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***H.B. 503/S.B. 303 of the
131st General Assembly***

***Rep. Duffey
Sen. Uecker***

June 9, 2016

ORSC Recommendation

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Summary of H.B. 503/S.B. 303

H.B. 503/S.B. 303 makes changes to the Incorporation by Reference into Rules Act, expands the actions the Joint Committee on Agency Rule Review (JCARR) may make in reviewing administrative rules, requires principles of law that are being used in policy to be restated in rules, and grants individuals negatively affected by a principle of law not expressly stated or implied in statute a right to bring and prosecute a lawsuit. Because the bill is fairly technical, this analysis will provide only a dot point summary of its major provisions:¹

Incorporation by Reference into Rules

- Specifies the circumstances when an agency is considered to have incorporated material by reference into a rule. Incorporation by reference refers to incorporation of material into a rule, only through a reference to that material, as if it were spelled out or reproduced in the rule.
- Requires agencies to make material incorporated by reference into a rule available to the public free of charge.
- Authorizes JCARR to recommend invalidation of a proposed rule when the citation included by the agency is insufficient to allow JCARR to access the incorporated material easily and without charge, or when the agency has treated the incorporated material as if it were exempt from the incorporation by reference standards when the material is not so exempt.

Additional JCARR Actions

- Permits JCARR to recommend invalidation of a rule if the rule imposes a fee that is not reasonably and fairly related to the cost incurred by the agency in performing the function for which the fee is charged.
- Permits JCARR, by majority vote, to order an agency to accelerate the five-year, periodic rule review of a rule immediately if the rule has an unforeseen adverse impact on business that is not reasonably within the express or implied scope of the statute under which the rule purportedly was adopted.
- Requires an agency, within three months after the start of a new gubernatorial term, to self-examine its own operations for policies that should be adopted as rules, to transmit its findings to JCARR, and to adopt rules if the agency is relying on policy that has not been adopted as a rule.
- Permits JCARR to compel agencies to appear before JCARR when they have not adopted rules as required by statute, and permits JCARR to direct agencies to adopt the rules if they have not done so.

¹ The LSC Analysis for S.B. 303 provides a complete analysis of the bill's provisions.

Principles of Law

Generally speaking, a principle of law refers to an operation of general and uniform nature that establishes a legal regulation or standard that would not exist in its absence.

- Permits JCARR to require agencies that are found to operate principles of law through policy rather than through rule to appear before JCARR to explain why, and requires the agency to adopt rules to supplant the policy.

Citizen Cause of Action

- Permits a person that has been party to an administrative adjudication or a civil action, which involved a policy that should have been adopted as a rule, to petition the relevant agency in writing to adopt the policy in rules, and requires the relevant agency in response either to adopt rules or to explain why the agency will not adopt rules.
- Creates the right to bring and prosecute a lawsuit if a rule makes an exception to or an amplification of a principle of law, the exception or amplification is not expressly or impliedly authorized by statute, and the plaintiff is adversely affected by the principle of law.

ORSC Comments

ORSC comments are divided along the four broad categories of the bill: incorporation by reference provisions, additional JCARR actions, principles of law, and citizen cause of action.

Incorporation by Reference.² The bill establishes statutory standards as to when JCARR is required to consider materials as incorporated into the text of a rule and provides a simpler method to access those incorporated materials for outside parties. Incorporation by reference is used by an agency to apply standards or procedures from another document or entity to a rule without duplicating the standards in the rule. For example, an agency could use federal Medicaid eligibility standards to apply to a state-run assistance program. This is different from when an agency simply references a federal law to which they are subject. For instance, the retirement systems reference the maximum benefit amounts allowed under federal law; they do not incorporate that federal law into the systems' rules.

The bill's provisions correspond to JCARR's current policy regarding incorporation by reference, but the bill would codify that policy into law. These changes may have a marginal increase in the systems' administrative burden, but the ORSC believes that this increase is acceptable considering the greater clarity the bill brings to incorporation by reference standards. ORSC, therefore, recommends that these

² R.C. 106.021, 106.03, 106.031, 111.15, 119.03, 121.71, 121.72, 121.73, 121.74, 121.75, 127.18, and 1707.20.

provisions apply to the retirement systems as they currently do under both H.B. 503/S.B. 303.

Additional JCARR Actions.³ The bill provides JCARR authority to take additional actions when a rule has an adverse effect on a business and when a rule is required by statute but has not been written by an agency. The action related to unintended adverse effects on business is an expansion of the authority granted under the Common Sense Initiative. The ORSC is provided authority to review law and rules as they relate to the retirement systems, not outside businesses. Therefore, ORSC finds that the bill's additional authority should continue to rest with JCARR and have no comment on these provisions of the bill.

The bill also gives greater enforcement to JCARR to compel an agency, that has failed to adopt statutorily required rules, to do so. The ORSC is not aware of the retirement systems ever failing to adopt a rule as commanded by the General Assembly, but agrees that such disregard of legislative commands merits action by JCARR. ORSC, therefore, recommends that the provisions apply to the retirement systems as they currently do under both H.B. 503/S.B. 303.

Principle of law.⁴ The bill provides JCARR additional oversight to compel an agency to appear before JCARR if the agency, in its operations, is relying upon a principle of law that is stated in policy rather than rule. The concept of the provision is to ensure that the operations of state agencies have legal grounding through rules. However, the ORSC finds that the proposed application of this principle is overly broad, bureaucratic, and, in the case of the retirement systems that have an existing procedure of review through the ORSC, redundant.

Two examples demonstrate how expansive this authority may be and the additional administrative issues that may arise:

1) Health care policies. Each retirement system has discretionary authority to provide health care.⁵ Currently, all systems provide health care which is administered in part through policy. The ORSC does not believe it is appropriate to place the entirety of the systems' health care provisions into rule, but logically H.B. 503/S.B. 303 could require such expansive rulemaking. It would be administratively cumbersome to detail all premiums, much less specific coverage standards, within rules. In addition, if placed in rule, it could legitimize the incorrect argument that health care is a legally protected benefit of the systems.

2) Membership determination policies. While statute provides membership standards, PERS has 3,700 employers with as many employment positions that require refinement. Should membership determination, currently as PERS policy, be required as specific rules, PERS could be required to create 3,700 employer specific rules of membership. This is impractical. It is for this exact reason that the legislature provided

³ R.C. 101.353, 106.032, 107.52, 107.54, and 121.82.

⁴ R.C. 101.352, 117.115, 121.93, and 121.931.

⁵ R.C. 145.58, 742.45, 3307.39, 3309.691, and 5505.28.

broad and final determination authority to each retirement system to determine membership, in accordance with statutory principles. When there is a change or dispute of those principles, the ORSC has reviewed and provided supervision of those policy changes. For instance in 2014, STRS and SERS engaged in a year-long process of firming membership criteria between the systems with employers. The ORSC provided oversight that resulted in a successful resolution to the membership status of these STRS and SERS members.⁶

These are only two examples from a lengthy list of issues for which the retirement systems must establish rules. H.B. 503/S.B. 303 could result in a significant expansion of rules by the retirement systems. The retirement systems already have their rules reviewed twice: once by JCARR and once by ORSC staff. And retirement policy is likewise reviewed twice: once by the General Assembly and once by ORSC staff. The retirement systems do not require the additional oversight proposed by H.B. 503/S.B. 303.

The ORSC finds that the proposed JCARR oversight regarding principles of law is more properly conducted by the ORSC and that requiring all principles of law to be expressly detailed in rule would be duplicative oversight, bureaucratic, and impractical. The ORSC, therefore, recommends that the systems be excluded from the changes proposed under Revised Code 101.352, 117.115, and 121.93.

Citizen Cause of Action.⁷ The bill's petition and right to bring forth a lawsuit would similarly be duplicative, bureaucratic, and impractical. Effectively, should the principle of law provisions be removed and the citizen action provisions remain, the retirement systems could still be required by the bill to state all policies in rule, but have the additional consequence of a potential lawsuit if a citizen is negatively affected by a policy. This ability is inadvisable for the retirement systems. Consider that premium changes in the health care program could result in a marked increase of lawsuits for the systems. The ORSC was created to mediate and provide oversight of the retirement systems, and it has successfully completed these duties since its creation in 1968. For example, most recently, strong reaction from interested parties against STRS' increase in the mitigating rate received extensive review by the ORSC and an eventual statutory adjustment.

Most concerning about this provision is the potential ability to bring forth a lawsuit against a policy that negatively affects an individual. The retirement systems provide a pension benefit, and almost any change has the potential to negatively affect an individual. Pension benefits are innately personal benefits. The type of legal recourse provided under the bill has the potential of markedly increasing legal action against the retirement systems.

The ORSC has been provided the oversight of the system and that is where that authority should continue to lie rather than diffused to citizen lawsuits. The ORSC,

⁶ STRS and SERS, "Important Message About Membership Determination" (January 2014), and February, March, April, and May ORSC meetings.

⁷ R.C. 121.932 and 121.933.

therefore, recommends that the systems be excluded from the changes of the bill under Revised Code 121.931 and 121.932.

ORSC Recommendation

At its June 9, 2016, meeting, the ORSC recommended that the General Assembly approve of H.B. 503/S.B. 303 only with the exclusion of the retirement systems from the bill's provisions in Revised Code 101.352, 117.115, 121.93, 121.931, and 121.932.

Excluding the retirement systems from both the principle of law and cause of action portions of the bill would prevent the diminishment of ORSC as the oversight body of the retirement systems and avoid administratively bureaucratic requirements on the systems. The ORSC recommends that all other provisions of H.B. 503/S.B. 303 apply to the systems.

The version of H.B. 503 pending in the House Government Accountability and Oversight incorporates the suggests of the ORSC and excludes the retirement systems from the bill's provisions in Revised Code 101.352, 117.115, 121.93, 121.931, and 121.932.