

Department of Legislative Services
Maryland General Assembly
2009 Session

FISCAL AND POLICY NOTE

House Bill 1109
Judiciary

(Delegate McComas, *et al.*)

Administrative Procedure Act - Exemption - Death Penalty Protocols

This bill exempts from the requirements of the Administrative Procedure Act the protocols of the Department of Public Safety and Correctional Services governing the administration of the death penalty, including any execution operations manual.

The bill takes effect June 1, 2009.

Fiscal Summary

State Effect: None. The bill's requirements can be met with existing resources.

Local Effect: None.

Small Business Effect: None.

Analysis

Current Law: The requirements of the Administrative Procedure Act apply to each unit in the Executive Branch of State government, and each unit that is created by public general law and operates in at least two counties. The Administrative Procedures Act does not apply to a unit in the Legislative or Judicial branches, the Injured Workers' Insurance Fund, a board of license commissioners, or the Rural Maryland Council.

The Administrative Procedure Act sets forth the requirements for the review of regulations adopted by units of government under the jurisdiction of the Act, including requirements for notice, hearing, review, and publication. A "regulation" is a statement, amendment, or repeal of a statement that has general application and future effect. It is a

statement adopted by a unit of government to detail or implement a law administered by the unit, or to govern its organization, procedures, and practices. A regulation may be in any form including a guideline, rule, standard, or statement of interpretation or policy. A regulation is not effective unless it is authorized by statute; therefore, it must contain a citation of the statutory authority for the regulation.

A unit of the Executive Branch that proposes a regulation must submit it for preliminary review by the Joint Committee on Administrative, Executive, and Legislative Review (AELR Committee) at least 15 days before the proposed regulation is submitted for publication in the *Maryland Register*. The AELR Committee consists of 10 senators and 10 delegates and is charged by statute with the review of all regulations proposed by units of the Executive Branch.

A proposed regulation may not be adopted until after it is submitted to the AELR Committee and at least 45 days after its first publication in the *Maryland Register*. The unit must permit public comment on the proposed regulation for at least 30 days of the 45-day period after it is first published in the *Maryland Register*. Failure by the AELR Committee to approve or disapprove the proposed regulation during the period of review may not be construed to mean that the AELR Committee approves or disapproves the proposed regulation. However, the unit may proceed with adoption of the proposed regulation if the AELR Committee has not taken action to either approve or disapprove it.

An Executive Branch unit may adopt a proposed regulation on an emergency basis if the unit declares that emergency adoption is necessary, the proposed regulation and its fiscal impact are submitted to the AELR Committee, and the AELR Committee approves the emergency adoption. A public hearing must be held on the emergency adoption of the proposed regulation if requested by a member of the AELR Committee. The Administrative Procedure Act also sets forth procedures that must be followed if the AELR Committee opposes adoption of a proposed regulation, and for the notice and publication of regulations once they are adopted.

Background: This bill is in response to rulings by the Court of Appeals in *Evans v. State*, 395 Md. 256 (2006). In the four consolidated cases, the Court of Appeals ruled that the protocols of the Division of Correction (DOC) in the Department of Public Safety and Correctional Services directing administration of lethal injection are ineffective until either: (1) the protocols are adopted as regulations according to the Administrative Procedure Act; or (2) the General Assembly statutorily exempts the protocols from the requirements of the Act.

The Evans Cases: Vernon Evans was convicted of killing two people in Baltimore County in 1983 who were scheduled to testify in a federal narcotics case. The State sought the death penalty based on two aggravating factors – the crime was a contract

killing and more than one person was killed during the same incident. Evans was sentenced to death in 1984. He appealed his conviction and also submitted several petitions for post-conviction relief. In 1991, a new sentencing proceeding was ordered, and that proceeding resulted in a death sentence. Evans appealed to the U.S. Supreme Court, which declined to review the case. After the most recent denial, the Baltimore County circuit court issued a warrant of execution.

After the signing of the death warrant, Evans initiated additional petitions for post-conviction relief including a demand for an injunction against the use of the current execution protocol used by DOC. These petitions were consolidated on appeal and were the subject of the four decisions by the Court of Appeals.

Court of Appeals Ruling: Among the allegations addressed by the court were whether (1) the DOC execution protocol materially conflicts with the Maryland death penalty statute, in that the statute only requires the use of two of the three drugs currently used in the lethal injection process; and (2) the DOC execution protocol conforms to the Administrative Procedure Act, since it was not properly published in the *Maryland Register* and sent to the AELR Committee for review.

The Court of Appeals found merit in the defendant's challenge to the DOC execution protocol. The court held that the DOC execution protocol, specifically the lethal injection checklist, must be adopted as a regulation in accordance with the Act, as it is not simply a decision made in the course of routine internal management. Moreover, the court found that the number and type of drugs identified in the protocol is an issue affecting inmates, correctional personnel, witnesses to the execution, and the public through its perception of the execution process. By identifying the protocol as a regulation, the court stated that the protocol should have been published for comment as a proposed regulation in the *Maryland Register* and submitted to the AELR Committee before it became effective. The court held that the DOC protocols directing the administration of lethal injection are ineffective until either: (1) the protocols are adopted as regulations; or (2) the General Assembly statutorily exempts the protocols from the requirements of the Act.

Adherence to the court's decision necessitates a *de facto* moratorium on all executions that might otherwise be implemented through lethal injection in Maryland. DOC advises that there are five people currently on death row.

Lethal Injection Controversy: Implementation of the death penalty had been effectively halted nationwide since the U.S. Supreme Court agreed to hear the appeal in *Baze v. Rees* No. 07-5439 (2007). In September 2007, the court agreed to consider the constitutionality of the lethal injection process as administered in Kentucky. Two death row inmates, Ralph Baze and Thomas Clyde Bowling, Jr., sued Kentucky in 2004

claiming that the state's lethal injection process amounted to cruel and unusual punishment. The Kentucky Supreme Court upheld the procedure's constitutionality. The case had wide-ranging implications because the Kentucky procedures for lethal injection are substantially similar to the procedures used in many other states, including Maryland. In April 2008, the court affirmed the decision of the Kentucky Supreme Court and ruled that Kentucky's lethal injection protocol did not constitute cruel and unusual punishment. Following the decision in *Baze*, nine states carried out executions for the remainder of 2008.

Of the 36 states that impose the death penalty, 35 states use lethal injection. Nebraska used the electric chair until its use was declared unconstitutional by the Nebraska Supreme Court in February 2008. The execution method that will replace the electric chair has not yet been determined. Most states, including Maryland, use the same three-drug combination for lethal injections: sodium pentothal (anesthetic property); pancuronium bromide (paralytic property); and potassium chloride (stops the heart and causes death). Eight of the 35 states using lethal injection do not specify which drugs are used. **Appendix 1** shows the states that impose the death penalty and the method of execution used.

Additional Information

Prior Introductions: HB 1250 of 2008 received an unfavorable report by the House Judiciary Committee. SB 239/HB 690 of 2007 received unfavorable reports from the Senate Judicial Proceedings Committee and House Judiciary Committee, respectively.

Cross File: None.

Information Source(s): Judiciary (Administrative Office of the Courts), Department of State Police, Office of Administrative Hearings, Office of the Public Defender, Department of Public Safety and Correctional Services, State's Attorneys' Association, Death Penalty Information Center, Department of Legislative Services

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Appendix 1
States that Impose the Death Penalty and Method of Execution
Lethal Injection Moratorium States

Lethal Injection

Three-drug Combination

Arizona, Arkansas, California, Colorado, Connecticut, Delaware, Florida, Georgia, Idaho, Illinois, Indiana, Louisiana, Maryland, Mississippi, Missouri, Montana, Ohio, Oklahoma, Oregon, New Mexico, South Dakota, Tennessee, Texas, Utah, Washington, Wyoming

Drugs Not Specified

Alabama, Kansas, Kentucky, Nevada, New Hampshire, Pennsylvania, South Carolina, Virginia

Other

North Carolina (current usage involves three drugs, though only two drugs are required by statute)

Method to Be Determined

Nebraska

Source: Death Penalty Information Center