

LCRAR

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Legislative Commission

to Review Administrative Rules

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The Legislative Commission to Review Administrative Rules
Biennial Report 1989 - 1990

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___ Pursuant to MS 14.40 ___



I. Executive Summary

The Legislative Commission to Review Administrative Rules is a bi-partisan joint legislative body whose purpose is to "promote adequate and proper rules and an understanding upon the part of the public respecting them." (*Minnesota Statutes, section 3.842*) Under the authority in *Minnesota Statutes, sections 3.841 - 3.845*, the Commission investigates complaints and answers questions from legislators, organizations and concerned citizens about state administrative agency rules and rulemaking.

During the 1989 - 1990 biennium, the LCRAR received 53 complaints. Of these, 29 required a detailed investigation by staff. The full Commission held seven meetings, and conducted formal rule reviews on four of these issues.

The LCRAR spent much time and effort on an issue related to prevailing wages and the Departments of Transportation and Labor and Industry. DLI's truck rental rate involved nearly every imaginable player in state government - the Legislature, an ALJ, the Ramsey County Court, the Minnesota Court of Appeals and two state departments. By the time the LCRAR reviewed the issue, the Court of Appeals had enjoined the rule until further rulemaking occurs. Due to the political nature of the issue, at year's end, a resolution remains elusive. Nonetheless, the LCRAR contributed toward a public airing of the issues, encouraged mediation, and gave the departments some direction toward a resolution.

The Commission also sponsored bills amending Chapter 14 and added a purpose statement to the APA as a reminder that the detailed procedural requirements of the APA serve as a means to an end, namely, to encourage and protect the public's right to participate in state agency rulemaking.

The Commission continues its important monitoring function by tracking agency responsiveness to legislative direction to adopt rules. The Legislature may go home after session, but its mandates to adopt rules require agencies to begin rulemaking. The Commission feels responsible to monitor rulemaking activity and keeps policy committees informed about agency follow-through on rulemaking required by law.

Finally, this biennium saw the beginning of *Rules Review*, the LCRAR newsletter for members and staff. The Commission wants to disseminate vital information about rulemaking, which is often otherwise scattered and less than readily accessible. And the Commission has contributed toward a new effort to form a regional professional legislative and staff working group to share ideas on how to better serve the Legislature through its rule review function.

II.

LCRAR Review of Rules

In seven meetings during 1989-1990, the LCRAR conducted four formal rule reviews, which are summarized below:

**1.) Department of Transportation State-Aid Operations Rules
Minnesota Rules, parts 8820.3300, .3400, .9912 and .9913**

At the request of Representative Kathleen Vellenga and Senator Gene Waldorf, the LCRAR held a preliminary assessment on June 7, 1989, regarding DOT State-Aid Operations rules.

Representative Vellenga brought the issue to the LCRAR on behalf of the City of St. Paul, which questioned the appropriateness of the design standards for municipal state-aid streets. In addition, the city advocated changes in the process to grant variances from the standards. City Councilmember Bob Long testified about St. Paul's economic and environmental concerns and the need for revision of the variance process.

Gordy Fay, DOT State-Aid Engineer, explained some history of the State-Aid rules and told the Commission that Rules Chapter 8820 deserved review, and that the department was "willing, able and anxious" to amend the rules.

The Commission directed staff to monitor DOT's review of Chapter 8820 and report back to the Commission. The department subsequently appointed a rules advisory committee to review its draft of amendments to Chapter 8820, which included a representative of the City of St. Paul. The department proposed amendments to the State-Aid Operations rules in July and December, 1990. The LCRAR took no further action on this issue.

**2.) Department of Labor and Industry/Department of Transportation – Rental Rates for
Trucks on Highway Projects
Minnesota Rules, part 5200.1105**

Senator Belanger, on behalf of some independent truck owners (ITOs) and brokers of ITOs, brought a complaint regarding the application of the DLJ truck rental rate rule to truck drivers hauling materials for commercial establishments and the effect of a DOT addenda that interprets the meaning of the term "substantially in place." The rule creates a formula to compensate ITOs for their equipment when used on state highway projects.

The complainants had, during the 1989 session, attempted to obtain legislative relief in the form of a repeal or a temporary suspension of the rule. When these attempts failed, they sought relief from the courts and the LCRAR. At a preliminary assessment on June 27, 1989, the LCRAR took testimony and, finding the issue to be meritorious and worth of attention, scheduled a public hearing for August 1, 1989.

At the public hearing, the Commission heard testimony from representatives of both departments, ITOs, brokers, union officials and commercial establishments. LCRAR members raised questions about the adequacy of the existing rule, and were informed that the administrative law judge (ALJ) that reviewed the rule in 1988 had also cautioned DLJ about possible statutory authority and constitutional difficulties in implementing the rule. The LCRAR directed staff to prepare a final report, with consideration given to the ALJ's recommendation to refer this issue to the appropriate policy committees.

At an October 12, 1989 meeting, LCRAR members approved the recommendations contained in a final staff report which directed DLJ to form a rules advisory committee to assist it in developing a new truck rental rate rule to be ready for public hearing within 120 days. The report also recommended that, in the formulating the new rule, DLJ consult with DOT staff responsible for enforcing it.

On February 19, 1990, the LCRAR heard a status report and entertained DLI's request for an additional 120 days to draft and hold a public hearing on the proposed truck rental rate rule. In light of a recent Court of Appeals injunction that prohibits the state from enforcing the existing truck rental rate rule, the LCRAR concluded there was no need for it to act on the DLI request.

**3.) Department of Human Services – Nursing Home Property Rental Reimbursement Formula
(Rule 50)
Minnesota Rules, part 9549.0060**

In October 1989, Senator Waldorf and Representative Gruenes, on behalf of Care Providers of Minnesota, requested that the LCRAR revisit its review of DHS Rule 50. (The LCRAR had conducted a review of Rule 50 in late 1987 and early 1988, at which the Commission recommended the establishment of a task force to represent all parties affected by the property rental reimbursement formula.)

Staff presented a follow-up report on this issue. The Commission also heard testimony from DHS staff on its progress in resolving issues related to Rule 50, and from industry representatives who requested more legislative involvement in order to reach a satisfactory resolution.

The LCRAR directed staff to continue monitoring the issue with the possibility of assisting the Legislature in resolving the problems with Rule 50.

In 1990, the Legislature directed the nursing home property reimbursement task force to design a new system for the reimbursement of nursing home property expenses. Providers, agency staff, legislators, and legislative staff have met frequently with KPMG Peat Marwick consultants, and must issue a report with recommendations on January 15, 1991. At the direction of the Commission, LCRAR staff participated in the task force.

**4.) Department of Health – Fees for Manufactured Home Parks
and Recreational Camping Areas
Minnesota Rules, parts 4630.1900, 4630.2000 and 4630.2010**

This issue came to the Commission in December, 1990 at the request of Senator Belanger and Representative Blatz on behalf of the Minnesota Association of Campground Operators. The complaint addressed Health Department rules which increase license fees for private campgrounds and manufactured home parks. At a preliminary assessment on December 18, 1990, the complainants questioned the reasonableness of the fee structure.

In an October, 1990 rule hearing report, an administrative law judge found that the department failed to establish the need and reasonableness of the fee rules. The Health Department reduced the fees to accommodate the ALJ's concerns.

In testimony before the LCRAR, however, the complainants asserted that the current fees did not comply with the statutory directive (M.S. 144.122) to be "reasonable" and that amounts collected should equal administrative costs only "where practical." In addition, the campground operators testified that other issues should be re-examined: the 500-site cap, the partial delegation to counties to inspect sites, and the exemption from license fees for public campgrounds.

After other testimony from the department, LCRAR members agreed to refer the issue to the appropriate policy and appropriations committees in the House and the Senate.

III. APA Legislation

Based on the findings of the 1988 LCRAR Subcommittee on Exemptions, members of the Commission sponsored legislation (SF 206/HF 93) to amend the Administrative Procedure Act (Chapter 14), and the LCRAR's enabling statutes in Chapter 3.

The changes made by the 1989 legislation (Laws 1989, Chapter 155) required that after May 1989, no new exempt rule has the force and effect of law until it has been published in the *State Register*. In addition, the law modified the Department of Natural Resources' (DNR) handling of game and fish rules. As a result, DNR game and fish rules are not effective until seven days after their publication in the *State Register* and specified newspapers, and the agency notifies the LCRAR of the forthcoming rule.

The subcommittee's report also led to a change in Senate Rules. The Senate amended Rule 35 to require that any bill containing emergency rulemaking authority or an exemption from Chapter 14 rulemaking procedures must be referred to the Governmental Operations Committee. A similar requirement in the House, House Rule 5.8, was established in 1987.

During the 1990 session, LCRAR-sponsored legislation established a statement of purpose section in the APA. The law (Laws 1990, Chapter 422) also required agencies to send the LCRAR copies of statements of need and reasonableness, and directed an agency to provide notice of hearing to those who requested it.

IV. Staff Monitoring of the APA, Section 14.12

Minnesota Statutes, Section 14.12 requires a state agency that has been required to adopt rules to publish a Notice of Intent to Adopt Rules within 180 days of the effective date of the law requiring the rules. If an agency does not meet the publication deadline, it must notify the LCRAR, appropriate policy committees of the Legislature and the governor of the reason for the failure to do so. The purpose of Section 14.12 is to encourage agencies to exercise promptly their delegated rulemaking authority.

Since 1986, the LCRAR has monitored agency compliance with the publication and notification requirements of Section 14.12. Each year after session, the LCRAR identifies mandatory rulemaking grants, notifies the responsible agencies and monitors whether the agencies publish proposed rules in the *State Register* on time.

For 1989 and 1990, the Section 14.12 publication or notification compliance rate for mandatory rulemaking grants has been as follows:

<u>Year</u>	<u># of grants</u>	<u># of agencies</u>	<u>Compliance rate</u>
1989	66	28	87%
1990	50	19	82%

PART V.

Other Commission Activities

1) Compilation of State Agencies' General Grants of Rulemaking Authority

In December 1989, the LCRAR began a review of general grants of rulemaking authority given to state agencies. Staff requested 89 agencies to provide information on whether the Legislature had granted them broad discretion to adopt rules as deemed necessary to carry out their duties and programs. This data is available upon request.

2) LCRAR Rules Review Newsletter

Beginning in January, 1990, LCRAR staff have produced newsletters intended to inform legislators and staff about the activities of the LCRAR and state agency rulemaking. The newsletters have included explanations of legislative complaints about rules, summaries of administrative law judge reports, court decisions related to administrative rules, reports on staff projects and highlights of proposed and adopted rules.

3) Midwestern Meeting for Rule Reviewers

On November 16, 1990, the Minnesota LCRAR was host to a meeting of ten members and staff of legislative rule review committees from Wisconsin, Missouri, Iowa, North Dakota and Idaho. The meeting was an effort to create an organization for legislators and staff who work on rule review issues to exchange information and experiences.

Central to discussion at the meeting were two recent court cases that uphold legislative veto of state agency rules: Mead vs. Arnell (Idaho) and Martinez vs. Department of Industry, Labor and Human Relations (Wisconsin). Although an appeal to the Wisconsin Court of Appeals is pending, the courts in both cases concluded that since rules are not laws, their rejection or rescission by the legislature is not subject to the Constitutional requirements of bicameral passage and gubernatorial presentment.

The meeting attendees agreed to continue their association by meeting again in July, 1991, in conjunction with the Council of State Governments annual meeting in Omaha, Nebraska.