A STAFF REPORT TO THE HOUSE AND SENATE GOVERNMENTAL OPERATIONS COMMITTEES ON THE MINNESOTA ADMINISTRATIVE PROCEDURES ACT AND ITS CURRENT APPLICATION

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THE ADMINISTRATIVE PROCEDURES ACT AND ITS CURRENT APPLICATION: A STAFF REPORT

PREFACE

During the 1974 interim, the House and Senate Governmental Operations Committees (herein referred to as the "Committee") held five meetings* to review the Minnesota Administrative Procedures Act and its current application. The major part of those meetings involved testimony from agency officials and members of the public interested in the administrative process.

Midway through the Committee's inquiry, specific problem areas came into focus and, at the direction of the Committee, the staff prepared a working draft of amendments addressed to each area of concern (see the "Information Notebook" for the complete text). During the Committee's two meetings in November, the amendments were presented and discussed.

At the final Committee meeting, the staff was directed to review the entire record of the Committee's proceedings and modify the proposed amendments by incorporating appropriate suggestions and criticisms.

This report is, in substance, such a second draft. Background information and commentary are interwoven with the language of the amendments for the benefit of legislative consideration during the 1975 session.

A more detailed compilation of reference material developed by the Committee is available separately as an "Information Notebook." (A table of contents to the Information Notebook follows.)

Finally, the Committee staff wishes to express appreciation to members of the Committee, agency officials and numerous private associations and individuals for their cooperation and assistance in this project.

*In two hour sessions on May 7, June 3 and 18, and November 14 and 21)

INFORMATION NOTEBOOK

Contents

PROPOSED AMENDMENTS TO THE ADMINISTRATIVE PROCEDURES ACT: SECOND DRAFT WITH BACKGROUND INFORMATION AND COMMENTARY

As originally drafted, the proposed APA amendments were in four sets. (Again, for the text of those amendments, see the Information Notebook.) Set 1 was a comprehensive attempt to address inadequacies in the current language of the APA. Set 2 set forth a proposal presented initially by the Administrative Law Section of the Minnesota Bar Association to establish an office of hearing examiners responsible for conducting all hearings under the APA. Sets 3 and 4 proposed alternative functions and powers for the Legislative Joint Committee for Review of Rules, created by 1974 law.

The latter two sets of amendments were of secondary concern. The initial intent of the Committee was to isolate and correct any weaknesses in the language and application of the APA. The Committee did not wish to become involved in a controversy surrounding the existence of the Legislative Review Committee. Amendment sets 3 and 4 were drafted as options for future consideration. The two amendment sets are not repeated in this report.

Also, it should be noted that amendment sets 1 and 2 have been combined into a single bill.

By way of introduction, it should additionally be pointed out that the Committee's concern was with the "rule-making" or quasi-legislative aspects of the APA. There was little attention given to the "contested case" or quasi-judicial procedures of the law and the only amendment offered that would directly affect that aspect involves the creation of an office of hearing examiners. For a general discussion of the "contested case" area, see the Information Notebook, "Reference Material," p. I-16.

SECOND WORKING DRAFT

A Bill for an Act

relating to state administrative procedures...

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

Section 1. Minnesota Statutes 1971,* Section 15.0411, is amended to read:

*This draft is written of necessity in reference to M.S. 1971, and Laws 1973 and 1974, since M.S. 1974 are not yet available.

15.0411 /DEFINITIONS./ Subdivision 1. For the purpose of section 15.0411 to ~~15.0422~~ 15.052 the terms defined in this section have the meanings ascribed to them.

Subd. 2. "Agency" means any state officer, board, commission, bureau, division, department, or tribunal, other than a court, having a statewide jurisdiction and authorized by law to make rules or to adjudicate contested cases. Sections 15.0411 to ~~15.0422~~ 15.052 do not apply to (a) agencies directly in the legislative or judicial branches, (b) emergency powers in laws 1951, chapter 694, title III, sections 301 to 307, (c) ~~adult corrections commission and~~ the pardon board, (d) the ~~youth conservation commission,~~ Minnesota corrections authority, (e) the department of manpower services, (f) the director of mediation services, or (g) ~~the department of labor and industry, (h)~~ the workmen's compensation commission.

Comments

(For additional background material on the definition of "agency," see the Information Notebook, "Reference Material," pp. I-6 through I-8.)

At an early date in its inquiry, the Committee asked each of the agencies specifically excluded from the APA definition of "agency" to justify the continuance of their exclusion. (The effect of exclusion from the definition is to exempt the agency from the requirements of the APA.) The statements that were received can be located in the Information Notebook under "Correspondence, Exclusions From the APA."

In the first draft of amendments, the exclusions for the Director of Mediation Services and the Department of Labor and Industry were stricken; and the exclusions for the Adult Correction Commission and Youth Conservation Commission were not extended to the Minnesota Corrections Authority, the successor agency. Communications from the Commissioner of Corrections (see Information Notebook) and discussions by the Committee supported the

granting of an exclusion to the Corrections Authority. A similar modification from the initial draft is proposed with respect to the Director of Mediation Services. Thus, the only agency exclusion proposed to be eliminated is for the Department of Labor and Industry (see letter from Bud Malone, Commissioner, in the Information Notebook, "Correspondence, Exclusions From the APA").

(Section 1, Cont., Amending M.S. 1971, 15.0411)

Subd. 3. "Rule" includes every ~~regulation~~ agency statement of general applicability and future effect, including the amendment, suspension, or repeal thereof, ~~adopted by an agency, whether with or without prior hearing,~~ 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) regulations 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 and regulations relating to the management, discipline, or release of any person committed to any state penal institution; or (c)~~ rules of the division of game and fish published in accordance with Minnesota statutes, section 97.53; or ~~(d)~~ (c) regulations relating to weight limitations on the use of highways when the substance of such regulations is indicated to the public by means of signs; or (d) opinions of the attorney general.

Comments

A. Exceptions to the Definition of Rule. First, a brief comment about changing the exceptions to the definition

of "Rule" (which exceptions again have the effect of excluding agencies or some part of their actions from the requirements of the APA). In the first draft, the exception of "rules of the division of game and fish" was removed, but it should be emphasized that the proposed striking was not based on prior inquiry and the Committee had received no indication that the game and fish exception should be eliminated. The intent of the first draft proposal was to call forth from the division a statement specifying the reasons for the exclusionary provision. As presented to the Committee in testimony, those reasons appeared to be compelling and the "game and fish" exception clause is restored in this second draft.

The proposal to remove the exception relating to inmate disciplinary rules was a part of the original draft and is retained here. It is felt that disciplinary standards for inmates have been somewhat arbitrary and inconsistent, and their maintenance and availability have been less than adequate. The procedural requirements of the APA will help to ameliorate these weaknesses, and will be consistent with recent judicial efforts to secure greater due process in correctional institutions (see memo to Members of House Subcommittee on Stillwater Prison from Dianne Heins, Information Notebook, "Correspondence, Exclusions From the APA").

Finally, it is proposed that "Opinions of the Attorney General" be included as an exception to the definition of rule. This change is only an editorial modification (i.e., shifting language for the sake of clarity) since opinions of the Attorney General are already excluded from the APA by Section 15.0413, Subdivision 1.

B. The Definition of Rule Generally. The definition of rule proposed above, "...every agency statement of general applicability and future effect...made to implement or make specific the law.../etc./," is resubmitted as drafted in the original set of proposals, even though no other area of the first working draft received more attention or criticism. Many concerns and complexities are involved. It is our strong opinion, however, that when properly understood, the proposed definition of rule is an appropriate and necessary change in the current law. In substantiating that opinion, considerable comment is required. We would emphasize the following:

1. The current definition of rule is circular. The law says that a rule is a "regulation...," but

"regulation" is never defined and the APA uses the terms "rule" and "regulation" interchangeably.

The effect of having such a nondefinition is to allow agencies considerable discretion in deciding whether to adopt administrative policies or standards according to the procedures of the APA or through some other method (possibly less open to public involvement and oversight by the Attorney General). As shall be expanded upon below, other ambiguities in the law compound this problem area, with the result that agencies do at times choose an alternative procedure to the APA in the adoption of substantive policies and standards that affect the rights of the public. Such non-APA guided action has been termed "informal rule-making." The Committee's inquiry found it to be an important problem; a problem that can be corrected largely by removing the circularity from the current definition of "rule."

2. "Informal rule-making" is not a newly recognized problem, but one that has been of concern in Minnesota and other states for at least several decades. It is, in fact, instructive to briefly review the comments of the Minnesota Legislative Research Committee in 1954 on the subject:

> When administrative agencies conform to the procedures outlined for the process of promulgating rules and the grants of rule-making authority are properly restricted in specific cases, then the question remaining is the extent to which administrative agencies engage in <u>informal</u> rule-making and interpretation. It is difficult to establish how much administrative agencies in Minnesota have exceeded their authority by issuing administrative directives and developing informal policy interpretations. Instances are known, however, in which regulatory agencies have passively coerced regulated business to comply with informal rules and administratively-created, unpublished policy directives. Administrative heads and supervisory personnel have been known to encourage varying standards of rules and law enforcement and thereby, in effect, work an informal amendment of formally established rules and thus illegally chang-

> ing the legislative intent that there be uniform application of laws including rules and regulations. A certain degree of such informal interpretation is inherent in and necessary to the proper functioning of the administrative process in government, but the steering of administrative action in accordance with and within the narrow confines of published and formally established rules should be encouraged. (Minnesota Legislative Research Committee, Publication No. 61, June 1954, pp. 9-10)

The issue of "informal rule-making" reoccurred in deliberations of the 1968 Legislative Interim Commission on Administrative Rules, Regulations, Procedures and Practice and, again, legislative concern was expressed (transcripts are available through the Legislative Reference Library).

To update the current inquiry on the matter of "informal rule-making" the Committee staff conducted a survey of documents manifesting administrative adoption of policies or standards without adherence to the APA since July, 1973 (see letter from Chairman Bill Quirin to All Department, Board and Commission Heads, May 20, 1974, in the Information Notebook, "Correspondence"). In surveying the documents submitted, the staff found that some agencies had "informally" adopted (by a non-APA procedure) a wide variety of statements, standards, guidelines, etc. Some were of an advisory nature, others only informational, but some statements submitted were substantive in their effects on the public and were adopted as enforceable policy. It is, of course, this latter group that is of concern, in that they exhibit the characteristics of a "rule" but they are not adopted through the APA procedure. For example:

> On July 8, 1974, the Department of Human Rights issued "Guidelines for Eliminating Sex Discrimination in Elementary, Junior and Senior High School Athletics, interpreting the 1973 Human Rights Act and setting forth policy and standards relative to school athletic activities.
>
> In November, 1973, the Board of Education published its Guidelines for the Collection, Maintenance and Release of Pupil Records, placing limitations on the accessibility of personal pupil records and stating when such records may be released.

On November 20, 1973, the State College Board issued its Operating Procedure 19 relating to liquor regulations, allowing consumption of liquor in residence halls and in other than academic buildings for "special occasions."

On November 27, 1973, the State College Board issued its fourth amendment to Internal Rule 5 establishing criteria for the determination of resident or nonresident tuition status, providing for determinations to be based upon various domicile and support characteristics.

On June 7, 1974, the Department of Revenue, Income Tax Division, issued a memo to its tax examiners relating to the determination of eligibility for rent credits of tenants renting from relatives, specifying that rental transactions must be at arm's length and permitting communications with a landlord to verify the transaction.

On June 26, 1974, the Department of Public Welfare issued its Policy Bulletin #68 relating to AFDC grants, dictating how "emergency supplementary grants" are to be distributed, specifying which types of major home repairs are authorized.

On November 4, 1974, the Department of Public Welfare issued its Policy Bulletin #96 relating to the payment of medical assistance benefits where spouses live apart from each other, requiring a "social evaluation" to determine eligibility.

On May 17, 1971, (outside of the survey period, but noted because it is still in effect) the Department of Public Welfare adopted a statement of "official policy" on the performance of prefrontal lobotomies on patients in state hospitals.*

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*The committee staff wishes to point out that the above examples have been selected from a large number of "informal rules" and are not presented in an attempt to criticize any particular agency. Rather, the examples are cited only to illustrate the need for greater clarity in the definition of rule.

(For more details concerning the staff survey and analysis of current "informal rule-making" see the Information Notebook, "Correspondence.")

3. "Informal rule-making" undermines important safeguards on governmental action.

As was mentioned earlier, of necessity, executive agencies fulfill certain quasi-judicial and quasi-legislative functions. The recognition of this breach in strict "separation of powers" is of long standing. But, it has also been recognized that in exercising extra-executive powers, administrative agencies must be bound by certain standards to insure that fairness and due process are afforded all interested persons. Some of these standards, particularly in the quasi-judicial area, have been imposed on agencies by the courts. But the Legislature also has an essential role to fulfill in seeing to it that the public is protected when an agency acts either quasi-legislatively or quasi-judicially. The primary instrument available to the Legislature is the Administrative Procedures Act. It is the framework within which an agency is supposed to exercise the authority delegated to it by the Legislature. When an administrative agency does not adhere to the APA in adopting a policy or standard (i.e., when functioning quasi-legislatively), the following results:

--the agency is not bound by notice and hearing requirements, i.e., the agency action may be taken without giving those to be affected an opportunity to share their opinions and information with the agency;

--the agency is not required to specify its legal authority to adopt the policy or standard;

--the agency is not held accountable for demonstrating, in facts, the need for the policy or standard;

--the responsibility of the Attorney General to review the agency's proposed action is circumvented (which is particularly important because the Attorney General can stop an agency from adopting any rule that would extend the power of the agency beyond its delegated authority, and he can stop the adoption of any rule for which need has not been demonstrated); and, finally, in this non-APA process

--the agency's policy or standard may not, even after adoption, be immediately accessible for public review, since no publication require-

ments exist outside of the APA.

It is true that even in the absence of adherence to legislatively set administrative procedural requirements, the courts can and have protected the public from arbitrary agency actions. The APA itself recognizes the role of the courts and provides that agency statements of policy or standards ("rules") can be invalidated by a state district court if not properly adopted (see M.S. 15.0416 and 15.0417). On the other hand, the courts have recognized the need for the Legislature to set strict procedural standards in the delegation of authority to administrative agencies. As Professor Frank Cooper noted in his exhaustive analysis of state administrative law: "...starting some thirty years ago... state courts began the formulation of a doctrine that delegation of legislative or judicial power to administrative agencies must be limited by the imposition of legislatively prescribed standards. Such standards serve the purpose of stating...a guide /for/ the agency, directing and channeling its discretion...."*

4. The proposed definition of "rule" is consistent with the most authoritative legal advice available and with the practical experience of numerous other states and the Federal Government.

The definition of rule as "...every agency statement of general applicability and future effect made to implement the law..." is the definition prescribed in:

--the Uniform Law Commissioners' Revised Model State Administrative Procedures Act (see Information Notebook);

--the Federal APA (except that Rule and Orders from Contested Case are defined together);

--most state administrative procedures acts (at least thirty-five states have been identified as having such a definition).

Above reference was made to the work of Professor Frank Cooper. His two volume study is the most comprehensive treatment of state administrative law ever undertaken. (The effort was a research project of the American Bar Foundation and the

*Cooper, State Administrative Law (1965), p. 54.

University of Michigan Law School). His comments on the definition of rule are worth considering:

> Among the elements which should be included in the definition, the following are of particular importance:
>
> First, the concept should be described in broadly inclusive terms (the word 'statement' has been most popular). This has proved necessary to defeat the inclination shown by some agencies to label as 'bulletins,' 'announcements,' 'guides,' 'interpretive bulletins,' and the like, announcements which, in legal operation and effect, really amount to rules; and then to assert that the promulgations are not technically rules but merely policy statements, and hence may be issued without observance of the procedures required in connection with the adoption of rules.
>
> A second element which is important is that the term 'rule' be confined, by definition, to statements of general applicability....
>
> A third essential inclusion in any workable definition of the term 'rule' is a provision that the term 'rule' is a provision that the term includes all statements which implement, interpret or prescribe law or policy. Thus, the term includes not only so-called substantive regulations but also all statements setting forth the agency's position on questions of statutory interpretation and questions of policy.
>
> A fourth essential is that the term 'rule' include all statements describing the procedure or practice requirements of the agency.
>
> Finally, it is important to include, within the definition of 'rule,' amendments or repeals of rules, because obviously the amendment or repeal of a rule can have just as important an effect as the adoption of a new rule.

A majority of the states having adopted definitions of the term 'rule' have included most of the above-described essentials.*

5. Other remedies to the problem of "informal rule-making" have been considered, but the proposed modification in the definition of "rule" is the most straightforward and appropriate approach.

In addressing the problem of informal rule-making, the staff considered various ameliorative approaches. Of particular concern here are three: 1) legitimate "informal rule-making" by defining a class of "rules" (given some other name) that need not be adopted through the full rule-making process of the APA; or 2) assume that "informal rule-making" will take place and provide a process whereby the public will be informed about the adoption of "informal rules" and have a means of recourse against them (while not amending the law so as to define "informal rules" as a separate and distinct category from "rules"); or 3) prescribe that all quasi-legislative action by an agency shall be bound to the procedural standards of the APA (except when specifically exempt).

In trying to execute the first approach, the main challenge is, of course, definitional. It is requisite that at least two distinct categories of quasi-legislative executive statements be defined with one class of statements to be adopted in an APA manner and another class of statements to be adopted less formally.

The problem with words is an extremely difficult one and the staff was not satisfied that two separate categories of quasi-legislative action can be clearly defined. The approach is also troublesome because even if the definitions can be achieved, the effect would be to give agencies considerable discretion and require little accountability in making a range of policies that affect the rights of the public. An "informal rule" category would undoubtedly involve matters which affect the rights of the public and the evidence is strong that such matters should be subject to APA standards.

The second approach recognizes the improbability of defining a category of "rules" and a category of "informal rules" distinct from one another; but,

*Cooper, State Administrative Law (1965), pp. 107-109.

the second approach assumes that in the day to day operation of agencies, two categories will emerge de facto. In other words, it is assumed that agencies will participate in "informal rule-making." Thus, the attempt of the second approach is to provide safeguards for such an occurrence.

In amendment set 1, of the original drafts, this approach was set forth by adding a subdivision (Subd. 7) to Section 15.0412 which would: 1) require public notice of an agency's intention to adopt a "statement or standard of policy or interpretation of general application...without adherence to the procedure..." of the APA; 2) require the notice to include the text of the statement or standard that is being proposed; 3) require the agency to hold a public informational hearing on the statement or standard when petitioned to do so by at least fifty persons; 4) require the agency to hold "rule-making" hearings on the statement or standard when directed to do so by the Attorney General; and 5) require statements or standards not adopted as rules to be published in the State Register.

The above procedures would appear to be adequate to safeguard against agency abuse of "informal rule-making" when such informal rule-making comes onto the scene. However, the mere existence of subdivision 7 has an inherent disadvantage--it assumes that agencies will participate in "informal rule-making" and, indeed, the subdivision may encourage such participation by giving indirect recognition to the status of "informal rules."

Placing the above procedures into the law cements the ambiguity from which "informal rule-making" has arisen. The procedures seem to imply that agencies may propose and proceed to take quasi-legislative action, i.e., to adopt statements or standards of policy of general application, without adherence to the formal rule-making requirements of the APA. That implication is inconsistent with the Committee's object (as we, the staff, perceived it). The intention of the Committee was to remove ambiguities, to clarify and simplify and to require agencies to adhere to the APA procedure whenever they are exercising a quasi-legislative responsibility in a way that will affect the rights of the public.

Thus, we move to the third approach, which is to clarify that all agency statements of general application and future effect...made to implement the law are "rules," to be adopted according to the standards of the APA. This approach has already been defended and that commentary will not be repeated. However, one brief reply to some criticism of this third approach is in order.

Some agency officials have objected to the third approach and criticized the definition of rule by pointing out areas of executive quasi-legislative activity that would be over-burdened by the APA rule-making procedures. Indeed, there undoubtedly are activities that must be pursued with more flexibility than the APA rule-making procedures allow. But those activities (involving an agency's operation in whole or part) should be excluded from the APA specifically by the Legislature after a full examination of the circumstances involved.

Further, many of the time constraint problems presented by agency officials could be adequately managed by more thoughtful planning of the administrative rule-making process.

It should also be remembered that in very difficult situations, agencies may have recourse to the emergency rule-making provisions of the APA. M.S. 15.0412, Subd. 5, provides that agencies with emergency powers may establish emergency rules without adherence to the normal rule-making procedures of the APA when necessary; but such emergency rules can only be effective for 60 days (which we propose to extend to a total of 150 days), after which they must be adopted formally as rules or become void. This would open an avenue of flexibility while maintaining proper safeguards and administrative standards.

However, many of the agencies that have complained about the time burden of rule-making have not utilized the above emergency provision. However, the provision is an appropriate aspect of the APA and one that speaks well of the law's reasonableness.

In summary, we recommend that the Legislature clarify the definition of "rule," making it broad and inclusive of all agency quasi-legislative activity, and thereby remove a troublesome ambiguity that has resulted in the unwise proliferation of "informal rule-making."

(Section 1, Cont., Amending M.S. 1971, 15.0411)

Subd. 4. "Contested Case" means a proceeding before an agency in which the legal rights, duties, or privileges of specific parties are required by law or constitutional right to be determined after an agency hearing.

Comments

As stated previously, the Committee did not give attention to the "Contested Case" aspects of the APA. For general background comments, see Information Notebook, "Reference Material," pp. I-16 and I-17.

* * *

Sec. 2. Minnesota Statutes 1971, Section 15.0412, Subdivision 1, is amended to read:

15.0412 /RULES, PROCEDURES./ Subdivision 1. ~~In addition to other rule making powers or requirements provided by law each agency may adopt rules governing the formal or informal procedures prescribed or authorized by sections 15.0411 to 15.0422. Such rules shall include rules of practice before the agency and may include forms and instructions. For the purpose of carrying out the duties and powers imposed upon and granted to it, an agency may promulgate reasonable substantive rules and regulations and may amend, suspend or repeal the same, but such action shall not exceed the powers vested in the agency by statute.~~ Each agency shall adopt, amend, suspend or repeal its rules in accordance with the procedures specified

in sections 15.0411 through 15.052, and only pursuant to authority delegated in law and in full compliance with its duties and obligations.

Comments

The following six sections of the bill are concerned with M.S. 15.0142, which sets forth the major rule-making standards of the APA. The proposed amendments seek to structure 15.0412 in a clear and organized form (and, thus, language stricken in one existing subdivision may be moved or eliminated). The above amendment is illustrative. It attempts to remove language that contributes to the law's ambiguities and replaces it with a simple but basic statement concerning rule-making authority and procedure.

* * *

Sec. 3. Minnesota Statutes 1971, Section 15.0412, Subdivision 2, is amended to read:

Subd. 2. To assist interested persons dealing with it, each agency shall, in a manner prescribed by the commissioner of administration, prepare a description of its organization, stating the process whereby the public may obtain information or make submissions or requests. The commissioner of administration shall annually publish these descriptions in the state register ~~so far as deemed practicable, supplement its rules with descriptive statements of its procedures, which shall be kept current.~~

Comments

This amendment has been changed from the original draft so as to incorporate a specific suggestion: that the organizational

material be published annually in a form prescribed by the Commissioner of Administration. Generally, the concept of this amendment is a part of the Model State APA and appeared to be acceptable to all interests involved in the Committee's deliberations.

* * *

Sec. 4. Minnesota Statutes 1971, Section 15.0412, Subdivision 3, as amended by Laws 1974, Chapter 344, is amended to read:

Subd. 3. ~~Prior to the adoption of any rule authorized by law, or the suspension, amendment or repeal thereof, unless the agency follows the procedure of subdivision 4, the adopting agency shall publish notice of its intended action in the state register as described in section 15.051 and afford interested persons opportunity to submit data or views orally or in writing.~~ Each agency shall adopt rules setting forth the nature and requirements of all formal and informal procedures related to the administration of official agency duties. Procedures concerning only internal management which do not directly affect the rights of or procedures available to the public need not be adopted as rules.

Comments

The above amendment removes the language of the first draft that required "forms and instructions" to be adopted through rule-making. The second draft amendment also attempts to clarify that the term "rules," even in the context of procedures, does not include matters relating only to "internal management."

Again, the general concept of this amendment has been recommended in the Model State APA and numerous administrative law commentaries. The amendment also was supported in the Committee's discussions. It will be noted that, again, the language of the law as currently written seems to undermine the formal rule-making requirement of the APA, implying that agencies can choose not to hold a rule-making hearing or follow other APA requirements. For further comment on this subdivision, see the Information Notebook, "Reference Material."

* * *

Sec. 5. Minnesota Statutes 1971, Section 15.0412, Subdivision 4, as amended by Laws 1974, Chapter 344, is amended to read:

Subd. 4. No rule shall be adopted by an agency unless the agency first holds a public hearing thereon, affording all affected interests an opportunity to participate; and gives notice of its intention to hold such a hearing at least 30 days prior to the date set for the hearing ~~following the giving of at least 30 days prior to the hearing of notice of the intention to hold such hearing,~~ by United States mail, to representatives of associations or other interested groups or persons who have, within the current calendar year, registered their names with the secretary of state for that purpose and in the state register ~~as described in section 15.051~~. The notice in the state register shall include the full text of the rule proposed for adoption and further, the agency shall make available at least one free copy of the proposed rule to any interested person upon request. At the public hearing the agency shall make an affirmative presentation of facts that establish the need for and reasonableness of the rule proposed

for adoption and shall take any additional action that may be necessary to fulfill any relevant substantive or procedural requirements imposed on the agency by law or rule. After allowing written material to be submitted and recorded in the hearing record for 20 days after the public hearing ends, the hearing examiner assigned to the hearing shall proceed to write a report as provided for in 15.052, subdivision 3, which report shall be completed as promptly as possible and shall be available to all affected persons upon request for at least 10 days before the agency takes any final action on the rule. If the agency adopts the rule, it shall be submitted with the complete hearing record to the attorney general, who shall review the rule as to form and legality. ~~Every rule hereafter proposed by an administrative agency, before being adopted, must be based upon a showing of need for the rule, and shall be submitted as to form and legality, with reasons therefor, to the~~ The attorney general~~, who,~~ shall, within 20 days, ~~shall~~ either approve or disapprove the rule. If he approves the rule he shall promptly file it in the office of the secretary of state. If he disapproves the rule, he shall state in writing his reasons therefor, and the rule shall not be filed in the office of the secretary, nor published. If he fails to approve or disapprove any rule within the 20-day period, the agency may file the rule in the office of the secretary of state and publish the same. A rule shall become effective after it has been subjected to all requirements described in this subdivision and 20 days after its publication in the state register ~~as described~~

~~in section 15.051~~ or at some later date if specified in the rule. Any rule adopted after July 1, 1975 which is not published in the state register shall be of no effect.

Comments

The above "Subdivision 4" is, of course, the heart of the APA's rule-making requirements. Four proposals are made by way of amendment in the interest of strengthening its provisions.

First, it is proposed that 30 days prior to the public hearing agencies be required to publish in the State Register the full text of any rule they propose to adopt and make a copy of the proposed rule available to any interested person upon request. This suggestion is the direct result of testimony presented to the Committee, in which it was stated that some agencies have selectively distributed copies of proposed rules, offering some interested persons only an opportunity to view the proposed rule at the agency office.

Additionally, on this first area of concern, it should be pointed out that in the original draft of amendments, the "Secretary of State's list" was eliminated (the "list" being the current means of giving free notice of hearings to all interested persons). It was strongly suggested that some process of "free notice" should be retained.

In the above drafts we have, therefore, reinstated the use of the Secretary of State's list, but with one addition: interested individuals will have to register their names annually with the Secretary of State. We feel that this will resolve much of the unnecessary mailing problem that has been experienced in the past, while maintaining a method of "free notice." Moreover, we would add that alternatives to the Secretary of State's list may still be preferable and should be considered. For example, the state could offer a free subscription to an abridged edition of the Register, containing only notices; or each agency could maintain a free notice mailing list; or the Office of Hearing Examiners could be made responsible for issuing such notices; and there are undoubtedly other viable options.

The second major proposal contained in the above amendments would simply add emphasis to the APA requirement that agencies must demonstrate at a public hearing (and thus, to the Attorney General in the hearing record) that the proposed rule is needed and reasonable. This provision is not only a statement of legislative policy, but it also is an attempt to strengthen the quality of the public record from which the agency action

can be judged (by the Attorney General and, if necessary, the courts).

Adding this emphasis to "Subdivision 4's" standards is closely related to the third proposal--requiring that the hearing examiner's report (to be discussed on p. 36) be available for at least 10 days before final action is taken on a proposed rule. The proposal, found at the end of the document, to create an independent force of hearing examiners is an effort to insure that the APA standards are, in fact, applied in the process of rule-making (and in contested cases). The "hearing examiner's report" is a principal mechanism in that effort and, thus, it is appropriate that it be available for public inspection and reaction before a final decision on a rule is made, as well as after.

The fourth proposal would have rules become effective at least 20 days after publication in the State Register, a provision that has been previously discussed.

The new language that requires the record to be held open for written submissions 20 days after the public hearing is actually already imposed on agencies through the Attorney General's "Rules on Rule-Making Procedures" /Atty. Gen. 303(e)/. (For more background on the Attorney General's "Rules on Rule-Making Procedures," see the Information Notebook.)

Finally, a word should be added relative to a reoccurring rule-making problem that is not addressed in the proposed amendments of this report. The problem is this: If in the process of adopting a rule an agency changes the language from that originally proposed, is a new notice and hearing process required on the altered version of the rule?

The Attorney General's rule on the problem (which rule, having been adopted through the APA procedures, has the "force and effect of law," i.e., agencies are bound to it) states the following:

> AttyGen 304 Further Hearings Shall be Held if the Proposed Regulations Are Changed Before Adoption. If a change is made which goes either to another subject matter or results in a rule fundamentally different from that contained in the notice of hearing, a further hearing must be held, at least on the rules insofar as they relate to another subject matter or are fundamentally different from the Notice of Hearing.

The Attorney General's rule obviously must be applied with a significant degree of subjective judgment. But it would appear that the nature of the decision requires it. The only additional guide that we have considered is a provision that would allow

rule amendments to be made under the initial hearing proceeding if the changes are supported in the record and adopted by the agency at the public hearing. We have not added this type of provision to Subdivision 4, however, but leave it for Committee discussion.

* * *

Sec. 6. Minnesota Statutes 1971, Section 15.0412, Subdivision 5, is amended to read:

Subd. 5. Where statutes governing the agency permit the agency to exercise emergency powers, emergency rules ~~and regulations~~ may be established without compliance with the provisions of subdivision 4. These rules are to be effective for not longer than ~~60~~ 75 days and may ~~not immediately~~ be reissued or continued in effect for an additional 75 days, but may not immediately be reissued thereafter without following the procedure of subdivision 4. Emergency rules ~~or regulations~~ shall be published in the state register as soon as practicable.

Comments

Previous comments have been directed at this subdivision as a possible means of allowing for administrative flexibility when normal rule-making procedures impose a burdensome time schedule on an agency. It may be that some additional agencies will ask for "emergency powers" to make this subdivision available to them. Again, this avenue of flexibility will allow the Legislature to review the merits of each such request. The Legislature will undoubtedly also wish to monitor agency utilization of "emergency rule-making," recognizing its potential for misuse as well as benefit.

The additional time periods suggested above are in response to the added time required to effectuate rules promulgated normally (note, for example, that amendments in this report provide that rules would not go into effect until at least 20 days after their publication).

* * *

Sec. 7. Minnesota Statutes 1971, Section 15.0412, is amended by adding the following new subdivision:

Subd. 6. When an agency seeks to obtain information or opinions in preparing to propose the adoption, amendment, suspension, or repeal of a rule from sources outside of the agency, the agency shall make notice of its action in the state register and shall afford all interested persons an opportunity to submit data or views on the subject of concern in writing or orally. Any written material received by the agency shall become a part of the hearing record to be submitted to the attorney general under section 15.0412, subdivision 4.

Comments

Again, this proposal resulted directly from testimony received by the Committee, wherein it was noted that often times agencies informally "work-out" the specifics of a rule with major interests before the public hearing. The Committee did not, however, take a wholly negative view of this pre-hearing consultation process, since it apparently has been used affirmatively to better inform affected interests and resolve potential debilitating conflicts. On the other hand, the Committee did express a strong desire to have the pre-hearing information and opinion-gathering process used properly and not as a device that frustrates the broad interest of the general public to participate in the rule-making process. Thus, the amendment above simply says that when an agency initiates such a pre-hearing process, it is required to make notice and receive materials from all sources and, on the suggestion of the Attorney General's office, the material is to become a part of the hearing record.

* * *

Sec. 8. Minnesota Statutes 1971, Section 15.0413, Subdivision 1, as amended by Laws 1974, Chapter 344, is amended to read:

Subdivision 1. Every rule ~~or regulation~~ approved by the attorney general and filed in the office of the secretary of state as provided in section 15.0412 shall have the force and effect of law ~~upon~~ 20 days after its publication in the state register unless a later date is required by statute or specified in the rule . ~~and upon its further filing in the office of the commissioner of administration. Standards or statement of policy or interpretations of general application and future effect shall not have the effect of law unless they are adopted as a rule in the manner prescribed in section 15.0412. This section does not apply to opinions of the attorney general.~~ The secretary of state shall keep a permanent record of rules filed with that office open to public inspection.

Comments

The major impact of this subdivision is its specification that rules adopted in accordance with the procedures of the APA have the "...force and effect of law." It will be noted that the section currently also provides that "...statements or standards of policy or interpretation of general application and future effect shall not have the effect of law unless they are adopted as a rule...." Although there is some obvious beneficial clarity in having this latter provision in the law, there is also a previously discussed difficulty: the provision raises the implication that an agency can adopt a "statement or standard of general application and future effect" without adherence to the rule-making procedures of Section 15.0412. As discussed at length under comments concerning the definition of "rule," the preferred approach is to remove such implications by asserting through the APA that all agency "statements of general application and future effect...made to implement the law..." are to be adopted as rules.

* * *

Sec. 9. Minnesota Statutes 1971, Section 15.0413, Subdivision 2, as amended by Laws 1974, Chapter 344, is amended to read:

Subd. 2. Each rule hereafter ~~adopted,~~ amended, suspended, or repealed shall become ~~effective~~ amended, suspended, or be repealed ~~upon publication of~~ 20 days after the new or amended rule or notice of suspension or repeal is published in the state register ~~as provided in section 15.051 and upon their filing in the office of the secretary of state and the further filing in the office of the commissioner of administration~~ unless a later date is required by statute or specified in the rule. ~~The secretary of state shall endorse on each rule the time and date of filing and the commissioner of administration shall do likewise. The commissioner of administration shall maintain a permanent record of all dates of publication of the rules.~~

Comments

This amendment would simply make the "20 days after publication" provision previously inserted clearly applicable to rule amendment, suspension or repeal, as well as adoption.

* * *

Sec. 10. Minnesota Statutes 1971, Section 15.0413, Subdivision 3, as amended by Laws 1974, Chapter 344 is amended to read:

Subd. 3. Rules ~~and regulations~~ hereafter promulgated,

amended, suspended, or repealed of ~~each~~ any state officer, board, commission, bureau, division, department or tribunal other than a court, having statewide jurisdiction and authorized by law to make rules ~~and regulations~~, but excluded from the definition of ~~not defined as an~~ "agency" in section 15.0411 shall ~~not~~ have the force and effect of law ~~unless~~ if they are filed in the office of the ~~commissioner of administration~~ secretary of state in the same manner as rules ~~and regulations~~ of an agency are so filed and ~~unless~~ if they are submitted to the commissioner of administration in a manner he shall prescribe and published in the state register. This subdivision, however, shall not apply to rules and regulations of the regents of the University of Minnesota.

Comments

The above subdivision makes an important statement: rules of state governmental bodies excluded from the definition of "agency" (e.g., the Workmens' Compensation Commission, the Department of Employment Services, etc.) have the force and effect of law if properly filed and published.

Since such agency rules have not been subjected to the procedural standards of the APA, there may be some question about giving them the status of law. However, in most cases, those governmental units excluded from the definition of "agency" have procedural rule-making standards imposed on them elsewhere in statute (as is the case with the Department of Employment Services) or by case law (as with the Workmens' Compensation Commission).

Moreover, alternatives to the above provision are unattractive. Stating that such "non-agency" rules do not have the "force and effect of law" would leave these governmental units in an ambiguous, if not untenable, position, i.e., it could leave them possibly unable to enforce certain necessary standards of administration. Also, to say nothing about the status of "non-

agency" rules would leave the enforcement questions even more unclear: What force and effect would such rules have? Undoubtedly, the question would be resolved by the courts and it is probable that the rules in question would be given the status of law as an administrative necessity, particularly since the governmental units involved have been expressly excluded from the APA rule-making requirements by the legislation and, supposedly, for a justifiable set of extenuating circumstances.

* * *

Sec. 11. Minnesota Statutes 1971, Section 15.0413, Subdivision 4, Subdivision 5 and Subdivision 6, as amended by Laws 1974, Chapter 344, are repealed.

Comments

Subdivision 4 is repealed because it no longer has any relevance. The subdivision was added in 1963 to require the filing of previously promulgated rules with the Commissioner of Administration by July 1, 1964.

Subdivision 5 is simply repealed so that it can be moved to a more appropriate location under the State Register section of Chapter 15 (see Section 18 of this report).

Subdivision 6 is repealed for the same purpose as Subdivision 5, i.e., for a more appropriate location in the APA (see Section 19 of this report).

* * *

Sec. 12. Minnesota Statutes 1971, Section 15.0415, is amended to read:

15.0415 PETITION FOR ADOPTION OF RULE. Any interested person may petition an agency requesting the adoption, suspension, amendment or repeal of any rule. The petition shall be specific as to what action is being requested and the need for

such action. Upon receipt of such a petition an agency shall have 60 days in which to make a specific and detailed reply in writing as to its planned disposition of the request. If the agency states its intention to hold a public hearing on the subject of the request, it shall proceed according to section 15.0412. ~~Each agency may~~ The attorney general shall prescribe by rule the form for ~~such~~ all petitions under this section and ~~the~~ may prescribe further procedures for their submission, consideration, and disposition.

Comments

The paramount difficulty with the current law centers on the word "may" -- "...every agency may prescribe by rule the form... procedure /etc./" whereby the public may ask for consideration. The language is obviously weak and agencies have taken little or no initiative under it. As noted to the Committee, the staff undertook a phone survey of five major state departments and all reported that they had no formal standards or procedures for receiving or evaluating "petitions." In fact, most departments maintained that they had never been petitioned on the matter of rule-making, though "requests" are often received.

The above new language would have the Attorney General set uniform standards for the petition process and specifies that an agency must respond in writing within 60 days to every petition received.

It should be noted that the first amendment draft relating to this section required a petition to bear fifty signatures and provided that the petitioners could appeal to the Attorney General if the agency denied them a hearing. The Attorney General's representative indicated to the Committee that such an appeal provision was not consistent with the relationship the Attorney General's office should have with agencies. Since the objection was strenuous, the appeal provision has been dropped and, according to the language proposed in this draft, the agency's disposition of a petition would be a final decision, the courts being the next mechanism of recourse.

It was suggested that the Legislative Committee for Review of Administrative Rules could be used as an appeal body when a

petition for hearing is denied by an agency. However, the issue of the Committee's proper role is too confused and in doubt for that suggestion to be set forth by the staff as a proposed amendment. That is not to say that the idea should not be discussed and considered by the 1975 Legislature.

Finally, in dropping the requirement of fifty signatures, this second draft reflects the Committee's concern that a petition be judged on its substantive merits only.

* * *

Sec. 13. Minnesota Statutes 1971, Section 15.046, is amended to read:

15.046 PUBLICATION ADVISORY BOARD. There is hereby created a publication advisory board which shall consist of the ~~commissioner of administration, the~~ secretary of state, ~~and~~ the attorney general, the director of the legislative reference library, the revisor of statutes, and the chief hearing officer. Each member may designate one of his assistants to act in his stead as a member of the board. Such designation shall be filed in the office of the secretary of state. The board shall select a chairman and secretary from its members. The board shall meet, from time to time, upon the call of the chairman ~~commissioner of administration or his duly designated assistant~~. It shall be the duty of the board to advise the commissioner of administration on matters relating to the publication of the state register and the manual of state agency rules.

Comments

Since the Commissioner of Administration is responsible for publishing the Register and the Manual of Minnesota Agency Rules, it is appropriate to provide him with an advisory group that can contribute helpful expertise.

* * *

Sec. 14. Minnesota Statutes 1971, Section 15.047, Subdivision 1, is amended to read:

15.047 ~~REGULATIONS.~~ MANUAL OF STATE AGENCY RULES, PUBLICATION. Subdivision 1. ~~The publication board shall prescribe regulations for carrying out the provisions of sections 15.046 to 15.049. Among other things, such regulations shall provide for:~~

~~(1) periodic publication of all rules and regulations filed with the secretary of state in accordance with sections 15.046 to 15.049;~~

~~(2) the selection, compilation and publication of such orders of administrative agencies as it may deem necessary;~~

~~(3) a uniform manner and form for the preparation, printing and indexing of regulations and compilations to the end that all regulations and compilations be published uniformly at the earliest practicable date;~~

~~(4) the commissioner of administration shall prepare the compilation and indexing of the rules and regulations for publication.~~

The commissioner of administration shall publish a manual of state agency rules, which shall include all agency rules currently in effect. The manual shall be so designed as to allow for economic publication and distribution and efficient use.

Comments

Although rules are to be published in their final form in the State Register, it was strongly suggested to the Committee that the current system of rule publication, that is indexed by department in loose-leaf notebook form, should be continued. The above suggested change in language would specify that such a compilation of "rules-in-effect" is to be published and made available to the public.

* * *

Sec. 15. Minnesota Statutes 1971, Section 15.048, is amended to read:

15.048 EFFECT OF PUBLICATION OF RULES OR ORDERS. The ~~filing or~~ publication of a rule~~, regulation,~~ or order in the state register raises a rebuttable presumption that:

(1) The rule or ~~regulation~~ order was duly adopted, issued, or promulgated;

(2) The rule or ~~regulation~~ order was duly filed with the secretary of state and available for public inspection at the day and hour endorsed thereon; and

(3) The copy of the rule or ~~regulation~~ order published in the state register is a true copy of the original ~~rule or regulation; and~~.

~~(4) All requirements of sections 15.046 to 15.049 and regulations prescribed thereunder relative to such regulations have been complied with.~~

Comments

No substantive change is intended in the amendments suggested for this section.

* * *

Sec. 16. Minnesota Statutes 1971, Section 15.049, is amended to read:

15.049 JUDICIAL NOTICE TAKEN. Judicial notice ~~of any rule, regulation, or order duly filed or published under the provisions of sections 15.046 to 15.049~~ shall be taken of material published in the state register.

Comments

Again, no substantive change is intended in the above amendment.

* * *

Sec. 17. Laws 1974, Chapter 344, Section 8, Subdivision 1, is amended to read:

Subdivision 1. PURPOSE. The commissioner of administration shall publish a state register containing all notice for hearings concerning rules ~~or regulations~~, giving time, place and purpose of the hearing and the full text of the action being proposed. Further, the register shall contain all rules ~~or regulations~~, amendments, ~~thereof~~ suspensions, or repeals thereof, ~~as adopted under~~ pursuant to the provisions of this chapter. The commissioner shall further publish any executive order issued by the governor which shall become effective upon such publication. The commissioner ~~may~~ shall further publish any official notices in the register which ~~he deems to be of significant interest to the public~~ a state agency requests him to publish. Such notices shall include, but shall not be limited to, the date on which

a new agency becomes operational, the assumption of a new function by an existing state agency, or the appointment of commissioners. The commissioner may prescribe the form and manner in which agencies submit any material for publication in the state register, and he may withhold publication of any material not submitted according to the form or procedures he has prescribed.

The commissioner of administration ~~shall ascertain~~ may organize and distribute ~~that~~ the ~~content~~ contents of the register ~~is clearly ordered by the four~~ according to such categories ~~described in this subdivision in order to~~ as will provide economic publication and distribution and will offer easy access to ~~this~~ information by any interested party.

Comments

The added language would specify a provision previously made -- that the full text of a proposed rule is to be published in the Register 30 days prior to the required public hearing. There is also new language authorizing the Commissioner to set standards for the submission of material for publication so as not to burden the Department of Administration with editorial responsibilities (i.e., Administration personnel should not have to retype or type-set materials submitted for publication -- the material should be submitted in a printable form to maximize efficiency).

Further, the change proposed for the final paragraph is an attempt to authorize the publication and distribution of the Register in categorical parts (without predetermining or fixing in statute what those parts should be). For example, it has been discussed that the Commissioner may wish to divide the Register so that a person could subscribe to specific subject areas or departmental categories without having to receive and pay for material not within his interest.

If the Commissioner or the Legislature wants to write more details into the law on this matter, the necessary language could be developed. However, again, we state the impression that this is an area that needs some flexibility. As well, the Commissioner can turn to the Publication Advisory Board for recommendations.

* * *

Sec. 18. Laws 1974, Chapter 344, Section 8, is amended by adding the following new subdivision:

Subd. 4. When an agency properly submits a rule, proposed rule, notice, or other material to the commissioner of administration, the commissioner shall then be accountable for the publication of the same in the state register. The commissioner of administration shall require each agency which requests the publication of rules, proposed rules, notices, or other material in the state register to pay for the proportionate cost of the state register unless other funds are provided and are sufficient to cover the cost of the state register.

The state register shall be for public sale at a location centrally located as determined by the commissioner of administration and at a price as the commissioner of administration shall determine. The commissioner of administration shall further provide for the mailing of the state register to any person, agency, or organization if so requested, provided that reasonable costs are borne by the requesting party. The supply and expense appropriation to any state agency is deemed to include funds to purchase the state register. Ten copies of each issue of the state register, however, shall be provided

without cost to the legislative reference library and to the state law library.

Comments

The above subdivision is, in substance, 15.0413, Subdivision 5, which was previously repealed and relates to the publication and distribution of the State Register. The changes from the current language would clarify that individuals ordering the State Register can be charged a "reasonable amount," which is not limited to the cost of mailing.

* * *

Sec. 19. Minnesota Statutes 1971, Chapter 15, is amended by adding the following new section:

Sec. 15.050. /PUBLICATION ACCOUNT./ An administrative rules and state register publication account is hereby created in the state treasury. All receipts from the sale of rules and the state register authorized by this section shall be deposited in such account. The sum of is appropriated from the general fund in the state treasury to such account. All moneys in the administrative rules and state register publication account in the state treasury are appropriated annually to the commissioner of administration to carry out the terms and provisions of this section.

Comments

Again, the above section was previously repealed as 15.0413, Subdivision 6. An "administrative rules publication account"

is the mechanism presently employed to publish the eleven volumes of "Rules and Regulations" (bound in loose-leaf notebooks) currently in effect. Though it is a revolving fund, supposedly replenished by sales, the Committee was informed that, in fact, the publication of "Rules and Regulations" is not financially self-supporting but is subsidized by the sale of other state documents at prices over their actual cost.

With this in mind, and considering the cost implications involved in adding the publication of the Register to this account, the Legislature will probably wish to review the need for an appropriation. $26,000 was originally provided.

* * *

Sec. 20. Laws 1974, Chapter 344, Section 8, Subdivision 2, is amended to read:

Subd. 2. /PUBLICATION./ The commissioner of administration shall publish the state register whenever he deems necessary, except that no ~~notice for hearings or adopted rules or changes thereof, or executive order~~ material properly submitted to him for publication shall remain unpublished for more than ten ~~calendar~~ working days.

The state register shall have a distinct and permanent masthead with the title "state register" and the words "state of Minnesota" prominently displayed. All issues of the state register shall be numbered and dated.

Comments

The above change to 10 "working" days is proposed at the suggestion of the Department of Administration.

* * *

Section 21. Minnesota Statutes 1971, Chapter 15, is amended by adding a section to read:

15.052 /OFFICE OF HEARING EXAMINERS./ Subdivision 1. A state office of hearing examiners is hereby created. The office shall be under the direction of a chief hearing examiner, who shall be learned in the law and appointed by the governor, with the advice and consent of the senate, for a term ending on June 30 of the sixth calendar year after appointment. The chief hearing examiner shall appoint such additional hearing examiners to serve in his office as is necessary to fulfill the duties prescribed in this section. All hearing examiners shall be in the classified service except that the chief hearing examiner shall be in the unclassified service, but may be removed from his position only for cause. Additionally, all hearing examiners shall have demonstrated knowledge of administrative procedures and law and shall be free of any political or economic association that would impair their ability to function officially in a fair and objective manner.

Subd. 2. When regularly appointed hearing examiners are not available, the chief hearing examiner may contract with qualified individuals to serve as hearing examiners for specific assignments. Such temporary hearing examiners shall not be deemed employees of the state and shall be remunerated for their service at a rate not to exceed $150 per day.

Subd. 3. All hearings of state agencies required to be conducted under this chapter shall be conducted by a hearing

examiner assigned by the chief hearing examiner. In assigning hearing examiners to conduct such hearings, the chief hearing examiner shall attempt to utilize personnel having expertise in the subject to be dealt with in the hearing. Only hearing examiners learned in the law shall be assigned to contested case hearings. It shall be the duty of the hearing examiner to: (1) advise an agency as to the location(s) at which and time(s) during which a hearing should be held so as to allow for participation by all affected interests; (2) conduct only hearings that have been given proper notice; (3) see to it that all hearings are conducted in a fair and impartial manner; and (4) make a report on each proposed agency action in which the hearing examiner functioned in an official capacity, stating his findings of fact and his conclusions and recommendations, taking notice of the degree to which the agency has (i) documented its statutory authority to take the proposed action, (ii) fulfilled all relevant substantive and procedural requirements of law or rule, and (iii) demonstrated the need for and reasonableness of its proposed action with an affirmative presentation of facts.

Subd. 4. The chief hearing examiner shall promulgate rules to govern the procedural conduct of all hearings, relating to both rule adoption, amendment, suspension or repeal hearings and contested case hearings. Such procedural rules for hearings shall be binding upon all agencies and shall supersede any

other agency procedural rules with which they may be in conflict.

Subd. 5. The office of hearing examiner shall maintain a court reporter system. Unless the chief hearing examiner determines that the use of an audio magnetic recording device is more appropriate, a court reporter shall keep a record at any hearing which takes place under this chapter and may additionally be utilized as a chief hearing examiner directs.

Court reporters shall be in the classified service and all initial appointments to the position of court reporter shall be filled by individuals who acted in this capacity for individual state agencies prior to the enactment of this legislation.

Subd. 6. In consultation with the commissioner of administration the chief hearing examiner shall assess agencies the cost of services rendered to them in the conduct of hearings. All agencies shall include in their budgets provisions for such assessments.

Subd. 7. A state office of hearing examiner account is hereby created in the state treasury. All receipts from services rendered by the state office of hearing examiner shall be deposited in such account, and all funds in such account shall be annually appropriated to the state office of hearing examiner for carrying out the duties specified in this section.

Subd. 8. The chief hearing examiner may enter into contracts with political subdivisions of the state for the purpose of providing hearing examiners and reporters for administrative proceedings. For such services there shall be an assessment in like manner to that for agencies.

Subd. 9. In consultation and agreement with the chief hearing examiner, the commissioner of administration shall, pursuant to authority vested in him by Minnesota statutes section 16.13, transfer from agencies, such employees as he deems necessary to the state office of hearing examiners. Such action shall include the transfer of any state employee currently employed as a hearing examiner, if such employee qualifies under the requirements of this section.

Comments

As previously stated, this section is a redraft of a proposal initially presented to the Committee by the Administrative Law Section of the Minnesota Bar Association. The amendment to Chapter 15 would establish an independent Office of Hearing Examiners, responsible for conducting all hearings held under the APA.

As presented in this report, the hearing examiner proposal varies from the Bar Association bill in two respects. First, the Bar would require all hearing examiners to be lawyers that have been admitted to practice for at least five years in any state, territory or the District of Columbia (as well as having been admitted to practice in Minnesota). The proposal of this report is to require lawyers as hearing examiners on contested cases, while setting the general requirement for employment as a hearing examiner at "demonstrated knowledge of administrative procedures and law...." Such an approach is presented as a compromise to the conflicting opinions expressed to the Committee (and by the Committee), and it is thought to be a defensible compromise.

The second variation from the Bar proposal is more fundamental. Under the above provisions, the hearing examiner would not only

officiate at hearings (as the Administrative Law Section proposes) but would also make a report, in which he would state findings of fact and conclusions and recommendations, drawing particular attention to the degree to which the agency has fulfilled the substantive and procedural requirements imposed on it by rule or law.

The insertion of a hearing examiner's report, containing the kinds of information suggested above, is thought to be a significant mechanism for insuring fairness and due process in the rule-making (and contested case) procedures of the APA. The report will not only strengthen the hearing examiner's role in the immediate proceeding, but will also improve the written record available for review. Undoubtedly, however, some agency officials will feel uncomfortable having an independent judgment rendered on their actions. But for the sake of the broad interests involved, a hearing examiner's report is considered a useful tool.

* * *

Sec. 22. Minnesota Statutes 1971, Section 15.0421, is amended to read:

15.0421 /PROPOSAL FOR DECISION IN CONTESTED CASE./ ~~Whenever in a~~ In all contested ~~case~~ cases ~~a majority of the officials of the agency who are to render the final decision have not heard or read the evidence~~ the decision of the officials of the agency who are to render the final decision shall not be made until the report of the hearing examiner as required by section 15.050, has been made available to ~~a party~~ parties to the proceeding ~~either than the agency itself, shall not be made until a proposal for decision, including the statement of reasons therefor has been served on the parties~~, for at least 10 days and an opportunity has been afforded to each party adversely affected to file exceptions and present argument to a majority of the officials who are to render the decision.

Comments

Making the hearing examiner's report available for review before a final decision in a contested case has obvious merit since the report is expected to have a bearing on the agency judgment. (The rationale should apply here as it did with agency decisions on the adoption of a rule.) Moreover, the above proposal is consistent with the Administrative Law Section bill.

* * *

Sec. 23. The commissioner of administration shall see to it that the office of hearing examiners is provided adequate office space and supplied such equipment and materials as are necessary.

* * *

Sec. 24. There is appropriated from the general fund the sum of $ to be deposited in the state office of hearing examiners account and utilized in the initial costs of establishing the state office of hearing examiners. It is intended that this not be a reoccurring appropriation.

* * *

Sec. 25. This act is effective on July 1, 1975, except that those provisions relating to the office of hearing examiners shall be effective on January 1, 1976.

* * *

Additional amendments necessary to conform existing statutory language to the provision set forth above may be proposed by the Revisor of Statutes if this report is submitted for drafting into bill form.