Executive and Legislative Review and Vetoes 2001 - 2017

ALABAMA - *Current*

The Joint Committee on Administrative Regulation Review reviews each proposed rule. The Committee has the power to veto a rule, and this veto is only good until the next regular session of the state legislature. The legislature must approve the veto by a joint resolution, but this joint resolution is subject to the Governor's veto.

ALASKA

The Joint Committee on Administrative Regulation Review reviews all proposed rules. The Committee holds oversight hearings and may recommend to the entire legislature that a bill be passed to bar adoption of a rule. This bill would be subject to the Governor's veto. In the past, the Committee could annul a rule, but that was ruled unconstitutional in 1980. There was an unsuccessful attempt to pass a constitutional amendment that would allow the legislature as a whole to annul rules by resolution. The Committee does not review existing rules. The legislature maintains the power to amend the authorizing statute for each agency.

The Lt. Governor can return rules that do not faithfully execute the law or respond the comments by the legislative committee. No rule is effective until the Attorney General signs off on the legislative review. The Attorney General returns about 25 percent of rules.

ARIZONA - *Updated*

Arizona has had a rulemaking moratorium in place since 2009, which has been approved and extended by two governors and the state legislature. The moratorium has forced agencies to review and repeal outdated rules, but as time has gone on, numerous agencies have been granted exemptions by the Governor's Office to carry out new rulemaking. Agencies essentially must seek permission to promulgate rules.

ARKANSAS - *Current*

Both proposed rules and possible amendments to existing rules must be filed with the Bureau of Legislative Research of the Legislative Council. Whenever the Council thinks that a rule is contrary to legislative intent or is not within an agency's statutory authority, the Council will inform the General Assembly. The Council may also hold hearings to listen to testimony on a rule, and the Council may recommend that the General Assembly pass a statute to supersede the rule. Legislative committees may take the same action as the Council if they so choose. If the legislature chooses to pass a bill to supersede the rule, it must be signed by the Governor.

CALIFORNIA - *Current*

The Office of Administrative Law, which is an independent review agency, reviews proposed rules. The Office has the power to bar adoption of rules, but these decisions can be appealed to the Governor.

COLORADO

There is no review of proposed rules. After rules become effective, the Attorney General issues an opinion regarding the rule, and then the Office of Legislative Legal Services reviews the rule to ensure that the rule is within the scope of the agency's authority. Rules that the Office

flags for further review are scheduled for a hearing before the legislature's Joint Committee on Legal Services.

All rules are subject to automatic expiration unless the legislature passes a bill extending the timeframe. Each year a rule review bill is passed dealing with newly promulgated rules, and this bill, like all others, is subject to the Governor's veto. Rules that the Committee decides are not within the agency's power to promulgate will be included in a section of the bill that sets apart rules that will be allowed to automatically expire.

CONNECTICUT - *Updated*

The Attorney General reviews all proposed rules for legality. Then, the Regulation Review Committee reviews all rules, including emergency rules. The Committee votes on each rule and can choose to bar adoption of a rule, approve a rule, or make technical changes to a rule. Only a vote of the legislature as a whole can overturn the decision of the Committee. The Committee is a legislative entity comprised of 14 members (six from the Senate and eight from the House), and there are an equal number of members from each party. If the Committee takes no action after 65 days for a new rule or 35 days for a resubmitted rule, the rule is deemed approved.

DELAWARE - *Current*

The legislature's Sunset Committee provides legislative review of rules. The Committee only reviews existing rules, and this is done by reviewing rules for about five or six agencies each year on a rotating basis. This review is limited to ensuring that the agency has not exceeded its statutory authority. Other review is done by the judiciary.

FLORIDA

The legislature's Joint Administrative Procedures Committee reviews all proposed and existing rules. The Committee can recommend that the legislature pass a bill to suspend or repeal a rule, but the Committee cannot take action to repeal a rule on its own. The legislature can only veto a rule by passing a bill subject to the Governor's veto. The Division of Administrative Hearings can invalidate both proposed and existing rules.

If the agency fails to respond to comments received from the Committee, the Department of State will not accept the rule for adoption. Also, there is now a requirement that all rules must be firmly grounded in an agency's statutory authority.

GEORGIA

All proposed rules are reviewed by legislative committees. The presiding officers of the House and the Senate assign each proposed rule to the appropriate committee based on subject matter. If the committee decides to oppose the rule, a resolution to override the rule will be placed on the legislature's docket. If the resolution passes by two-thirds in each house, the rule will be void. If the resolution passes by less that two-thirds in each house of the legislature, the rule will be forwarded to the Governor for his approval or veto.

HAWAII -Updated

The adoption, amendment, or repeal of any rule by any state agency shall be subject to the approval of the Governor.

IDAHO -*Updated*

Even though it was already part of the APA, Idaho recently amended its constitution to give the legislature constitutional authority to review any administrative rule to ensure it is consistent with the legislative intent of the statute being interpreted, implemented, prescribed or enforced. Here is Section 29 of Article III of the constitution:

SECTION 29. LEGISLATIVE RESPONSE TO ADMINISTRATIVE RULES. The legislature may review any administrative rule to ensure it is consistent with the legislative intent of the statute that the rule was written to interpret, prescribe, implement or enforce. After that review, the legislature may approve or reject, in whole or in part, any rule as provided by law. Legislative approval or rejection of a rule is not subject to gubernatorial veto under section 10, article IV, of the constitution of the state of Idaho.

A rule being promulgated must be submitted for legislative review and approved before it can go into effect. The Idaho legislature uses the concurrent resolution to reject a rulemaking, which prevents it from taking effect, or to reject any or all of a previously approved final rule. All temporary rules and fee rules must be approved by concurrent resolution or they are null, void and of no force and effect.

On the executive side, the Governor's Division of Financial Management requires a promulgating agency to fill out and file a "rulemaking request form" prior to initiating a rulemaking. The executive review is done by both financial and policy analysts who, after review of the request form, either deny the request or allow the rulemaking to go forward. There are no statutory provisions that address this executive review. This is the governor's policy.

ILLINOIS - *Current*

The Joint Committee on Administrative Rules reviews both proposed and existing rules. The Committee can suspend a rule for a number of days. In order for the suspension to be permanent, both houses of the legislature must pass a joint resolution.

INDIANA

The legislature's oversight power is vested in the Administrative Rules Oversight Committee. It has interpreted its power of review only to extend to existing rules. The Committee looks at each rule and advises the legislature of any actions to take. The legislature may only veto a rule if a bill is passed under normal conditions.

Both the Attorney General and the Governor review proposed rules, and they both have the power to veto rules. The Attorney General can only veto rules if they are in an improper form or if they do not conform to existing law. The Governor can veto rules for any reason.

Each agency is required to re-promulgate its rules every seven years.

IOWA

The legislature's Administrative Rules Review Committee meets monthly to review all proposed rules. The Governor's Administrative Rules Coordinator sits on the committee as a non-voting member, and all rules must be filed with him. The Committee may object to a rule if it finds the rule to be unlawful. This objection only becomes important if the rule is challenged in court. The Committee can delay the effective date of a rule in order to allow for additional

review by the legislature as a whole, and the legislature may rescind a rule by a joint action of the two houses.

The Governor may also object to a rule on the same basis as the Committee. He can also rescind a rule at any time during the first 70 days after it takes effect for any reason.

KANSAS

The Joint Committee on Administrative Rules and Regulations reviews all proposed rules, and it may choose to review existing rules. Any comments made by the Committee concerning a proposed rule are made part of the public record that is available at the hearing on the rule. The Committee may recommend statutory changes to overcome any problems it has with the final version of the rule, but this power has never been utilized because the agency always heeds the Committee's comments.

The Attorney General reviews all rules to ensure that the agency has the statutory authority to promulgate the rule.

KENTUCKY

All proposed rules are sent to the Legislative Research Commission, which is composed of General Assembly support staff. There are two legislative committees that have the power to review rules. The Administrative Regulation Review Subcommittee specializes in reviewing rules, and it holds hearings on each rule it reviews. The findings of the hearing are returned in a report to the Commission, and then the Commission assigns the rule to the second committee for review. The second committee is one that specializes in the appropriate subject areas. This committee can hold hearings and render findings in the same way as the Subcommittee.

Either of the above mentioned committees can find that a rule is deficient. If a rule is found to be deficient, it will automatically expire at the end of the next session of the General Assembly unless it is enacted as a statute. The General Assembly may also pass a bill that addresses the same subject as a rule but is substantially different in effect, which makes the rule void. Currently, there is a case pending over whether this process violates the separation of powers.

LOUISIANA

The legislative committee that has the power to review each rule is determined by the subject area of the committee (i.e., the Natural Resources committee would review rules in that subject area). The Finance and Appropriations committees also review each rule. The committees may choose whether to meet to discuss submitted proposed rules. The committees may reject rules, but the Governor can override that decision. Therefore, the legislature passed a law that states that the legislature can suspend, amend, or repeal rules without that decision being subject to the Governor's veto. If there is no action on a rule by the legislature within 30 days of the agency submitting the rule to the committees, the agency may continue the process of adoption without waiting for the review.

The Governor may choose to veto a rule even if the committees approve it. This is done by executive order and must be done within the first 30 days after the rule becomes effective.

MAINE - *Current*

The Attorney General must review all rules to ensure that they conform with the law.

Only major substantive rules are reviewed by the legislature, and whether a rule is considered substantive is determined by the agency's enabling statute. The rule goes to a committee, and the committee makes recommendations to the entire legislature. The legislature has the power to amend, approve, or disapprove a rule. This must be done by passing a bill, which is subject to the Governor's veto.

MARYLAND - *Updated*

The Attorney General and the Joint Committee on Administrative, Executive, and Legislative Review review all rules after promulgation. The committee is not required to give its explicit approval in order for a proposed regulation to become effective. If the committee cannot complete its review of the proposed regulation within the 45-day period, it may delay, or "hold," the adoption of the regulation. During this time, the committee may suggest to the unit that certain changes be made. If no agreement is reached, the unit may subsequently notify the committee of its intent to adopt the regulation despite the committee's hold. At any time, the committee may formally vote to oppose the adoption of the regulation. If the Committee decides to oppose a rule, the rule cannot take effect without approval of the Governor.

MASSACHUSETTS

The current review process was established in 1996 by executive order. Each agency sends its rules to the appropriate Secretary for review. Then, all rules must go to the Office of Regulatory Review, which is part of the Governor's office, for review and approval. The rules are reviewed to ensure that they are necessary, easy to understand, and cost effective. Also, each agency must have a plan for future action on its rules, so obsolete rules will not linger on the books. The Office can reject a rule or suggest amendments, but there is a 10-day time limit for the Office to take action.

The Legislature must be informed of all newly promulgated rules, but they do not actually review the rules.

MICHIGAN - *Updated*

In Michigan, there is no executive veto of regulations. Further, there is no per se legislative veto of regulations. That said, every rule being promulgated must be submitted to the legislature for review. At that point, the legislature can either propose a change to the rule, object to the rule based on certain objection standards outlined in Michigan's APA (see MCL 24.245a(1)), or do nothing (default approval).

MINNESOTA

The Office of Administrative Hearings reviews all rules except the expedited emergency rules of the Department of Natural Resources, which are reviewed by the Attorney General. The Attorney General may bar adoption of these emergency rules if they are found not to conform with certain legal standards. For all other rules, the Office of Administrative Hearings holds a hearing, which is lead by an administrative law judge (ALJ). The ALJ hears all evidence presented and then files a written report. The ALJ may approve, approve with amendments, or disapprove a rule. He must disapprove a rule if it falls into one of the categories listed in the statute.

Rules are assigned to standing committees for review based on the subject area covered by the rule and the committee. The standing committees of the legislature may delay adoption of

a rule by way of a majority vote as long as the vote is taken before the notice of rule adoption is published in the State Register. If a committee does so, the agency may not adopt the rule until the end of that legislative session.

The Governor may veto a rule if he submits the notice of veto to the State Register within 14 days of receiving a copy of the rule.

Agencies are required to file an annual report of obsolete rules, and the report must include a timetable for repealing the rules.

MISSISSIPPI

There is no review of rules for content by anyone other than the agency that promulgated the rules.

MISSOURI

The Joint Committee on Administrative Rules receives a copy of every proposed rule. The Committee may hold hearings on any rule or any part of a rule, and it may submit comments and recommendations to the Administrative Rules Division for publishing. The Committee may also send its comments to the Appropriations Committees of the House and Senate.

If the Committee disapproves a rule or a portion of a rule, the rule cannot go into effect for 30 days. During that time period, the House and Senate can pass a joint resolution permanently disapproving a rule. This resolution must be signed by the Governor. If this is done, the rule cannot go into effect at all. The legislature as a whole may also choose to pass a bill that overrides the rule.

Not all agencies are subject to this process. The Committee does not have the authority to disapprove emergency rules; however, it can still make comments about the rule. The Secretary of State reviews emergency rules.

The Secretary of State ensures that all rules were promulgated according to the state's rulemaking requirements. The Attorney General and the Governor do not have any powers of review.

MONTANA

Each of the seven interim legislative Committees has the power to review rules that fall within its subject area jurisdiction. The Committees may require an agency to hold hearings on a rule, and the Committees may submit comments on proposed rules. If the Committee objects to a rule, the agency must respond in writing, and if the agency does not amend the rule to satisfy the Committee's objections, the agency will bear the burden of proving the rule falls within its authority. The Committee may also petition an agency to amend or repeal rules, as well as delay the effective date of a rule.

The Committees may also make recommendations to the Legislature. For instance, they can recommend that the statute granting rulemaking authority to the agency be amended in order to ensure that the agency follows legislative intent in its future rulemaking. The Committee may also draft such legislation to be presented to the Legislature.

The Governor has the power to review each rule for compliance with gubernatorial policy if he chooses. He may choose to veto any rule.

NEBRASKA

A copy of each rule promulgated is filed with the Executive Board of the Legislature, and it forwards the rule to the appropriate standing committee based on subject matter. The committee reviews the rule, and members of the legislature may appear at the hearings for proposed rules to make comments. The legislature does not have the power to bar adoption of rules or to veto rules.

The Attorney General and the Governor must approve all rules before they can be filed and become law. The Attorney General ensures that all rules are constitutional and comply with the agency's statutory authority to promulgate. The Governor is assisted in his review of rule content by the Governor's Policy Research Office, which receives information on each rule both prior to the hearing on the rule and immediately prior to the rule being published. If the Governor does not approve a rule, it does not become effective.

The Secretary of State reviews rules merely for format.

NEVADA - *Updated*

A copy of all proposed rules goes to the Legislative Commission, which may offer revisions. A legislative committee may be designated to review rules that are promulgated between legislative sessions. The Committee determines whether the rule falls within the agency's statutory authority, whether it meets legislative intent, and if there is sufficient explanation of the need for the rule. The Legislative Commission or Subcommittee to Review Regulations may object to a permanent regulation after its adoption, in which case it does not become effective. The regulation does not become effective until the Commission or Subcommittee approves the regulation.

NEW HAMPSHIRE

The Joint Legislative Committee on Administrative Rules is the only governmental entity that reviews proposed rules. The Committee may approve, conditionally approve, or preliminarily object to a rule. If the Committee conditionally approves a rule, the agency must make certain changes to the rule before it will be approved. If the Committee objects, the agency may make changes to the rule and resubmit it. If the Committee then rejects the rule again in a final objection, the rule is valid until a court finds the rule invalid. The Committee may temporarily bar adoption of a rule by voting to sponsor a joint resolution against the rule, but the resolution is subject to the Governor's veto. Only the portions of the rule that would be affected by the resolution cannot be adopted. The only proposed rules that require approval of the Committee are interim rules.

NEW JERSEY

The legislature has the power to veto rules under a 1992 amendment to the New Jersey Constitution if the rule is found to be inconsistent with legislative intent. The following steps must be taken to veto a rule: 1) both houses of the legislature must pass a concurrent resolution finding the rule to be inconsistent with legislative intent; 2) the agency fails to amend or withdraw the rule, and a public hearing is held; and 3) both houses of the legislature pass a concurrent resolution barring adoption of the rule.

The Governor does not a have the power to veto rules, but he does have 30 days to respond to a disapproval of a rule by the legislature. The Attorney General does not have any direct oversight of rulemaking.

NEW MEXICO - *Current*

There is no review for rule content.

NEW YORK -*Updated*

The legislature's Administrative Regulations Review Commission reviews each newly proposed rule to examine issues of compliance with legislative intent, as well as economic impact and affect on the public. The legislature does not have the power to bar adoption of a rule. The Governor's Office of Regulatory Reform previously had veto power over all rules except emergency rules; this power was rescinded in 2011.

NORTH CAROLINA -*Updated*

For most agency rules, the Rules Review Commission (RRC) is required to approve a rule for it to become effective. However, there are agencies that are exempt from the Administrative Procedure Act altogether or RRC review within the APA. (*See* N.C.G.S. 150B-1)

Legislative Veto: A rule can be subjected to legislative review after RRC approval if the RRC receives 10 letters from anyone objecting to the rules and requesting legislative review. (*See* N.C.G.S. 150B-21.3) When that happens, the rule does not go into effect following RRC approval, but instead awaits the legislative review. The rule goes to the next legislative session beginning 25 days after the rule was approved, and either house of the General Assembly may introduce a bill within 30 legislative days to disapprove the rule. If no bill is introduced, the rule becomes effective on the 31st legislative day. If a bill is introduced and passes, the rule is disapproved and does not become effective (unless there is an executive order; see below). If the bill does not pass, the rule will go into effect.

Executive Veto: There is no provision in the NC APA for executive veto of a rule. The Governor can enact by executive order any rule that has a pending effective date due to legislative review. [*See* N.C.G.S. 150B-21.3(c)] If the rule is disapproved by the General Assembly, the rule is deemed repealed as of that date, even with an executive order in place.

NORTH DAKOTA

The Administrative Rules Committee reviews all rules after they become effective, and the Committee can veto rules for specific reasons set out by statute. The Governor must approve emergency rules before they can become effective. The Attorney General looks at all promulgated rules, and he can bar adoption of any rule that is illegal. The Attorney General can void a rule even after it has been made effective.

OHIO

The Joint Committee on Agency Rule Review reviews all proposed rules. By majority vote, the Committee can invalidate all or a portion of a rule and then amend the rule. The Committee looks at each rule for four reasons: 1) to see if it falls within the agency's statutory authority; 2) to see if it violates legislative intent; 3) to see if it is in conflict with another rule or law; and 4) to see if the rule is incomplete. The Committee does not have the authority to bar adoption of a rule.

All existing rules are reviewed by the Committee every five years in order to

determine if there are obsolete rules, and each agency may review its own rules for obsolete rules as it sees fit.

OKLAHOMA -*Updated*

Executive: Prior to adoption of a permanent rule, agencies must provide a copy of their proposed rules to the Governor. The Governor, within 45 days, may disapprove the rule in writing. If agencies do not receive written notification within 45 days, they may proceed in adopting the proposed permanent rule. (See EO 2013-34)

Within 10 days after adoption, agencies submit the adopted rules to Governor, Speaker of the House of Representatives, and President ProTempore of the Senate. (See 75 O.S., §303.1) After submission, the Legislature may actively disapprove an adopted rule by passing a joint resolution (See 75 O.S., §308(B)) or by passing an omnibus joint resolution. (See 75 O.S., §308.3) Joint resolutions are used for specific rules while an omnibus resolution could disapprove rules from numerous agencies.The Governor may approve or veto resolutions disapproving rules. The Legislature has the ability to override the veto.

All adopted rules in Oklahoma must be actively approved. If the legislature fails to pass a resolution approving rules, the Governor has the ability to approve rules though a Governor's Declaration. (See 75 O.S., §308.3(D)) The declaration has also been used to disapprove adopted rules over the past few years.

OREGON - *Current*

Agencies are required to submit all proposed rules to the legislature. The Committee that has subject matter jurisdiction over the rule has the power to review the rule and may hold hearings concerning it. The legislature also has the authority to review existing rules. No entity has the power to veto rules.

PENNSYLVANIA

Proposed rules are reviewed by the Attorney General, the legislature, and the Independent Regulatory Review Commission (IRRC). The Attorney General reviews rules merely to ensure legality. If the Attorney General does not take any action within 30 days of receiving the rule, it is deemed to be approved.

Each house of the legislature has committees that review proposed rules. The committees may submit comments concerning the rule to the agency. The appropriate committees may approve or disapprove the rule. The committees may submit concurrent resolutions to the legislature as a whole for the purpose of disapproving the rule. This resolution is subject to the Governor's veto.

IRRC reviews all rules except the rules promulgated by the Game Commission and the Fish and Boat Commission. The scope of the review covers whether the rule falls within the agency's rulemaking authority and whether the rule is consistent with legislative intent. IRRC sends comments on each rule to the agency, and IRRC has the authority to disapprove a rule.

The Governor recently passed a management directive instructing state agencies to review their existing rules in an effort to get rid of obsolete rules. The Governor's General Counsel also reviews all rules to ensure that they meet policy and legal requirements.

RHODE ISLAND

NO RESPONSE

SOUTH CAROLINA - *Current*

Proposed rules must be submitted to the General Assembly for approval. Each rule is reviewed by the appropriate committee based on subject matter. The General Assembly can either approve or disapprove a rule by joint resolution within 120 days of receiving it. The joint resolution does not take effect until approved by the Governor. If no action is taken within the 120 days, the rule is automatically approved.

SOUTH DAKOTA

The Legislative Research Council does a preliminary review of all proposed rules for style and form and to ensure that the agency's statutory authority allows it to make such a rule. The Interim Rules Review Committee also reviews proposed rules. The Committee's power to bar adoption of a rule is limited to cases where the rule is outside of the scope of the agency's authority or when the rule is determined to be unconstitutional. To bar adoption of a rule, the Committee needs a minimum of a three-fourths majority vote.

TENNESSEE -*Current*

The House and Senate Government Operations Committees review rules. The Committees may petition an agency to amend, withdraw, or repeal a rule. The Committees may also delay the effective date of a rule for up to 60 days, but they do not have the power to veto a rule. By majority vote, any standing committee of the General Assembly can require a promulgating agency to hold hearings on a particular proposed rule.

The Attorney General reviews all rules for legality, and he can reject rules that he determines to be illegal under current law or that fail to meet statutory criteria for adoption.

TEXAS

Legislative review of proposed rules is conducted by the standing committees of the legislature. The committees may send agencies statements supporting or opposing proposed rules. Agencies are limited in their ability to promulgate rules in that they must not overstep the bounds of their statutorily granted authority.

The Attorney General and the Governor do not play a formal role in the rules review process, but the Attorney General occasionally counsels agencies on actions taken during the rule-making process.

No entity has the power to veto a rule.

UTAH

The legislature's Administrative Rules Review Committee reviews all rules. The Committee reviews each rule to determine 1) whether it is authorized by statute, 2) whether it complies with legislative intent, 3) whether the economic impact will be significant, and 4) whether the impact on affected persons will be too great. After making its findings, the Committee may make recommendations to the legislature as a whole concerning the rule (i.e., to pass legislation concerning the new rule).

Unless re-authorized by the legislature, all newly promulgated rules expire on May 1st. The Administrative Rules Review Committee prepares a piece of legislation every year to

reauthorize a majority of the rules. Those which are not to be re-authorized are set out in a separate section denoting that they will be allowed to expire. The Governor may extend a rule beyond its expiration date despite the legislature's choice not to re-authorize the rule.

Each agency must review each of its own rules every five years. After the review, the agency must either file a five-year renewal of the rule or a repeal of the rule with the Division of Administrative Rules. If the agency does not take any action on a rule that is up for its five-year review, the rule is automatically repealed.

VERMONT -*Updated*

In Vermont, the Legislative Committee on Administrative Rules (LCAR) does review all administrative rules promulgated by state agencies. The committee has certain criteria under which it may object to a rule (see 3 V.S.A. § 842for details). The agency must respond within 14 days and may choose to do nothing, or amend the rule to sway the committee in their favor. Upon consideration of the agency response, LCAR may rescind the objection, modify the objection, take no action, or certify the objection with the Secretary of State. When LCAR certifies their objection with the Secretary of State, and the agency goes forward with the adoption of the rule the burden of proof shifts if challenged in court of law such that the agency must defend the rule.

Vermont does not have a provision for executive veto of regulations however, the executive branch does include a committee (Interagency Committee on Administrative Rules) that reviews each rule before it is formally proposed. This committee makes recommendations and assists the agency in a plan for maximizing public input. Nothing in statute appears to require the committee's approval so they may not prevent a rule from moving forward.

WASHINGTON

The Joint Administrative Rules Review Committee (JARRC) is the legislative committee that reviews both proposed and existing rules, but JARRC only reviews rules that raise a question of whether they follow legislative intent. Standing legislative committees review rules if JARRC feels that the authorizing statute was controversial in the particular subject area. If JARRC objects to a rule, the promulgating agency must hold a hearing on the rule. If the agency does not amend the rule in a way JARRC finds to be appropriate, JARRC files a formal objection to the rule. By a majority vote, JARRC may recommend suspension of a rule. This suspension must be approved or disapproved by the Governor. If it is approved, the rule will be suspended until 90 days after the next legislative session. The public may appeal the decision of the Committee concerning a rule to the agency and then to the Governor, and the Governor has the power to veto a rule.

WEST VIRGINIA

The Legislative Rule-Making Review Committee reviews rules and then makes recommendations concerning each rule to the legislature as a whole. The legislature must pass a bill in order to bar adoption of a rule after the Supreme Court's decision, which found that there was a separation of powers issue if this was done in any other manner.

Emergency rules are not reviewed by the Committee. They are reviewed by the Attorney General and the Secretary of State for form and legality.

WISCONSIN -*Updated*

In Wisconsin, although not labeled as vetoes, there are, in essence, both executive and legislative vetoes of proposed rules.

Executive:

1. The rulemaking process begins with Register publication of a statement of scope (a statement of intent to engage in rulemaking). Under section 227.135, Wis. Stats., "The agency may not send the statement to the legislative reference bureau for publication under sub. (3) until the governor issues a written notice of approval of the statement."
2. All proposed rules are subject to approval of the governor.

Legislative:

All proposed rules in final draft form and approved by the governor under section 227.185, Wis. Stats., are submitted to the legislature for committee review.

1. Under section 227.19 (5) (d), Wis. Stats., "(I)f the joint committee for review of administrative rules objects to a proposed rule or a part of a proposed rule, an agency may not promulgate the proposed rule or part of the proposed rule objected to until a bill introduced under par. (e) fails to be enacted. The joint committee for review of administrative rules may object to a proposed rule or a part of a proposed rule only for one or more of the reasons specified under sub. (4) (d)."
2. Under section 227.19 (5) (em), Wis. Stats., "If the joint committee for review of administrative rules objects to a proposed rule or a part of a proposed rule under par. (dm), any member of the legislature may introduce a bill to authorize promulgation of the proposed rule or part of the proposed rule."
3. Under section 227.19 (5) (em), Wis. Stats., "If both bills required under par. (e) are defeated, or fail to be enacted in any other manner, the agency may promulgate the proposed rule or part of the proposed rule that was objected to. If either bill becomes law, the agency may not promulgate the proposed rule or part of the proposed rule that was objected to unless a subsequent law specifically authorizes its promulgation."

WYOMING - *Current*

The Legislative Services Office (LSO) reviews rules. After reviewing rules, LSO makes recommendations to the Management Council of the Legislature. Any rules that are found to be objectionable are forwarded to the Governor with a recommendation that he request the agency rescind the rule. The legislature can pass a legislative order (much like a bill) to prohibit the implementation of a rule, and the Governor can veto a rule in whole or in part.

§ 2.2-4020. Formal hearings; litigated issues.

D. Upon the motion of the agency or of a party the presiding officer may conduct a closed hearing, issue necessary protective orders, and seal all or part of the hearing record as may be necessary to allow the agency upon issuance of its final case decision to implement the provisions of § 2.2-4023.

§ 2.2-4023. Final orders

The terms of any final agency case decision, as signed by it, shall be served upon the named parties by mail unless service otherwise made is duly acknowledged by them in writing. The signed originals shall remain in the custody of the agency as public records subject to judicial notice by all courts and agencies; and they, or facsimiles thereof, together with the full record or file in every case shall be made available for public inspection or copying except (i) so far as the agency may withhold the same in whole or part for the purpose of protecting individuals mentioned from personal embarrassment, obloquy, or disclosures of a private nature including statements respecting the physical, mental, moral, or financial condition of such individuals or (ii) for trade secrets or, so far as protected by other laws, other commercial or industrial information imparted in confidence. Final orders may be recorded, enforced, and satisfied as orders or decrees of a circuit court upon certification of such orders by the agency head or his designee.

1975, c. 503, § 9-6.14:14; 2001, c. 844;2009, c. 797.

The chapters of the acts of assembly referenced in the historical citation at the end of this section may not constitute a comprehensive list of such chapters and may exclude chapters whose provisions have expired.

JLARC
JOINT LEGISLATIVE AUDIT
AND REVIEW COMMISSION

Fiscal Impact Review
2017 General Assembly Session

Date: April 27, 2017

Bill: HB 2370; Administrative Process Act, reconsideration of an agency's final decision, intermediate relief, suspension of effective date of a regulation or agency decision

Review requested by: Chairman Gilbert, House General Laws Committee

JLARC Staff Fiscal Estimates

JLARC staff concur with the Department of Planning and Budget (DPB) impact statement that the fiscal impact of HB 2370 is indeterminate but that it would likely increase costs. HB 2370 would change the reconsideration provision under the Administrative Process Act by expanding the types of agency decisions for which a petition for reconsideration can be filed and delaying agency action and the time for filing a court appeal until the agency renders an opinion. These changes would likely lead to an increase in petitions for reconsideration and additional workload at some agencies. HB 2370 would also make changes to intermediate relief during judicial review, which would likely lead to an increase in lawsuits against state agencies. HB 2370 may cause additional financial impact to agencies by delaying the collection of fees and penalties and the recovery of funds.

The substitute bill would have a smaller fiscal impact due to a narrower scope of changes to the reconsideration provision. The substitute also drops the changes to judicial review.

An explanation of the JLARC staff review is included on the pages that follow.

Authorized for release:

Hal E Greer

Hal E. Greer, Director

Bill summary: HB 2370 would make several changes to the reconsideration and intermediate relief provisions of the Administrative Process Act (§ 2.2-4023.1). If enacted, HB 2370 would suspend the agency decision when a petition for reconsideration is filed, and toll the time for filing a notice of appeal with the circuit court until the agency renders an opinion on the petition. Under current law, the agency decision is not suspended and the time for filing a court appeal is not tolled unless the agency provides for such action when it grants the petition.

HB 2370 would expand the types of agency decisions for which a petition for reconsideration can be filed to include agency decisions made pursuant to informal fact-finding proceedings (§ 2.2-4019). Under current law, parties may file a petition for reconsideration of a final agency decision made only pursuant to a formal hearing (§ 2.2-4020).

HB 2370 would also amend the provision for intermediate relief during judicial review of an agency regulation or decision, by requiring the agency to postpone the effective date of the regulation or decision until conclusion of the review proceedings. Under current law, the agency or court *may* postpone the agency regulation or decision during judicial review but is not required to do so (§ 2.2-4028).

The substitute for HB 2370 would limit when an agency decision could be suspended and the time for filing a court appeal tolled under the reconsideration process. The substitute also drops the inclusion of informal fact-finding proceedings in the reconsideration process and the changes to the intermediate relief provision during judicial review.

Fiscal implications

JLARC staff concur with the DPB impact statement that the fiscal impact of HB 2370 is indeterminate. The bill would impact many state agencies, and it is difficult to predict how much the bill would increase the number of petitions for reconsideration or lawsuits. It is likely that HB 2370 would lead to increased costs, according to information provided by several agencies that would be affected by the bill. The substitute (HB 2370-S) would increase costs less than the introduced version.

HB 2370 would lead to more petitions for reconsideration and result in added costs and lost revenue

There would likely be an increase in filings of petitions for reconsideration under HB 2370. HB 2370 would significantly expand the agency decisions for which petitions for reconsideration could be filed to include agency decisions made through informal fact-

finding proceedings rather than just decisions made pursuant to formal hearings, as under current law. There are many more informal fact-finding proceedings than formal hearings, according to agencies contacted by JLARC staff.

HB 2370 would also create a further incentive to file petitions for reconsideration because, unlike under current law, the agency decision would not take effect until the agency renders an opinion on the petition. The time available for parties to file a court appeal would also be extended by the amount of time taken for the reconsideration, providing another incentive to file a petition.

The additional workload resulting from increased petitions for reconsideration would likely increase costs for some agencies. Some agencies have not received a petition for reconsideration since legislation was enacted in 2016 allowing such petitions. Although it is difficult to project the increase in petitions for reconsideration resulting from HB 2370, comparing the number of formal hearings to the number of informal fact-finding proceedings provides insight on the potential increase in petitions (Table). For this review, several agencies provided information on the number of formal hearings and informal fact-finding proceedings they conducted in FY16:

Department of Medical Assistance Services (DMAS),
Department of Professional and Occupational Regulation (DPOR),
Department of Health (VDH), and
Department of Environmental Quality (DEQ)

Several of these agencies indicated that a significant portion of informal fact finding decisions (anywhere from 25% to 75%) could result in petitions for reconsideration. (Agencies that conduct formal hearings indicated that approximately 50% to 75% of formal hearings could result in petitions for reconsideration under HB 2370.) The agencies also provided estimates for the increased costs they could incur in dealing with additional petitions for reconsideration expected under HB 2370. Adjusted for the volume of informal fact-finding proceedings at each agency, the estimated cost increases provided by the agencies were similar. The costs reflect additional staff that would be needed to process the petitions for reconsideration.

Potential increase in workload and costs resulting from increased petitions for reconsideration under HB 2370

Agency	Formal hearings (FY16)	Informal fact-finding proceedings (FY16)	Estim. annual cost for increased petitions for reconsideration
DMAS	54	2,480	$488,000
DPOR	0[1]	514	$172,000-$344,000
VDH[2]			
Office of Environmental Health Services	2	55	Up to $23,000
Office of Licensure & Certification	0	18	Up to $10,000
DEQ	0	13	$7,000

SOURCE: Virginia Department of Health.
[1] DPOR does not conduct formal hearings. [2] Costs for VDH offices are based on average estimated cost per petition for reconsideration times 75% of the number of informal fact-finding proceedings. [3] The informal fact-finding proceedings that DEQ provided information on are related to its enforcement program, which are the most likely to result in a petition for reconsideration, according to DEQ staff.

HB 2370 could also lead to a loss in revenue for state agencies. Under current law, fines, penalties, or interest are often collected immediately and, at least in some cases, the amounts owed accrue until a final case decision is made. Because HB 2370 would suspend the execution of the agency decision until the agency renders an opinion on the petition, agencies indicate that they would have to delay collection of fines and penalties, and the amounts owed would not accrue during the reconsideration process.

HB 2370 could lead to more lawsuits and related costs

Several agencies expressed concern that the changes to intermediate relief (§ 2.2-4028) under HB 2370 would likely lead to an increase in lawsuits filed against state agencies. HB 2370 would require that, when a court review of an agency's regulation or decision is instituted or about to be, the agency *must* postpone the effective date of the regulation or decision pending conclusion of the review proceedings. Current law permits agencies or the court to postpone the effective date of a regulation or decision, but postponement is not required and is not typical. HB 2370 would provide an additional incentive for parties to bring lawsuits against state agencies, because it would require agencies to suspend issuance of a permit or license, implementation of a regulation, or enforcement of a regulation or disciplinary action.

The proposed change to intermediate relief could result in significant fiscal impacts, according to some agencies interviewed for this review. If a regulatory change is

required to impose or increase an agency fee, agencies would be unable to collect the increased revenue until the conclusion of the court proceeding. Similarly, agencies would be unable to collect fines or recover funds for violations until conclusion of the proceedings. According to the agencies, the lawsuits themselves can be costly in terms of staff time and resources. Court cases may take years to conclude, and lost fees and collections, or added costs would continue over this time frame.

Substitute bill

A substitute for HB 2370 would narrow the scope of the bill and significantly reduce the fiscal impact on state agencies. The substitute would not expand the reconsideration process to include informal fact-finding proceedings, and it would omit the changes to intermediate relief during judicial review. The intent of the substitute appears to be that suspension of agency decisions and tolling the time for filing a notice of appeal would only apply to petitions filed by the aggrieved party. This would remove the incentive for other parties to file a petition, although there would still be an incentive for aggrieved parties to file a petition.

The substitute should be clarified to ensure consistency with other provisions of the Administrative Process Act regarding agency case decisions and to specify that it applies to a named party in a case decision. As currently drafted, the substitute makes reference to *persons applying*, a condition that occurs before the agency decision, so the bill's provisions would not apply. The substitute also makes reference to a *potential violation*, which is interpreted differently by different agencies.

Budget amendment necessary? Not initially. Budget amendments could be necessary in future years if HB 2370 results in significant increases in agency workload.

Agencies affected: State agencies that have regulations which are not exempt from the Administrative Process Act.

Prepared by: Kimberly Sarte

Date: April 27, 2017

Are citizens of Virginia receiving a fair hearing under the Administrative Process Act?

We've all learned about the separation of power in school as it relates to the executive, legislative and judicial branches of government, but were you aware that the inherent checks and balances in the system do not pertain to agencies of the commonwealth? Simply stated, the Virginia Administrative Process Act gives state agencies all three powers with little to no checks and balances. For example, appeals under the Virginia Administrative Process Act follows a different set of rules.The Circuit Court judge hearing the appeal can only review an agency's actions based on their official record and if the agency has "primary jurisdiction" in the matter, it significantly limits the options an appeals court judge has. In my case, the judge hearing the appeal was required to go with the agency decision since purchase of prior service was in their "primary jurisdiction" and to dismiss the case. In other words, there was no option for the judge hearing the appeal to modify or change the agency decision even though the Virginia Retirement System never communicated all the requirements concerning purchase of prior service to members prior to and during the statutory purchase window.

Before I get into concerns with the Administrative Process Act, I want to put things into perspective as a Virginia Retirement System member. The root cause of the problem stems from the fact that **the Virginia Retirement System did not communicate the requirements that all types and amounts of eligible prior service had to be purchased in order, from the most recent to the oldest when the law was changed in 2001.** Because these critical requirements were never communicated to members before and during the designated statutory purchase window, between July 1, 2001 and June 30, 2004, members like myself were making important purchase of prior service decisions without having all of the required information.

In preparation for the July, 2001 purchase of prior service rule changes, the Virginia Retirement System included an overview in their Spring 2001 "Memo to Members." The Virginia Retirement System did inform members that several changes were being made to the code that made it easier and less costly for them to purchase service early in their careers before they were vested. The Virginia Retirement System also communicated that members would be required to purchase eligible prior service before July 1, 2004, or within three years of joining VRS for new members, or the cost would escalate to a much higher actuarial rate. However, they did not inform members that they would be required to purchase all types and amounts of eligible prior service, in order, from the most recent to the oldest.

When I read this information in Spring 2001 "Memo to Members", I concluded the following based on the written information provided by the Virginia Retirement System:

1. I could always purchase my prior refunded service at the five percent rate as indicated in all member handbooks, but would have to purchase the service with a lump sum payment after July 1, 2004 which was acceptable to me.

2. Although I had seventeen months of educational leave, the information provided by the Virginia Retirement System only stated that the price of the educational leave would increase to an actuarial rate after three years. Since I had several months of prior refunded service that I could purchase, there was really no need to purchase the educational leave. However, if the Virginia Retirement System clearly communicated that all types and amounts of eligible prior service needed to be purchased in order, from the most recent to the oldest when the law was changed in 2001, I and other

members would have been in a position where we could have made an informed decision concerning our financial future. Without this important sequencing or order of purchase requirement, we were making financial decisions in the dark. (*Please see Attachment 1*)

When I was initially given the opportunity to appeal the Final Case Decision made by Director Schultz, in his September 13, 2013 letter, I assumed that all of the relevant facts and information related to the case would be reviewed and considered. Instead, the Virginia Retirement System focused their defense on code section 51,1-142.2(3) and **much of the evidence I presented to substantiate my case was not addressed.** Please see the specific areas outlined below along with their supporting documentation:

Disclosure Policy:

The Virginia Retirement System did not comply with its own disclosure policy as mandated in Title 51.1, Chapter 10 - Disclosure Requirements for Public Retirement Systems. The code clearly states that the summary plan description (SPD) should contain all or substantially all the information an average member would deem crucial to possess a knowledgeable understanding of his benefits under the plan. VRS Plan 1 retirement benefits are based on age, service credit and average final compensation at retirement. The VRS describes service credit as a retirement asset that has monetary value when used to calculate retirement benefits and can include credit for prior service members may purchase. Because prior service is identified as a benefit with monetary value by the Virginia Retirement System, all of the requirements and conditions concerning the purchase of prior service should have been clearly communicated in their summary plan description, but were not. Section 51.1-1001 of the code further communicates summary plan description requirements as summarized below:

- **shall contain the retirement system's requirements respecting eligibility for** membership and **benefits**; ...**circumstances that may result in** disqualification, **ineligibility, or denial or loss of benefit**; ...the procedures to be followed in presenting claims for benefits and the remedies available for the redress of claims which are denied in whole or in part.
- **be written in a manner calculated to be understood by the average retirement system member and beneficiary and shall be sufficiently comprehensive to apprise the members and beneficiaries of their rights and obligations under the retirement system plan.**
- every member and beneficiary **shall be furnished with an updated summary plan description within 210 days after the end of the retirement system plan year in which a material modification or change in the retirement system or its plan occurs.**

How the Virginia Retirement System could ignore its own disclosure policy and refer members to the code of Virginia Statute 51.1-142.2(3) instead of including the order of service requirement in their member handbooks (Summary Plan Descriptions) doesn't make sense. The member handbooks are a known source of information specifically for members and would be the first place that members would look for information pertaining to them. Please refer to the 2004 version of the Code.of Virginia.

Statutory and Fiduciary Duty:

The Virginia Retirement System is administered by the Board of Trustees whose powers and duties include the following under Section 51.1124.22 of the Code of Virginia:

> 7. Publishing annual financial statements of the Retirement System or annual reports in accordance with §§ 51.1-1000 through 51.1-1003.
>
> 8. Promulgating regulations and procedures and making determinations necessary to carry out the provisions of this title.
>
> 10. Adopting rules and policies that bring the Retirement System into compliance with any applicable law or regulation of this Commonwealth or the United States.

The Board of Trustees had the authority to bring the Virginia Retirement System's purchase of prior service regulations into compliance with their disclosure policy as outlined in Chapter 10 of Title 51.1, and by not doing so, breached their statutory duty. As Trustees, they also had a fiduciary duty to members of the Virginia Retirement System and should have adopted a prudent man standard of care when disclosing important plan information to members and by not doing so, breached their fiduciary duty. Please refer to the 2003 version of the Code of Virginia.

Unsubstantiated Statements Accepted as Fact During IFF Hearing:

Two high level VRS administrators lied when they communicated that the order of service requirement was communicated to members in the Member Handbooks and other official VRS publications before and during the designated statutory purchase window, between July 1, 2001 and June 30, 2004. Please see the following paragraph from Attorney Michael A. Katzen's October 27, 2014 IFF Hearing recommendation to the Virginia Retirement System:

"The contention that the VRS failed to communicate that information to its members has been disputed by the agency. Patricia Bishop, the VRS Deputy Director for Customer Relationships, in fact, commented by letter to the Member of February 11, 2014, that the VRS website, the member handbook and communications to members through the Members News Newsletter and the Employer Update Newsletter advised members of the chronological purchase of service requirement. Additionally, noted Ms. Bishop, 'The VRS also provided this information in many other ways. VRS call center staff are available to answer members' questions. Furthermore, VRS provides this information through numerous publications and communications aimed at employers and employees.' (Letter, Patricia Bishop, February 11, 2014) In a transcript of a telephone conversation between Mr. Fisher and VRS Controller, Kathryn Quiriconi, The latter likewise advised Mr, Fisher that the information regarding the chronological purchase of service was contained in the employee handbook."

Also, in her July 17, 2013, response to questions presented by Delegate M. Kirkland Cox in a formal letter on my behalf, Deputy Director Patricia Bishop stated the following concerning how the Virginia Retirement System members were informed about changes concerning purchase of prior service:

3. Excluding a VRS cost letter, how were participant members informed in the past that they must purchase all types of their prior service, “from the most recent to the oldest” in chronological order? Please provide information that demonstrates how this information was disseminated to participant members before legislation changed the purchase “from most recent to the oldest.”

As provisions for the purchase of service are statutory, over time the provisions surrounding the purchase of service have changed. In 2001, for example, major changes were made to the purchase of service provisions in Title 51.1. For your reference, copies of the Memo to Members and Employer Update newsletters that communicated these changes to members and employers alike are enclosed. VRS also posted the changes on the website, communicated with members via letter, and provided information to employers during regular meetings.

Please note that VRS members only received the “Memo to Members” publication and that the “Update for Employers” publication was only for VRS participating Employers. (*Please see Attachment 3*)

In addition, Attorney Michael A. Katzen, IFF Hearing Officer, did not substantiate their claims and accepted what they said as fact even though I presented evidence to the contrary. (*Please see Attachment 4 Audio File starting at 18:10, Attachment 4B, Attachment 5, Attachment 6, Attachment 2) and* Member Handbooks from 1974 to 2004. *Also see (Attachment 7*) for a review of factual errors in Attorney Michael A. Katzen, IFF Hearing Recommendations to the Virginia Retirement System that I sent to Attorney Goodman.

Witnesses:

Attorney Michael A. Katzen, the Informal Fact Finding Hearing Officer, informed me that I had the right to subpoena witnesses for the IFF Hearing in his June 16, 2014 letter. On June 20, 2014, attorney Katzen requested that I submit a list of VRS employees I wanted to interview and communicated that he would forward it VRS once he received it. I submitted a list of witnesses to attorney Katzen on June 20, 2014 and the Virginia Retirement System declined the request to make the individuals available for the IFF Hearing in a letter from Brian Goodman, VRS Legal Affairs & Compliance Coordinator dated July 10, 2014. Attorney Goodman stated that the VRS sent the record to the court on January 30, 2014 and that Judge Hughes ordered the record to be reviewed at the IFF Hearing.

It was my understanding that the hearing was ordered to determine the fact basis for the September 13, 2013 final case decision. How could the Informal Fact Finding Hearing be objective and valid if I was denied the opportunity to face and question key witnesses? If I had the opportunity to question Deputy Director Patricia Bishop and VRS Comptroller, Katherine Quiriconi, I would have asked them to produce any Member Handbooks or “Memo to Members” publications that clearly communicated the order of service requirement to members, before and during the designated statutory purchase window, between July 1, 2001 and June 30, 2004. This time period is extremely important because the Virginia Retirement System changed the rate to purchase the seventeen months of educational leave from five percent to a much higher actuarial rate on July 1, 2004 without informing members of the order of service requirement. I have reviewed all the information in the official VRS record and nothing they submitted clearly communicates the requirement that members must purchase all types and amounts of eligible prior service, in order, from the most recent to the oldest.(*Please see Attachment 8, Attachment 9, Attachment 10, Attachment 11, Attachment 12, Attachment 13 and Attachment 14)*

The VRS did not follow its own Written Guidelines

On January 4, 2013, I informed a Virginia Retirement System customer service representative named Lauren that there were approximately seventeen months of service missing from my compensation history. She reviewed my record and informed me that I would have to contact my employer at the time,Virginia Training Center (LTS&H), because they did not report the missing service to the Virginia Retirement System through their payroll reports. Lauren also communicated that there were three years missing from my history as opposed to just seventeen months and I explained that I was also on approved educational leave during that time period.

Although the Virginia Retirement System located a total of nineteen missing months of refunded service in February of 2013, they focused on the seventeen months of educational leave and ignored the reason why the service was missing in the first place, a payroll error. Please see the chart below that shows the missing refunded service highlighted in yellow and my educational leave that fell within the missing period:

Monthly Pay Period		Monthly Salary	VRS Contribution
*July, 1977		$935.42	$46.77
*August, 1977		$952.08	$47.60
*September, 1977		$952.08	$47.60
*October, 1977		$952.08	$47.60
*November, 1977		$952.08	$47.60
*December, 1977		$952.08	$47.60
*January, 1978		$952.08	$47.60
*February, 1978		$952.08	$47.60
*March, 1978		$952.08	$47.60
*April, 1978		$952.08	$47.60
*May, 1978		$952.08	$47.60
*June, 1978		$952.08	$47.60
*July, 1978		$952.08	$47.60
*August, 1978		$952.08	$47.60
*September, 1978		$983.75	$49.19
*October, 1978		$1,004.97	$50.25
*November, 1978		$1.015.42	$50.78
*December, 1978		$1.015.42	$50.78
January, 1979	Attended Graduate School	$0.00	$0.00
February, 1979		$0.00	$0.00
March, 1979		$0.00	$0.00
April, 1979		$0.00	$0.00
May, 1979		$0.00	$0.00
June, 1979		$0.00	$0.00
July, 1979		$0.00	$0.00
August, 1979		$0.00	$0.00
September, 1979		$0.00	$0.00
October, 1979		$0.00	$0.00
November, 1979		$0.00	$0.00
December, 1979		$0.00	$0.00
January, 1980		$0.00	$0.00
February, 1980		$0.00	$0.00
March, 1980		$0.00	$0.00
April, 1980		$0.00	$0.00
May, 1980		$0.00	$0.00
*June, 1980		$1,144.00	$57.20

As the chart above shows, the missing period included eighteen months I was employed at Lynchburg Training School and Hospital from July 1,1977 to December 26, 1978 and the month of June, 1980. It is also important to note that I was on educational leave from January 1, 1979 through May 31, 1980 and that the educational leave occurred within the period of missing service.

On April 3, 2013, Patricia Bishop, VRS Deputy Director, informed me that I was assigned two different social security numbers and that was the reason why my nineteen months of refunded service was missing from my compensation history. Because the missing service was a payroll error associated with an incorrect social security number, this information was not considered a part of my VRS record from June 30, 1977 until it was corrected in February of 2013. (*Please see Attachment 15*)

Not having this information in my VRS account for well over thirty-five years meant that my record was inaccurate and put me in a position where I did not receive important notifications from VRS and my employer. For example, the November/December 2003 issue of the VRS Employer Update stated the following on page 2 under the heading,**VRS Identifies Members Eligible to Purchase Certain Types of Service:**

"With the June 30, 2004 deadline rapidly approaching, VRS wants as many eligible members as possible to be aware of the opportunity to purchase service at the 5 percent rate. **To help employers direct information about the purchase of prior service credit deadline to affected members, VRS is sending payroll officers a list of their VRS-covered members who have applied to purchase prior service credit or who have refunded service in their records.** The list does not include employees who are eligible to purchase other types of service, such as service with the federal government or service with other states, because VRS does not have a record of these types of service. Remind your employees that, while they are not required to purchase service, additional service credit could enable them to retire earlier or to enjoy an enhanced benefit."

This communication was also a missed opportunity for the Virginia Retirement System to inform members that they were required to purchase all types and amounts of eligible prior service in order, from the most recent to the oldest. Please note that I was employed by Chesterfield County Public Schools from September, 1995 to June,2015 and was not contacted by the school system or VRS concerning purchase of prior service. (*Please see Attachment 16*)

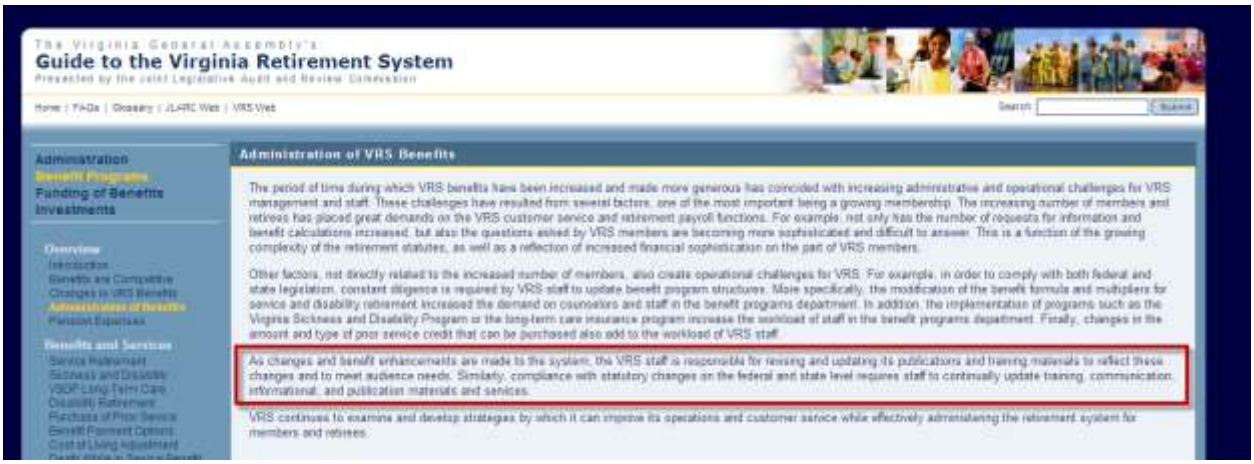
The Virginia Retirement System did not follow its own written guidelines concerning employer payroll reports.The May/June 2003 issue of the VRS Employer Update stated the following on page 3 under the heading, Deadline for Purchasing Service Credit at 5 Percent:

"If a member is omitted from a payroll report and the error was within the past three years, the cost to purchase the service will be 5 percent of current creditable compensation. **If the error occurred more than three years ago, the cost to buy the service will be at the actuarial rate. The employer is responsible for payment to restore service lost due to payroll error."**

Again, **please note that thirty-six months of service were missing from my official VRS record for over thirty-five years through no fault of my own**. This included nineteen months of prior refunded service from July 1,1977 to December 26, 1978 and the month of June,1980. In addition, it also included the seventeen months I was on approved educational leave from January 1, 1979 through May 31,1980 that occurred within the period of missing service. **It doesn't make sense that my family and I have to suffer a financial hardship because someone entered an incorrect social security number and created a second VRS payroll record. In addition, I want to know why Deputy Director Bishop did not share this information with me when she explained the reason for the missing service.** (*Please see Attachment 17 and Attachment 15*)

JLARC Communication Recommendations:

Although the Virginia Retirement System readily cites Section 51.1-142.2 when questioned about purchase of prior service regulations and state that they have no authority to change the requirement that service must be purchased in a manner consistent with the statue, they are not acknowledging their role as a fiduciary, or assuming responsibility for not communicating crucial purchase of prior service requirements to members. Even the Virginia General Assembly's Guide to the Virginia Retirement System shown on the previous version of the JLARC website stated the following:



“As changes and benefit enhancements are made to the system, **the VRS staff is responsible for revising and updating its publications and training materials to reflect these changes and to meet audience needs.** Similarly, compliance with statutory changes on the federal and state level requires staff to continually update training, communication, informational, and publication materials and services.”

<u>General Assembly intent and VRS interpretation of section 51.1-142.2(3)</u>

The Virginia Retirement System cites the following statement in section 51,1-142.2(3) of the Code of Virginia as the basis for requiring members to purchase all types and amounts of eligible prior service in order, from the most recent to the oldest:

“When a member requests credit for a portion of the period, the most recent portion shall be credited.”

For example, then Deputy Director Patricia Bishop stated the following in her July 17, 2013 letter to Delegate M. Kirkland Cox:

"Legislation enacted during the 2001 Session of the General Assembly (Va. Code Section 51.1-142.2(3)) requires a member to purchase service credit in chronological order from the most recent to the oldest."

(*Please see Attachment 18*)

Then Director Robert P. Schultze stated the following in his September 13, 2013 final case decision letter to me:

"As you know, purchase of service is governed by Section 51.1-142.2 of the Code of Virginia. Legislation enacted in the 2001 session of the Virginia General Assembly (Specifically Va, Code

Section 51.1-142.2(3)) requires a member to purchase service in chronological order from the most recent to the oldest."

(*Please see Attachment 19*)

Attorney Michael A. Katzen, VRS appointed IFF Hearing Officer, stated the following in his October 27, 2014 IFF Hearing recommendation to the Virginia Retirement System:

"Virginia Code Section 51.1-142.2(3)) provides inter alia, that 'When a member requests credit for a portion of the period, the most recent portion shall be credited.' The VRS, in conformity with its interpretation of the statute, requires requesting members to purchase service credit in chronological order from the most recent to the oldest."

(*Please see Attachment 2*)

All three individuals are consistent with their interpretation of the 2001 statute, however, the same identical statement, "When a member requests credit for a portion of the period, the most recent portion shall be credited" has been in Section 51.1-142 of the code since 1990.**This is extremely important because prior to 2001, Virginia Retirement System members could purchase any type and amount of eligible prior service they desired without regard to an order of service requirement.** In other words, members were not required to purchase all types and amounts of eligible prior service in order, from the most recent to the oldest even though the same identical statement was in the code. In addition, a close variation of the statement has been in Section 51-111.41:1 of the code since 1974 as shown below:

"In the event a member requests credit for a portion of the period which may be credited, the most recent such portion shall be credited."

All one needs to do is look at "The Revision of Title 51 of the Code of Virginia, House Document NO. 52 or previous versions of the code and it becomes evident that this exact statement, or a close variation has been in Title 51 of the Code of Virginia for at least twenty-seven years before the 2001 change.

Since the Virginia Retirement System cited section 51.1-142.2(3) specifically, I reviewed the 2001 Purchase of Prior Service legislation presented by Senator Kevin G. Miller and Delegate M. Kirkland Cox in an attempt to determine the intent of the legislation, but could not find any supporting information that clearly communicated the requirement that members must purchase service in order from the most recent to the oldest. Please see Kevin G. Miller's history concerning SB 1077 and M. Kirkland Cox's history concerning HB 2293.

Knowing the history of Title 51, one would expect the Virginia Retirement System to interpret this defining statement consistently over time, but that is not the case. How can the Virginia Retirement System interpret the same identical statement in section 51.1-142 of the code both before and after 2001 and have two radically different interpretations?

How can the Virginia Retirement System interpret the same statement, or a close variation in the Code of Virginia one way for twenty-seven years and arbitrarily change their interpretation without informing members knowing full well that it could have a negative financial impact on them?

Why didn't the Virginia Retirement System know what was in previous versions of the code concerning purchase of prior service when I brought this communication problem to their

attention in March of 2013?

These three important questions need to be answered, but someone also need to determine how something like this could happen in the first place and what specific safeguards need to be put in place to prevent it from happening to members in the future? *Could a new category be recommended on the Bill Financial Impact statement that requires a review of all prior versions of the code for inconsistencies?*

What are the legislator responsibilities regarding the intent of a newly introduced bill or the intent of an amended statute? *I reviewed Kevin G. Miller's Impact Statement dated 2-26-01 concerning SB 1077 and M. Kirkland Cox's Impact Statement dated 2-28-01 concerning HB 2293 and did not see any clearly communicated information concerning the "order of service" requirement that members must purchase all types and amounts of prior service in order, from the most recent to the oldest.*

What are the Virginia Retirement System's responsibilities regarding consistent interpretation, communication and enforcement of statutes that complement or reinforce their legislative intent?

How is it possible for the "plain language meaning" of the statement's below to change over time?

"In the event a member requests credit for a portion of the period which may be credited, the most recent such portion shall be credited."

"When a member requests credit for a portion of the period, the most recent portion shall be credited."

Why did Attorney Michael A. Katzen, the Informal Fact Finding Hearing Officer use the term, "**presumptively** dictated by Virginia Code Section 51.1-142.2" as opposed to just "dictated by Virginia Code Section 51.1-142.2" when he made his IFF recommendation to the Virginia Retirement System? Please note that previous communications regarding the case were framed in a more direct manner as shown below and did not leave any possibility of doubt:
"Denial to Alter the Sequence to Purchase Service other than in the Manner Dictated by Section 51.1-142.2 of the Code of Virginia."