inspection of the net contents of packages is done on a daily basis. He explained that different remedies are offered to the retailer regarding net weight violations such as re-labeling the product or retrieving the items in the lot that meter exceed the label quantity and put them back out for sale. They can also choose to return them to the packer or they can place a sticker indicating the product is short weight and reduce the price. If a gas station fails, it is taken out of service unless a component of the system can be isolated to allow a remainder of the station to remain open.

He added that everyone receives a copy of the Administrative Bill of Rights and on the inspection form itself is listed the statutory reference for the visit, along with all of the knowledge and help the inspectors can offer.

Presentation by the Department of Health Services

Mary Wiley, Assistant Director, Department of Health Services, addressed the committee. Ms. Wiley explained the department licenses all health care and daycare facilities, as well as emergency medical services, and assisted living homes and child care facilities. There are two programs within the division of licensing that are also federal programs.

Ms. Wiley discussed the Notice of Inspection (Attachment 3). She explained that first, the Notice of Inspection is taken to the facility, a photo identification is presented and the inspector states why he is there. Application and licensing fees are charged and someone can accompany the inspector during the investigation. Upon completion of the inspection, an exit interview is conducted. Opportunity to submit a Plan of Correction is offered, as well as the opportunity to submit an Informal Dispute Resolution. The inspection form is signed and a copy is left at the facility.

Ms. Wiley responded to inquiry from the committee and explained that many times, surveyors will go out in teams for the purpose of self-monitoring. In daycare and assisted living situations, case management is performed, which means that each surveyor has a block of facilities and those are rotated every three years. She discussed the Licenses Servicing Flow Chart (Attachment 4) and explained that first, the application is received and the inspection is conducted. The surveyor examines the facility and completes a Statement of Deficiency (SOD) and it is sent to the facility within 14 days of the inspection. A Plan of Correction is received from the facility within 14 days of their receipt of the SOD. If the Plan of Correction is acceptable, a follow up inspection is conducted and the license is then issued. However, if the Plan of Correction is unacceptable, the facility is notified and a new Plan of Correction is provided. If the new plan is acceptable, the follow up survey is conducted and the license is issued. If the second plan is unacceptable, the case is referred to an enforcement team. The facility is notified every 30 days of the license status. Ms. Wiley informed the committee that she sits on the enforcement team where the case is presented for review and a determination is then made.

Elaine Hogan, Childcare Director, Arizona Childcare Centers, addressed the committee. Ms. Hogan informed the committee that childcare centers are inspected by five agencies. Maricopa County inspects the kitchens and bathrooms using a numerical coded inspection and the center is given a copy before the inspector leaves. The center is then aware of each violation. The Phoenix Fire Department uses a similar system for their inspections and for documenting violations. The Arizona Department of Education monitors the food program using an exit interview disclosing each violation and follows up with a typewritten copy by mail clearly outlining corrective action required. Once the department receives the corrective action, a letter is sent indicating the corrections were received. The Arizona Department of Economic Security subsidizes childcare payments and monitors the centers to confirm compliance.

Ms. Hogan stated her primary reason for addressing the committee was to discuss the inconsistencies of the Arizona Department of Health Services. She stated there are different inconsistencies among inspectors and that sometimes, a center is not inspected at all. There is no consistency for which rule violation would apply to a particular scenario. She pointed out that a staff file without proof of a high school diploma could be cited for R9-5-401, which is unqualified staff, R9-5-402A, which is no proof in the file and R9-5-501.B.1 for unsupervised staff. She stated that there are twelve rule requirements for staff files and six of those rules are often cited as two or three rule violations.

She provided a copy of her Independent Study (Attachment 5) and she discussed the pertinent issues of her concern. She informed the committee that 59 childcare centers were documented in her study.

She discussed the data collection reflected on page 5 of the study (Attachment 5) and referred to pages 8, 9, and 10, which reflect the differences in the processing of civil penalties. She explained that table 3 displays the rules and statutes that childcare centers in the study violated and for which they were charged civil penalties. The table also provides data on a rule or statute, how many times a center violated that rule before being assessed civil penalties and the number of centers that violated that same rule the same number of times. Also, the number of centers that were assessed civil penalties and the number of centers who violated that same rule the same number of times and were not assessed any civil penalties.

She informed the committee that unless otherwise stated, all civil penalties for each rule violation is \$100, which is the most the department can charge for a civil penalty. One center was charged on two separate occasions for \$100 times the number of staff in violation of the requirement to fingerprint staff within 7 days of hire. Another center was inspected, cited for a lack of fingerprinting requirements, and re-inspected 10 days later. That center was charged \$100 for each of the 10 days. One center was assessed \$100 due to both the fingerprint statute and the requirement to have a criminal history affidavit in the staff file. The researcher documented each of these rule violations as \$50 each. One center was only charged \$50 for the 10th and 11th violation of staff working alone who were not qualified to do so and also \$50 for the 6th and 7th violation of a similar rule which states that all staff must meet educational requirements. Only one center was charged for two violations of R9-5-304, which is the Children's Enrollment Information, although there were 38 additional centers that were cited twice for the same violations. Only one center was charged for one violation with five (5) citations of Diaper Changing Procedures, which constitutes 7 rules that are cited by inspectors.

Ms. Hogan continued with her presentation and explained that the rule for providing false information to the Department of Health Services was only violated by two centers and they were both charged civil penalties. She pointed out that five centers were cited once for the room temperature range violation and the only center that was charged a civil penalty had a repeat violation and the temperature was 83 degrees, one degree over the requirement. She added that although some centers were charged on the 2nd and 3rd violation of R9-5-503A.1.b (keeping the diaper changing area free from unrelated items), one center with four and one with seven violations of this identical rule were not charged a civil penalty.

Discussion

Senator Burns stated that based on Ms. Hogan's study, it seems there is selective enforcement taking place.

Ms. Wiley responded that Ms. Hogan spent much time researching files and while it is one thing to read a report, it is another to actually be present at the survey. There are many rules and the reasons for citing violations are not always apparent when looking at a file after the survey. She stated that several safeguards are in place to help with consistency. She pointed out that there are 26,000 facilities and approximately 28 inspectors, which makes it difficult for each of them to cite the same violations. She informed the committee that a Consistency Committee was created, which consists of five team leaders and members of the survey staff. Those violations most frequently cited and most problematic are reviewed by the committee in an effort to reach a coordinated way of responding to those violations. She added that the Enforcement Team reviews the scope and severity of the violation and then chooses enforcement.

She discussed civil money penalties and explained that the charge used to be \$100 for each violation. Presently, the charge starts at \$50 and increases for more serious violations. She responded to Ms. Hogan's claim that the department will occasionally "double up" on surveyors and explained that this is sometimes done in the case of a provider who has offered consistent problems. This is done to protect the surveyor against claims of favoritism or discrimination and also to protect the provider. She explained that the Formal Dispute Resolution is not required in statute but is offered and that she would research the claim of the center that had not been inspected in over four years.

Senator Burns stated his intent to examine the study and would ask staff to assist him. He stated that in addition to inspecting private child care centers, the department also has the responsibility of inspecting those child care centers located in the public school system. He said he was interested to see how those inspections compare to those presented by Ms. Hogan.

Ms. Wiley stated she would review Ms. Hogan's study with her program manager.

Representative Huffman stated that due to lack of time, the presentation by the Department of Economic Security would not be heard. With respect to material presented, he stated that there has to be some consistency in application of the rules, as well as ensuring that people are aware of their rights when there is a violation.

Mr. Barclay inquired as to whether a bill of rights would be applicable in the political subdivisions, municipalities and so forth, so that there is more consistency in that area.

Senator Burns stated he would be interested to know what the penalties are when an agency violates the rules.

Mr. Kimball referred to the presentation by the Department of Weights and Measures and pointed out that he did not notice the names of the ombudsman or the contact person on their inspection forms. There was just a telephone number and the statute states an identifiable name must be given. He suggested including that information in order to bring compliance.

Future Meetings

Representative Huffman stated he would to be in touch with the members regarding their schedules and suggestions for the next meeting.

Without objection, the meeting adjourned at 11:40 a.m.

Robyne Richards, Committee Secretary
December 19, 2003

(Original minutes, attachments and tape on file in the Office of the Chief Clerk)