

OFFICE OF LEGISLATIVE LEGAL SERVICES

COLORADO GENERAL ASSEMBLY

DIRECTOR
Sharon Eubanks

DEPUTY DIRECTOR
Julie A. Pelegrin

REVISOR OF STATUTES
Jennifer G. Gilroy

ASSISTANT DIRECTOR
Duane H. Gall

PUBLICATIONS COORDINATOR
Kathy Zambrano



COLORADO STATE CAPITOL
200 EAST COLFAX AVENUE SUITE 091
DENVER, COLORADO 80203-1716

TEL: 303-866-2045 FAX: 303-866-4157
EMAIL: OLLS.GA@STATE.CO.US

MANAGING SENIOR ATTORNEYS
Jeremiah B. Barry Jason Gelender
Christine B. Chase Robert S. Lackner
Michael J. Dohr Thomas Morris
Gregg W. Fraser

SENIOR ATTORNEYS
Jennifer A. Berman Jery Payne
Brita Darling Jane M. Ritter
Edward A. DeCecco Richard Sweetman
Kristen J. Forrestal Esther van Mourik
Nicole H. Myers

SENIOR ATTORNEY FOR ANNOTATIONS
Michele D. Brown

STAFF ATTORNEY
Kip Kolkmeier Yelana Love

MEMORANDUM

TO: Committee on Legal Services

FROM: Jennifer Berman, Office of Legislative Legal Services

DATE: November 8, 2017

SUBJECT: Rules of the Parks and Wildlife Commission, Division of Parks and Wildlife, Department of Natural Resources, concerning parks and wildlife procedures, 2 CCR 406-16 (LLS Docket No. 170385; SOS Tracking No. 2017-00329).¹

Summary of Problems Identified and Recommendations

Section 24-4-106 (4), C.R.S., of the Administrative Procedure Act grants a person 35 days after an agency's final action becomes effective to bring an action in district court for judicial review of the agency action. Rule #1601, section B.2.e., however, requires the Parks and Wildlife Commission, when giving written notice of a license suspension, to advise the licensee that he or she has 30 days to bring an action in district court for judicial review of the commission's suspension decision. Additionally, Rule #1601, section B.2.e. authorizes the commission to automatically grant a stay of a license suspension upon request, but section 24-4-106 (5), C.R.S., authorizes such a stay of agency action only "upon a finding that irreparable injury would otherwise result". **Because Rule #1601, section B.2.e. conflicts with the statute, we**

¹ Under § 24-4-103, C.R.S., the Office of Legislative Legal Services reviews rules to determine whether they are within the promulgating agency's rule-making authority. Under § 24-4-103 (8)(c)(I), C.R.S., the rules discussed in this memorandum will expire on May 15, 2018, unless the General Assembly acts by bill to postpone such expiration.

recommend that Rule #1601, section B. 2. e. of the rules of the Parks and Wildlife Commission concerning parks and wildlife procedures not be extended.

Section 33-6-106 (9), C.R.S., concerning petitions to end a license suspension, was repealed, effective July 1, 2017. Rule #1601, section B.5., however, still provides a process for petitioning the commission to end a license suspension. **Because Rule #1601, section B.5., now exceeds the commission's statutory rule-making authority, we recommend that Rule #1601, section B.5., of the rules of the Parks and Wildlife Commission concerning parks and wildlife procedures not be extended.**

Analysis

1. The Parks and Wildlife Commission promulgated a rule that conflicts with two components of the Administrative Procedure Act.

Section 24-4-106, C.R.S., of the Administrative Procedure Act concerns judicial review of an agency's final action. The statute provides in pertinent part:

24-4-106. Judicial review. (4) Except as provided in subsection (11) of this section,² any person adversely affected or aggrieved by any agency action may **commence an action for judicial review in the district court within thirty-five days** after such agency action becomes effective; ...

(5) **Upon a finding that irreparable injury would otherwise result**, the agency, upon application therefor, shall postpone the effective date of the agency action pending judicial review ... **(Emphasis added)**

In contrast, the commission's Rule #1601 section B.2.e., concerning license suspension appeals, provides:

#1601 – Conduct of Meetings

B. Adjudicatory Hearings

2. License Suspension Appeals

e. Written notice of the final decision of the commission shall be sent to the licensee by certified mail, return receipt requested, to the last known address of such person. The notice shall advise the licensee that he or she may appeal the Commission's suspension decision to the state district court as provided in § 24-

² Subsection (11) of section 24-4-106, C.R.S., which is not at issue here, concerns proceedings for review in the court of appeals and provides a person 49 days after the date of service of the agency's final action to file a notice of appeal.

4-106, C.R.S., by **bringing an action for judicial review within 30 days after such action becomes effective.** If such judicial action is initiated, the licensee may contemporaneously apply in writing to the Commission (and provide a copy to the hearing examiner) for a stay of the license privileges suspension pending review and final action by the district court. **If requested, the Commission shall automatically grant such stay. (Emphasis added)**

Although citing section 24-4-106, C.R.S., Rule #1601 B.2.e. conflicts with the statute in two material ways: (1) The rule only affords 30 days after the suspension becomes final for a person whose license was suspended to bring an action for judicial review in district court, but section 24-4-106 (4), C.R.S., affords a person 35 days after an agency action becomes final to seek judicial review of the action in district court; and (2) The rule requires the commission to automatically grant a request for a stay of the suspension of license privileges pending judicial review by a district court, but section 24-4-106 (5), C.R.S., authorizes an agency to grant a stay of its final action pending district court review only if, upon request for such stay, the agency determines that “irreparable injury would otherwise result”. Because the rule conflicts with section 24-4-106, C.R.S., the rule should not be extended.

2. The Parks and Wildlife Commission’s rule concerning petitions to end a license suspension now exceeds the commission’s statutory rule-making authority because the statute that the rule was based upon has now been repealed.

Section 33-6-106 (9), C.R.S., authorized petitions to end a license suspension. Subsection (9)(f) of the section provided:

33-6-106. Suspension of license privileges – repeal. (9) (f) This subsection (9) is repealed, effective July 1, 2017. Prior to the repeal, the commission shall review the petition program under this subsection (9) to determine whether the number of petitions granted justifies the continuance of the program. Based upon this review, the commission shall make recommendations to the general assembly whether to continue this subsection (9) by October 1, 2016.

On July 1, 2017, subsection (9) of section 33-6-106, C.R.S., was repealed.

The commission’s Rule #1601, section B.5. is based on section 33-6-106 (9), C.R.S., and provides a process for petitioning the commission to end a license suspension. The rule states:

#1601 – Conduct of Meetings

B. Adjudicatory Hearings

5. Requests to End Previous License Suspensions

See 33-6-106 (9) (a), for additional detail and requirements

- a. A person may petition the Commission to end a suspension at least 10 years in duration in accordance with 33-6-106 (9), C.R.S.
- b. The request for review shall be submitted to the Office of the Hearings Examiner at 6060 N. Broadway, Denver, CO 80216, and shall include:
 - 1) The petitioner's name, address and telephone number;
 - 2) A narrative statement of the petitioner's position supporting relief from the decision of suspension, including, but not limited to, a statement as to why the petitioner is unlikely to violate wildlife statutes and regulations in the future;
 - 3) Copies of any written documentary evidence in support of the petitioner's request for review.
- c. Commission review will be based on the request for review, and any written materials or documentary evidence provided to the Commission by the Division, in response to the request for review submitted by the claimant, and unless the Commission directs otherwise, there will be no oral presentations or further submittals to the Commission.
- d. In the case of termination of a suspension, unless waived by the Commission at that same hearing, a petitioner must complete the following requirements prior to the purchase of any license:
 - 1) Pay a reinstatement fee of three hundred dollars;
 - 2) Perform forty hours of service under the Division's direction on wildlife or state parks projects; and
 - 3) Successfully pass a Hunter's Safety course.

Upon repeal of section 33-6-106 (9), C.R.S., on July 1, 2017, the commission lost its statutory rule-making authority to have a process for petitioning the commission to end a license suspension. Because Rule #1601, section B.5., now exceeds the commission's statutory authority, the rule should not be extended.

Recommendations

We therefore recommend that Rules #1601, section B.2.e. and #1601, section B.5. of the rules of the commission concerning parks and wildlife procedures not be extended because Rule #1601, section B.2.e. conflicts with statute and Rule #1601, section B.5. now exceeds the commission's statutory authority.

s:\lls\cols\memos\2017\170385jab.docx