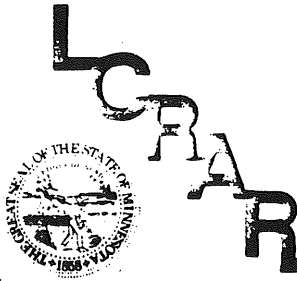


LEGISLATIVE COMMISSION TO REVIEW ADMINISTRATIVE RULES

**1983-1984
Biennial Report**





Legislative Commission to
Review Administrative Rules

Senator Carl W. Kroening
Chair

Maryanne V. Hruby
Executive Director

Representative Kathleen A. Blatz
Vice-Chair

November 27, 1985

Members of the Legislature:

The 1983-1984 Report of the Legislative Commission to Review Administrative Rules is hereby submitted as required by Minnesota Statutes, Section 14.40.

The Legislative Commission to Review Administrative Rules (LCRAR) was created by the Minnesota Legislature (Laws 1974, Chapter 355, Section 69) as a bipartisan, joint commission to "promote adequate and proper rules by state agencies and an understanding upon the part of the public respecting them."

The Legislature delegates authority to state agencies to adopt rules to carry out specific legislation. These rules have the force and effect of law. The purpose of the LCRAR is to provide legislative oversight of agency rule-making to ensure that rules comply with legislative intent and statutory authority. To carry out this function the LCRAR has the statutory authority to investigate complaints, hold public hearings, request agencies to go to rules hearings, and, if the circumstances warrant, suspend a rule. The suspension of a rule must be ratified by the Legislature and signed by the Governor.

The LCRAR welcomes your interest and hopes that it can serve each of you by monitoring state agencies' rulemaking. Ideally, the LCRAR's activities should not only serve to check possible abuses of rulemaking authority; they should also encourage productivity and accountability in state government, which is the goal of every legislator.

The report which follows describes the procedures used and actions taken on complaints about rules brought before the LCRAR from January, 1983, to December, 1984.

Sincerely,

Senator Carl W. Kroening
Chairman, LCRAR

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LEGISLATIVE COMMISSION TO REVIEW ADMINISTRATIVE RULES

BIENNIAL REPORT
1983-1984

Prepared by LCRAR Staff
Pursuant to Minnesota Statutes
Section 14.40

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LCRAR MEMBERS 1983-1984

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Representative Wayne Simoneau, Chair, 10/83 - 12/84
Representative Kathleen Blatz
Representative David O. Fjoslien
Representative Dan Knuth
Representative Peter Rodosovich

Senator William P. Luther, Vice Chair
Senator Duane D. Benson
Senator Fritz Knaak
Senator Carl W. Kroening
Senator Gene Waldorf

LCRAR STAFF 1983-1984

Kathleen P. Burek, Executive Director
Lorraine Hartman, Commission Secretary, 1/83 - 5/83
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EXECUTIVE SUMMARY

The Legislative Commission to Review Administrative Rules (LCRAR) is a ten-member bipartisan Commission, composed of five appointed members of each legislative house. The members elect their own Chair and Vice-Chair, the offices alternating every two years between the legislative houses.

The Commission meets at the call of the Chair or at the request of two Commission members or five legislators.

The Commission's purpose is to "promote adequate and proper rules by agencies and an understanding upon the part of the public respecting them." To accomplish this purpose, the Commission investigates complaints about agency rules, which generally are brought to its attention by legislators on behalf of their constituents.

Minnesota Statutes, Sections 14.40 to 14.43, give the Commission its authority to hold public hearings, to suspend rules, and to request an agency to hold a public hearing with respect to recommendations made by the Commission.

The statutes governing the LCRAR (see Appendix B) describe briefly its responsibilities and procedures for performing its duties. However, an analysis of Commission actions during the 1983-1984 biennium illustrate the variety of methods used by the Commission to accomplish its task of providing legislative oversight of agency rules.

For example, for the 25 rule reviews conducted by the Commission during 1983 and 1984, final Commission actions can be categorized as follows:

1. Monitoring rulemaking: On six occasions the Commission directed its staff to monitor agency and legislative policy committee work or to mediate, when appropriate, between agencies and complainants.
2. Referral of issues: The Commission referred issues to legislative policy committees seven times, including the three times it voted to initiate suspension proceedings. This referral function provides policy committees with an additional degree of policy analysis of legislative and rulemaking issues.
3. Rulemaking requests: On five occasions the Commission requested an agency to amend or adopt a rule, either through the public hearing process or noncontroversially.
4. Advice: While not demanding a particular agency response, on at least

eight occasions the Commission gave further direction and advice to agencies regarding issues that arose during the rule review process.

5. Rule suspension: The Commission voted to initiate the rule suspension process three times, thereby referring the suspension issue to the appropriate policy committees. Of these three suspension initiations, the Commission only once suspended an agency's rules.

6. Legislation: On three occasions, the Commission decided to sponsor legislation to remedy problems revealed during its rule reviews.

7. No action: On three occasions, the Commission took no action, and once it declined jurisdiction over a matter.

In addition to conducting its regular rule reviews during the 1983 session, the Commission also successfully sponsored legislative changes to the Administrative Procedures Act, Minnesota Statutes, Chapter 14. (See page 21 for details).

Finally, during 1983 and 1984, the Commission was not requested to give its advice and comment as to the need and reasonableness of a rule, as provided in Minnesota Statutes, Section 14.15, Subdivision 4.

LCRAR RULE REVIEW PROCESS

The following is a general description of the usual LCRAR process for reviewing rules. It is a product of institutional history and not of formal procedural rules or laws.

- Complaints or inquiries about rules come to the Commission staff from Commission members, other legislators, individual citizens, or interest groups.
- Staff discusses the complaint or inquiry with the complainant and, if appropriate, with the agency whose rule is in question. Some preliminary research into the rule's history and statutory authority usually occurs at this early stage.
- Sometimes the complaint can be handled with an explanatory phone call or letter from staff. At other times, if a complaint appears to raise issues that staff believes require the attention of the Commission, staff prepares a written preliminary assessment to present at a Commission meeting. This report summarizes staff research and analysis to date and recommends whether the Commission proceeds in conducting its rule review.
- The Commission meets to hear a staff presentation of the preliminary assessment and brief testimony as to whether the complaint is "meritorious and worthy of attention."
- Unless a complaint requires no further attention, staff then continues to investigate the issues raised and to accomplish other recommendations of the Commission.
- At this point the Commission has the option to hold a public hearing about the rule in question and related issues. A public hearing is generally held for the most controversial rules under review.
- Staff prepares a final written report and includes recommendations for Commission action.
- The Commission decides its course of action. Many options are available, there being little limit on the Commission's creativity. For example, the Commission may refer issues to legislative policy committees for consideration; it may request an agency to amend or adopt a rule, either noncontroversially or after holding a public hearing; it may initiate the process of suspending a rule, or may proceed to suspend a rule; it may decide no LCRAR action is necessary; or it may have staff continue to monitor an agency's rulemaking process.

Minnesota Statutes, Section 14.15, Subdivision 4 (See Appendix B) also allows the Commission to give its advice and comment on the need and reasonableness of a rule if an agency so requests. Commission practice is to hold two meetings. At the first meeting, the staff presents an initial report of the issues, and the agency testifies in defense of the need and reasonableness of the rule. Other testimony may also be heard. At the second meeting, staff presents a final report, and the Commission gives its advice and comment.

This process must occur within 30 days of the request made of the Commission by the agency for such advice and comment. If more than 30 days pass, the agency may proceed with its course of action notwithstanding the Commission's advice. In any case, the advice is not binding upon the agency.

LCRAR RULE SUSPENSION PROCESS

Suspension of a rule is a Commission action that temporarily repeals an agency rule. Minnesota Statutes, Sections 14.40, 14.42, and 14.43 provide procedural requirements for a rule suspension. The process is briefly described as follows:

- The Commission votes to initiate the suspension process, thereby requesting the Speaker of the House and the President of the Senate to refer the question of suspension to appropriate policy committees in each house for committee recommendations. These recommendations are advisory only.
- The Commission must wait until it receives the committees' recommendations, or until 60 days have elapsed since the question of suspension was referred to the Speaker of the House and the President of the Senate.
- A rule is suspended upon an affirmative vote of at least six members of the Commission.
- As soon as possible after the Commission votes to suspend and after proper notice is made, the Commission must place before the Legislature, at the next year's session, a bill to repeal the suspended rule.
- Failure to enact the bill reinstates upon adjournment the rule suspended by the Commission, if the agency has not already repealed the rule through the rulemaking process.
- If the bill is passed by both houses and signed by the Governor, the rule is repealed.

LCRAR STATISTICS FOR 1983 AND 1984

	<u>1983</u>	<u>1984</u>
● Number of Commission meetings	16	9
● Number of rule reviews conducted by the Commission	13	12

The 13 rule reviews conducted in 1983 and the 12 rule reviews conducted in 1984 involved the agencies listed below. The number after each agency name indicates the number of times the agency was the subject of a rule review.

1983

Department of Administration	1
Board of Assessors	1
Board of Education	1
Department of Education	1
Department of Health	2
Pollution Control Agency	1
Department of Public Safety	3
Department of Public Service	1
Department of Public Welfare	2
Department of Revenue	1
Sentencing Guidelines Commission	1
Board of Teaching	2

1984

Department of Administration	1
Board of Animal Health	1
Department of Commerce	1
Department of Energy and Economic Development	1
Pollution Control Agency	1
Department of Public Safety	1
Department of Public Welfare (Human Services)	4
Department of Transportation	3

	<u>1983</u>	<u>1984</u>
● Number of rule complaints received by staff	47	23

SUMMARY OF LCRAR RULE REVIEWS
CONDUCTED IN 1983 AND 1984

1. DEPARTMENT OF EDUCATION, (EDU 262.R) Rule restricting lettering on School Buses.

This complaint was brought to the Commission in 1982 by Senator Olhoft to investigate whether the department had the statutory authority to prohibit statements of religious principle on buses owned by church schools. The Senator questioned the unnecessary restrictiveness of the rule.

A motion to suspend the rule failed at an LCRAR meeting on 7/7/82.

Due to Senator Olhoft's failure to be re-elected, the Commission was concerned that legislation needed to clarify current law might not be initiated. Therefore, the Commission voted on 2/25/83 to refer the issue to the House and Senate Education Committees, requesting clarification of the statutes relating to school buses. As a result, Laws 1984, Chapter 403 was passed to clarify the relevant statutes.

2. BOARD OF ASSESSORS, Assessors' License Fees.

A county assessor complained to the Commission that the Board increased its license fee and changed the effective date of a license without publishing a notice of these changes in the State Register. Due to unclear statutes in Minnesota Statutes, Sections 270.41 to 270.53 and 16A.128, the Board and LCRAR staff asked for an informal opinion from the Attorney General's office. The opinion was that the statutes were so unclear that it was difficult to advise the agency as to how to implement the increase.

The Commission directed staff to attempt an agreement with the Board.

The Board agreed to:

- adopt a rule to change from a calendar year to a fiscal year, using the noncontroversial rulemaking process;
- adopt the fee increase by a noncontroversial rule; and
- credit persons who paid two fees for the last 6 months of 1982.

The Commission also requested the Board to publish notice of the proposed rules by a certain date.

3. BOARD OF TEACHING (5MCAR 3.090 G.3) Rule for a Provisional License to teach in the area of Special Learning Disabilities (SLD).

In late 1982 the Commission began a review of this rule, based on a letter to the chair from a teacher who complained that because the rule made no distinction between a provisional and a full license, regular education teachers who had more seniority but who faced layoffs were able to obtain SLD provisional licenses. The effect was to replace or "bump" fully licensed SLD teachers with provisionally licensed regular education teachers.

The rule in question was adopted in 1980 in response to the demand for teachers of handicapped children. But by 1982 the education picture had changed dramatically. Instead of teacher shortages, layoffs were common.

While the complaint originated in the Special Learning Disabilities area, the problems also applied to 8 other licensing areas. To prevent the "bumping" situation from worsening, the Commission voted to initiate suspension of rules relating to provisional licenses in the areas of visually handicapped, hearing impaired, educable retarded, trainable retarded, crippled children, special learning disabilities, special education, early childhood, and developmental/adaptive physical education. The House and Senate policy committees considered the issues. The House Education Committee asked the Commission to delay final action on suspension until after April 1, 1983, pending progress of related legislation.

By May 1983, there remained only three areas of provisional licenses that the Commission considered in its vote to suspend: educable retarded, crippled children, and special learning disabilities. On May 5, 1983, the Commission voted unanimously to suspend these three rules effective June 1, 1983.

4. DEPARTMENT OF PUBLIC SERVICE, Gasoline Pump Inspection Fees.

Commission member Representative Fjoslien brought this issue before the Commission to question the reasonableness of the flat-rate gasoline pump inspection fee set by the Bureau of Weights and Measures to inspect the accuracy of gasoline pumps. Petroleum dealers also complained that the fees were set without any notice to the public.

The statute requiring the Bureau to set fees does not require that the fees are set by rule. Hence, the fee in question was not adopted under Administrative Procedure Act requirements.

The Commission reviewed not only the pump inspection fee, but also the quality inspection fee.

The Commission voted to recommend:

- that the statute requiring these fees, Minnesota Statutes, Section 239.10, be amended to require that fee adjustments follow Minnesota Statutes, Section 16A.128; and
 - that Minnesota Statutes, Section 296.13 be amended to require that the fee be increased by rule according to Minnesota Statutes, Chapter 14. The result was Laws 1984, Chapter 654, which was sponsored by Commission members.
5. POLLUTION CONTROL AGENCY, (WPC 34) relating to Wastewater Treatment Facilities Construction Grants Program.

In August 1981 the Commission requested PCA to amend its wastewater treatment facilities construction grants program and to form a rulemaking task force. At the meeting on 3/18/83 the PCA presented its proposed amendments for the Commission's review. As a result, the Commission sent a letter to PCA requesting its attention to certain comments made by the public at the meeting (3/13/83).

6. BOARD OF TEACHING (5MCAR 3.0909) Rule for a License to Teach Developmental/Adaptive Physical Education (D/A P.E.)

This complaint was brought by Commission member Representative Simoneau on behalf of a parent of a handicapped child. The complaint concerned the effective date (7/1/85) of the Board's licensing rule for teachers of D/A P.E. The complaint raised other issues of licenses for any new field:

- the phasing in of school district compliance with the rule during the time the supply of newly licensed individuals is being created; and
- the need to determine seniority status of license holders if licenses are granted before the date the district must comply.

Since legislative policy committees were already involved with these issues, the Commission voted to request the Board to include in its legislative report on provisional licenses, a discussion of phasing in new license fields, separating the effective date for compliance, and seniority status.

7. DEPARTMENT OF REVENUE, Form PDA-46H for Tax Exempt Bulk Gasoline Sales to Farmers.

Commission member Representative Fjoslien brought this complaint to question whether Form PDA-46H entails unnecessary paperwork and was contrary to legislative intent.

While the department had to collect information to carry out its statutory requirement to detect tax evasion, it did not need to require that this form

be completed. Other ways of submitting the information were available.

The Commission requested the department to clarify its memo relating to this form to inform distributors that the required information may be submitted in a more convenient form. Also, the Commission requested the department to continue to explore other less burdensome methods for detecting tax evasion and fraud in this area.

8. DEPARTMENT OF PUBLIC SAFETY, Uniform Fire Code (Section 10.309) Basement Sprinklers.

Representative Sherman requested review of the reasonableness of this rule requiring automatic sprinklers to be installed in certain sized basements in existing buildings if they are used to store certain materials. Winona business leaders and city officials were particularly concerned that strict enforcement of this requirement would cause businesses to close or to leave Winona. The Winona City Council imposed a moratorium on inspections and installation orders by the Winona Fire Marshal until a citizens' committee could report on costs and alternatives to the automatic basement sprinklers.

The Commission deferred formal action on this rule until the Winona citizens' committee completed its report. The LCRAR staff was delegated as mediator in this dispute if requested by the parties involved.

9. DEPARTMENT OF PUBLIC WELFARE Policy on Home Visits for Medical Assistance Recipients in Skilled Nursing Facilities and Intermediate Care Facilities.

Commission member Fjoslien asked the Commission to review the department policy that limits the number of home visits to 36 days per year for young persons receiving Medical Assistance. The issues raised were:

- whether the 36-day limit was unduly restrictive given that additional days might be needed for clients who must spend part of these days traveling a distance from the facility they use; and
- whether this policy should be open to public participation through the Chapter 14 rulemaking process.

The Commission held a public hearing and requested DPW to:

- hold a hearing to adopt a rule governing the number of days that would be reimbursed, and the level of reimbursement;
- consider a policy of allowing the number of leave days to be determined as part of the resident's therapeutic program under DPW Rule 80, and to consider a limit on consecutive leave days to be reimbursed;
- confer with Chairs of the Senate and House Health and Human Services committees;

- publish the proposed rules by June 30, 1984;
- keep LCRAR staff informed of its rulemaking progress; and
- before the new rule was adopted, to consider changing its current policy on leave days to allow greater flexibility.

10. SENTENCING GUIDELINES COMMISSION, Modifications to Sentencing Guidelines.

In August 1983, five legislators requested review and suspension of modifications to the guidelines that were to take effect November 1, 1983. The LCRAR first addressed the issue of whether the LCRAR had jurisdiction to review these guidelines. Much testimony was gathered relating to the legislative intent regarding review of these guidelines.

On August 31, 1983, the Commission voted to accept the staff report that concluded that the LCRAR does not have the authority to review the guidelines. The Commission decided that the guidelines do not meet the definition of a rule (Minnesota Statutes; Section 14.02, subdivision 4) because they are not a statement that "implements the law enforced or administered by an agency." The SGC itself does not enforce criminal sentencing laws in Minnesota. The judiciary exercises that power. The SGC's role is limited to suggesting the appropriate sentence. Therefore, the guidelines are chiefly advisory in nature.

The Commission's decision not to review the guidelines was based on its understanding of its own jurisdiction and the legislative intent regarding review of the guidelines. Testimony led the Commission to conclude that the Legislature did not intend for LCRAR review, but rather contemplated review of the guidelines by the Legislature as a whole through its policy committees and the bill enactment process.

11. DEPARTMENT OF PUBLIC WELFARE (Rule 2) Licensing of Family and Group Family Daycare Homes, and (Rule 3) Licensing of Daycare Centers.

The Commission began its review of these rules in 1983 upon request by several legislators concerned about the general daycare situation, the amount of regulation in this area, and Fire and Safety Code requirements needed to protect children.

The rule review involved the Departments of Public Welfare, Public Safety (Fire Marshal), Administration (Building Code), and to a lesser extent the Departments of Health and Education. Due to its complexity and widespread effect throughout Minnesota, the Commission held several public hearings, two of them outside St. Paul (Apple Valley and Blue Earth). The Commission direc-

ted the staff to act as facilitator to a task force that met to discuss the complex issues involved in this complaint. After months of work, the Commission made the following requests:

- that the Department of Public Welfare amend Rule 2 to include the Fire Marshal's checklist and an exemption from fire inspections for renewals of group licenses except in certain instances. The hearings on amendments to Rule 2 and Rule 3 were to begin by June 30, 1984. Also, while not a formal request, the Commission formally encouraged DPW to confer with the other agencies involved to produce an easily understandable manual on rules for daycare providers.
- that the Department of Administration, Building Code Division amend the Uniform Building Code to exempt group family daycare homes serving ten or fewer children under six years of age from having to comply with E-3 occupancy standards which are stricter than single-family residency requirements. The amendment process was to begin by June 30, 1984.
- that the Department of Public Safety, Fire Marshal's Office amend the Uniform Life Safety Code to allow group family daycare homes to satisfy the code requirement for a second exit from second floors or basements by having an accessible escape window rather than a door. The amendment process was to begin by June 30, 1984.

The Commission also voted to initiate suspension of the Uniform Fire Code provisions governing staff/child ratios in daycare homes.

The legislative response to the initiation of suspension proceedings was Laws 1984, Chapter 658, Section 3, which, among other things, prohibits the Fire Marshal from adopting or enforcing a rule establishing staff ratios, age distribution requirements, and limitations on the number of children in care.

The same section of Laws gave further directions to the Department of Public Welfare for amending Rule 2. Commission members were instrumental in the passing of Chapter 658.

12. DEPARTMENT OF PUBLIC SAFETY, LIQUOR CONTROL DIVISION (11 MCAR 1.8039A)
Sales of Liquor to Wholesalers and Manufacturers.

Liquor wholesaler Phillips and Sons Co. requested suspension of Rule 11 MCAR 1.8039A on grounds that the rule exceeded the statutory authority and was contrary to legislative intent.

The rule required that all importers make their products available to all wholesalers and manufacturers on an equal basis. Phillips contended that it was not the intent of the Legislature that Phillips make available its private label of rectified liquors to its wholesale competitors.

The Commission held a hearing on the issue on November 3, 1983.

While a staff report presented at the 12/13/83 meeting recommended suspension of part of the rule, the issue of suspension never came to a vote because the parties in contention agreed to resolve their differences. The parties worked to pass Laws 1984, Chapter 626, Section 3, which amended Minnesota Statutes, Section 340.114 to exempt a wholesaler's private label from the requirement of making that product available to competitors.

13. DEPARTMENT OF HEALTH, Licensing of Free-Standing Emergency Medical Centers.

Representative Rodriguez requested review of this matter relating to the need for licensure of free-standing medical centers. While the law requires health facilities to be licensed, there is no procedure in the Department of Health for licensing this kind of health facility.

Because of this lack of licensure, free-standing emergency medical centers continue to have difficulty collecting medicare and other third-party payments for emergency services. Also, due to lack of standardization or regulation, ambulance services often hesitate to take patients to free-standing emergency centers because it is difficult to determine if such centers will be able to meet the needs of a patient.

The Department of Health began drafting licensing guidelines in late 1981 but after staff was transferred from the project, this progress came to an end. After a two year lapse, the department began to reconsider new licensing rules.

The Commission directed staff to continue work on the issue with the Insurance and Financial Institutions policy committees. After the Commission held a public hearing, it voted to refer to appropriate policy committees the issue of establishing licensure requirements, taking into account testimony received from insurers.

14. DEPARTMENT OF PUBLIC WELFARE (Temporary Rule 53) Rate-setting Procedure for Intermediate Care Facilities for the Mentally Retarded (ICF/MR).

Several legislators asked for a review of this temporary rule shortly after it became effective January 1, 1984, based on a concern that the department had made fundamental policy changes in the temporary rule for which no public hearing was required. The review focused on whether the new rule exceeded the legislative intent. The review also involved an assessment of the rule's compliance with recommendations made previously by the Legislative Audit Commission.

The LCRAR was concerned about the broad delegation of authority given to the agency to adopt this rule, and the fact that the rule could continue for 720 days. However, because the session was approaching, the Commission voted to refer the issue to the appropriate policy committees.

15. DEPARTMENT OF TRANSPORTATION (14 MCAR 1.027 and 1.030 to 1.032) Eligibility of Blind Persons for Metro Mobility Services.

Commission member Senator Waldorf brought this complaint in April 1984 on behalf of blind persons associated with the American Council of the Blind of Minnesota (ACB). The rules established eligibility standards for Metro Mobility services (special buses) to contain costs by ensuring that only persons who could not use mainline bus service were eligible for this special bus service.

ACB claimed that the rules were unfair because they discriminated against blind persons by requiring them to have a second handicap to be eligible to use Metro Mobility services. Another organization representing the blind, the National Federation for the Blind in Minnesota (NFB), split with ACB on this issue, arguing that the blind do not need special treatment.

Staff worked with the department to arrive at suggested language changes in DOT's rules to achieve satisfactory objective criteria that do not discriminate against certain blind persons who cannot use the mainline bus system.

The Commission requested the department to amend its rules to incorporate the suggested language changes.

These changes provided for objective criteria for eligibility and established that orientation and mobility specialists could verify an applicant's disability.

During the 1984 legislative session the authority to administer the Metro Mobility services shifted from DOT to the Regional Transit Board as of July 1985. (DOT did not amend its rules, but in November 1985 the Regional Transit Board adopted essentially the same language recommended to DOT by the Commission).

16. DEPARTMENT OF ENERGY AND ECONOMIC DEVELOPMENT (Minnesota Rules Chapter 4215) Minnesota Model Energy Code.

In June 1984 Commission members Senators Benson and Luther, on behalf of the Minnesota State Builders Association, asked the Commission to review several issues relating to the newly amended Model Energy Code. Builders were concerned about liability for problems associated with new standards for foundation wall insulation and vapor barriers. MSBA also believed that the Energy agency exceeded its statutory authority.

Staff took a very active role as facilitator for a task force which included staff from the MSBA, the Building Code Division in the Department of Administration, and the Energy Division of the Department of Energy and Economic Development. Meetings were held during the latter part of 1984 (and into 1985).

17. DEPARTMENT OF TRANSPORTATION, Minnesota Traffic Engineering Manual on Freeway Signs for Educational Institutions.

In August 1984, at the request of Representative Vanasek, the Commission reviewed the department's regulations contained in its manual governing freeway signs for private institutions. St. Olaf and Carleton Colleges sought permission to have a locator sign at the Trunk Highway 19 exit on Interstate 35. Neither current nor proposed regulations addressed the problem of signs for colleges and universities located in non-metropolitan areas. The complaint challenged the reasonableness of the current and proposed standards. A specific request was made for a more permissible policy for college locator signs, or a

variance procedure in individual cases.

Since the department had created an external review committee to review the signing issue during the rule revision process, the Commission forwarded its concerns to this external committee for their consideration and directed the LCRAR staff to work with the parties to resolve the issue.

18. DEPARTMENT OF COMMERCE, Board of Cosmetology, Minnesota Rules, Part 2640.3700, Subpart 7 Salon Ventilation Requirements.

In August 1984 several legislators requested LCRAR review of this rule based on complaints from salon operators. The rule required a mechanical ventilation system to remove potentially harmful fumes produced during certain beauty treatments. The rule differed from the Building Code which allowed window ventilation as a means of compliance.

Salon operators claimed the cost of compliance was burdensome, especially for operators who rent a salon. Operators feared the extra cost might force them to close shop.

The Board's rule had gone through the hearing process during its adoption and the hearing examiner found it needed and reasonable.

The Commission held a public hearing (8/28/84) at which time Commissioner of Commerce Michael Hatch asked the LCRAR to suspend the rule to avoid having the department go through the time-consuming rule repeal process. Meanwhile, the department asked inspectors not to enforce the rule.

The LCRAR voted to initiate suspension of this rule. In so doing the Commission referred the issue of suspension to appropriate policy committees in the House and Senate. The Commission also passed along to these committees Chairman Simoneau's concern about the dangers of products used by cosmetologists.

The issue was resolved when the department repealed language in this rule that prohibited window ventilation. The rule was never put to a final suspension vote.

19. BOARD OF ANIMAL HEALTH (3 MCAR 2.026) Rules for Control of the Swine Pseudorabies Virus (PRV).

In August 1984 Senator DeCramer brought this issue to the Commission on behalf of hog breeders. They contended that the newly adapted PRV rules were discriminatory, as they imposed a heavier financial burden to control PRV on hog breeders than on feeder pig producers. Hog breeders wanted the rules sus-

pending.

The Commission held a public hearing and approved several staff recommendations:

- to refer issues of PRV testing, clean-up, and education to appropriate House and Senate policy committees,
- to request the Board to amend the PRV rules to eliminate the requirement for a second negative test,
- to have the Commission support the request by the Board of Veterinary Medicine for authority to adopt rules defining unprofessional conduct,
- to have the LCRAR draft a House Advisory for an eradication program with a reimbursement mechanism attached, and
- to have the LCRAR seek support from the Minnesota Congressional delegation for federal testing and clean-up programs for PRV.

20. DEPARTMENT OF PUBLIC SERVICE, DIVISION OF WEIGHTS AND MEASURES, Minnesota Rules, Part 7650.0100, Subpart 1 C (2) for Gasoline Pump Inspection Fees.

In October 1984 Commission member Representative Fjoslien requested LCRAR review of the proposed increase in gasoline pump inspection fees on the grounds that the increase was contrary to legislative intent, since a 1984 law eliminated the gasoline pump inspection fee effective 7/8/85.

The complaint also questioned the legislative wisdom of Minnesota Statutes, section 16A.128, that allowed this fee to be set without a public hearing. Staff explained that under M.S. 16A.128, fees charged to recover costs of appropriations were not subject to the requirement of a public hearing.

The Commission took no action because there was no evidence to suggest that the department's new fee exceeded the department's inspection costs.

21. DEPARTMENT OF HUMAN SERVICES, Minnesota Rules, Parts 9500.0031 - 9500.0353 (Emergency) Governing Aid to Families with Dependent Children (AFDC).

Representative Simoneau requested review of this emergency rule on behalf of several counties that must administer the rules.

The review focused on two parts of the rules.

Part 9500.0071, subpart 3 (Emergency), related to visitation by absent parents. Counties complained that the new criteria for visitation by absent parents were too easily met, thereby enabling more people to qualify for AFDC, and making it more difficult for counties to prosecute cases of fraud. Some counties also believed the new definition of absent parent violated a Minnesota Supreme

Court decision.

Parts 9500.0331 to 9500.0353 (Emergency) provide for AFDC-Emergency Assistance for recipient utility and mortgage payments. Counties were concerned that changes in emergency assistance payments would cause counties to exceed their budgets.

Also, in general, counties complained that the department was making major policy changes through emergency rules which do not require public hearings.

The Commission voted to hold a public hearing on the issues relating to these 2 major portions of the emergency rules even though the department was planning to adopt permanent rules which would most likely require public hearings.

22. DEPARTMENT OF HUMAN SERVICES, Minnesota Rules, Parts 9525.0015 to 9525.0353 (Emergency) Governing County Board Responsibilities to the Mentally Retarded.

In November 1984 Representative Simoneau requested review of these emergency rules on behalf of Anoka County who complained that the department was exceeding its statutory authority by having the rules apply to all mentally retarded persons, not only to those covered by waived services. The rules required counties to identify the services needed by mentally retarded persons. Anoka County feared a large and unexpected increase in its social service budget if services for mentally retarded persons had to be provided to all needy mentally retarded persons.

In general, Anoka County objected to the department's use of emergency rules to adopt major policy changes without public participation.

Finally, Anoka County sought LCRAR review to ensure the rules comply with the legislative intent of the Community Social Services Act.

Due to the complexity of the complaint, the Commission voted to hear public testimony at its next hearing.

(Commission members played a major role in passing Laws 1985, 1st Special Session, Chapter 9, Article 2, sections 40 to 45, which helped to address some of the issues that arose at the hearing held 2/28/85).

23. DEPARTMENT OF TRANSPORTATION, Minnesota Rules, Parts 7800.4500, 7800.4600, 7800.6000, and 7800.6200, Safety Equipment on Farm Trucks.

In November 1984 Representative Fjoslien requested review of rules that require safety equipment on farm trucks. He believed the rules were unnecessary and burdensome to farmers. Staff reported that it was the legislative

changes in 1983 and 1984 that required the application of these safety requirements to farmers.

The Commission referred consideration of the issue to appropriate legislative policy committees.

24. POLLUTION CONTROL AGENCY, Minnesota Rules, Parts 7045.0131, subpart 4 on Corrosivity of Hazardous Waste, and 7035.1700, Relating to Recycling of Hazardous Waste.

This complaint arose from Representative Forsythe's concern over a pile of lime sludge located in Northeast Minneapolis. She believed the MPCA hazardous waste rules were inhibiting recycling of this sludge. Hazardous waste generators also believed that the state hazardous waste recycling rules were more stringent than necessary, and that state adoption of federal standards were sufficient to protect the environment.

Under the newly amended hazardous waste rules, recycled wastes were no longer subject to the same restrictions as hazardous wastes. Rather, recycled wastes were now only subject to manifest and transportation requirements.

Because a Senate subcommittee was investigating the issue of recycling lime sludge, the LCRAR directed the staff to monitor the subcommittee's efforts. The Commission also directed staff to continue investigating the larger question of the impact of PCA hazardous waste recycling rules and to present a report at the next meeting.

(In 2/85 Commission staff reported that PCA was amending its rule to permit the Department of Transportation to use the lime sludge as a soil stabilizer. Also, the U.S. Environmental Protection Agency recently adopted changes in its hazardous waste recycling rules that were as strict or stricter than similar MPCA rules. Due to this federal action, there was no need for further LCRAR action. As for the actual pile of lime sludge, the Department of Transportation contracted to have the pile recycled and therefore removed from Northeast Minneapolis).

REVISIONS TO THE ADMINISTRATIVE
PROCEDURE ACT

On a motion adopted at the end of 1982, LCRAR staff prepared a report on revisions to the APA. The suggested revisions resulted from rule complaints investigated by the Commission.

At the LCRAR meeting on March 11, 1983, the Commission accepted the staff recommendations as follows:

1. That the LCRAR introduce legislation to amend Minnesota Statutes, Sections 14.14, Subdivision 1; 16A.128; and 214.06 to require that fees fixed by appropriations made by law shall be made by rule, except that no public hearing shall be required.

2. That the LCRAR inform the House Appropriations and Senate Finance committees of the issues which have been raised relating to agency discrimination among fee payers, and to request those committees to use the budget review process to carefully review the fees charged by agencies under M.S., Sections 16A.128 and 214.06.

3. That the LCRAR introduce legislation to amend M.S., Section 14.12 to require notice of failure to meet the six-month deadline to be sent to the LCRAR.

4. That the LCRAR introduce legislation to provide for a three-working-day period after the close of the hearing record in which the agency can indicate acceptance of amendments offered by the public.

5. That the LCRAR introduce legislation to provide that the rule must be submitted to the State Register for publication within 180 days of the hearing examiner's report. This 180 days will not include any time required by the Chief Hearing Examiner or the LCRAR to review the proposed rule pursuant to M.S., Section 14.15, Subdivisions 3 and 4, nor will it include time required by the Attorney General or Chief Hearing Examiner to review a rule pursuant to M.S., Sections 14.16, 14.17, and 14.26.

6. That the LCRAR introduce legislation to amend M.S., Section 14.15 to provide that suggestions referred to are those of the "Chief" Hearing Examiner.

7. That the LCRAR introduce legislation to amend M.S., Section 14.22 to include a requirement that the notice of intent to adopt without a public hearing include the language in 1 MCAR 1.203.G.10, which requires that:

"If the rule is not attached to the notice, the notice must clearly

state the nature and effect of the proposed rule and include a statement announcing the availability and means of obtaining upon request a copy of the proposed rule."

8. That the LCRAR introduce legislation to provide for a six-month period in which to complete noncontroversial rulemaking, beginning with the end of the 30-day comment period, and ending with approval by the Attorney General.

To accomplish these recommendations, Commission members sponsored Laws 1983, Chapter 210 to amend certain sections of Minnesota Statutes, Chapter 14.

Laws 1983, Chapter 301, Sections 91 and 165 also amended certain statutes as recommended by the LCRAR.

LCRAR REPORT ON IMPLEMENTATION OF M.S., SECTION 14.115
SMALL BUSINESS CONSIDERATIONS IN RULEMAKING

Minnesota Statutes, Section 14.115 basically provides that an agency must consider the effect that a new rule or an amendment to an existing rule may have on small businesses.

As of August 1, 1983, agencies have been required to document in the rule's statement of need and reasonableness the impact on small businesses.

Agencies also have been required to provide an opportunity for small businesses to participate in the rulemaking process. The statute sets forth several means for an agency to meet this requirement by giving notice or an opportunity to participate at a public rule hearing.

Compliance with M.S., Section 14.115 has been monitored by the Office of Administrative Hearings and the Office of the Attorney General. Under the statute, "if an Administrative Law Judge or an Attorney General finds that an agency has not complied with Minnesota Statutes, Section 14.115, Subdivisions 1 to 4, the agency rules shall not be adopted."

M.S., Section 14.115, subdivision 8 requires the LCRAR to "review the implementation of this section and...include in the biennial report required by Section 14.40 a report on the implementation of this section."

Since August 1983, LCRAR staff have received no complaints from the public or legislators concerning an agency's noncompliance with M.S., Section 14.115.

However, research into files of the Attorney General's office reveals three instances since August 1, 1983 where the AG disapproved a rule, at least in part, for noncompliance with M.S., Section 14.115.

- On April 23, 1984 the Attorney General disapproved a rule of the Department of Revenue because the agency did not indicate in its statement of need and reasonableness which method (in M.S., Section 14.115, subdivision 4) it used to provide an opportunity for small businesses to participate in the rulemaking process.

- On October 1, 1984 the Attorney General disapproved rules of the Secretary of State's Office relating to Uniform Commercial Code (UCC) Forms. The statement of need and reasonableness indicated that the agency attempted to comply

with Section 14.115, subdivision 4, clause (c), by mailing a notice of the proposed rulemaking to the first 200 small businesses that filed documents with the Secretary of State after a certain date. Subdivision 4, clause (c) requires "direct notification of any small business that may be affected by the rule." The AG advised the department that it should have determined the number of small businesses to notify after the department had conducted an analysis of the qualitative and quantitative impact of the proposed rules. The department resubmitted the rule for approval after complying with M.S., Section 14.115.

- On October 22, 1984, the Attorney General disapproved the Department of Public Service Rules Governing Inspection Fees for failure to meet the requirement in M.S., Section 14.115, subdivision 4.

Subdivision 4, clause (c) requires an agency to directly notify any small business that may be affected by a rule. The department did not satisfy this requirement by mailing the notice of intent to adopt rules to associations that represent the businesses subject to the proposed rules. This notice was indirect, rather than direct. The department was advised to cure this defect by directly notifying any small business that may be affected by the rules.

Finally, as to the Office of Administrative Hearings (OAH), there are no readily available records of rules that have been disapproved due to non-compliance with Minnesota Statutes, Section 14.115. This is probably due to the fact that an agency becomes aware of jurisdictional problems such as non-compliance with M.S., Section 14.115 during the initial stages of its contact with the OAH. This gives the agency an opportunity to correct these defects long before a formal rule disapproval would be issued.

It appears then that since August 1, 1983, state agencies have substantially complied with the requirements of Minnesota Statutes, Section 14.115, Subdivisions 1 to 4.

APPENDIX A

LCRAR MEMBERS 1981-1982

Senator Timothy J. Penny, Vice Chair 1/81, Chair, 2/81 - 12/82
Senator Carl W. Kroening
Senator William P. Luther
Senator Wayne Olhoft
Senator Glen Taylor

Representative Paul McCarron, Vice Chair
Representative Thomas R. Berkleman
Representative David O. Fjoslien
Representative William Peterson
Representative Wayne Simoneau

LCRAR STAFF 1981-1982

Susan P. Robertson, Executive Director, 1/81 - 8/81
Kathleen P. Burek, Executive Director, 8/81 - 12/82
Lorraine Hartman, Secretary
Terri Lauterbach, Commission Counsel
James Foreman, Research Analyst, 6/81 - 11/82

LCRAR STATISTICS FOR 1981 AND 1982

	<u>1981</u>	<u>1982</u>
● Number of Commission meetings	11	9
● Number of rule reviews conducted by the Commission	17	17

The 17 rule reviews conducted in each of the years 1981 and 1982 involved the agencies listed below. The number after each agency name indicates the number of times the agency was the subject of a rule review.

1981

Department of Corrections	1
Department of Education	2
Environmental Quality Board	1
Department of Health	1
Department of Labor and Industry	1
Department of Natural Resources	1
Pollution Control Agency	1
Department of Public Safety	1
Department of Public Welfare	1
Department of Transportation	1

1982

Department of Agriculture	1
Board of Assessors	1
Board of Education	1
Department of Education	1
Environmental Quality Board	1
Department of Health	1
Pollution Control Agency	2
Department of Public Safety	1
Department of Public Service	1
Public Utilities Commission	1

Department of Public Welfare 3
Board of Teaching 2
Department of Transportation 1

	<u>1981</u>	<u>1982</u>
●Number of rule complaints received by staff	46	20

LEGISLATIVE REVIEW OF RULES

14.39 LEGISLATIVE COMMISSION TO REVIEW ADMINISTRATIVE RULES; COMPOSITION; MEETINGS.

A legislative commission for review of administrative rules, 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.

History: 1974 c 355 s 69; 1975 c 271 s 6; 1980 c 615 s 1; 1980 c 618 s 26; 1981 c 112 s 1,2; 1981 c 253 s 1; 1981 c 342 art 2 s 1; 1982 c 424 s 130

14.40 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. The jurisdiction of the commission includes all rules as defined in section 14.02, subdivision 4. The commission also has jurisdiction of rules which are filed with the secretary of state in accordance with section 14.38, subdivisions 5, 6, 7, 8, 9, and 11 or were filed with the secretary of state in accordance with the provisions of section 14.38, subdivisions 5 to 9, which were in effect on the date the rules were filed. It may hold public hearings to investigate complaints with respect to rules if it considers the complaints meritorious and worthy of attention. It 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 section 14.42 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 not enacted in that year's session, the rule is effective upon adjournment of the session unless the agency has repealed it. If the bill is enacted, the rule is repealed. The commission shall make a biennial report to the legislature and governor of its activities and include its recommendations to promote adequate and proper rules and public understanding of the rules.

History: 1974 c 355 s 69; 1975 c 271 s 6; 1980 c 615 s 1; 1980 c 618 s 26; 1981 c 112 s 1,2; 1981 c 253 s 1; 1981 c 342 art 2 s 1; 1982 c 424 s 130; 1984 c 655 art 1 s 4

14.41 PUBLIC HEARINGS BY STATE AGENCIES.

By a vote of a majority of its members, the commission may request any agency issuing rules to hold a public hearing in respect to recommendations made pursuant to section 14.40, including recommendations made by the commission to promote adequate and proper rules by that agency and recommendations contained in the commission's biennial report. The agency shall give notice as provided in section 14.14, subdivision 1 of a hearing thereon, to be conducted in accordance with sections 14.05 to 14.36. The hearing shall be held not more than 60 days after receipt of the request or within any other longer time period specified by the commission in the request.

History: 1974 c 355 s 69; 1975 c 271 s 6; 1980 c 615 s 1; 1980 c 618 s 26; 1981 c 112 s 1,2; 1981 c 253 s 1; 1981 c 342 art 2 s 1; 1982 c 424 s 130

14.42 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' recommendations. No suspension shall take effect until the committees' recommendations are received, or 60 days after referral of the question of suspension to the speaker of the house and the president of the senate. However, the recommendations shall be advisory only.

History: 1974 c 355 s 69; 1975 c 271 s 6; 1980 c 615 s 1; 1980 c 618 s 26; 1981 c 112 s 1,2; 1981 c 253 s 1; 1981 c 342 art 2 s 1; 1982 c 424 s 130

14.43 NOTICE OF SUSPENSION.

In addition to the other requirements of this section, no suspension shall take effect until notice has been published in compliance with section 14.38, subdivision 4. The commission shall send the notice to the state register.

History: 1974 c 355 s 69; 1975 c 271 s 6; 1980 c 615 s 1; 1980 c 618 s 26; 1981 c 112 s 1,2; 1981 c 253 s 1; 1981 c 342 art 2 s 1; 1982 c 424 s 130

14.15 ADMINISTRATIVE LAW JUDGE'S REPORT.

Subd. 4. Need or reasonableness not established. If the chief administrative law judge determines that the need for or reasonableness of the rule has not been established pursuant to section 14.14, subdivision 2, and if the agency does not elect to follow the suggested actions of the chief administrative law judge to correct that defect, then the agency shall submit the proposed rule to the legislative commission to review administrative rules for the commission's advice and comment. The agency shall not adopt the rule until it has received and considered the advice of the commission. However, the agency is not required to delay adoption longer than 30 days after the commission has received the agency's submission. Advice of the commission shall not be binding on the agency.

14.115 SMALL BUSINESS CONSIDERATIONS IN RULEMAKING.

Subdivision 1. Definition. For purposes of this section, "small business" means a business entity, including its affiliates, that (a) is independently owned and operated; (b) is not dominant in its field; and (c) employs fewer than 50 full-time employees or has gross annual sales of less than \$4,000,000. For purposes of a specific rule, an agency may define small business to include more employees if necessary to adapt the rule to the needs and problems of small businesses.

Subd. 2. Impact on small business. When an agency proposes a new rule, or an amendment to an existing rule, which may affect small businesses as defined by this section, the agency shall consider each of the following methods for reducing the impact of the rule on small businesses:

- (a) the establishment of less stringent compliance or reporting requirements for small businesses;
- (b) the establishment of less stringent schedules or deadlines for compliance or reporting requirements for small businesses;
- (c) the consolidation or simplification of compliance or reporting requirements for small businesses;
- (d) the establishment of performance standards for small businesses to replace design or operational standards required in the rule; and
- (e) the exemption of small businesses from any or all requirements of the rule.

In its statement of need and reasonableness, the agency shall document how it has considered these methods and the results.

Subd. 3. Feasibility. The agency shall incorporate into the proposed rule or amendment any of the methods specified under subdivision 2 that it finds to be feasible, unless doing so would be contrary to the statutory objectives that are the basis of the proposed rulemaking.

Subd. 4. Small business participation in rulemaking. In addition to the requirements under section 14.14, the agency shall provide an opportunity for small businesses to participate in the rulemaking process, utilizing one or more of the following methods:

- (a) the inclusion in any advance notice of proposed rulemaking of a statement that the rule will have an impact on small businesses which shall include a description of the probable quantitative and qualitative impact of the proposed rule, economic or otherwise, upon affected classes of persons; or
 - (b) the publication of a notice of the proposed rulemaking in publications likely to be obtained by small businesses that would be affected by the rule; or
 - (c) the direct notification of any small business that may be affected by the rule;
- or
- (d) the conduct of public hearings concerning the impact of the rule on small businesses.

Subd. 5. Compliance. If an administrative law judge or the attorney general finds that an agency has failed to comply with subdivisions 1 to 4, the rules shall not be adopted.

Subd. 6. **Agency review of rules.** Each agency shall, during the five-year period beginning with the effective date of this section, review the current rules of the agency which were in effect prior to that date and shall consider methods of reducing their impact on small businesses as provided under subdivision 2. If a method appears feasible, the agency shall propose an amendment to the rule. No review is necessary for a rule that is repealed during the five-year period. This subdivision shall not apply to rules governing licensure of occupations listed in section 116J.70, subdivision 2a, clause (3), paragraphs (a) to (pp).

Subd. 7. **Applicability.** This section does not apply to:

- (a) emergency rules adopted under sections 14.29 to 14.36;
- (b) agency rules that do not affect small businesses directly, including, but not limited to, rules relating to county or municipal administration of state and federal programs;
- (c) service businesses regulated by government bodies, for standards and costs, such as nursing homes, long-term care facilities, hospitals, providers of medical care, day care centers, group homes, and residential care facilities; and
- (d) agency rules adopted under section 16.085.

Subd. 8. **LCRAR review.** The legislative commission to review administrative rules shall review the implementation of this section, and shall include in the biennial report required by section 14.40 a report on the implementation of this section.

History: 1983 c 188 s 1; 1984 c 640 s 32; 1984 c 655 art 1 s 2,3