STATE OF NEW YORK

5982

2017-2018 Regular Sessions

IN SENATE

May 9, 2017

Introduced by Sen. JACOBS -- read twice and ordered printed, and when printed to be committed to the Committee on Investigations and Government Operations

AN ACT to amend the legislative law, the state administrative procedure act and the executive law, in relation to the filing of objections to agency rules by the administrative regulations review commission

The People of the State of New York, represented in Senate and Assembly, do enact as follows:

Section 1. Section 87 of the legislative law is amended by adding a new subdivision 4 to read as follows:

4. The commission shall have the power to object to all, or a portion of any administrative rule or regulation that has been adopted or that has been proposed by an agency pursuant to the rule making procedures of section two hundred two of the state administrative procedure act. Should in the performance of its duties, a majority of members of the commission find that an administrative rule or a portion of an administrative rule is (i) arbitrary, capricious, an abuse of agency discretion, or is otherwise not in accordance with law; or (ii) is contrary to constitutional, right power, privilege or immunity; or (iii) is inconsistent with, or in excess of statutory jurisdiction, authority, or limitations, or is short of statutory right; or (iv) has been adopted or has been proposed without substantial observance of the procedures required by law; or (v) is otherwise irrational or unreasonable upon consideration of any or all of the criteria specified in this subdivision, the commission may, in writing, notify the agency of their objection and reason or reasons for their objection. A written letter of objection must be mailed or delivered to the agency responsible for the adoption or proposal of the objected to rule. A valid letter of objection must be signed by each member of the commission that has decided to object to the rule in its entirety, or in part. The commis-

EXPLANATION--Matter in *italics* (underscored) is new; matter in brackets [-] is old law to be omitted.

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sion must also file a certified copy of the letter of objection with the department of state, division of administrative rules.

§ 2. Paragraph (a) of subdivision 9 of section 202 of the state administrative procedure act is amended by adding three new subparagraphs (vi), (vii) and (viii) to read as follows:

(vi) following receipt of a valid letter of objection that is written and signed by a majority of the members of the administrative regulations review commission, publish such letter in the next issue of the state register.

(vii) following receipt of a valid response to a letter of objection written and signed by the commissioner, director or counsel of that agency, publish such written response in the next issue of the state register.

(viii) reject any letter of objection or any written response to a letter of objection that is deficient for lacking at least a minimal explanation of an objectionable issue, or the requisite signature or signatures, and give prompt notice of deficiency to the administrative regulations review commission or agency.

§ 3. Section 202 of the state administrative procedure act is amended by adding a new subdivision 10 to read as follows:

10. Objection. (a) If in the performance of their duties, as specified in subdivision one of section eighty-seven of the legislative law, a majority of the members of the administrative regulations review commission decide to object to an administrative rule or a portion of an administrative rule that has been adopted or that has been proposed, an objection must be made in accordance with the procedures specified in subdivision four of section eighty-seven of the legislative law.

(b) An agency that receives a letter of objection pertaining to a rule that has been proposed, but has not been adopted must read and consider the objection and issue a written response prior to adoption of the objected to rule. Agencies must provide written responses to letters of objection to the department of state, division of administrative rules for publication in the state register. A written response to a letter of objection must state that the agency has either (i) agreed to change the rule in whole, or in part in accordance with the objection and will publish the requisite notice of revised rule making, or (ii) needs additional time to consider the objection and possible changes and will publish a notice of withdrawal, or (iii) that the agency has decided against making any changes to the proposed rule. Written responses to letters of objection must state that the objection was read and considered and include at least a brief explanation of the agency's rationale for either agreeing with the objection, or requiring additional time for consideration, or for disagreeing with the objection. Any agency decision to stop, extend, or proceed with promulgation of all or part of an objected to rule, must be done in accordance with the rule making requirements of this section.

(c) An agency that receives a letter of objection pertaining to all or part of a rule that has been adopted must read and consider the objection and issue a written response within forty-five days of receiving the letter of objection. Agencies must provide written responses to letters of objection to the administrative regulations review commission as well as a certified copy of any such response to the department of state, division of administrative rules for publication in the state register. A written response to a letter of objection must state that the agency either (i) agrees to change the rule in whole, or in part in accordance with the objection and will publish a notice of proposed rule

making needed to promulgate a new corrected rule, or (ii) needs additional time to consider the objection and possible changes, or (iii) that the agency has decided against making any changes to the rule. Written responses to letters of objection must acknowledge that the objection was read and considered and include at least a brief explanation of the agency's decision to agree with the objection, or to require additional time for consideration of the objection, or to disagree with the objection. Should an agency decide that additional time is needed to consider the objection as well as possible solutions, an agency will be provided up to an additional forty-five days to provide a written response to the objection.

(d) An agency will not be compelled by the administrative regulations review commission to change an adopted or proposed rule in response to a letter of objection; however refusal to do so, can be used as evidence by a petitioner in action challenging an administrative rule or a portion of an administrative rule in an adjudicatory hearing pursuant to article three of this chapter, or an action for declaratory judgment pursuant to section two hundred five of this article, or in a proceeding made against an agency pursuant to article seventy-eight of the civil practice law and rules.

(e) Should a petitioner (i) challenge an administrative rule or a portion of an administrative rule, or seek relief for damages resulting from an administrative rule, and (ii) include as evidence, a relevant letter of objection, as well as an agency written response stating refusal to accommodate the objection, or assert the absence of any agency response to the objection, and (iii) challenge the same issue or issues, as is stated in the letter of objection, then the burden of proof that the rule is not defective due to the particular issue or issues alleged, will move from the petitioner to the agency.

(f) Should a petitioner establish each of the three requirements specified in paragraph (e) of this subdivision, the administrative judge or tribunal, or that state supreme court or appellate court judge or judges shall consider the issue or issues, objected to in both the petitioner's action and in a letter of objection and impose a heightened standard of review upon the agency to prove that the administrative rule or the portion of the rule in question, is not defective due to the specific reason or reasons as claimed by the petitioner and the administrative regulations review commission in the letter of objection. Other than moving the burden of proof under these criteria, no other component of subdivision eight of this section, section two hundred five, or article three of this chapter, or article seventy-eight of the civil practice law and rules shall be amended by this subdivision.

§ 4. Section 102 of the executive law is amended by adding a new subdivision 6 to read as follows:

6. All letters of objection that state at least a brief explanation of an objectionable issue pertaining to an adopted or a proposed administrative rule in its entirety, or in part, that are written and signed by a majority of the members of the administrative regulations review commission; as well as any written response to a letter of objection that includes at least a brief response to the objection and the signature of the commissioner, director or counsel of a state agency must be included in the official compilation of codes, rules and regulations of the state of New York. All such letters of objection and written responses to objections shall be made available to members of the public and shall be included within any published unofficial compilations of the codes, rules and regulations of the state of New York, including the

unofficial version that is linked to on the department of state website. Letters of objection and written agency responses to objections shall be received, recorded and compiled consistent with all other requirements of this section and sections one hundred one-a, one hundred one-b, one hundred three, one hundred four, one hundred five, one hundred six and one hundred six-a of this article.

§ 5. This act shall take effect immediately.