

LEGISLATIVE COMMISSION TO REVIEW ADMINISTRATIVE RULES

1977 · 1979
BIENNIAL
REPORT



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Marshall R. Whitlock
Executive Secretary

Legislative Commission to
Review Administrative Rules

December 15, 1979

Members of the Legislature:

The 1977-1978 Report of the Legislative Commission to Review Administrative Rules is hereby submitted as required by Minnesota Statutes, Section 3.965, Subdivision 2. The Commission is charged with promoting "adequate and proper rules by agencies and an understanding upon the part of the public respecting them."

Largely inactive during the first two years of its existence (1974-1976), the Commission has faced a much heavier workload over the past two years. The Commission has upgraded its staff in response to increased need, and has developed a working relationship with Committee staff, Senate Counsel and House Research.

The Commission has found some agencies have promulgated rules in direct violation of legislative intent. Also we have encountered the development of unnecessary "red tape," and unreasonable or confusing regulation.

Although progress has been made in the area of streamlining and reforming our rule making procedures, the Commission will continue its efforts to ensure that governmental rule making both fulfills legislative intent and responds to public needs and wishes.

Please feel free to contact the Commission with any questions, comments or complaints regarding existing or proposed rules and regulations.

Sincerely

A handwritten signature in cursive script that reads "Wayne Olhoft".

Senator Wayne Olhoft
Chairman, LCRAR

EXECUTIVE SUMMARY: LCRAR BIENNIAL REPORT

The Commission has experienced, over the period from 1977 to 1978, an increase in activity brought on by a growing number of complaints regarding administrative rules and a desire by the Commission to improve the rule making process in Minnesota. While the Commission met only infrequently during the period from 1974 to 1976, during 1977 and 1978 the Commission met over sixteen times.

The Commission has received and investigated over fifty complaints during this biennium. At the same time, the Commission has responded to a great many inquiries from legislators and the public regarding agency rule making activities.

Complaints from legislators have received the highest priority by the Commission. As a result of a number of legislator complaints, the Commission has reviewed the activities of the Department of Health, Department of Natural Resources, Pollution Control Agency, Energy Agency, Public Service Commission, Corrections Department, State Auditor, Department of Agriculture, Department of Education, Department of Transportation, Cable Communications Board, State Planning Agency, and the Department of Economic Security.

The public has also registered a number of complaints with the Commission during the past two years. The Commission has endeavored to respond to those complaints when it determined the need existed, and the resources were available to adequately review the rule in question. The public has complained about the rule making activities of the Arts Board, Department of Education, Department of Health, Department of Public Welfare, Barber Board, Cosmetology Board, Department of Revenue, Department of Commerce, State Retirement System, and the Department of Public Safety.

The nature and types of complaints received have varied over the past two years. Some of the complaints have necessitated only preliminary assessment by Commission members to determine that a problem did not exist. Many of them, however, involved questions about the propriety and validity of agency rules. The complaints fell largely into the following categories:

1. Rule is in violation of legislative intent.
2. Rule is beyond the statutory authority of the agency.
3. Rule is not reasonable.
4. Rule is improper (i.e. the agency did not promulgate it in accordance with the requirements of the Administrative Procedure Act)
5. The agency had issued policy statements or bulletins in contravention of the APA requirements.
6. Other (miscellaneous complaints about rules)

As a result of Commission reviews, agencies have responded by taking a variety of corrective actions. The Arts Board has completely redrafted its rules, taking into consideration the concerns of a number of groups about the lack of clarity in its existing rules on grant making activities. The Department of Public Welfare has indicated agreement with recommendations made by the Commission with regard to a number of present rules. Reports have been issued by the Commission regarding the existence of questionable policy statements of the Public Service Commission and the Department of Education. In addition, the Commission has found that some complaints regarding Department of Agriculture and Department of Health rules were not valid.

The Commission, in accordance with the dictates of Laws of Minnesota for 1977, Chapter 455, Section 8, has reviewed the Legal Assistance to Minnesota Prisoners (LAMP) program for possible violations of legislative intent. The Commission, as a result of two hearings, determined that certain types of cases handled needed to be brought to the attention of the full legislature for potential action. A report has been made to the appropriations committees in that matter.

The Commission has made a legislative recommendation to have the Commission's enabling statute, Minn. Stat. § 3.965, include a reference to a grant of subpoena power. This recommendation was made as a result of awareness by Commission members that the Commission did not fall within the definition of a standing committee, which possesses subpoena powers. A bill was introduced in the 1978 legislature. The House passed the bill, however the Senate was unable to act on the bill before the end of the session.

MINNESOTA LEGISLATURE
LEGISLATIVE COMMISSION TO REVIEW ADMINISTRATIVE RULES

1977-78

Members

Senator Wayne Olhoft, Chairman 29 State Capitol	296-4178
Senator Nicholas D. Coleman 208 State Capitol	296-4196
Senator Jerome Gunderson 306 State Capitol	296-8870
Senator Timothy Penny 323 State Capitol	296-4165
Senator John Keefe 124 State Office Building	296-4118
Representative Gordon Voss, Vice Chairman 251 State Office Building	296-4226
Representative Irvin Anderson 273 State Office Building	296-6251
Representative David Cumiskey 293 State Office Building	296-3656
Representative Wayne Simoneau 357 State Office Building	296-4331
Representative Mary Forsythe 377 State Office Building	296-4363

3.965 LEGISLATIVE COMMISSION TO REVIEW ADMINISTRATIVE RULES.

Subdivision 1. Composition; meetings. A legislative Commission for review of administrative rules defined pursuant to sections 15.0411 to 15.0422, consisting of five senators appointed by the committee on committees of the senate and five representatives appointed by the speaker of the house of representatives shall be appointed. The commission shall meet at the call of its chairman or upon a call signed by two of its members or signed by five members of the legislature. The legislative commission chairmanship shall alternate between the two houses of the legislature every two years.

Subdivision 2. Review of rules by commission. The commission shall promote adequate and proper rules by agencies and an understanding upon the part of the public respecting them. It may hold public hearings to investigate complaints with respect to rules if it considers the complaints meritorious and worthy of attention and may, on the basis of the testimony received at the public hearings, suspend any rule complained of by the affirmative vote of at least six members provided the provisions of subdivision 4 have been met. If any rule is suspended, the commission shall as soon as possible place before the legislature, at the next year's session, a bill to repeal the suspended rule. If the bill is defeated, or fails of enactment in that year's session, the rule shall stand and the commission may not suspend it again. If the bill becomes law, the rule is repealed and shall not be enacted again unless a law specifically authorizes the adoption of that rule. The commission shall make a biennial report to the legislature and the governor of its activities and include therein its recommendations.

Subdivision 3. Public hearings by state departments. By a vote of a majority of its members, the commission may request any department issuing rules to hold a public hearing in respect to recommendations made pursuant to subdivision 2. The department shall give notices as provided in section 15.0412, subdivision 4 of a hearing thereon, to be conducted in accordance with section 15.0412. The hearing shall be held not more than 60 days after receipt of the request.

Subdivision 4. Review by standing committees. Before the commission suspends any rule, it shall request the speaker of the house and the president of the senate to refer the question of suspension of the given rule or rules to the appropriate committee or committees of the respective houses for the committees' recommendation. No suspension shall take effect until the recommendation is received, or 60 days after referral. However, the recommendation shall be advisory only.

(1974 c 355 s69; 1975 c 271 s6)

Legislative Commission to Review Administrative Rules (LCRAR) Administration

Staff:*

Marshall R. Whitlock
Executive Secretary

William Brooks III (1977)
Staff Attorney
(On loan part time from the Revisor of Statutes)

Stephanie Jones (1977)
Staff Attorney
(On loan part time from the Revisor of Statutes)

Janet Rahm (1978)
Staff Attorney
(On loan part time from the Revisor of Statutes)

Peggy Kormendy (1977-1978)
Secretary
(On loan part time: Sen. Olhoft's secretary)

Office:

Room 433 SW
State Office Building
St. Paul, Minnesota 55155

(612) 296-1143

*The Commission utilizes the services of other legislative staff agencies during the review of rules, thus giving the Commission the expertise of persons most familiar with the operation of particular state agencies.

MINNESOTA LEGISLATIVE COMMISSION TO REVIEW ADMINISTRATIVE
RULES

History

The Legislative Commission to Review Administrative Rules (LCRAR) was established in 1974 by the Minnesota legislature as a means through which the public, and their elected representatives, could effectively oversee administrative rules. According to Min. St. § 3.965, subd. 2, the Commission "shall promote adequate and proper rules by agencies an an understanding upon the part of the public respecting them." In order to accomplish that goal, the LCRAR was provided with the power to investigate complaints, hold hearings, and it may, if the situation warrants, suspend an administrative rule until the next legislative session.

Purpose

The LCRAR was created as a result of legislative recognition that state agencies were promulgating hundreds of rules every year, some of which had been found to violate legislative intent or exceed the statutory authority delegated by the legislature to the agency. The following comments reflect some prevailing attitudes by legislators and concerned citizens with respect to the existence of such a large body of rules which have the force and effect of law:

"Rules are set by agencies that the people must respect, the same as laws passed by the legislature. Therefore, the legislature must have a handle on what is being done by state agencies."

"I believe that many times administrative rules are adopted contrary to what the legislature intended."

"I have been told that some agencies have had rules that even contradicted legislation."

"Administrative rules are often confusing and subject to varying interpretations."

"Agencies don't have the impetus to respond to citizen complaints against their own rules."

Complaints

The LCRAR receives complaints from a variety of sources. The statute outlining the powers of the Commission does not limit the source of such complaints. The Commission, however, has indicated that its priorities

will be to respond to complaints received from legislators, with those complaints received from staff, interested groups and individual citizens responded to on a lesser priority basis.

Nature of the Complaints

The statute refers to the Commission promoting "adequate and proper rules by state agencies." The Commission has interpreted that phrase in light of the requirements found in Chapter 15 for state agencies to follow in promulgating rules. The agency must demonstrate that it has statutory authority to promulgate the rule. It must also conform with legislative intent in drafting and promulgating the rule. The Commission concentrates on rules which are contrary to legislative intent or beyond the statutory authority of an agency. Beyond that, however, the Commission may also review complaints which contend that a rule or set of rules are unreasonable or improper.

A person wishing to register a complaint against an agency's rules should first of all contact the Commission's Executive Secretary, or the chairman of the Commission. Such complaints should clearly identify the rule in question, the reason why the person believes the rule should be reviewed by the Commission, and the complaint should also be accompanied by whatever documentation is available pertaining to the complaint and the rule.

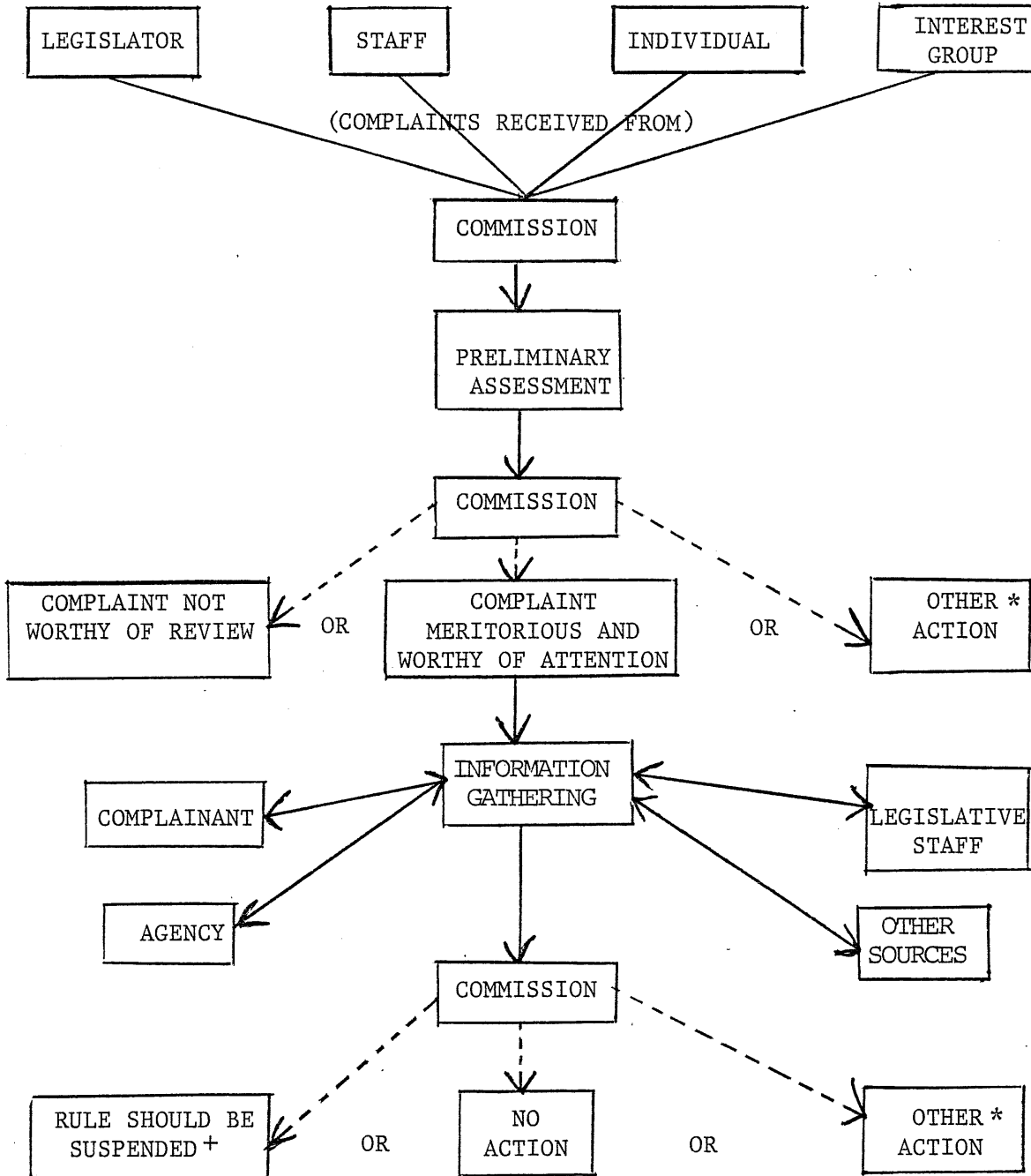
Complaint Processing

According to the statute, the Commission has discretion in dealing with complaints. It can determine that a complaint is "meritorious and worthy of attention" (Min. St. § 3.965, subd. 2), or it may decide that the issue is not critical and that the Commission should not deal with it. For the Commission to determine that an issue is sufficiently meritorious, the Commission staff engages in a preliminary assessment of the complaint. Staff gathers relevant data on the rule, identifies the major questions and issues pertaining to the complaint, contacts the agency to indicate that a complaint has been received, and generally begins the process of reviewing the rule for any problem areas.

Once sufficient information has been collected, the Commission then determines whether the rule necessitates a full-scale review by the LCRAR. If that determination is made, then staff begins the process of contacting concerned groups, agency personnel, and those legislators who have had an association or interest with a particular issue or rule.

The process through which the Commission reviews rules is outlined on the next page. It traces the Commission's procedure from the receipt of a complaint to potential action by the Commission to resolve a rule related problem.

LCRAR RULE REVIEW PROCESS



*Other action includes referral to other legislative bodies, informal negotiation with agency to resolve problems, and tabling the discussion until some future date

+The process through which rules are suspended are discussed on page (see also Minn. St. § 3.965, Subds. 2, 3 and 4)

Criteria for Review of a Rule

The Commission members consider a variety of criteria during the preliminary process when a decision is made whether or not to review a rule in depth. Those criteria are as follows:

1. Jurisdiction.
2. Legislative Interest.
3. Appropriateness.

The Commission is limited to review of complaints pertaining to administrative rules, within the definition of Min. Stat. § 15.0411, Subd. 3. That section defines "rule" as follows:

Subd. 3. "Rule" includes every agency statement of general applicability and future effect, including the amendment, suspension, or repeal thereof, made to implement or make specific the law enforced or administered by it or to govern its organization or procedure, but does not include (a) rules concerning only the internal management of the agency or other agencies, and which do not directly affect the rights of or procedure available to the public; or (b) rules of the commissioner of corrections relating to the internal management of institutions under his control and those rules governing the inmates thereof prescribed pursuant to section 609.105; or (c) rules of the division of game and fish published in accordance with section 97.53; or (d) rules relating to weight limitations on the use of highways when the substance of such rules is indicated to the public by means of signs; or (e) opinions of the attorney general.

Thus, the Commission cannot review complaints regarding practices which are not governed by rules within that definition. If the practice is contained in a rule of the Commissioner of Corrections, for example, the Commission cannot review and suspend such a "rule."

If the question relates to a rule which is derived from federal requirements, the Commission has limited ability to affect such a rule. While it may be possible to "suspend" that rule under state law, the effect might be to bring the state in noncompliance with federal law. The Commission, therefore, considers the limited impact that it might have on a federal mandate when it reviews such a rule by a state agency.

The Commission places the highest priority on complaints brought to its attention by legislators. Those which come from interested groups or the public are reviewed when time and resources permit. Due to the extremely limited staff resources available to the Commission, the members

make a decision during the preliminary review of a complaint whether to direct staff to investigate a rule in depth. Also, with regard to the second criteria, the Commission concentrates on those complaints which contend that a rule is contrary to legislative intent or beyond the statutory authority of the agency. Beyond that, the members may decide to review complaints concerning rules which seem to be unreasonable and improper, but only if time and staff resources are available for such reviews.

A third, and most important consideration, in regard to the second criteria is whether a matter can be resolved without the intervention of the Commission. If other means can be resolved, then the Commission may recommend alternative remedies. Other means include introduction of corrective legislation, and recommending rule amendments to an agency, if that step has not already taken place.

Appropriateness, the third criteria, is an equally important point to consider in the review of a rule. The Commission, and the legislature, has limited technical and scientific data and resources available directly to it, and a particular rule may be extremely difficult to review if it involves complex and technical questions. The Commission, therefore, determines whether the rule can be adequately reviewed by the legislature before making a decision to approve a full scale investigation.

It may be found that a complaint should be directed to other legislative agencies, such as the Legislative Audit Commission's Program Evaluation Division, or other research arms of the legislature. Other legislative agencies are contacted throughout the review process in order to determine whether adequate resources are available.

Commission Decision Making

The Commission has the statutory authority to "hold public hearings to investigate complaints with respect to rules." If, after investigation, the Commission members become convinced that a rule warrants some action, then it determines which action is most appropriate. There are some formal, as well as informal, options available to the Commission.

The Commission may determine that a rule does not constitute a problem, and that no action is necessary or desirable. In this case, the Commission has the option to take no action. It may also pass a resolution indicating that a rule is valid or that the agency is properly implementing legislative intent. The purpose of this action would be to express support for the agency's rule.

The Commission members might become convinced, after hearing testimony, that a rule is troublesome and that it needs attention. Commission members might recommend legislation to clarify a confusing statutory directive, for example, or they may propose legislation to correct a particular problem.

Commission members might also find that the situation warrants additional investigation by the standing committees of the legislature. In such a case, the Commission might send a report to the appropriate standing committees indicating concern about a particular situation, and possibly recommending action to investigate the situation.

During the process of reviewing a set of rules, the Commission receives testimony from agency personnel regarding the rule and its effect on the public. If, after hearing testimony from all available sources, the Commission finds that a problem exists, then it might pass a resolution recommending that the agency reconsider its rule. In many cases, the agency voluntarily corrects a situation once it becomes aware of the existence of a problem. The Commission attempts to work with the agency at all times, and has in the past been able to resolve rule-related problems through the cooperation of the agency.

If all other avenues fail, the Commission may find that the circumstances warrant the full exercise of its power: suspension of the rule. If the Commission determines that suspension is needed, then the statutes prescribe a certain procedure which must be followed in order to make suspension effective.

Suspension

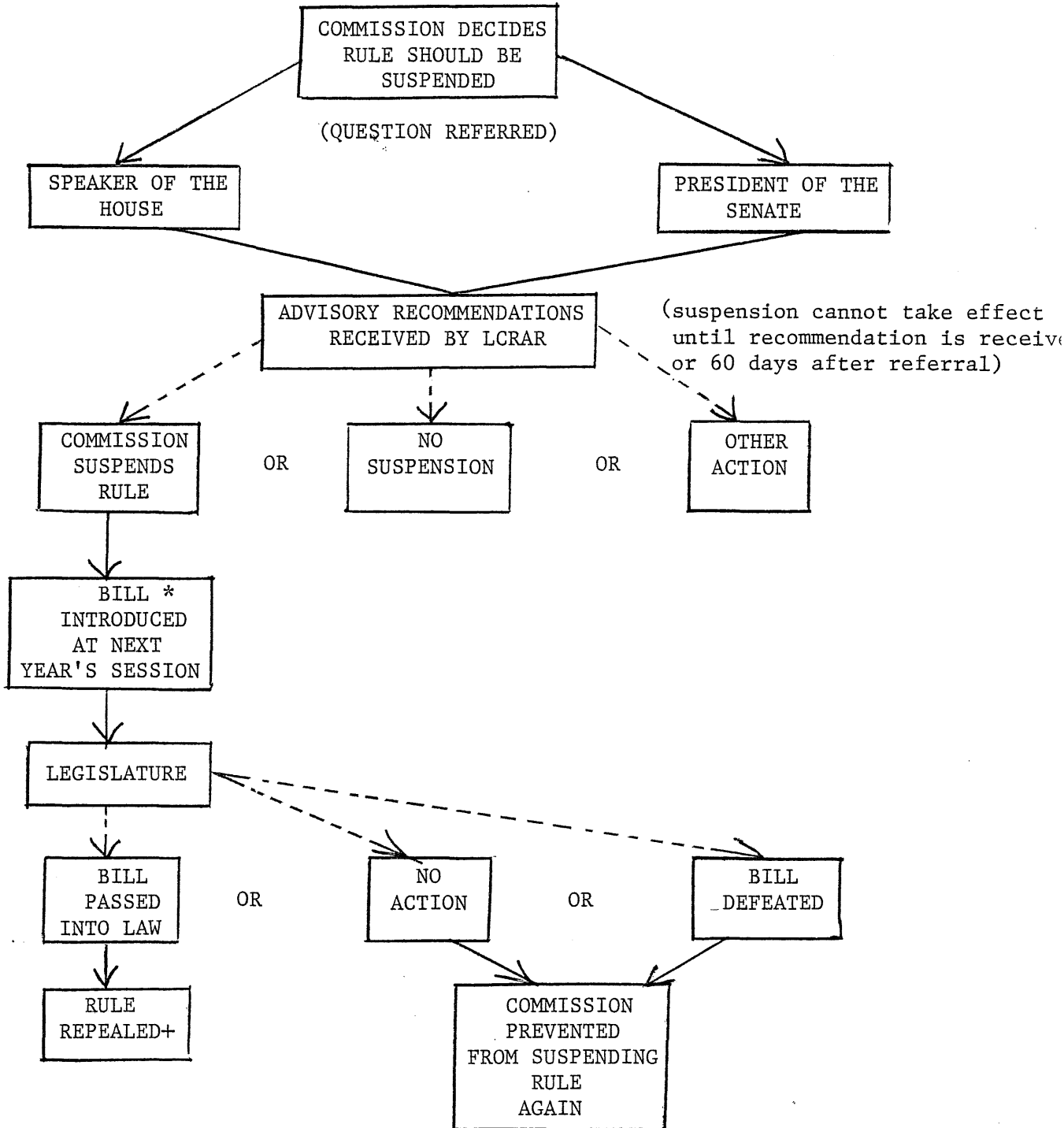
If the Commission, after public hearing and testimony from affected persons, determines that suspension is appropriate, then before it can approve a suspension motion, it must forward to the Speaker of the House and the President of the Senate a request to refer the question of suspension to the appropriate committee or committees of the two houses.

The committees then have an opportunity to review the Commission's findings and determine whether it should recommend that the Commission suspend the rule. The committees have sixty days in which to debate the matter and forward an advisory recommendation to the Commission. If the recommendations do not arrive within sixty days, the Commission may act without them. If such recommendations do arrive sometime within that sixty day period, the Commission can then proceed to act on a motion to suspend.

The Commission can suspend a rule only after six affirmative votes are received on such a motion. If suspension is approved, then the rule is immediately suspended and the agency cannot enforce that particular rule.

¹The following page outlines the Commission's suspension procedure, as prescribed by Minnesota Statutes, Section 3.965, Subds. 2 and 4. It indicates the process through which the question of suspension is referred to the appropriate House and Senate committees for advisory recommendations, and the statutory requirement to have the suspension affirmed by the full legislature at the next session.

THE PROCESS OF SUSPENDING A RULE: LCRAR



*This bill provides for the repeal of the rule suspended by the LCRAR

+Once a rule is repealed in this manner, the agency cannot enact a rule with the same or similar language unless a law specifically authorizes the adoption of that rule.

Legislative Affirmation

The statutes also require that the Commission submit its suspension actions to the next legislative session for ratification by the full legislature. As soon as possible after suspension has been approved, the Commission must introduce a bill which repeals the suspended rule. If the bill passes into law, the rule is permanently repealed, and the agency cannot enact it again unless a law is subsequently passed specifically authorizing the adoption of the rule. If the bill fails to pass into law, the effect of the suspension shall be lifted, and the rule goes back into effect. The Commission is prohibited, by law, from suspending a rule again if the full legislature fails to pass a repealer.

LCRAR MEETINGS: 1977-1978

During 1977 and 1978, the Legislative Commission to Review Administrative Rules met sixteen times (ten meetings during 1977 and six during 1978). That figure reflects the more active nature of the Commission during the past two years. During the first three years of its existence (1974-1977) the Commission met only infrequently and had very few complaints registered with it regarding administrative rules. That situation changed dramatically during 1977. The Commission was more visible, and as a result of that visibility to the legislature, more and more legislators contacted it with concerns pertaining to rules by state agencies.

During the first three years of the Commission's existence, less than twelve complaints were registered, and only five of them resulted in any hearings by the Commission. During 1977 and 1978, however, the Commission heard over fifty complaints, as well as numerous inquiries and letters dealing with the rule making activities of state agencies. The following table indicates the number of formal complaints which were subsequently investigated by the Commission during those two years.

TABLE 1

LCRAR: Complaints Investigated; By Department or Agency 1977-78

Department of Education	8	Public Service Commission	1
Department of Public Welfare	7	Veterans Affairs	1
Department of Health	5	Human Rights	1
Department of Natural Res.	4	Corrections	1
Pollution Control Agency	2	State Auditor	1
Arts Board	1	Barber Board	1
Energy Agency	1	Cosmetology Board	1

Table 1 (continued)

Cable Communications Board	1	Department of Econ. Security	1
Department of Agriculture	1	State Planning Agency	1
Department of Transportation	1	Department of Commerce	1
Department of Revenue	1	State Retirement System	1
		Department of Public Safety	1
Total: 44			

Table 1 indicates only those complaints which were subsequently investigated. Many of the inquiries which the Commission receives do not warrant further review or investigation. In addition, while the total number of complaints investigated, according to Table 1, add up to 44, there were a great many more individual letters received by the Commission pertaining to a complaint already under investigation. For example, the Commission received an official petition (pursuant to Min. Stat. § 3.965, Subd. 1) from five legislators requesting that the Commission investigate "the question of orders and other statements by the Public Service Commission" governing statewide policy over utility service. Also, the Commission might, in the course of its review, receive additional complaints from other legislators pertaining to a particular agency rule. During its investigation of the Department of Transportation's state aid road standards, the Commission received additional complaints from two legislators, as well as a chairman of a Regional Development Commission.

Legislator Contact with the Commission

A great many more legislators are now contacting the Commission with concerns about particular rules. The number increased dramatically during 1977, and in 1978 correspondence files indicate at least one letter or phone call per week regarding agency rule making activities. This increased demand upon the Commission placed a strain on the ability of the Commission to respond. While some of the complaints did not involve extensive expenditure of Commission and staff time and resources, many of them required more than one hearing, and lengthy staff investigation and data collection.

During 1977, the Commission investigated Driver's Education rules by the Department of Education, Department of Agriculture rules governing Diseased Tree Control, as well as many other rules. During 1978, the number of rules which required extensive involvement by the Commission increased to well over a dozen. The Commission was requested to investigate the Public Service Commission's policies on utility service, a review which necessitated eight months of Commission time, and two hearings. Another complaint, pertaining to the Arts Board, required more than four hearings and

the involvement of staff from various legislative agencies.

With the increased demand on the Commission's time, the members have found it necessary to pass on some of the questions to the committees for their attention. In addition, some referrals have been made from the Commission to other legislative research agencies.

Commission Staff

In mid 1977, the Commission began to reassess its function and activities over the previous three years. As a result of that reassessment, it was the decision of the Commission to hire staff in order to give the Commission the ability to respond to complaints. During the period from 1974 to 1977, the Commission relied heavily upon the services of attorneys from the Revisor of Statutes. During the interim, between legislative sessions, the Revisor could supply some legal assistance, on a limited part time basis, to the Commission. That arrangement worked until 1977, when the Commission found that there were a growing number of complaints raised by legislators regarding agency rule making. The Commission determined that full time, permanent staff was essential in order to provide the Commission with the capability to respond to complaints in a timely manner.

In June of 1977, the Commission hired its first Executive Secretary; Marshall R. Whitlock. Mr. Whitlock had previously served with the Legislative Audit Commission-Program Evaluation Division, and had a background in administrative procedure and law. The Executive Secretary was charged with the responsibility of coordinating the review and analysis efforts by the Commission, and of acting as the chief administrative officer of the Commission.

Throughout 1977 and 1978, the Commission still relied heavily upon the services of other legislative staff agencies, for research and analysis. It was the Commission's desire to coordinate its efforts with those of existing staff research agencies. As a result, Senate Counsel, Senate Research, House Research and the various committee staff were brought in when the need arose.

The volume of complaints received by the Commission during 1978 necessitated a re-examination of the Commission's staff. It was decided that the Commission should request the legislature to fund additional full time, and part time, permanent staff. The lack of secretarial help for the Executive Secretary was a problem which resulted in a recommendation for a secretary/administrative assistant. In addition, existing research staff of other agencies were unable to provide the necessary support during the review process, and so the Commission also requested the legislature to approve the funding of a part-time research analyst. It was still the desire, however, of the Commission, for its staff to coordinate the review of rules with the other legislative staff agencies. That recommendation was transmitted to the 1979 legislature for approval.

Commission Priorities

The Commission approved, on July 22, 1977, the following resolution as a statement of purpose and direction for the Commission:

"The Commission shall place the highest priority on responding to complaints by legislators, staff, interest groups and individuals, in that order of importance.

The Commission shall request all agencies to submit copies of petitions and complaints which they have received regarding administrative rules, and any responses which they have given to those petitions and complaints.

The Commission shall establish a system to identify troublesome proposed rules, as well as adopted rules. Troublesome shall be defined as a rule which violates legislative intent, is beyond the statutory authority of the agency, is unreasonable or is improper."

During 1977 and 1978, the Commission staff began to analyze the rule making activities of state agencies. A letter was sent out during August, 1977 to all agencies which requested that they forward correspondence from individuals who had complained about administrative rules, and the agency's responses to those complaints. The results of that survey was compiled in a report by the Commission, issued September 9, 1977.

According to that survey, twenty nine (29) of the forty eight (48) agencies responding indicated that they had received no complaints during the six month period from January 1, 1977 to July 1, 1977. During that same period, over forty (40) complaints were registered against particular administrative rules. Those forty complaints were against rules of thirty four (34) agencies.

State Register/Minnesota Code of Agency Rules (MCAR)

During the last half of 1977 and the first part of 1978, the Commission began to examine the rule making process under Minnesota Statutes, Chapter 15. Part of that review involved an examination of the State Register, the official state publication for all notices, proposed rules and adopted rules. After an initial examination, the Commission became aware of a number of problems with the publication. In addition, a number of legislators and staff persons expressed concerns about the way in which proposed and adopted rules were published in the State Register.

The Commission authorized its staff to work with the State Register in order to make the publication more efficient, effective, readable and usable by the public. As part of that effort, the Commission staff gathered together representatives from the Revisor of Statutes' office, Senate Counsel, the Attorney General's office, the Hearing Examiner's office, House Research and members of the public who had expressed concerns or interest in the State Register. A meeting was held in which the problems with the State Register were discussed at length. Mr. James Clancy, then Acting Editor of

the Office of the State Register, represented the Department of Administration. In addition, a number of legislators were present.

As a result of that meeting, as well as a Commission hearing on the subject, the Commission recommended that the State Register take a number of steps to correct problems with the publication. Those recommendations were as follows:

1. Scrap the present system of indicating changes from proposed to adopted rules. The use of four marking systems (boldface, single brackets, double brackets and underlining) created confusion at hearings and resulted in problems with public awareness of changes being proposed by state agencies.
2. Enhance the publication by adding explanatory paragraphs before each of the major sections of the State Register indicating what the section represented, and any other information which could aid public awareness and understanding of the publication (e.g. sections on Proposed Rules, Adopted Rules, Notices of Hearings, etc)
3. Index the State Register periodically, and in a manner which allows for quick reference by interested parties to those rules which were proposed and adopted.
4. Solicit, on a regular basis, opinions from legislators and interested parties as to the effectiveness and efficiency of the publication.

The second part of the Commission's effort was to review the Minnesota Code of Agency Rules (MCAR). The MCAR was the compilation of all adopted rules, in a loose-leaf binder system. It was found that the MCAR had severe problems, including the lack of an index, different numbering systems, and confusing organization. While no recommendations were made with respect to the MCAR, it was understood that the Office of the State Register, the administering authority for the MCAR, would begin to correct those problems as well, as soon as the State Register had been enhanced.

Number of Administrative Rules in Minnesota Government

The Commission also became aware of a problem with the MCAR concerning the numbering of administrative rules. Because each agency maintained its own numbering, and since agencies also tended to "reserve" certain numbers for future use, there was no clear comprehension as to the extent of agency rule making in Minnesota. The Commission staff examined the MCAR, and the results were as follows:

1. There were, as of October 18, 1977, fifteen volumes, in a looseleaf system, of administrative rules.

2. In those fifteen volumes there were approximately 6,500 pages.

3. There were, as of October 18, 1977, approximately 6,240 rules.¹

In addition, the Commission staff found that the number of rules was growing by at least 300 pages per year, from 1975 onward.

Rule Promulgation Time Under the 1977 Administrative Procedure Act Amendments

The Commission authorized its staff to examine the Administrative Procedure Act (APA) in depth, in an effort to educate the Commission, as well as full legislature, of the process through which rules are approved. Commission staff began its efforts by analyzing the time which it took to adopt rules. Legislators and the public had been discussing the time question for some time, as a result of agency concern over what they considered as an extremely lengthy and burdensome process. The Commission received a report from staff, dated August 14, 1978, in which the question was analyzed in depth.

Because of various dates which are recorded in the State Register (notice of hearings, dates of adopted rules), it was possible to assess how long the process took, under current statutory requirements. An extensive analysis of the State Register during the period from August 1, 1977 to August 1, 1978 resulted in the following:

1. There were 55 sets of proposed rules during that period.
2. Of the 55 sets, 37 were adopted in some form, and 18 had not yet been adopted during that period.
3. The average amount of time that it took for a rule to be approved (from the time that it takes an agency to submit procedural documents to the Office of Hearing Examiners to the effective date of the adopted rules) was approximately 198 days, or six and one-half months.²

Due to the short period which the survey reflected, that six and one-half month period of time reflected only a tentative conclusion. The Commission staff continues to collect data on this question, in order to understand the problems associated with rule promulgation over a longer period of time.

¹Legislative Commission to Review Administrative Rules. Report on Number of Administrative Rules by Department or Agency. (October 18, 1977).

²Legislative Commission to Review Administrative Rules. Report: Rule Promulgation Time Under the 1977 APA Amendments. (August 14, 1978).

Future Commission Goals (1978-1980)

The Commission reviewed, at its September, 1978 meeting, a number of future goals or projects which the Commission might become involved in for the next two years. Of those discussed, the following were adopted:

1. The Commission would continue to monitor agency responsiveness to citizen petitions and complaints. As part of that effort, Commission staff is authorized to request all agencies to forward copies of petitions received pursuant to Minnesota Statutes, Section 15.0415 as well as the agency's responses to those petitions to adopt, amend, suspend or revoke an agency rule.
2. The Commission would give notice in the State Register of any future rule reviews which were particularly complex or which needed input by the public.
3. The Commission would tentatively authorize the creation and possible distribution to the public of a brochure developed by staff for the purposes of answering questions on the Commission's procedures and activities.
4. The Commission would periodically survey all legislators in order to identify rules which need the attention of the Commission.
5. The Commission authorizes staff to work with legislators who express concerns about proposed rules, during the prehearing, hearing and posthearing stages.
6. Commission staff will survey agencies to determine whether their internal review processes adequately identify rules which need agency or legislative attention (i.e. rules which conflict with the rules of other agencies, conflict with its own rules, conflict with federal law or regulation, duplicate other agency rules, or which are contrary to new state law).

Commission staff have begun work on those particular projects or goals, and preliminary surveys of legislators indicate the existence of a number of both proposed and adopted rules which need legislative attention.

Legal Assistance to Minnesota Prisoners (LAMP) Review

The LCRAR's main responsibility is, by statute, to review complaints registered against particular agency rules. In addition, however, the legislature mandated, in 1977, that the Commission also perform a programmatic review of Legal Assistance to Minnesota Prisoners (LAMP) for possible violations of legislative intent.

Laws of Minnesota for 1977, Chapter 455, Section 8 mandates the Commission to "review and comment on the propriety of the cases handled [by LAMP] and may, using the provisions of Minnesota Statutes, Section 3.965, suspend the activities of legal assistance to Minnesota prisoners. Unencumbered money shall cancel to the general fund."

The Commission, therefore, was required to analyze LAMP for possible impropriety as to cases handled by the program. In order to understand the Commission's responsibility in this matter, reference should be made to section 8 of that appropriations bill. It states that:

"Legal assistance to Minnesota prisoners shall serve the civil legal needs of persons confined to state institutions. None of these funds shall be used to pay for lawsuits against public agencies or public officials to change social or public policy."

Thus, the Commission had a two-fold charge: (1) Examine the cases handled by LAMP during that year, for any instances where LAMP had handled cases which fell outside of the "civil legal needs of persons confined to state institutions, and (2) Examine the cases handled by LAMP during that same period in order to determine whether the program had instigated litigation against public agencies or public officials for the purpose of changing "social or public policy."

The Commission held two hearings on this program, at its June, 1978 meeting and on December 19, 1978. At both hearings, the Commission heard testimony from Mr. C. Paul Jones, Minnesota Public Defender, who was the chief administrator for LAMP. The Commission also reviewed an interim report from LAMP, outlining the cases handled during the previous year.

After hearing testimony from Mr. Jones, and reviewing the report, the Commission determined that certain types of cases needed the attention of the full legislature so as to clarify whether they constituted violations of legislative intent. The Commission members felt that the major emphasis of LAMP should be on cases which one commonly accepted as "civil" cases, i.e. marriage and divorce, paternity, child support, adoption, name change, etc. In this regard, certain types of cases (sentencing, detainers and charges pending, institutional grievances, disciplinary hearings, prison records and parole and probation) seemed to not fall within the civil legal needs of confined persons. The Commission, therefore, approved LAMP in general, but requested that the legislature pay particular attention to those six types of cases in any future reviews by the finance and appropriations committees. The Commission did not feel that LAMP had instituted, in the period under review, any litigation against the state for the purposes of changing social or public policy.

COMPLAINTS HEARD BY THE LCRAR

The Commission is, by statute, charged with the responsibility to "investigate complaints with respect to rules," hold hearings, and may, if the circumstances warrant, suspend any rule complained of by six affirmative votes. Before the Commission suspends a rule, the statutes prescribe a certain referral and advisory recommendation procedure. That procedure is outlined in the first section of this report.

During 1977 and 1978, the Commission heard over fifty complaints, with many of the complaints from more than one individual or group. In addition, the Commission received inquiries and letters from many more persons or groups, indicating potential concern about particular proposed or adopted rules.

The following section describes some of the major reviews undertaken by the Commission during that two year period, and the results, if any, of the Commission's reviews.

1. Department of Public Welfare Rule 160. Commission Diane Ahrens of Ramsey County expressed great concern about DPW 160, in particular the host county contracting portion of the rule.

The complaint concerned the relationship between the state and counties in the provision of social services. According to DPW 160, a county contracts with individual providers. While a particular host county can refuse to contract with a particular provider for placement of its own persons, if another county indicates a desire to place its persons in that facility, the host county must establish a contract with the provider, on behalf of the other county, and maintain responsibility for monitoring that provider.

Commissioner Ahrens, as well as other persons, believed that the rule constituted a violation of the statutory relationship between counties and the state in the provision of social services to individuals.

The Commission found that the circumstances warranted a recommendation that the agency review and amend the rule so as to allow for county discretion to refuse to enter into a host county contract. The Department indicated that it was in agreement with the proposal, and that it would proceed, in 1979, to public hearing on the amendment.

2. Arts Board Grant Making Rules. The Commission received a number of complaints from various arts groups concerned about Arts Board rules on applications for grants, in particular the rules which allowed for Board discretion to apply unspecified "criteria" to grant applications.

After staff investigation into the complaints, the Commission held a series of hearings on the matter. The Commission became convinced that the Arts Board, in contravention of the statutory directive to "promulgate by rule procedures . . . (and) standards to be followed by the Board" in receiving and reviewing requests for grants, had allowed rules to be promulgated granting it authority to issue guides to program which included standards in addition to those set by rule.

The Commission passed a resolution on the issue, recommending that the Arts Board proceed to amend, extensively, its rules on grants. The recommendations included (1) the Arts Board will not utilize standards in addition to those set by rule, (2) The Arts Board will adopt more specific rules relating to grant application review criteria and standards before June 30, 1978, (3) The Arts Board will not, after that date, review applications using criteria other than those found in rule form.

The Board agreed to those recommendations, and proceeded to establish new rules governing the grant making process. Those rules were adopted by November 1, 1978 (due to the length of time required by statute to promulgate new rules as well as the necessity to have the amendments adopted by the Board at a regular meeting). In addition, during the period from January 1, 1978 to November 1, 1978, the Board indicated that it would not use criteria other than those found in present rules, or in its already issued Guide to Program.

The complainants indicated that their concern over the lack of published criteria had been satisfied, and that the Board had issued rules which did specify, in detail, the standards which would apply in all cases in the future.

The Commission forwarded a report on this issue to the House and Senate Governmental Operations Committees, and the Senate Finance and House Appropriations Committees on January 23, 1978.

3. Public Service Commission Use of Policy Statements. The Commission received an official petition, pursuant to Min. Stat. § 3.965, Subd. 1, from five representatives requesting that the Commission review the problem associated with the use of policy statements by the Public Service Commission (as opposed to rules promulgated under the APA).

Reps. Walter Hanson, Stanley Fudro, James White, Don Freidrich and Douglas Ewald were the petitioners. The Commission accepted the petition, and proceeded to investigate the matter. After extensive analysis by Commission staff, in conjunction with Senate Counsel, the Commission held a hearing on December 19, 1978.

At that hearing, the Commission reviewed a report by Staff on the issue, indicating that the PSC had utilized a procedure which was suspect, as it violated the spirit, if not the letter, of the APA. The PSC was given

broad discretionary authority over the regulation of utilities, yet it was not exempt from the requirements of the APA when it made statements of general applicability and future effect (the definition of rule within the APA). The report also concluded that the policy statements were not subject to the suspension power of the Commission, and thus only a recommendation on the matter could result from Commission investigation.

The LCRAR adopted a motion on December 19, 1978, referring the report and the matter to the Senate and House committees charged with the responsibility over PSC and utility regulation. In that motion, the Commission expressed the desire that legislation be drafted and passed so as to either expressly permit or prohibit the use of policy statements by the PSC. It was the Commission's concern that legislative attention to the problem was critical.

4. Pollution Control Agency Solid Waste Rules. The Commission received extensive complaints from Sen. Wayne Olhoft, Rep. Bob Anderson and others regarding PCA's solid waste rules. As a result of those complaints, the Commission authorized an in depth review of the problem.

The central issue in this review was the lack of rules which gave due recognition to the differences between sparsely populated and densely populated areas of the state. The statutes required the agency to draft rules with those differences in mind, however there was great concern about the lack of appropriate rules. Many of those complaining about the rules indicated that the rules were only appropriate for an urban area, and that there was only one standard, not different standards for different areas of the state.

Agency personnel and Commission staff began, in late 1978, to investigate the matter, and by the time of this report, only preliminary information had been received from the agency.

5. Department of Agriculture Proposed Dutch Elm Tree Disease Control Rules. Senator Timothy Penny, a member of the Commission, expressed concern in January 1978 about DOA proposed rules on tree disease control. His concern pertained to the extensive local reporting requirements in the rules, and the state control over the grants to local municipalities.

Commission staff worked with Senator Penny, and the subsequent review revealed that the Department of Agriculture had broad discretionary authority over the program. The proposed rules were in accordance with legislative intent, insofar as the statutes specified what was required in rule form. Senator Penny's concerns were satisfied.

6. Department of Transportation State Aid Road Standards. Senator Timothy Penny, Rep. David Beauchamp and Mr. Andy Leith, chairman of the West Central Regional Development Commission, as well as other legislators, expressed concern over the rigid state aid road standards of the

Minnesota Department of Transportation. It was their concern that the rules did not allow appropriate flexibility to grant variances to the rules in certain cases. The Commission authorized review of this matter in early 1978.

After extensive analysis of the matter, the Commission staff worked with the Senate Transportation Committee, which had scheduled meetings on the subject in December, 1978. Commission Executive Secretary, Marshall R. Whitlock, briefed the Committee members about the subject, and indicated how the Commission would review the matter.

At the time of this report, the Commission staff had not yet concluded its investigation and report on this issue.

7. Department of Public Safety-Liquor Control Division Rule 39-A. Ed. Phillips and Sons, Inc. brought a complaint to the Commission relative to LCD 39-A, which pertained to the sale of liquor to all wholesalers and distributors.

The Commission heard from representatives of Ed. Phillips and Sons, Inc., Griggs-Old Peoria, Johnson Brothers and the Department of Public Safety at a hearing in 1978. The complainants argued that the rule would require that Phillips' brand name product be sold to any wholesaler who requested it, and that the result would be to destroy its name brand merchandise. Phillips also contended that the rule was in violation of legislative intent, as the subject of name brand liquor products never was discussed during the hearings over the Liquor Reform Act of 1973, and that the authors never intended that name brand merchandise such as Phillips be included in the prohibition against exclusive marketing by liquor companies.

After hearing testimony on the rule, the Commission discussed various options, as well as whether the rule did, in fact, violate legislative intent. The Commission was split on the question of legislative intent, and as a result it decided that no action was possible on the matter. No conclusion was reached by the Commission, as a result, on whether the rule was valid in terms of legislative intent.

8. Sales and Use Tax On Meat Processing Material. The Minnesota Association of Meat Processors (MAMP), and Mr. Howard Nelson, Legislative Chairman for the Association, brought a complaint to the Commission regarding a Department of Revenue rule, S&U 408 (e) (5).

The Commission heard testimony from Mr. Nelson at its July 31, 1978 meeting. At that hearing, Mr. Nelson argued that Min. Stat. § 297A.25 exempts from sales and use tax certain items, including:

"sale of . . . use . . . of all materials including . . .
packaging materials used in packaging food and beverage

products . . . used or consumed in agricultural or industrial production of personal property intended to be sold ultimately at retail whether or not the items so used becomes an ingredient or constituent part of the property produced. Such production shall include, but is not limited to . . . manufacturing processing of agricultural products, whether vegetable or animal"

Mr. John Streiff and Mr. Donald Mundahl, representing the Department of Revenue gave testimony relative to the complaint, arguing that the statute did not grant an exemption to both sales and use tax for wrapping of custom meat processing paper.

The Commission, after hearing the relevant testimony, decided that the rule did, in fact, constitute a violation of legislative intent. It did not decide, however, to proceed to suspend the rule. The Commission's action, therefore, was an indication of Commission position, which was to be transmitted to the Senate and House Tax committees for possible action by the 1979 legislature.

The Commission members indicated that it was their feeling that the law did grant an exemption for meat processing paper used in custom meat work, and that the Department had improperly interpreted the law.

9. Vocational Education Rules. The Minnesota Industrial Arts Association, together with Rep. James Pehler, registered a complaint with the Commission regarding the recently promulgated rules of the Department of Education pertaining to licensure and certification of industrial arts teachers. The Commission approved an investigation into the matter.

It was the contention of the MIAA representatives that the rules in question had the effect of giving school districts the impression that vocational education, as opposed to industrial arts, programs were more dollar rich in terms of state aid, and that the result of the rule was to have school districts force industrial arts teachers to become vocationally certified, a process which was not intended by the legislature.

At the time of this report, the Commission staff was in the process of finishing up its investigation into the matter.

10. Minnesota Department of Health Nursing Home Fines. Sen. John Keefe brought to the attention of the Commission a matter relative to the failure of the Department of Health to promulgate rules setting daily fines for nursing homes found in violation of the standards. The law authorizing that set of rules specified that the Department shall promulgate the fine schedule by rule before January 1, 1977. The Department

had failed to promulgate the relevant rules by that date. The Commission approved an inquiry into the matter, requesting the Commissioner of Health to respond to Senator Keefe's concerns.

The Commission received a response from the Department of Health which cited the reasons for that failure to promulgate rules. According to that letter, there were two major reasons for the lack of rules:

1. The Department of Health was in the process of completely revising the nursing home standards. It was the departmental goal to first revise the standards and then to draft rules to implement the daily fines law.
2. The Department of Health had been sued by a party relative to the law. The litigation involved the validity of the law, and as a result the Department did not want to proceed with drafting rules until the law's constitutionality had been upheld.

The Commission has not yet, as to December 15, 1978, determined what its next step is in this matter.

11. Vocational Education Rules on Adult Farm Management Programs. Senator Marvin Hanson registered a complaint, on behalf of his constituents, regarding rules by the Department of Education on adult farm management programs. The contention was that the rules had the effect of destroying programs in the rural portion of the state, especially northern Minnesota, by requiring no less than 42 students in a program who had not been in the program more than six years.

The Commission received this complaint on December 1, 1978. Investigation has been started in this matter.

Types of Complaints Received: 1977-1978

Those eleven complaints constitute only a small portion of the work which the Commission has engaged in during 1977 and 1978. A great many more complaints or inquiries were received during that period of time. The complaints received during those two years fell largely into a number of categories, or types, of complaints. The following represent the breakdown of complaints received by the Commission.

1. Rule is in violation of legislative intent.
2. Rule is beyond the statutory authority of the agency.

3. Rules were not reasonable.
4. Rules were improper (i.e. the agency did not promulgate them according to the APA, etc)
5. The agency had issued policy statements or bulletins, in contravention of the APA requirements.
6. Other (miscellaneous category)

Legislative Recommendations

The Commission, according to statute, is required to transmit any recommendations that it has made regarding statutory changes to the legislature in this report. The following represent the changes which have been recommended by the Commission in 1977-1978:

A. Commission Subpoena Power.

The Commission does not readily fall within the general legislative power, exercised by committees, to compel witnesses to appear and give testimony. To clarify that matter, the Commission recommended, to the 1978 legislature, that an amendment be made which explicitly granted that power to the Commission. (See Appendix A)

The Commission members felt that the Commission needed that express grant of subpoena power in order to fulfill its statutory mission. While no problem existed to date, the Commission members indicated a desire to clarify and correct the matter prior to the existence of a problem.

Legislation was introduced in the 1978 session, with the chief author in the Senate being Senator Wayne Olhoft, chairman of the Commission, and in the House the chief author was Rep. Wayne Simoneau.

The House passed the bill, however the Senate did not hear the bill before the end of the session. The Commission will not reintroduce the bill in 1979.

- #### B. The Commission has forwarded reports on particular rule reviews to various House and Senate committees during the last two years. Those reports included specific recommendations, such as a bill which would explicitly grant, or deny, the PSC the authority to issue policy statements on public utility matters.

Those recommendations may be found in the body of this report.

Reports to the Legislature

The Commission has regularly reported to the legislature on specific rule related activities. For example, a report was made to the Senate and House on the results of the Arts Board complaint review by the Commission. Whenever the Commission made some specific action on a rule, a report has been generated and distributed to the Legislative Reference Library. Copies may be obtained either through the LRL or the Commission's offices.

The results of all Commission investigations are public. Inquiries into the results of Commission reviews may be directed to the Commission's chairman, or the Commission staff.

#1

A bill for an act

relating to the legislature; concerning the legislative commission to review administrative rules; conferring subpoena powers; amending Minnesota Statutes 1976, Section 3.965 by adding a subdivision.

BE IT ENACTED BY THE LEGISLATURE OF THE STATE OF MINNESOTA:

Section 1. Minnesota Statutes 1976, Section 3.965, is amended by adding a subdivision to read:

Subd. 5. (SUBPOENA POWERS.) The commission shall possess the subpoena powers granted by, and shall be subject to, the provisions of section 3.153. For the purposes of section 3.153, the legislative commission to review administrative rules shall be treated as a standing legislative committee.

ANALYSIS OF SUBPOENA POWERS BILL FOR THE LCRAR

1. At present, the Commission does not possess, in any explicit way, the power to compel state agencies or those outside the realm of state government to give testimony or deliver information in our review of administrative rules.
2. While this has not been a problem in a substantial way in the past, it could be a problem in the future. For example, the Commission in the past has asked all state agencies to forward to us copies of complaints on rules for the first six months of 1977. We received responses back from all agencies. This was no problem. If, however, in the course of investigating a particularly controversial rule, an agency does not forward to us necessary material or does not open its files for our review, then the Commission is helpless. A large part of the Commission's job demands cooperation by both state agencies and those outside state government. If we were to need material which an individual outside an agency possess, there is no way at present to get that material. We might be able to force compliance for those in state government in indirect ways, but there are no ways to force compliance from anyone outside state government.
3. All regular committees possess subpoena powers. As an extension of the legislature, the Commission should possess subpoena powers. The bill does not go any farther than the regular process now in existence of a committee that wishes to get information or receive testimony.
4. While not all Commissions have subpoena powers built into their statutes, there are reasons for this particular Commission having such a power. Resistance to investigation and review is the primary reason. The Legislative Audit Commission has such a power, and we are similar tools of legislative oversight. Both need such power in an explicit manner so as to conduct reviews without unnecessary resistance.
5. The grant of subpoena powers does not necessarily result in abuse of such a power. The Audit Commission has not used it in recent memory. And, since the proposed bill subjects the Commission to the provisions of Statutes section 3.153, the Commission must, like all committees, go through a process of obtaining the necessary approval.