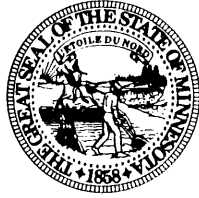


LCRAR



Legislative Commission

to Review Administrative Rules

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Legislative Commission to Review Administrative Rules

Final Report: Laws 1994, Chapter 370 Rulemaking Study

March 8, 1994

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INTRODUCTION

The 1993 Legislature directed the LCRAR to submit a report with recommendations by February 15, 1994 on various rulemaking topics to the House and Senate Governmental Operations committees. The topics are taken directly from the language in Laws 1993, Chapter 370, Section 12. They fall into the following categories:

- I. Rulemaking delegations
- II. Rule impact statements
- III. Rulemaking exemptions
- IV. Fees
- V. Coordination of rulemaking in the executive branch

This study flows in part from rulemaking reports issued in 1993 by both the Commission on Reform and Efficiency (CORE) and the Legislative Audit Commission (LAC).

SUBCOMMITTEE MEETINGS

The Commission chair appointed Representative Peggy Leppik as chair of the Subcommittee. The Subcommittee met as follows:

- November 9, 1993 Organizational meeting.
- November 17, 1993 Testimony about study topics taken from:
- Laura King, Assistant Commissioner for Budget Services, Department of Finance;
 - Bruce Reddemann, Director of Budget Operations, Department of Finance;
 - Joel Jamnick, Legislative Counsel, League of Minnesota Cities;
 - Christie Eller, Assistant Attorney General, Attorney General's Office;
 - Kevin Johnson, Chief Administrative Law Judge, Office of Administrative Hearings;
 - Rose Herrera Hamerlinck, past member of the CORE Project;
 - Nick Riley, Association of Minnesota Counties;
 - Carol Milligan, Rule Development Coordinator, Department of Agriculture;
 - Charles Schaffer, Director of the Small Assistance Division, Department of Trade and Economic Development;
 - Marlys McPherson, Program Evaluation Division, Legislative Audit Commission; and
 - Mike Hickey, National Federation of Independent Businesses.
- December 20, 1993 Hearing held in conjunction with House Governmental Operations and Gambling Subcommittee on Administrative Rules; Senate Governmental Operations and Reform Subcommittee on Rulemaking; and the full LCRAR. Guest speakers were:
- Professor Arthur Bonfield, University of Iowa Law School, author of State Administrative Rule Making;
 - Representative Janet Metcalf, co-chair, Iowa Administrative Rules Review Committee; and
 - Senator Robert Jauch, Senate Minority Leader and member of Wisconsin Joint Committee for Review of Administrative Rules.
- January 18, 1994 Discussion of preliminary report and recommendations.

LCRAR MEETINGS

- December 20, 1993 Guest speakers: Professor Bonfield; Representative Metcalf, Iowa Administrative Rules Review Committee; and Senator Jauch, member of Wisconsin Joint Committee for Review of Administrative Rules.
- January 26, 1994 Discussion of Subcommittee report and bill.
- February 9, 1994 Discussion and public testimony of Subcommittee report and bill.

February 10, 1994 Chair informed chairs of House and Senate Governmental Operations Committees of delay in report and forwarded draft report to them.

March 8, 1994 Discussion and approval of report and bill.

Section numbers in bold after recommendations refer to sections in the bill approved by the Commission, Senate File 2363 / House File 2593.

LAWS 1993, CHAPTER 370, SECTION 12

No later than February 15, 1994, the legislative commission to review administrative rules shall submit a report including its recommendations to the governmental operations and gaming committee of the house of representatives and the governmental operations and reform committee of the senate on the following topics:

I. RULEMAKING DELEGATIONS

(1) A list of all delegations of rulemaking authority to state agencies that indicates which of those are grants of general rulemaking authority and which are narrowly drawn, specific authorizations;

(2) The use made of broad delegations of rulemaking authority, the purpose served by this use, and the relationship of broad delegations with other delegations of authority in the promulgation of rules;

(3) An evaluation of the continued need for these delegations of rulemaking authority;

(4) An evaluation of the continued need for delegations of rulemaking authority to quasi-independent boards or commissions.

FINDINGS:

The LCRAR asked for current lists of rulemaking delegations from the 20 largest cabinet-level agencies as defined as "departments" in *Minnesota Statutes*, Section 15.01. All agencies responded and most also answered the inquiry about the use and continuing need for general rulemaking authority. Not all of the largest agencies have general rulemaking authority, but those that do would like to retain it for any of the following reasons:

- It is necessary for agencies to respond quickly to legislative or federal changes.
- It is needed to make housekeeping or non-controversial changes.
- It is impossible for the legislature to predict what rulemaking authority will become necessary.
- It enables the legislature to avoid micro-management.
- The legislature is not in session at all times.
- The Administrative Procedure Act protects the public from any abuse of agency authority.

Both CORE and the LAC raised concerns about agency abuse of general rulemaking authority in their reports. However, no data was provided to support these concerns.

RECOMMENDATIONS:

- #1.** Rulemaking authority is granted on a case-by-case basis. The LCRAR supports more legislative attention to rulemaking language in bills, making for more specific delegations. This attention can occur in either or both policy committees and Governmental Operations committees. Whenever possible, the legislature should make policy decisions in law rather than by delegating authority to agencies to make rules, especially in controversial areas.
- #2.** Because drafting more specific delegations may not always be possible or desirable, the LCRAR supports a meaningful systematic review of proposed rules by the legislature. The LCRAR proposes amending the APA to provide for legislative review of proposed controversial rules.

Under the scheme suggested in the bill approved by the Commission, the Chief Administrative Law Judge is to prepare a summary of issues that arose at the rulemaking hearing and is to forward it to the legislature for review by policy committees. The policy committees will then have an opportunity to hold hearings about rule issues and to address unresolved problems in bills. No controversial rule may be adopted unless submitted to the legislature for consideration. (Sections 7, 8)

- #3. From the legislative perspective of delegating rulemaking authority, quasi-independent boards are not unique. Rulemaking authority is granted on a case-by-case basis, board-by-board. The LCRAR encourages policy committees to review these delegations. However, if the executive branch is concerned about the accountability of these boards, it should seek legislative changes to address its concerns.
- #4. To begin more effective legislative oversight of specific and general rulemaking delegations, the LCRAR will refer the lists of delegations provided by the largest agencies to the appropriate policy committees, and recommend that the committees biennially review the delegations and rules adopted thereunder for continued appropriateness. In addition, the LCRAR will gather this kind of information for use by the entire legislature every five years. (Section 1)

II. RULE IMPACT STATEMENTS

(5) Recommendations for establishing statutory criteria to be used in preparing rule impact statements including those in Minnesota Statutes, Sections 14.11 and 14.115, for agricultural land, small businesses, and local governments or the removal of requirements for these impact statements;

(6) Recommendations for development of more complete information on the economic and other impacts of proposed rules on directly affected parties and on agencies required to enforce the rules, how to determine when these impacts are significant enough to require greater efforts at assessing impacts, on ways this information might be obtained from affected parties and developed by agencies, whether this information should be included in the statement of need and reasonableness, and how the information might be distributed before the proposed rule is published.

FINDINGS:

It is desirable for the legislature to have information about economic impacts, costs to adopt rules, areas of controversy and alternative methods of regulation, but the current APA requirements relating to small businesses, agricultural land, and local governments are not very effective. The new rule note regulation in Laws 1993, Chapter 370, Section 2 as yet untested, is an attempt to address this need for information. Professor Bonfield urged adoption of the Model Act provision 3-105 for regulatory analysis, but warned that it is a burdensome and expensive requirement.

RECOMMENDATIONS:

- #5. The LCRAR proposes repealing all impact statements currently required by the APA relating to small business, agricultural land, and local governments, and replacing them with a modified, less burdensome version of "regulatory analysis" found in the Model State Act Section 3-105. (Section 5)
- #6. The LCRAR will monitor the new "Rule Note" process and proposes amending Section 3.984 to require that rule notes also contain an estimate of the cost of adopting rules under the APA. (Section 2)

III. RULEMAKING EXEMPTIONS

(7) Criteria to be used by legislative committees for the granting of exemptions to the rulemaking requirements of Minnesota Statutes, chapter 14.

FINDINGS:

In 1989, the LCRAR issued a rulemaking exemptions report that recommended:

- Reducing the number of rulemaking exemptions by repealing unnecessary exemptions.
- Amendments to House and Senate rules requiring the Governmental Operations Committees to review exemptions.
- Periodic review of exemptions by the LCRAR.
- Additional publication requirements for exempt rules.
- Policy committees review exempt agencies and rules under their jurisdiction.

The LCRAR remains concerned about exemptions because of due process considerations. Exemptions continue to be granted by the legislature but presently are not limited in scope or duration. Also, under our current APA system, exempt rules do not undergo a legal review.

The Commission proposes adopting the Model Act provision 3-108 allowing exemptions for true emergencies and technical changes. Proposed new due process safeguards include a legal review and justification by state agencies. This changes our current scheme for adopting emergency rules.

RECOMMENDATIONS:

- #7.** To provide legislative oversight for exempt rules, the LCRAR proposes amending the APA to sunset all existing and future exemptions after a period of two years, i.e. by July 1, 1996. **(Sections 13, 14)**
- #8.** The LCRAR encourages policy committees to review existing exemptions as soon as feasible, and to sunset problematic exemptions sooner than in two years, e.g., the general exemption for rules of the State High School League, if there are legislative concerns about them.
- #9.** The LCRAR proposes amending the APA to allow general exemptions for good cause for emergencies and technical changes, based on the language in the Model Act Section 3-108 **(Section 15)**. This amendment will require the Office of Administrative Hearings to conduct a legal review of all exempt rules for compliance with the new APA provisions, i.e. is good cause shown, do the rules exceed statutory authority, or conflict with the law? **(Section 13)**
- #10.** The LCRAR proposes amending the APA to allow a new category of exemptions for forms. **(Section 4)**
- #11.** The LCRAR proposes repealing the emergency rulemaking provisions in chapter 14, except for the expedited process created for the Department of Natural Resources, making it no longer necessary for the legislature to grant specific authority to adopt emergency rules. **(Sections 19, 21)**
- #12.** The LCRAR encourages the House and Senate Governmental Operations Committees to continue scrutiny of exemptions by using the standard provided in the comments to Model Act Section 3-116:
Balance the need for public participation in, and adequate publicity for, agency policy making against the need for efficient, economical and effective government.

IV. FEES

(8) Recommendations on which fees should be set or changed by rule or statute.

FINDINGS:

LCRAR staff reviewed 20 Administrative Law Judge (ALJ) reports from 1988 to 1993 for fee-related rules. Staff found that:

- In all but one case, ALJs approved fee rules as proposed by agencies on the grounds that agencies demonstrated that the fees were needed and reasonable to cover the costs of administering their programs.

- Delegations that contained specific criteria and formulas for agencies to consider in adopting fee rules resulted in fewer controversies and a better understanding of legislative intent by the ALJs and agencies. (example -- Laws 1993, Chapter 270, Section 1, Subdivision 2, PCA Hazardous Waste Administration Fees).
- On the issue of fees that recover long-standing program deficits, ALJs have rejected arguments that rules recouping such deficits are unlawfully retroactive.

The LCRAR sent a letter in November 1993 to the finance and appropriation committees in the House and Senate informing them of our study and asking for input on the issue of fees. The LCRAR received only one response from Senator Don Samuelson, Chair, Health Care and Family Services Division.

The Department of Finance will be implementing a new statute to govern fee rules, Section 16A.1285. The new law was part of a departmental effort to reform the way it captures, reports and classifies fees and charges. The department modified its departmental earnings report to clarify the definition of fees, how fees are set, how they are reported, and compares one fee against another. In addition, the department is implementing a new computerized accounting system to improve agency cost-setting and revenue intake, and the biennial fee-setting process.

Finally, during its normal business the Commission has reviewed complaints about adopted fee rules that have raised the issues of retroactivity and equity. The Commission has found that where agency rulemaking authority contains no standards for fee rules, it is very difficult to exercise effective legislative oversight.

RECOMMENDATIONS:

- #13. The LCRAR proposes amending the APA to make all technical reference changes to Section 16A.1285, and to monitor this new statute governing fees (Section 11). The LCRAR requests from the Department of Finance, as soon as feasible, information about the number of fees currently set in rule and in law and the amount of revenue collected annually by fees.
- #14. The LCRAR encourages the legislature to draft all new grants of rulemaking authority for fee rules to be as specific as possible.
- #15. The LCRAR proposes amending Section 16A.1285 to limit deficit recovery of program costs by agencies through fee rules to two years, rather than the current practice that allows a five-year deficit recovery period. (Section 16)

V. COORDINATION OF RULEMAKING IN THE EXECUTIVE BRANCH

(9) Methods to improve the coordination of rulemaking in the executive branch.

FINDINGS:

Currently, rulemaking is not centralized in the executive branch. Some larger agencies have created rule writing divisions. But agencies that infrequently adopt rules have less experience.

If the legislature desires more executive branch accountability, some form of gubernatorial review is necessary and an office of administrative rules review can serve the governor to perform this function.

The governor has issued the following executive orders which address coordination of executive branch rulemaking:

- Executive Order 92-15. Required all state agencies to review their rules and regulations affecting businesses and weigh them against certain tests of appropriateness and effectiveness to determine if they had exceeded their usefulness or were no longer necessary. The Department of Trade and Economic Development (DTED) identified 146 rules for repeal or amendment. This year a bill will be introduced to repeal the identified rules, and agencies will begin amending the rules identified for amendments.

- **Executive Order 93-10.** Requires agencies to annually review their regulatory statutes and rules affecting businesses as part of the budget preparation process, and to develop recommendations for the amendment or elimination of those which are no longer effective, appropriate or efficient. In addition, agencies have been asked, within the framework of their organization, to clarify those processes to shorten the internal critical paths for handling of regulatory matters.
- **Executive Order 93-9.** Requires DTED to work with other agencies in conducting a feasibility study of true one-stop licensing and permitting for all state licenses and permits. One-stop shopping is defined as a single point of contact in the state government which has the resources and expertise of personnel, budgeting, systems analysis, data processing and so forth to actually issue applications for various licenses and permits, and either process them or get other agencies to process them, and then to issue licenses as an agent for the agency that has the actual legislative authority to license. DTED's final report is due to the governor in January 1995.

RECOMMENDATIONS:

- #16. The LCRAR proposes amending the law to provide an on-going training program in the Department of Employee Relations for agency rulemakers from all agencies. **(Section 18)**
- #17. The LCRAR proposes amending the law to create an administrative rules counsel to advise the governor on rulemaking matters. **(Section 3)**
- #18. The LCRAR proposes amending the law to provide a form of gubernatorial rule review. **(Section 3)**.
- #19. The LCRAR will monitor the one-stop shopping efforts underway by the executive branch.