Comments of the Independent Regulatory Review Commission

IRRC
Independent Regulatory Review Commission

State Civil Service Commission Regulation #61-6 (IRRC #3167)

Implementation of Acts 69 and 167 of 2016

June 21, 2017

We submit for your consideration the following comments on the proposed rulemaking published in the April 22, 2017 *Pennsylvania Bulletin*. Our comments are based on criteria in Section 5.2 of the Regulatory Review Act (RRA) (71 P.S. § 745.5b). Section 5.1(a) of the RRA (71 P.S. § 745.5a(a)) directs the State Civil Service Commission (Commission) to respond to all comments received from us or any other source.

1. **Conforms to the intent of the General Assembly; Determining whether the regulation is in the public interest; Whether the regulation represents a policy decision of such a substantial nature that it requires legislative review.**

The General Assembly has demonstrated its interest in updating the workings of the Commission through passage of Act 69 of 2016 (Act 69) and Act 167 of 2016 (Act 167). Act 69 began as Senate Bill 1154 of 2015 and received unanimous approval in both chambers. The co-sponsorship memo for the Senate Bill states that the legislation will "offer much needed modernization to the Civil Service Act (Act)" and "place the Commonwealth more in line with hiring practices of the private sector and many other civil service covered states." The memo notes that "this legislation is needed to ensure vacancies are filled with qualified people in a timely manner." Act 167 began as House Bill 192 of 2015 and received three unanimous votes between the two chambers. While the unanimous votes on both bills make clear the General Assembly's support for the amendments in Acts 69 and 167, the issue of the intent behind the amendments has been raised by commenters.

Senators Mike Folmer and Randy Vulakovich, prime sponsors of Senate Bill 1154, jointly comment that "this regulation runs contrary to the intent of the General Assembly" and "does not reflect proper implementation of the Acts." Likewise, Representative Daryl Metcalfe, a co-sponsor of House Bill 192, and Representative Rob Kauffman, Chair of the House Labor and Industry Committee, jointly comment that the proposed regulation fails to implement the clear language of Acts 69 and 167, "thwarting the intent of the legislators of the General Assembly who voted to pass them." Representatives Metcalfe and Kauffman state that "these proposed regulations are unacceptable, and if implemented would prevent the state's Civil Service hiring process from undergoing much needed reform and modernization." We received comments from 23 Commonwealth agencies expressing concerns similar to those of the legislators. We address more specific aspects of these concerns, which we share, in subsequent comments.

Based on the significance of comments received, we believe the actions taken by the General Assembly indicate that the proposal is a policy decision of such a substantial nature that it requires legislative review. Considering the comments from several legislators, including prime sponsors, we have serious doubts as to whether the Commission's approach to amending its regulations is consistent with what the General Assembly intended. We urge the Commission to work closely with both chambers of the legislature, as well as the House Labor and Industry and Senate State Government committees, to ensure that the final-form regulation is consistent with the intent of the General Assembly. In the Preamble to the final-form regulation, we ask the Commission to explain how the language of the final-form regulation fulfills the statutory mandates set forth in Acts 69 and 167. We will review the Commission's response in determining whether the regulation is in the public interest and conforms to the intent of the General Assembly.

2. RRA Section 2. Legislative intent. – Conforms to the intent of the General Assembly; Determining whether the regulation is in the public interest.

Section 2 of the RRA (71 P.S § 745.2) explains why the General Assembly felt it was necessary to establish a regulatory review process. Given the interest this proposal has generated, we believe it is appropriate to highlight the following provision of Section 2(a) of the RRA. The provision states, "To the greatest extent possible, this act is intended to encourage the resolution of objections to a regulation and the reaching of a consensus among the commission, the standing committees, interested parties and the agency." 71 P.S. § 745.2(a).

Commenters state that they were not consulted or solicited to provide input regarding the proposed regulation. The Commission confirms this in response to Regulatory Analysis Form (RAF) #14 regarding input in developing and drafting the regulation. The Commission states that "these regulations were developed using a **committee comprised entirely of employees of the [Commission]**." [Emphasis added.] The Commission's response makes clear that it did not consult with, seek input from or conduct outreach to the regulated community, and therefore made no effort to reach consensus. The Department of Environmental Protection (DEP) states, "Developing these regulatory amendments with no outreach beyond [the Commission] implies a disregard and disrespect for the collective experience and opinions of Commonwealth [Human Resources] (HR) professionals who apply and abide by the rules." This is in direct opposition to the will of the General Assembly.

In order to resolve many of the objections raised by commenters, we strongly encourage the Commission to meet with the regulated community prior to drafting the final-form regulation. Input from legislators and interested parties should be considered as the Commission moves forward with this proposal. In addition, we suggest that the Commission issue an Advanced Notice of Final Rulemaking to help facilitate the reaching of consensus on the issues of concern that this proposal presents.

3. Determining whether the regulation is in the public interest; Economic or fiscal impacts; Reasonableness of requirements, implementation procedures and timetables for compliance.

Section 5.2 of the RRA (71 P.S. § 745.5b) directs the Independent Regulatory Review Commission (IRRC) to determine whether a regulation is in the public interest. When making this determination, IRRC considers criteria established by the General Assembly such as economic or fiscal impact and reasonableness. To make that determination, IRRC must analyze the text of the Preamble and proposed regulation and the reasons for the new or amended language. IRRC also considers the information a promulgating agency is required to provide under Section 745.5(a) in the RAF. 71 P.S. § 745.5(a).

The explanation of the regulation in the Preamble and the information contained in the RAF are not sufficient to allow IRRC to determine if the regulation is in the public interest. In the Preamble to the proposed regulation, the Commission provides only a brief and general overview. For the final-form regulation, the Commission should include in the Preamble a detailed explanation of changes to and rationale for each section of the regulation. Also, the RAF submitted with the final-form regulation should include more detailed information as required under Section 745.5(a) of the RRA. Specifically, we seek additional information on the following:

- The Commission responds "N/A" to several questions on the RAF; the Commission should explain why each question is not applicable.
- In response to RAF #12, the Commission states, "Nothing in these proposed regulatory changes will either advantage or disadvantage Pennsylvania as compared to other states in its ability to regulate its own civil service system." DEP contends that the proposed regulatory amendments "will impair and/or disadvantage the collective ability of Commonwealth agencies to recruit qualified candidates." DEP asserts that Pennsylvania does compete with contiguous states, as well as the federal and local government and non-profits. The Commission should address the impact of the final-form regulation on Pennsylvania's ability to compete with other entities.
- The Commission should explain how the parties identified in response to RAF #15 will be affected. Also, DEP takes issue with the Commission's response to RAF #15, stating that it is incorrect because "local governments who contract their merit hiring to [the Commission] will also be impacted." The Commission should address this concern.
- In response to RAF #17 regarding the economic impact of the proposed regulation, the Commission references fiscal notes from Acts 69 and 167, noting that both fiscal notes indicate "no adverse impact on Commonwealth funds." However, the fiscal note printed in the *Pennsylvania Bulletin* states:

> "No fiscal impact. However: The proposed regulations do not implement [S]ection 212(d) in the Act 167 of 2016. This results in a cost of $2 million to $3 million for modernization of the Commission's Information Technology System to the Commonwealth. The proposed regulations do not implement [S]ection 502 in the Act of 167 of 2016, which would result

in an estimated cost savings to the Commonwealth of $55,800-$105,800, if implemented."

Representatives Metcalfe and Kauffman quote the *Pennsylvania Bulletin* fiscal note and state that if implemented, the proposed regulation would "potentially deny the taxpayers of Pennsylvania significant cost savings." DEP also states that agencies will experience a "negative fiscal impact if they have to continue to print and mail extensive availability surveys, or pay to advertise localized exams in newspapers and online sources, as the proposed regulations would require."

We ask the Commission to address the *Pennsylvania Bulletin* fiscal note, including the statement that the regulation does not implement Sections 212(d) and 502 of Act 167, and clarify the economic impact of this regulation.

- The Commission responds to RAF #18 that these regulations "may even generate cost savings for the Commonwealth," but responds "N/A" to RAF #21 which asks for a specific estimate of the savings to the state government associated with implementation of the regulation. The Commission should address this discrepancy regarding cost savings.
- The Commission states there are no new forms in response to RAF #22. However, DEP asserts that new forms will be needed to request alternative rule of three or vacancy-based experience and training exams. The Commission should clarify this issue.
- In response to RAF #26, the Commission states "alternative regulations were not considered as the [Commission] has determined that these regulations represent the least burdensome and acceptable way to comply with Pennsylvania law." DEP asserts that the proposed regulatory amendments are "unduly burdensome" as "the additional approvals required for alternative rule of three or vacancy[-]based [experience and training] exams will require agency HR staff to divert time and energy to this unnecessary bureaucratic exercise." We ask the Commission to address this concern.
- The Commission should amend its response to RAF #29 to reflect an updated estimate of the timeline for the final-form regulation.
- Responding to RAF #30, the Commission states that it "will work closely with the Governor's Office of Administration and the [HR] personnel of all agencies who employ civil service personnel to evaluate the continuing effectiveness of these regulations." DEP expresses concern that "given the lack of stakeholder outreach in the development of the regulations, that the same level of outreach will be employed in the implementation." DEP is "not confident that necessary input from agencies will be solicited or considered." Based on the Commission's response to RAF #14, we share this concern, as expressed in comment #2 regarding the importance of input from the regulated community.

We will consider the revised Preamble and responses to the final-form RAF as we determine whether the regulation is in the public interest.

4. Section 95.1. Application requirements. – Statutory authority; Conforms to the intent of the General Assembly; Determining whether the regulation is in the public interest; Reasonableness of requirements, implementation procedures and timetables for compliance; Whether the regulation represents a policy decision of such a substantial nature that it requires legislative review.

Act 167 amended Section 212(d) of the Act to provide:

> "The Commission shall enter into an agreement to utilize **the form and method of an employment application that is standard across departments and agencies that are under the governor's jurisdiction** for the purpose of entrance to, or promotion in, the classified service." [Emphasis added.]
> 71 P.S. §741.212(d).

Section 95.1(a) of the proposed regulation states:

> "Applications required of a candidate for entrance to, or promotion in, the classified service must be made in a format prescribed by the Director, utilize a form and method of application that is standard across departments and agencies that are under the Governor's jurisdiction . . . ."

Representatives Metcalfe and Kauffman state that the proposed amendment to Section 95.1 is "inadequate to implement the language of Act 167 as it retains the language that applications '[must] be made in a format prescribed by the Director.'" The representatives state that "failure to remove the Director's control over this process negates the efficacy of this language." Further, the representatives assert that the purpose of the language in Act 167 was to "ensure that [the Commission] applications use the same method standard across departments and agencies, and there is no room for the Director's discretion in this process."

Commenters also state that the proposed regulation does not address the required agreement because the Director of the Commission must prescribe the format of application. The Office of Administration (OA) comments that its "Office for Information Technology, the entity responsible for the Commonwealth's information technology, has established ITP-BUS008, *Enterprise Employment Application Platform Policy*, as **the form and method of employment application standard across the departments and agencies under the Governor's jurisdiction**." [Emphasis added.] According to OA, "pursuant to [Act 167], **the Commission is to use that application platform to comply with the requisites of Section 212(d)**." [Emphasis added.] Commenters also assert that the change to the law was made to make it easier for people to apply for state jobs by having a single site for both Non-Civil Service and Civil Service positions. We ask the Commission to explain in detail how the final-form language implements Section 212(d) of Act 167, conforms to the intent of the General Assembly, and is reasonable and in the public interest.

5. **Section 95.20. Authority. – Statutory authority; Conforms to the intent of the General Assembly; Determining whether the regulation is in the public interest; Reasonableness of requirements, implementation procedures and timetables for compliance; Whether the regulation represents a policy decision of such a substantial nature that it requires legislative review.**

Act 167 amends Section 502 (relating to nature of examinations) giving agencies the authority to determine the best examination method. The amended language states, in relevant part:

> "The appointing authority shall select the method of examination that shall be used for the individual position or the class of positions for which the employment or promotion list is being established." 71 P.S. §741.502.

While the Commission amends its regulation by inserting the above language from Act 167 almost verbatim, the Commission includes additional language, noted in bold below:

> **"If the Director determines that more than one method of examination will fairly test the relative capacity and fitness of persons examined to perform the duties of the class of positions to which they seek to be appointed or promoted**, the appointing authority shall select the method of examination that will be used for the individual position or the class of positions for which the employment or promotion list is being established. **When the same classification is used by more than one appointing authority, the affected appointing authorities shall reach a consensus on the method of examination that will be used for that classification as only one examination method will be used by the Commission to examine all candidates for positions in the same classification.**"

Representatives Metcalfe and Kauffman state that this additional language "obscures the clear intent of Act 167 by giving the Director control instead of permitting the appointing authority the flexibility to select the method of examination that will best allow them to test and secure employees for individual job vacancies." Additionally, the representatives note that requiring agencies to reach a consensus regarding the method of examination that will be used is "unnecessary and burdensome and again prevents agencies from using the type of examination that will best suit their needs."

Commenters argue the same point, asserting that these restrictions are not within the scope of Act 167. We ask the Commission to explain in detail how the final-form language implements Section 502 of Act 167, conforms to the intent of the General Assembly, and is reasonable and in the public interest.

6. **Section 97.11. Appointment process. – Statutory authority; Conforms to the intent of the General Assembly; Determining whether the regulation is in the public interest; Reasonableness of requirements, implementation procedures and timetables for compliance; Whether the regulation represents a policy decision of such a substantial nature that it requires legislative review.**

Act 69 amends Section 601 (relating to certification) of the Act to allow eligibles lists other than the standard rule of three. 71 P.S. § 741.601. The amendment enables the appointing authority to adapt the size of the eligibles list to the particular position it seeks to fill.

Act 69 also amends Section 602 (relating to selection and appointment of eligibles) by adding new language, including Paragraph (a)(2) which states that under certain circumstances an appointing authority may "request the director to create and issue a certification of eligibles consisting only of the names of those candidates who responded by applying for the vacancy after receipt of notice of the vacancy from the commission, **provided the director approves the use of this alternative selection procedure to fill the vacancy**." [Emphasis added.] 71 P.S. § 741.602.

The Commission proposes to amend Section 97.11(a) to add the following language in bold, "**Unless permission has been obtained from the Director to use an alternative rule, the rule of three** applies . . . ." Additionally, the Commission added a new Subsection (b) which states:

> "If an appointing authority wants to use an alternative rule to the rule of three for its appointments to a specific classification or classification series, **it must obtain permission from the Director** by submitting a request in writing to the Director . . . ." [Emphasis added.]

Commenters assert that the regulation incorrectly provides that appointing authorities must secure permission from the Director to use an alternative rule because Section 601 of the Act provides for the appointing authority to elect to follow one of the alternative procedures provided for in the Act. Commenters state that these imposed restrictions on this new process significantly impede appointing authorities' ability to use this alternative rule to fill jobs.

Another concern of commenters is that Paragraph (b)(1) requires specification of the job classification or classification series to which the alternative rule will apply. Commenters state that Act 69 amended Section 602 to permit vacancy-based postings and the language in the proposed regulation ignores the concept of "vacancy-based" hiring.

Additionally, Paragraphs (b)(2), (3) and (5) of the proposed regulation require appointing authorities that use an alternative rule to use that alternative rule (or rule of three if no alternative rule is requested) for **12 months** on a statewide basis. [Emphasis added.] Representatives Metcalfe and Kauffman state that the proposed addition requiring 12 months to pass places "further cumbersome restrictions on agencies that would prevent them from being able to modify their hiring procedures as they see fit."

Commenters express similar concerns regarding the 12-month requirement, asserting that such restrictions do not allow appointing authorities to adapt to changing circumstances or adjust the alternative rule in a timely fashion. Commenters note that even within a single agency there are

advantages to applying an alternative to the rule of three by position rather than job classification. Commenters state that different rules may be more advantageous in different parts of the state, and the most advantageous rule may change over time based on how many candidates are seeking a position at that particular time. However, commenters state that they will be stuck with one particular rule for every position in a classification everywhere in the state for 12 months even if the rule is not effective.

We ask the Commission to explain in detail how the final-form language implements Sections 601 and 602 of Act 69, conforms to the intent of the General Assembly, and is reasonable and in the public interest.

7. **Chapter 98. Appointment and promotion of employees in the classified service by recruiting applicants to apply for a specific vacancy-based examination announcement. – Statutory authority; Conforms to the intent of the General Assembly; Determining whether the regulation is in the public interest; Reasonableness of requirements, implementation procedures and timetables for compliance; Whether the regulation represents a policy decision of such a substantial nature that it requires legislative review.**

Similar to concerns noted in Comment #6, commenters raise the issue of whether permission must be obtained from the Director of the Commission for vacancy-based announcements. OA states, "There is no statutory authority for the Director to give permission to an appointing authority to fill a position, as set forth in the proposed regulation." Similarly, others comment that nowhere in the statutory amendments is the Commission given authority to require agencies to ask permission to fill a vacant position. They state that the statute provides that if an agency decides to fill a vacant position, it only has to request that the Director create and issue a certification of eligibles.

Similar to Comment #6, we ask the Commission to explain in detail how the final-form language implements Sections 601 and 602 of Act 69, conforms to the intent of the General Assembly, and is reasonable and in the public interest.

8. **Section 98.2. Requesting a vacancy-based examination announcement. – Clarity and lack of ambiguity; Reasonableness of requirements.**

We ask the Commission to clarify the provision in Paragraph (b)(1) that the Director will certify the names of "as many eligibles as necessary to satisfy the employment requirements of the appointing authority." How will the Director know how many eligibles are necessary to satisfy the employment requirements of the appointing authority?

9. **Miscellaneous clarity.**

The Commission uses the phrase "classification series" throughout the regulation; however, this phrase is not defined in the regulation or Act. We ask the Commission to define this term or amend the final regulation using defined terms such as *class* or *position*.