STATE OF NEW YORK

1680

2019-2020 Regular Sessions

IN ASSEMBLY

January 16, 2019

Introduced by M. of A. ABINANTI -- read once and referred to the Committee on Governmental Operations

AN ACT to amend the state administrative procedure act, in relation to the establishment of agency adjudication plans

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

Section 1. Legislative intent. The legislature hereby finds and declares that administrative adjudication was developed to provide expert, efficient, timely and fair resolution of claims, rights and disputes before state agencies. Administrative adjudication often addresses complex scientific, technical, financial, medical, legal and related issues under the jurisdiction of state agencies with specialized knowledge, and should be a more flexible alternative to, rather than a duplication of, the civil and criminal court system. Administrative adjudication must meet due process standards and should resolve disputes in a manner that is fair and appears fair to the public. The fairness of administrative adjudication and the appearance of fairness are particularly important when a state agency is a party to the administrative proceeding. To assure expert, efficient, timely and fair adjudication, hearing officers who preside at administrative hearings should be knowledgeable, competent, impartial, objective and free from inappropriate influence.

§ 2. The state administrative procedure act is amended by adding a new section 309 to read as follows:

§ 309. Agency adjudication plans. 1. As used in this section:

(a) "Agency" shall mean any department, board, bureau, commission, division, office, council, committee or officer of the state authorized by law to make final decisions in adjudicatory proceedings but shall not include the governor, agencies created by interstate compact or international agreement, the department of audit and control, the department of law, the division of military and naval affairs to the extent it exer-

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

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cises its responsibility for military and naval affairs, the division of state police, the identification and intelligence unit of the division of criminal justice services, the office of children and family services to the extent it exercises its responsibilities pursuant to article nineteen-G of the executive law, the state insurance fund, the workers' compensation board, the state division of parole, the department of corrections and community supervision, the joint commission on public ethics, the state education department and the division of tax appeals.

(b) "Hearing officer" shall mean a person designated and empowered by an agency to conduct adjudicatory proceedings as defined in this section, including but not limited to hearing officers, hearing examiners and administrative law judges; provided, however, that such term shall not apply to the head of an agency or to members of a state board or commission.

(c) "Adjudicatory proceedings" shall mean any activity before an agency in which a determination of legal rights, duties or privileges of named parties thereto is required by law to be made only on a record and after an opportunity for a formal adversarial hearing; provided, however, that such term shall not apply to: (i) a rule making proceeding; (ii) an employee disciplinary action or other personnel action pursuant to article five of the civil service law; or (iii) representation proceedings conducted by the public employment relations board.

2. Every agency that conducts adjudicatory proceedings shall ensure that such proceedings are impartial, efficient, timely, expert and fair.

3. (a) Unless otherwise authorized by law and except as provided in paragraph (b) of this subdivision, a hearing officer shall not communicate, directly or indirectly, in connection with any issue that relates in any way to the merits of an adjudicatory proceeding pending before the hearing officer with any person except upon notice and opportunity for all parties to participate.

(b) A hearing officer may consult on questions of law with supervisors, agency attorneys or other hearing officers, provided that such supervisors, hearing officers or attorneys have not been engaged in investigative or prosecuting functions in connection with the adjudicatory proceeding under consideration or a factually related adjudicatory proceeding. Hearing officers may also consult with supervisors, other hearing officers, support staff or court reporters on ministerial matters such as scheduling or the location of a hearing. The head of each agency shall strictly enforce the prohibition set forth in this subdivision.

(c) The provisions of paragraph (a) of this subdivision shall not apply: (i) in determining applications for initial licenses for public utilities or carriers; or (ii) to proceedings involving the validity or application of rates, facilities, or practices to public utilities or carriers.

4. No agency shall consider whether a hearing officer's rulings, decisions or other actions favor or disfavor the agency or the state in establishing the hearing officer's salary, promotion, benefits, working conditions, case assignments or opportunities for employment or promotion. The work of hearing officers shall only be evaluated on the following general areas of performance: competence, objectivity, fairness, productivity, diligence and temperament.

5. No agency shall establish quotas or similar expectations for any hearing officer that relate in any way to whether the hearing officer's rulings, decisions or other actions favor or disfavor the agency or the state.

6. In any pending adjudication proceeding, the agency may not order or otherwise direct a hearing officer to make any finding of fact, to reach any conclusion of law, or to make or recommend any specific disposition of a charge, allegation, question or issue, except by remand, reversal, or other decision on the record of the proceeding; provided, however, that such provision shall not preclude a supervisor from giving legal advice or guidance to a hearing officer where the supervisor determines that such advice or guidance is appropriate to assure the quality standards of the agency or to assure consistent or legally sound decisions.

7. If the head of an agency, or a designee, issues a decision that includes findings of fact or conclusions of law that conflict with the findings, conclusions or recommended decision of the hearing officer, the head of the agency, or the designee, shall set forth in writing the reasons why the head of the agency reached a conflicting decision.

8. (a) Every agency responsible for administrative adjudication shall develop an administrative adjudication plan. An agency may adopt such plan and may amend such plan as necessary following notice of a proposed plan or amendment thereto in the state register and an opportunity for public comment. The agency shall post its current administrative adjudication plan on its website.

(b) The administrative adjudication plan shall, at a minimum, include the following:

(i) an attestation by the head of the agency that the plan adheres to the principles of administration adjudication set forth in subdivisions one, two, three, four, five, six and seven of this section;

(ii)(A) an organization of administrative adjudication that ensures that hearing officers do not report with regard to functions that relate to the merits of adjudicatory proceedings to any agency official other than the head of the agency, a supervisor of hearing officers or the general counsel. Wherever practical, hearing officers shall be assigned to an administrative unit made up exclusively of hearing officers, supervisors and support staff. The unit may be part of the agency counsel's office but may not be part of any agency bureau, office or division with programmatic functions unless such functions are not the subject of adjudicatory proceedings within the agency nor may it include attorneys responsible for prosecutions or other adversarial presentation of agency position. Unless otherwise proscribed by law, hearing officers may be assigned duties in addition to serving as a hearing officer provided that: (1) such duties do not conflict with the hearing officer's responsibilities as a hearing officer; and (2) such duties do not involve functions related to prosecutions or adversarial presentations of agency positions. Hearing officers may be assigned to conduct investigatory hearings provided that the standards of independence and objectivity specified in this section are adhered to; and

(B) an agency may establish an organization of administrative adjudication for less complex cases that does not satisfy the requirements of clause (A) of this subparagraph provided that any such organization and its justification is set forth in the agency's administrative adjudication plan; and

(C) in order to comply with the requirement that a hearing officer not report with regard to functions that relate to the merits of adjudicatory proceedings to any agency official other than the head of the agency, a supervisor of hearing officers or the general counsel as set forth in clause (A) of this subparagraph, an agency may request the services of a hearing officer from a different agency;

(iii) provisions for the hiring of hearing officers that allow, to the extent practical and consistent with the civil service law, opportunities for non-agency personnel to compete for open hearing officer positions;

(iv) location of hearing officers that separates, to the extent practical, hearing officers, supervisors and support staff from other agency staff;

(v) duly promulgated procedural regulations governing adjudicatory hearings that include, without limitation, requirements for clear and detailed notices of hearing and statements of charges; permission for answers and responsive pleadings, where appropriate; provisions for discovery to the extent permitted by the agency; and a procedure for any party to request recusal of a hearing officer;

(vi) a description of continuing education and training programs for hearing officers. Training programs shall include an explanation of the need for objectivity and fairness and the avoidance of a pro-agency bias. The governor's office of employee relations shall develop training programs to assist agencies in providing continuing education and training to hearing officers;

(vii) a description of efforts to consult and share resources with other agencies;

(viii) the use of outside hearing officers, to be paid on a per diem or contract basis, where such outside officers are necessary to implement the provisions of this section;

(ix) for agencies that adjudicate fifty or more adjudicatory proceedings per year, a management system intended to effect timely disposition of adjudicatory proceedings;

(x) a description of the agency's existing system of administrative adjudication and a discussion of the changes in such system that the proposed plan would effect; and

(xi) the summary of the agency's rules governing procedures on adjudicatory proceedings and appeals required pursuant to subdivision three of section three hundred one of this article.

9. The governor shall designate an oversight entity to monitor agency compliance with the requirements of this section, and to receive any complaints from an individual or organization that an agency's system of administrative adjudication is not consistent with this order; provided, however, that such oversight entity shall have no jurisdiction to review a complaint until a complainant has exhausted all of the complainant's administrative and judicial remedies with regard to the administrative proceeding at issue. In reviewing any such complaint, the oversight entity shall not review the merits of an individual case determination nor shall it review issues that have been ruled upon by a court, but its review shall be limited to whether the system of adjudication utilized by the agency is consistent with the provisions of this section. In the event that this review identifies areas of an agency's system of administrative adjudication that appear to be inconsistent with the provisions of this section, the oversight entity shall notify the agency and the complainant. Such notification shall be advisory in nature and not binding on an agency.

10. Every two years after the effective date of this section, every agency shall make public a report that sets forth the steps taken by the agency to comply with this section. Such report shall also include statistics on proceedings brought against adjudications of the agency pursuant to the provisions of article seventy-eight of the civil practice law and rules, including the outcome of such proceedings and the

reasons for any reversal or modification of an agency determination. Such report shall be published in the state register and posted on the agency's website.

11. Public authorities and corporations and agencies not covered by this section are encouraged to administer their systems of administrative adjudication in a manner consistent with the principles of this section.

§ 3. This act shall take effect immediately, and every agency subject to its provisions shall be in full compliance with the provisions of this act on and after the first of January next succeeding the date upon which it shall have become a law.