STATE OF NEW YORK

1048

2019-2020 Regular Sessions

IN ASSEMBLY

January 14, 2019

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

AN ACT to amend the state administrative procedure act, in relation to negotiated rule making

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

Section 1. Short title. This act shall be known and may be cited as the "small business negotiated rule making act of 2019".

§ 2. Legislative intent. The legislature hereby finds that providing additional opportunities for direct small business and public participation in the development of potentially controversial rules can enhance the ability of the agency to develop the most appropriate and effective regulatory language, and can reduce the time and expense occasioned by litigation over the rule. Negotiated rule making provides a means of improving the substance and increasing the acceptability of rules, by affording to the agency, regulated small businesses and the public the opportunity for face-to-face negotiations over a rule making proposal which is under development by the agency. The opportunity for representatives of the various persons and small businesses interested in a rule to meet and communicate with each other provides a framework for the sharing of information, knowledge and expertise in order to develop a consensus on the most effective and appropriate rule making proposal. Fair representation of all interested parties and a skilled facilitator are essential elements of a successful negotiated rule making process.

Therefore, the legislature declares it to be in the public interest to set forth a statutory process for negotiated rule making in the state administrative procedure act as an alternative means of developing appropriate and effective proposed rules.

§ 3. The state administrative procedure act is amended by adding a new article 2-A to read as follows:

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

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ARTICLE 2-A
NEGOTIATED RULE MAKING

Section 250. Purpose of article.
251. Definitions.
252. Determination of the need for negotiated rule making.
253. Notice of proposed committee formation.
254. Committee establishment.
255. Conduct of committee activities.
256. Committee termination.
257. Services, facilities and payment of expenses of committee members.
258. Judicial review.

§ 250. Purpose of article. The purpose of this article is to establish a statutory framework for the selection of appropriate subjects for negotiated rule making, and for the conduct of negotiated rule making. Nothing in this article is intended to limit other innovative rule making procedures otherwise authorized by statute.

§ 251. Definitions. As used in this article:

1. "Consensus" means unanimous concurrence among the interests represented on a negotiated rule making committee established pursuant to this article, unless such committee by unanimous concurrence (a) agrees to define such term to mean a general but not unanimous concurrence; or (b) agrees upon another specified definition.

2. "Facilitator" means a person who impartially aids in the discussions and negotiations among the members of a negotiated rule making committee in developing a proposed rule.

3. "Interest" means, with respect to an issue or matter, multiple parties which have a similar point of view or which are likely to be affected in a similar manner.

4. "Negotiated rule making" means rule making through the use of a negotiated rule making committee.

5. "Negotiated rule making committee" or "committee" means an advisory committee established by an agency in accordance with the provisions of this article to consider and discuss issues for the purpose of reaching a consensus in the development of a proposed rule.

§ 252. Determination of the need for negotiated rule making. 1. An agency may propose to establish a negotiated rule making committee to negotiate and develop a proposed rule, if the head of the agency determines that the use of negotiated rule making is appropriate and in the public interest. In making this determination the head of the agency shall consider whether:

(a) there is a need for a rule;

(b) there are a limited number of identifiable interests or small businesses that will be significantly affected by the rule;

(c) there is a reasonable likelihood that such a committee can be convened with balanced representation of persons who can adequately represent the interest identified under paragraph (b) of this subdivision and who are willing to negotiate in good faith to reach a consensus on a proposed rule;

(d) there is reasonable likelihood that such a committee will reach a consensus on the proposed rule within a fixed period of time;

(e) use of negotiated rule making will not unreasonably delay the notice of proposed rule making and the issuance of a final rule;

(f) the agency has adequate resources and is willing to commit such resources as may be needed, including technical assistance, to a negotiated rule making committee;

(g) the negotiated rule making will not impose a disadvantage on persons whose participation is essential but who lack the resources to participate, or, if participation would impose such disadvantage, it is likely that the agency may obtain and make available such resources in a manner consistent with section two hundred fifty-seven of this article; and

(h) the agency will use the consensus of the committee with respect to the proposed rule as the basis for a rule proposed by the agency for notice and comment.

2. An agency which determines that the proposal of a negotiated rule making proceeding is appropriate and in the public interest shall propose such action to the committee. Such proposal shall indicate the basis for the agency's determination, and shall list the interests which the agency believes to be necessary for representation in the negotiated rule making proceeding and the basis for determining that the proposed list of interests is fair and balanced. The agency's proposal shall be made available to the public on request.

§ 253. Notice of proposed committee formation. 1. If an agency approves the proposal to conduct a negotiated rule making proceeding, then the agency shall publish in the state register and such trade and other specialized publications, and by such electronic means as it deems appropriate a notice which shall include:

(a) an announcement that the agency intends to establish a negotiated rule making committee to negotiate and develop a proposed rule;

(b) a description of the subject and scope of the rule to be developed, and the issues to be considered;

(c) a list of small businesses and other interests which have been determined to be likely to be significantly affected by the rule;

(d) a list of the persons proposed to represent such interests and the person or persons proposed to represent the agency;

(e) a proposed agenda and schedule for completing the work of the committee, including a target date for publication by the agency of a proposed rule for notice and comment;

(f) a description of administrative support to be provided to the committee by the agency;

(g) a solicitation of comments on the proposal to establish a committee, and the proposed membership of the committee; and

(h) an explanation of how a person may apply to nominate another person for membership on the committee, as provided in subdivision three of this section.

2. Special efforts shall be made by the agency to solicit participation by small businesses, residents of rural areas, inner-city urban areas, minority and disadvantaged groups, and other interests who may otherwise not be represented or may be underrepresented in the negotiated rule making proceeding.

3. Persons who would be significantly affected by a proposed rule and who believe that their interests would not be adequately represented by any person proposed by the agency to represent their interests, or who believe that the proposed representation of interests on the committee will not be fair and balanced, may apply for or nominate another person for membership on the committee to represent such interests or to achieve such balance. Each application or nomination shall include:

(a) the name of the applicant or nominee and a description of the interests such person shall represent;

(b) information that the applicant or nominee is qualified to represent such interests;

(c) a written commitment that the applicant or nominee shall actively participate in good faith in the development of the rule under consideration; and

(d) the reasons for believing that any person or persons proposed to represent interests in the notice published pursuant to subdivision one of this section would not adequately represent the interests of the person submitting the application or nomination.

4. The agency shall provide for a period of at least thirty calendar days for the submission of comments and applications under this section.

5. Any small business or person who is dissatisfied with an agency decision that:

(a) it is not necessary to provide for representation of the interest which such business or person proposes to represent; or

(b) an individual is not the best qualified person to represent an interest, may appeal such decision to the agency. Such business or person shall advise the agency of such appeal and shall provide the committee and agency with a statement of the basis for such appeal. In making a decision on representation of an interest, evidence that an organization has authorized a person to represent it shall be sufficient to demonstrate that such individual is best qualified to represent that organization. The agency shall notify the proposed committee members of the appeal. The decision by the agency shall be issued within thirty days and shall be final.

§ 254. Committee establishment. 1. After considering comments and applications submitted pursuant to section two hundred fifty-three of this article, the agency shall determine whether a negotiated rule making committee can adequately represent, in a fair and balanced manner, all interests that will be significantly affected by the proposed rule, and whether it would be feasible and appropriate to establish a committee for a particular rule making. In establishing and administering a committee, the agency shall comply with the intent of this article.

2. The agency shall promptly publish notice of its determination and the reasons therefor in the state register, in such trade or other specialized publications, or by electronic means as it deems appropriate. In addition, a copy of such notice shall be sent to any person who applied for or nominated another person for membership on such committee.

3. The agency shall provide appropriate administrative support to the committee, including technical assistance.

§ 255. Conduct of committee activities. 1. Each negotiated rule making committee established pursuant to this article shall consider the matters proposed for consideration by the agency and shall attempt to reach consensus on a proposed rule with respect to such matters.

2. The person or persons representing the agency on a committee shall participate in the deliberations and activities of the committee with the same rights and responsibilities as the other members of the committee, and shall be authorized to fully represent the agency in the discussions and negotiations of the committee.

3. The agency shall nominate a person to serve as a facilitator for the negotiations of the committee, subject to the approval of the committee by consensus. If the committee does not approve the nominee of

the agency as facilitator, the committee shall select by consensus a person to serve as the facilitator. A person designated to represent the agency in negotiation of substantive issues shall not serve as facilitator or chair of the committee.

4. A facilitator approved or selected by a committee shall:

(a) chair the meetings of the committee in an impartial manner;

(b) impartially assist the members of the committee in conducting discussions and negotiations;

(c) manage the keeping of committee minutes, except that any personal notes and materials of the facilitator or members of the committee shall not be subject to this section; and

(d) at the conclusion of the proceeding, provide the agency with his or her observations and comments on the usefulness and effectiveness of the negotiated rule making proceeding, and such other comments as he or she deems pertinent.

5. A committee established pursuant to this article may adopt procedures governing its operation not inconsistent with the law.

6. (a) If a committee reaches a consensus on a proposed rule, at the conclusion of negotiations the committee shall transmit to the agency which established the committee a report containing such proposed rule, which shall be proposed for adoption by the agency within sixty days of receipt of the report. If the committee does not reach consensus on a proposed rule, the committee may transmit to the agency a report specifying any areas in which the committee reached a consensus. The committee may include in the report and other information, recommendations or materials that the committee considers appropriate. Any committee member may include as an addendum to the report additional information, recommendations or materials.

(b) Any report transmitted pursuant to this section shall be provided to the committee at the same time such report is provided to the agency.

7. In addition to the report required by subdivision six of this section, a committee shall submit to the agency the records, materials and reports that were used to arrive at its recommendations. All such records shall be made available to the public for inspection and copying.

8. All records and reports made pursuant to this section, except for any personal notes and materials of the facilitator or members of the committee, shall be open and accessible to the public for inspection and copying.

§ 256. Committee termination. A negotiated rule making committee shall terminate upon promulgation of the final rule under consideration, unless the committee's charter contains an earlier termination date.

§ 257. Services, facilities and payment of expenses of committee members. 1. An agency may employ or enter into contracts for the services of an individual or organization to serve as the facilitator for a negotiated rule making committee under this article, or may use the services of a state employee to act as the facilitator for such a committee.

2. For the purposes of this section, an agency may use the services and facilities of other state agencies, and public and private agencies and instrumentalities, with the consent of such agencies and instrumentalities, and may receive and accept voluntary and uncompensated services from them.

3. Members of a committee shall be responsible for their own expenses of participation on such committee.

§ 258. Judicial review. Any action relating to establishing, assisting or terminating a negotiated rule making committee pursuant to this article shall not be subject to judicial review. Nothing in this section shall bar judicial review of a rule if such judicial review is otherwise provided by law. A rule which is the product of negotiated rule making and is subject to judicial review shall not be accorded any greater deference by a court than a rule which is the product of other rule making procedures.

§ 4. The provisions of this act shall preempt and supersede any inconsistent executive order relating to negotiated rule making.

§ 5. This act shall take effect immediately.