

LCRAR



*Approved as Amended*

Appendix E.

**Legislative Commission to  
Review Administrative Rules**

**Representative Peter Rodosovich**  
Chair

**Maryanne V. Hruby**  
Executive Director

**Senator Gene Waldorf**  
Vice-Chair

**FINAL REPORT**

of the

**LCRAR SUBCOMMITTEE ON RULEMAKING EXEMPTIONS**

January 1989

**Subcommittee Members:**

**Senator William Belanger**  
**Senator Robert Schmitz**  
**Representative Dave Gruenes**  
**Representative Sandy Pappas**

## BACKGROUND

The purpose of this Subcommittee was to examine the numerous statutory rulemaking exemptions that the Legislature has granted over the years to state agencies. These exemptions allow agencies to avoid some or all of the uniform rulemaking procedures provided in the Minnesota Administrative Procedure Act (APA) (Minnesota Statutes, chapter 14).

The Subcommittee was formed in early 1988 after staff research identified the existence of a significant number of rulemaking exemptions, and after the LCRAR Chair wrote to all heads of agencies that have rulemaking exemptions, asking for their assistance by verifying our list of exemptions and by providing the rationale for each one.

Under its authority in section 14.40 to "promote adequate and proper rules and an understanding on the part of the public respecting them", the Subcommittee held a series of three public hearings from August through November 1988 and invited eight state agencies to explain the rationales for their exemptions to the Subcommittee. The Subcommittee allowed the executive director to choose which state agencies to invite.

The Amateur Sports Commission was invited because it is a new small agency (created in 1987) that asked for an exemption for its procedural rules in 1988.

The World Trade Center was invited because it is a relatively new (1984) and somewhat controversial agency that has a blanket rulemaking exemption.

The Department of Natural Resources was invited because it is a large agency with a long-standing exemption for all the rules of the Division of Fish & Game and because the Subcommittee was aware of some Senate interest in this exemption.

The Department of Corrections was invited because Subcommittee member Representative Sandy Pappas was interested in the department's interpretation of their general exemption in section 14.02 as it relates to inmates under Supervised

Release, and because the LCRAR previously examined the department's exemption.

The Pollution Control Agency was invited because it is a relatively large agency that adopts many long, complex, and controversial rules but has only three minor exemptions.

The Department of Transportation was invited because it is a large agency with six exemptions and a Subcommittee member was interested in their responses.

And the Minnesota State High School League was invited because during the 1988 Session it was somewhat controversial, and because it is totally exempt from rulemaking under chapter 14.

The Subcommittee hoped to be able to compare and contrast rationales of various kinds of state agencies, and, due to time limitations, chose this sample of agencies to interview in person.

At the last Subcommittee hearing on November 15th, 1988, the second half of the agenda was open for comments from parties interested in the APA and the issue of rulemaking exemptions. Persons who testified included William Brown, Chief Administrative Law Judge, Office of Administrative Hearings; Professor Mel Goldberg, William Mitchell College of Law; Richard Wexler, Chair of the Minnesota State Bar Association, Administrative Law Section; Julie Brunner, Assistant Commissioner, Department of Human Services; and Jocelyn Olson, Assistant Attorney General, Pollution Control Agency.

## FINDINGS

Based on staff research, state agencies' responses, testimony of agency staff and others presented to the Subcommittee during the public hearings, the Subcommittee makes the following findings:

### 1. (NUMBER OF EXEMPTIONS)

There are currently 167 rulemaking exemptions that have been granted by the Legislature to state agencies. These exemptions are found in sections 14.02, 14.03, and in various other individual sections of law. (See Appendix A for a complete list of statutory exemptions.)

### 2. (TYPES OF EXEMPTIONS)

For purposes of this examination, there are two kinds of exemptions: program-specific and agency-wide or blanket exemptions. Of the total of 167, 17 are agency-wide. The remainder are program-specific.

### 3. (NUMBER OF AGENCIES WITH AND WITHOUT EXEMPTIONS)

There are approximately 80 state entities that have some characteristics of a

state agency. More than one-half or 48 of them have some rulemaking exemptions. And 20% have a blanket exemption. The remaining agencies apparently conduct their business without them.

#### 4. (PROCESS FOR EXEMPT RULES)

To have an exemption means that an agency can adopt certain rules and enforce them without affording the public an opportunity to participate in their development. This is because an exempt rule is not published when first proposed in the State Register.

It is not explained and justified in a Statement of Need and Reasonableness.

It is not reviewed by the Attorney General.

It is not subject to scrutiny at a public hearing.

And it is not published when final in Minnesota Rules for ready access by the public.

The result is that the vast majority of exempt rules are currently not published. There is no way to know how many exempt rules exist because by their very nature they are not subject to the normal procedural protections afforded the public by the APA. There is no comprehensive and uniform publication requirement for exempt rules.

(There are a few statutory rulemaking exemptions which by their own terms require an alternative form of publication, e.g. posting weight limits on highways (section 14.02, subdivision 4, clause (d)), and publication in newspapers of DNR fish and game rules (section 97A.051). And in 1985 section 14.385 was enacted to require certain exempt rules to be submitted to the Revisor of Statutes for publication. This elicited only 11 sets of exempt rules. In sum, these efforts have resulted in the publication of only a very few exempt rules.)

#### 5. (NO STATUTORY LIMITS ON EXEMPTIONS)

Exempt rules are not second class rules; they are not unlawful. Once granted, there are no general limitations imposed on them. The APA does not require a

stated rationale for an exemption. There are no general statutory time limits imposed. There are no formal statutory mechanisms for their legislative or executive review. And there is no Minnesota case law interpreting the implementation of a statutory rulemaking exemption.

#### 6. (LEGISLATIVE CONTROL OF EXEMPTIONS)

The only formal legislative mechanism to control rulemaking exemptions is in House Rule 5.8 which requires that any bill with a rulemaking exemption shall be referred to the Governmental Operations Committee.

There is no Senate counterpart to this rule.

At this time legislative review of rulemaking exemptions occurs primarily during the normal committee hearing process or during floor sessions.

#### 7. (RATIONALES FOR EXEMPTIONS)

Agencies were asked to give the rationale for each of their exemptions. The most common reasons provided were:

- the general need for flexibility
- the need to adopt effective rules quickly to protect the public or to implement a program in a timely manner
- rulemaking is costly
- their rules are really only internal management rules (as generally exempted by section 14.02, subdivision 4, clause (a))
- the program is only a pilot project i.e. experimental
- the rules do not apply to the "public"
- the federal government requires a quick response
- the "rule" is not in fact a rule i.e. it is only a "guideline"
- the "agency" is not a state agency
- there are other procedural safeguards in lieu of the APA
- rulemaking makes the agency duties difficult to perform
- rulemaking is inconvenient
- rules are not controversial, therefore no APA rulemaking is necessary
- unknown
- comfort language e.g. statute really suffices but drafter was being cautious

Clearly it is up to the Legislature as a whole to decide whether any of these

particular rationales is justifiable. However, unlike other state APAs and the Model Act, the Minnesota APA does not offer much assistance to the Legislature in assessing whether the rationale justifies removing rulemaking requirements for adopting rules. Each of our statutory exemptions apparently stands on its own. There are hardly any statutory criteria, general or specific, to consider when granting an exemption. The APA provides only one exemption for an entire category of rules for any agency. It is section 14.02, subdivision 4, clause (a) - for internal management rules.

In contrast, other APAs contain categories of rules that are exempt. These categories reflect, at a minimum, a decision that for certain kinds of rules the need for efficient, economical and effective government outweighs the public's right to participate in policy making. (See Appendix B for Model State APA, section 3-116 which uses a categorical approach to rulemaking exemptions.)

In addition, in the interest of fairness, all agencies should be apprised of the kinds of exempt rules and rationales that are available to them. If efficient, economical, and effective government is good for one agency, it may be good for others. If a category of exempt rules is justifiable for one agency, it may be justifiable for many. Likewise, rules that are not justifiably exempt for one agency, may not be justifiable for any.

#### RECOMMENDATIONS

To respond effectively to these findings, the Subcommittee recommends to the LCRAR the following:

1. To reduce the absolute number of rulemaking exemptions, the LCRAR should sponsor a housekeeping bill to repeal exemptions considered by agencies to be unnecessary.
2. To provide some measure of legislative control over the examination of an exemption before it becomes law, the LCRAR should sponsor an amendment to the Senate Rules, similar to House Rule 5.8, to provide that bills which exempt a department or agency from rulemaking shall be referred to the Committee on Governmental Operations, which shall be responsible for considering the need and rationale for the exemption. (See Appendix C.)

3. To ensure periodic review by the Legislature of the rulemaking exemptions that it grants to state agencies, the LCRAR should sponsor a bill to amend section 14.40 to add to the duties of the LCRAR that of periodic review of state agency exemptions.
4. To improve public access to exempt rules, the LCRAR should sponsor a bill amending chapter 14 to provide that no exempt rule (except for rules concerning only the internal management of a state agency) has the force and effect of law unless the agency publishes a notice in the State Register that summarizes the rule and indicates that the agency shall furnish a copy of the rule upon request. In addition, the Secretary of State shall maintain a log of the notices of these exempt rules, similar to the log kept for Executive Orders.
5. The LCRAR should refer this report to all policy committees, along with the relevant letters to and from state agencies, and the minutes of the Subcommittee's meetings. The LCRAR should request that policy committees review the exemptions of agencies under their control, and give consideration to the following issues:
  - a. Should the current rulemaking exemptions expire or be sunsetted unless they are reviewed and re-approved by the Legislature by June 30, 1990 or another appropriate date?
  - b. Should the Legislature adopt a general "good cause" exemption, similar to that found in the Model State APA, section 3-108? Basically, this exemption would allow an agency that believes it is "unnecessary, impracticable, or contrary to the public interest" to adopt a rule under the APA rulemaking process, to avoid those requirements by publishing a statement to that effect. Currently, agencies seek or are granted emergency rulemaking authority or a rulemaking exemption by the Legislature. With a "good cause" exemption, an agency would bear the burden of finding and publishing the reasons for the exemption. (See Appendix D Model State APA section 3-108 for a sample "good cause" exemption.)
  - c. How are the current exemptions being interpreted, broadly or narrowly? Is more specific language needed to limit the exemption?
  - d. If the rationale for a specific exemption is that the rules concern only the agency's internal management, then is the specific exemption needed since section 14.02, subdivision 4, clause (a) provides this categorical exemption?

- e. Should the Legislature amend the APA to adopt a provision similar to section 3-116 of the Model State APA? (See Appendix B.) This provision would establish categories of rules that are exempt.
- f. Absent other criteria for determining whether an exemption is justified, the committee should weigh the need for efficient, economical and effective government against the public's right to fully participate in state policy-making.

#### SUMMARY

The Subcommittee believes that these recommendations support the general principles of the APA, while allowing agencies to seek justifiable exemptions. These recommendations are designed to enhance legislative control over the delegation of policy making authority to the executive branch. They reflect the Subcommittee's view that the policy committees are in the best position to review specific exemptions and to assess their justification. The LCRAR has viewed its role as a broad one--of "promoting proper agency rules and an understanding on the part of the public respecting them." It does not wish to usurp the control over the subject matter of rules, which it believes is more properly exercised by appropriate policy committees.





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Section 3-116. [Special Provision for Certain Classes of Rules]

Except to the extent otherwise provided by any provision of law, Sections 3-102 through 3-115 are inapplicable to:

- (1) a rule concerning only the internal management of an agency which does not directly and substantially affect the procedural or substantive rights or duties of any segment of the public;
- (2) a rule that establishes criteria or guidelines to be used by the staff of an agency in performing audits, investigations, or inspections, settling commercial disputes, negotiating commercial arrangements, or in the defense, prosecution, or settlement of cases, if disclosure of the criteria or guidelines would:
  - (i) enable law violators to avoid detection;
  - (ii) facilitate disregard of requirements imposed by law; or
  - (iii) give a clearly improper advantage to persons who are in an adverse position to the state;
- (3) a rule that only establishes specific prices to be charged for particular goods or services sold by an agency;
- (4) a rule concerning only the physical servicing, maintenance, or care of agency owned or operated facilities or property;
- (5) a rule relating only to the use of a particular facility or property owned, operated, or maintained by the state or any of its subdivisions, if the substance of the rule is adequately indicated by means of signs or signals to persons who use the facility or property;
- (6) a rule concerning only inmates of a correctional or detention facility, students enrolled in an educational institution, or patients admitted to a hospital, if adopted by that facility, institution, or hospital;
- (7) a form whose contents or substantive requirements are prescribed by rule or statute, and instructions for the execution or use of the form;
- (8) an agency budget; [or]
- (9) an opinion of the attorney general [ ; or ] [.]
- (10) [the terms of a collective bargaining agreement.]

1 ..... moves to amend Senate Resolution No. ..., as follows:

2 Rule 35 is amended to read:

3 "35. All bills shall be referred by the President without  
4 motion to the proper standing committee unless otherwise  
5 referred by the Senate. A bill introduced by a committee need  
6 not be referred to a standing committee unless a question arises  
7 but rather shall lie over one day before being given its second  
8 reading. When a question arises concerning the proper reference  
9 of a bill during the order of business of first reading on the  
10 day of introduction or at the time of report on it by a standing  
11 committee to which the bill was previously referred, the bill  
12 shall be referred without debate to the Committee on Rules and  
13 Administration to report the proper reference, and upon adoption  
14 of the report of the Committee on Rules and Administration, it  
15 shall be referred accordingly.

16 All bills appropriating money, or obligating the state to  
17 pay or expend money, or establishing a policy which to be  
18 effective will require expenditure of money, when referred to  
19 and reported by any other than the Committee on Finance, shall,  
20 before passage, be referred to the Committee on Finance.

21 All bills delegating emergency rulemaking to a department  
22 or agency of state government and all bills exempting a  
23 department or agency of state government from rulemaking shall  
24 be referred to the Committee on Governmental Operations. Any

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[REVISOR ] PMH/MS 5A09-001

- 1 other standing committee to which the bill is referred shall, in
- 2 its report, recommend referral to the Committee on Governmental
- 3 Operations."



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### Section 3-108. [General Exemption from Public Rule-making Procedures]

(a) To the extent an agency for good cause finds that any requirements of Sections 3-103 through 3-107 are unnecessary, impracticable, or contrary to the public interest in the process of adopting a particular rule, those requirements do not apply. The agency shall incorporate the required finding and a brief statement of its supporting reasons in each rule adopted in reliance upon this subsection.

(b) In an action contesting a rule adopted under subsection (a), the burden is upon the agency to demonstrate that any omitted requirements of Sections 3-103 through 3-107 were impracticable, unnecessary, or contrary to the public interest in the particular circumstances involved.

(c) Within (2) years after the effective date of a rule adopted under subsection (a), the [administrative rules review committee or the governor] may request the agency to hold a rule-making proceeding thereon according to the requirement of Sections 3-103 through 3-107. The request must be in writing and filed in the office of the [secretary of state]. The [secretary of state] shall immediately forward to the agency and to the [administrative rules editor] a certified copy of the request. Notice of the filing of the request must be published in the next issue of the [administrative bulletin]. The rule in question ceases to be effective [180] days after the request is filed. However, an agency, after the filing of the request, may subsequently adopt an identical rule in a rule-making proceeding conducted pursuant to the requirements of Sections 3-103 through 3-107.