INFORMATION NOTEBOOK

Supplement To

A Staff Report To The House And Senate

Governmental Operations Committees On

The Minnesota Administrative Procedures Act

And Its Current Application

January 1975

REFERENCE MATERIALS FOR 1974 LEGISLATIVE INTERIM STUDY OF THE ADMINISTRATIVE PROCEDURE ACT AND ITS APPLICATION

Office Of Legislative Research

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INFORMATION NOTEBOOK

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INTRODUCTION TO MINNESOTA'S ADMINISTRATIVE PROCEDURE ACT

Preface

There are approximately sixteen major departments, twenty examining and licensing boards, thirteen advisory boards and commissions, and a variety of additional miscellaneous administrative agencies in the executive branch of Minnesota state government. Their jurisdiction to act in the interest of the "public good" is immense and their effect on private and corporate life can be substantial. To a significant extent, agency powers are exercised through "rules", giving the rule-making (amending, suspending and appealing) and rule application processes considerable importance.

In that context, laws have been established to conform the actions of administrative agencies to formal standards of fairness, due process, and public accountability. The most significant such legal device is the Administrative Procedure Act.

The APA attempts to facilitate public input into rule-making and seeks to require agency adherence to delegated jurisdiction, demonstrated public need and established facts. The APA also guards individual rights and insures due process when agencies attempt to apply laws and rules to regulate private and corporate activities.

Because of its importance, the APA must be continually scrutinized as to its fitness, and with particular attention to its effectiveness in practice. The following information will hopefully assist Minnesota legislators in their current attempts to review and evaluate the health of the Administrative Procedure Act and process.

In this initial material, particular focus is given to the rule-making procedures. Further information on the quasi-judicial functioning of agencies is preliminarily being planned. However, research efforts on the subject at hand will be responsive to the requests and needs of House and Senate members.

Office of Legislative Research

A. Historical Background

Procedural requirements for administrative rule-making were first set forth by the fifty-third Minnesota Legislature in Laws 1945, Chapter 452.[1] With some modification and considerable addition, the 1945 act was recodified under Chapter 806, 1957 Laws, which serves as the basis for Minnesota's current Administrative Procedure Act [APA] (see Appendix X for complete text of the 1945 and 1957 laws with subsequent amendments). The most significant difference between the 1945 and 1957 acts involved the latter's attention to "contested cases," i.e., matters relating to the quasi-judicial functions of administrative agencies (to be discussed).

Since its enactment, the 1957 law has received the following amendments (excluding amendments to simply change departmental names):

> 1961 Laws, Chapter 136 - placed the Commissioner of Insurance under the rule-making requirements of the APA.
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> 1963 Laws, Chapter 633 - placed health related professional and regulatory examining and licensing boards under the rule-making requirements of the APA.
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> 1963 Laws, Chapter 822 - required the filing of rules with the Commissioner of Administration in addition to the Secretary of State; stated that rules or regulations established by state agencies not defined as within the APA's coverage would be without the "force and effect" of law unless filed in accordance with the process of the APA; and delegated to the Commissioner of Administration responsibility for annually publishing all administrative rules and regulations.

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[1] Additionally, Laws 1945, Chapter 590, established requirements for the publication and distribution of all administrative rules.

1969 Laws, Chapter 9, Section 6 - excluded the Workmen's Compensation Commission from coverage under the APA.

1974 Laws, Chapter 344 - created a State Register and required notices of intended action, hearing notices and approved rules to be published therein.

Before Minnesota adopted comprehensive requirements for the rule-making process (starting in 1949) agencies were directed simply to make rules and regulations that would be "not inconsistent with law." Judicial review of administrative action was at the discretion of the courts and limited largely to the remedy of declaratory judgment. In their quasi-judicial proceedings, agencies were accountable only to generalized principles of due process, though in 1938 the U.S. Supreme Court set down some specific requirements, namely that regulated parties were entitled to:

--Notice of hearing and of issues

--A fair and open hearing

--Present evidence and submit arguments, as well as an opportunity to examine contrary evidence and agreements

--Administrative decisions based on the weight of evidence presented

Morgan v. U.S., 301 U.S. 1, 58 S.Ct. 773, L.Ed. 1129 (1938). Similar standards were adopted by the Minnesota Supreme Court in Juster Bros. v. Christgau, 214 Minn. 108 at 118, 7 N.W.2d 501 (1943).

Judicial review to safeguard such standards was by certiorari to the state district court.

The statutory establishment of the right to judicial review and the codification of procedural requirements

(both for quasi-judical and quasi-legislative administration) into an Administrative Procedure Act came in Minnesota as accompanyment to national moves for reform. The dimensions of such movements for change have at times been significant. For those interested in reviewing the background of these movements, see Cooper, State Administrative Law (1965), Chapter 1.

B. Analysis of Minnesota's Administrative Procedure Act

As noted below, Minnesota Statutes have been codified so as to include under the term "Administrative Procedure Act" a variety of provisions, many of which are unrelated to the rule-making (amending, suspending or repealing) or adjudicating process. In a more strict categorization, Minnesota's APA can be found within Sections 15.0411 - 15.0422, or that part of Chapter 15 that was adopted in Laws 1956, Chapter 806. By explicit reference Sections 15.0423 - 15.0426 extend the 1957 APA with additional provisions for judicial review of "contested cases". And Sections 15.046 - 15.048 remain from a 1945 law and relate to the publication of rule and regulation.

STATE DEPARTMENTS AND AGENCIES

ADMINISTRATION

CHAPTER 15

DEPARTMENTS OF STATE IN GENERAL

NOTE: Governor as state agent for federal funds, see sections 4.07 and 4.075.

For the purposes of the analysis undertaken here, Sections 15.0411 - 15.0422 will receive emphasis, and, together with 15.0423 - 15.049, shall be referred to as the Administrative Procedure Act of Minnesota.

15.0411 DEFINITIONS

Definitions as applied in Sections 15.0411 - 15.0422:[1] (It is the definitions of "agency" and "rule" which establish the limits of the APA's application to units of state government.)

> 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 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 Pardon Board, (d) the Youth Conservation Commission, (3) the Department of Manpower Services, (f) the Director of Mediation Services, (g) the Department of Labor and Industry, (h) Workmen's Compensation Commission.

Comments:

As a general rule, the definition of "agency" above includes all governmental units within the executive branch which have statewide jurisdiction, except:

1. The governor in his exercise of "emergency powers" under Laws 1951, Chapter 694 [M.S. Chapter 12].

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[1] 1973 and 1974 amendments to M.S. 1971 are acknowledged in "Comments".

2. The Adult Corrections Commission and the Youth Conservation Commission (abolished, with powers and duties transferred to the Minnesota Corrections Authority--established by Laws 1973, Chapter 654).

3. Board of Pardons, which may make rules pursuant to M.S. 1971, Section 638.07.

4. The Department of Manpower Services (name changed to Department of Employment Services by Laws 1973, Chapter 254), which makes rules under the authorization and guidelines set forth in M.S. 1971, Section 268.12, subd. 3.

5. The Director of Mediation Services, who ". . .shall adopt reasonable and proper rules and regulations. . ." pursuant to M.S. 1971, Section 179.05.

6. The Department of Labor and Industry, which has authority to issue rules under M.S. 1971, Section 175.171(2), as well as various other regulation-making powers under M.S. 1971, Sections 183.41, 183.44, 177.08, etc. However, Section 182.55, authorizing rule-making to implement occupational safety standards says that OSH rules are to be adopted ". . .in accordance with Chapter 15. . . ."

7. The Workmen's Compensation Commission, which has authority to issue rules under M.S. 1971, Section 176.669, subd. 2.

There are some further provisions elsewhere in statutes that expressly exempt certain other agencies in part from the APA. For example, Laws 1974, Chapter

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[1]All agencies with statutory emergency authorities can, under M.S., Section 15.0412, Subd. 5, issue emergency rules without going through the APA notice and hearing process, but such rules shall be effective for only 60 days unless subsequently established according to the normal APA requirements.

355, Section 42, authorized the Commissioner of Administration, with approval of the Executive Council, to establish categories of non-competitive commodities by regulation without having to follow the procedures of the APA. A complete compilation of such provisions is in process.

Additionally, the reverse is the case in some instances, namely, even agencies listed in 15.0411, subdivision 2 as exempt from the APA may be required elsewhere in law to formulate certain kinds of rules by the Chapter 15 process; and other agencies listed as exempt may voluntarily establish their rules in a manner very similar to that prescribed in the APA.

Court Findings:

> Minnesota Administrative Procedure Act applies only to boards and the like having state-wide jurisdiction. Minneapolis Area Development Corp. v. Common School District No. 1870, Scott County, 1965, 269 Minn. 157, 131 N.W.2d 29.
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> The terms "commission" and "board are synonymous. State ex rel. Johnson v. Independent School District No. 810, Wabasha County, 1961, 260 Minn. 237, 109 N.W.2d 596.

15.0411 (Definitions, cont.)

> Subd. 3. "Rule" includes every regulation, including the amendment, suspension, or repeal thereof, adopted by an agency, whether with or without prior hearing, 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) 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.

Comment:

Again, the definition is initially inclusive, with four categories of rules expressly excluded (remembering that the definition of "agency" has already excluded various other categories of rules and regulations). As shall be discussed at some length, the status of administrative action as a "rule" is nevertheless not always clear. Let us consider, for example, exclusion (a): ". . .regulations concerning only the internal management of the agency. . . not directly affect[ing] the rights of or procedure available to the public."

(a) Commentaries on administrative law often point out that in their quasi-legislative functioning executive agencies issue three types of rules: procedural, interpretive and legislative. This distinction will be useful in our discussion of the Minnesota APA, and particularly in discussion exclusion (a).

> (i) Procedural rules set forth the methods of operation and organization of an agency and may further involve certain standards to be followed in the substantive rule-making and adjudicating process. M.S. 15.0412, Subd. 1, provides

for such procedural rule-making: "In addition to other rule-making power or requirements provided by law each agency may adopt rules governing the formal or informal procedures. . . ." But we shall discover that it may become a matter of dispute as to whether a given "procedural rule" falls within exclusion (a), i.e., whether it involves only "internal management". The same can be said of "interpretive rules."

(ii) Interpretive rules (or statements) are established so as to give a more detailed account of how an agency intends to apply a rule in particular situations. Again, such administrative action is authorized by the Minnesota APA [M.S. 15.0412, subd. 2]: "To assist interested persons dealing with it, each agency shall, so far as deemed practicable, supplement its rules with descriptive statements of its procedures, which shall be kept current."

In particular circumstances an agency may also seek to make a rule more specific by issuing a "policy-statement", "directive", or "order".[1] It is not always certain whether such interpretive actions should be accountable to the public hearing process of the APA, nor is judicial jurisdiction over such actions easily determined.

Some agencies consider their interpretive and procedural rules to be regulations related only to internal management and excluded from the statutory definition of "rule" (and thus not subject to the public notice and hearing requirements of the APA). Such actions will not have the ". . .force and effect of law",[2] but because they are still of important de facto force and

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[1]If directed toward a private party it is probable that such administrative action falls within the definition of "contested case" and is then subject to an expansion.

[2]Section 15.0413, subdivision 1, states: "Standards or statements 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."

effect, many legislators and citizens have become increasingly concerned that interpretive or procedural rules (and particularly so-called administrative policy-statements, directives and orders) abuse the intent of the Administrative Procedure Act (and this point will be discussed further).

(iii) Legislative or substantive rules arise from a direct charge from the legislature to an administrative agency. They are, in effect, administrative statutes, extending the details of law so as to accomplish a more standardized implementation and administration. It is clear that such rules are to be established only through the process of the APA, whereby they will take on the ". . .force and effect of law." Legislative rules (or administrative statutes) are subject to judicial review and invalidation (section 15.0416, the details of which shall be discussed), and shall now be subject to temporary suspension by a ten-member joint legislative committee (Laws 1974, Chapter 355, Section 69). Clearly, legislative rules are not within the parameters of exclusion (a).

But again, what is within exclusion (a) is not easily determined in many cases. The problem is not new.

It is interesting to point out that in 1954, the Minnesota Legislative Research Committee addressed the issue in terms of "informal rule-making":

> 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 changing 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. This cannot be accomplished through cumbersome, over-detailed procedural requirements. Informal rule making cannot be absolutely and completely prevented, but its extensive use can be discouraged by provisions for legal action against the administrative official involved in cases where evidence points to encroachment on the rights of citizens through extra-legal regulatory practices and interpretations. (Minnesota Legislative Research Committee, Publication No. 61, June 1954, pp. 9-10.)

Not surprisingly the issue of "informal rule-making" reoccurred in deliberation of 1968 Legislative Interim Commission on Administrative Rules, Regulations, Procedures and Practice (and transcripts of that testimony is available through the Legislative Reference Library).

In summary, exclusion (a), concerning internal agency management, presents an issue--an issue of administrative discretion and legal interpretation. The remaining exclusions are more defined.

(b) Rules and regulations relating to the management, discipline, or release of persons committed to any state penal institution are excluded from the APA. Such

rules are established according to a variety of provisions in M.S. Chapter 241, and they are generally formulated without public hearings. Unfortunately, there is no complete compilation of these institution rules, particularly since there is variation in rules within the state's penal institution system.

(c) Also set aside are the rules of the Division of Game and Fish published according to M.S. Section 97.53, which specifies standards of publication and distribution:

> **97.53 PUBLICATION OF ORDERS AND LAWS.** Subdivision 1. As soon as practicable after each legislative session, the commissioner, under the direction of the attorney general, shall make a compilation of the laws relating to wild animals, brought up to date and properly indexed. This compilation shall be printed in pamphlet form of pocket size, and 50 copies distributed to each senator, 25 copies to each representative, and ten copies to each county auditor. Not more than 10,000 copies in addition shall be printed for general distribution. The commissioner shall also prepare syllabi of the laws and deliver to county auditors a sufficient supply to furnish one copy to each person procuring a hunting, fishing, or trapping license.
>
> Subd. 2. All orders and all rules and regulations promulgated by the commissioner or the director which affect matters in more than three counties, shall be published once in a qualified legal newspaper in Minneapolis, St. Paul and Duluth. All such orders, rules and regulations not affecting more than three counties shall be published once in a qualified legal newspaper in each county affected. No order, rule or regulation shall be effective until seven days after such publication, and when so executed and published, shall have the force and effect of law, and violation shall entail the same penalties as though such order, rule or regulation had been duly adopted by the legislature.
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> [*1945 c 248 s 1; 1949 c 150 s 14*]

(d) Finally, regulations relating to the posted weight limitations on the use of highways are excluded from the APA's definition. Such regulations are authorized under M.S. Section 169.87, and involved seasonal fluctuations.

> **169.87 SEASONAL LOAD RESTRICTIONS; DESIGNATION OF TRUCK ROUTES.** Subdivision 1. **Optional power.** Local authorities, with respect to highways under their jurisdiction, may prohibit the operation of vehicles upon any such highway or impose restrictions as to the weight of vehicles to be operated upon any such highway, whenever any such highway, by reason of deterioration, rain, snow, or other climatic conditions, will be seriously damaged or destroyed unless the use of vehicles thereon is prohibited or the permissible weights thereof reduced.
>
> The local authority enacting any such prohibition or restriction shall erect or cause to be erected and maintained signs plainly indicating the prohibition or restriction at each end of that portion of any highway affected thereby, and the prohibition or restriction shall not be effective unless and until such signs are erected and maintained.

Municipalities, with respect to highways under their jurisdiction, may also, by ordinance, prohibit the operation of trucks or other commercial vehicles, or may impose limitations as to the weight thereof, on designated highways, which prohibitions and limitations shall be designated by appropriate signs placed on such highways.

The commissioner shall likewise have authority, as hereinabove granted to local authorities, to determine and to impose prohibitions or restrictions as to the weight of vehicles operated upon any highway under the jurisdiction of the commissioner, and such restrictions shall be effective when signs giving notice thereof are erected upon the highway or portion of any highway affected by such action.

When a local authority petitions the commissioner to establish a truck route for travel into, through, or out of the territory under its jurisdiction, the commissioner shall investigate the matter. If the commissioner determines from his investigation that the operation of trucks into, through, or out of the territory involves unusual hazards because of any or all of the following factors; load carried, type of truck used, or topographic or weather conditions, the commissioner may make his order designating certain highways under his jurisdiction as truck routes into, through, or out of such territory. When these highways have been marked as truck routes pursuant to the order, trucks traveling into, through, or out of the territory shall comply with the order.

Subd. 2. **Seasonal load restrictions.** Except where restrictions are imposed as provided in subdivision 1, no person shall operate any vehicle or combination of vehicles upon any county or town road during the period between March 20 and May 15 of each year where the gross weight on any single axle, as defined in Minnesota Statutes 1945, Section 169.83, exceeds 10,000 pounds; provided, that there shall be excepted and exempted from the provisions of this section emergency vehicles of public utilities used incidental to making repairs to its plant or equipment; provided, however, that this provision shall not apply to roads paved with cement concrete. Subdivision 2 shall apply only to county and town roads located westerly and southerly of the following described line: beginning at a point on the south shore of Lake of the Woods, thence southerly along the Westerly borders of Lake of the Woods and Beltrami counties to the intersection with State Trunk Highway No. 2, thence easterly and southeasterly along State Trunk Highway No. 2 to Duluth.

[1937 c 464 s 129; 1947 c 505 s 1; 1949 c 695 s 1; 1951 c 445 s 1; 1967 c 12 s 1; 1967 c 467 s 1] (2720-279)

Court Findings:

Regrettably, the courts have not had an opportunity to clarify the major issue raised in this subdivision, namely: what administrative action involves substantive rule-making or directly affects the rights of the public so as to require application of the APA? Moreover, it is doubtful that the courts could set forth a general scheme to delineate that which is substantive--such determinations will undoubtedly be required on a case by case basis, whether the judgment comes from the court or elsewhere.

Thus, by the definitional exclusions under "agency" and "rule", the following are not subject to the requirements of the Administrative Procedure Act: (As noted earlier, a list of more limited exclusions found elsewhere in the statutes is being compiled.)

--Legislative branch

--Judicial branch

--Pardon Board

--Minnesota Corrections Authority

--Department of Manpower Services

--Director of Mediation Services

--Department of Labor and Industry

--Workmen's Compensation Commission

--Division of Game and Fish

--Governor, in exercise of emergency powers

--Rules of internal agency management

--Rules relating to inmates at state prisons

--Rules limiting use of highways by vehicle weight

15.0411 (Definitions, cont.)

Subd. 4. "Contested Case" means a proceeding before any 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:

With the definition of "contested case" we transfer our discussion from the quasi-legislative (or rule-making) function of agencies to the quasi-judicial. A contested case involves the application of agency rules and/or statutes to specific parties where constitutional or statutory due process provisions require a hearing to determine rights and obligations.[1] A contested case does not normally exist when an agency is formulating rules for general application; but rather in instances involving matters such as rate-making, licensing, franchising (etc.). In other words, a contested case arises when an agency seeks to regulate a particular individual or corporation.

The definition in Subd. 4 does not itself conclusively identify when a contested case exists. Reference must be made to additional legal provisions--namely, those which protect individual and corporate rights, duties and privileges by due process requirements. But often there are varying interpretations as to the point at which such requirements for due process become applicable to the administrative decision-making process.

Whether an administrative action is or is not a contested case has considerable importance. If a

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[1] As an example of a statutory requirement, see M.S. Section 15.05(1), which provides that no order of the Minnesota Pullution Control Agency will be effective if it affects the vested rights of any person unless a hearing after due notice has been held.

contested case exists, affected parties are allowed a variety of procedural and judical review safeguards which are not involved if the action is deemed to be only rule-making. And by statutory declaration a contested case may receive comprehensive judicial review.

Some agencies have formulated detailed procedural rules to govern contested cases. And the Attorney General has established "Model Rules for Contested Cases." The model rules are advisory only but have been adopted in whole or in part by several administrative agencies. (For text of Model Rules for Contested Cases, see appendix Z.) Also, see text of sections 15.0418 - 15.0421, infra.

15.0412 RULES, PROCEDURES

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.

Subd. 2. To assist interested persons dealing with it, each agency shall, so far as deemed practicable, supplement its rules with descriptive statements of its procedures, which shall be kept current.

Comments:

As discussed previously, the above subdivisions are a general rule-making authorization, whereby agencies may supplement that which they are required to formulate with additional substantive, procedural and interpretive rules. See discussion under Sections 15.0411, subd. 3, supra.

15.0412 (Procedures, cont.)

> 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, as far as practicable, publish or otherwise circulate notice of its intended action and afford interested persons opportunity to submit data or views orally or in writing.

Comments:

As stated earlier, Laws 1974, Chapter 344, established a State Register and amended various provisions in the APA so as to require publication of rules and notices of rule-making in the Register (see Appendix X for complete text of Chapter 344). The above subdivision now has such a requirement for its "notices of intended action."

However, subdivision 3 is still bothered by the ambiguous APA definition of "rule". That is, subdivision 3 implies that some "rules" will be established by a process other than that prescribed by Subd. 4, i.e. other than through public hearings. But again, it is not completely clear which "rules" are

eligible for the alternative, Subd. 3, process.

15.0412 (Procedures, cont.)

> Subd. 4. No rule shall be adopted by any agency subsequent to the effective date of sections 15.0411 to 15.0422 unless the agency first holds a public hearing thereon, 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 registered their names with the secretary of state for that purpose. 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 attorney general, who, 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.

Comments:

In large measure, subdivision 4 is the heart of the rule-making aspect of the APA. It specifies that:

- --No "rule" may be established by an "agency" without first holding a public hearing
- --Such hearing must be preceded by a 30-day mailed notice to interested persons or those who have registered with the secretary of state (and again, pursuant to Laws 1974, Chapter 344, notice must be made in the State Register)

--Rules must be adopted pursuant to a demonstrated need.

--Proposed rules must be submitted to the Attorney General for approval as to form and legality

These standards and procedures to be followed in the rule-making process have been considerably more defined by Rules and Regulations of the Attorney General, Chapter 3. (For a complete text see Appendix Y.) The A.G.'s rules are a very important extention of the APA--they are rules on rule-making, which since formulated according to the APA have the ". . .force and effect of law."

The following is a chronological review of the rule-making process in conjunction with the standards specified by the Attorney General: (The review itself was taken in part from materials compiled by the Attorney General's Office.)[1]

1. Pre-hearing Documentation

After a rule or action relating thereto has been proposed and in conjunction with rule preparation, the involved state agency must prepare a series of pre-hearing documents. The nature, requirements and examples of these documents are contained in the Attorney General's Rule Making Procedures and are reviewed chronologically below. (Note: The requirements are subject to some alteration in light of the establishment of a State Register under Laws 1974, Chapter 344.)

a. Order of hearing

This document must contain the time and place of the proposed hearing and state that notice must be given to all persons who have registered their names with the Secretary of State for that purpose (see Appendix Y, Exhibit A). If the Order is generated by board or commission action a resolution of said board or commission

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[1]From Continuing Legal Education, Minnesota Bar Assoc., Manual 61, Administrative Law, Chapter 2, "Rule-making Pursuant to the APA," 1974. Copyrighted by University of Minnesota.

authorizing the signatory to issue such order must be attached (see Appendix Y, Exhibits B-1 and B-2).

b. Notice of Hearing

The basic statutory requirements of the notice of hearing are found in Minn. Stat. §15.0412, Subd. 4 (1971), amended by Laws 1974, Chapter 344, State Register. Pursuant to Atty. Gen. 302 the notice must include the time and place of hearing, state that all interested parties will have an opportunity to be heard, the manner in which they may present their views and a statement or description of the subjects and issues involved. A copy of the proposed rules need not accompany the notice of hearing, but, in that event, the notice should clearly explain the nature and extent of the proposed rules. See Appendix Y, Exhibits D and E. Since the primary purpose of APA rule-making procedure is to afford interested parties the opportunity to be heard on proposed rules it is axiomatic that the notice of hearing should be sufficiently specific to apprise persons of the full nature and extent of the proceedings. Generally, notices of hearing also indicate at what state office(s) rules may be obtained, if the rules are not included with such notices. In any event, any person is entitled to examine or obtain a certified copy of the proposed rules pursuant to Minn. Stat. §15.17 (1971).

It is not necessary, however, to give notice to every person who might be affected by the proposed rules. It is sufficient if all persons who have registered their names with the Secretary of State for that purpose are notified. Welsand v. State of Minnesota Railroad and Warehouse Commission, 251 Minn. 504, 88 N.W.2d 834 (1958). As a general practice, notice of all rule-making hearings is also sent to all current members of the Minnesota Legislature.

c. Secretary of State's List

This list must be included with the pre-hearing documents and contain the names of all associations or persons who have registered with the Secretary of State in order to receive notices of hearing. The Secretary of State, in fact, maintains a

series of lists for persons who desire notices for only specific types of rules, but persons may register on a general list entitling them to notice of all administrative rule-making hearings.

d. Affidavit of Secretary of State

This document, which is to accompany the Secretary of State's list, certifies as to the completeness of the list, specifies the date on which the list was obtained by the agency proposing rules and is signed by a delegate of the Secretary of State. See Appendix Y, Exhibit C-1.

e. Affidavit of Agency Delegate

This affidavit, executed by the agency delegate and notarized, affirms: the delegate's agency relationship, that on a date specified he personally requested the Secretary of State's list, that he obtained said list and the date on which the list was obtained. See Appendix Y, Exhibit C-2.

f. Affidavit of Mailing

This document, executed by the person mailing out the notices of hearing and notarized, affirms that said person did mail such notices to all persons on the Secretary of State's list and specifies the date and city of mailing. See Appendix Y, Exhibit F-1.

g. Statement of Need

The Statement of Need must set forth sufficient reasons to support a find of need for the rules. A general recitation of statutory authority is not sufficient, unless the Legislature mandated the agency's promulgation of the proposed rules. If the specific rule-making process resulted from a petition as authorized in Minn. Stat. §15.0415 (1971), the petition may be substituted for the Statement of Need. See Appendix Y, Exhibit F-2.

2. The Public Hearing

a. Procedure

As earlier noted, agencies may adopt rules governing the formal or informal procedures

of APA rule-making (Minn. Stat. §15.0412, Subd. 1 (1971)) and these agency rules may govern the conduct of public hearings. Generally, the agency designates a hearing officer and certain agency personnel to sit as a hearing panel and the public hearing usually proceeds as follows:

i. The hearing officer or agency counsel specifies the procedure for the hearing and introduces the pre-hearing documents.

ii. The hearing officer briefly discusses the nature and impact of the proposed rules and may introduce written testimony received prior to the hearing.

iii. Testimony, oral or written, is received from interested parties and those offering testimony may be questioned by the hearing officer, panel or other persons in attendance at the hearing. Some agencies request that persons wishing to offer oral testimony so indicate on a register just before the hearing and, in that event, such persons' testimony is heard first. However, even under these circumstances, the oral testimony of persons failing to so indicate should be and is taken.

iv. At such time as all interested parties have had an opportunity to submit testimony, the hearing officer adjourns the hearing.

b. Hearing Record

Atty. Gen. 303 requires in part that a transcript of all rule-making hearings must be prepared and further specifies that the hearing record (transcript plus exhibits) must support the rule as adopted. Consequently, it is important for the proposing agency to affirmatively support its proposed rules even though no adverse testimony is presented, for to do otherwise would not build an adequate record for rule adoption. It is equally necessary, of course, for opponents of proposed rules to firmly establish their position in the hearing record.

3. Post-hearing Submissions

Atty. Gen. 303 also provides that the hearing record demonstrates that interested parties were afforded at least twenty days subsequent to the public hearing to submit briefs or other written testimony. Therefore, persons not testifying at the hearing or those wishing to offer additional comment may tender post-hearing submissions.

4. Agency Adoption of Rules

Following the designated period for post-hearing submissions the agency undertakes the task of evaluating the record and determining what action is to be taken. It is to be noted that if an agency wishes to change a proposed rule at this juncture, it may not do so without a public hearing if the proposed change either goes to subject matter different from that of the previous hearing or results in a rule fundamentally different from that specified in the notice of hearing. The course of action elected, assuming no rule changes, is reflected in two additional documents required by the Rules and Regulations of the Attorney General.

a. Findings of Fact

In this document, the agency must set forth in detail its basic findings of fact on which its action with respect to proposed rules is taken. A simple statement that a preponderance of evidence supports the rules is insufficient. Rather a clear treatment of significant fact issues is necessary. See Appendix Y, Exhibit G-2.

b. Order Adopting Rules

This exhibit must state the time and place of hearing, that proper notice was served, that all interested parties were given the opportunity to submit testimony and that the rules are being adopted on the basis of the record, proper authority and established need. See Appendix Y, Exhibit G-1. If the adopting body is a board, the adoption must take place by resolution of a quorum of the board. Following adoption, the board should, by separate resolution (see Appendix Y, Exhibit H-1),

designate a board member to attest to the board's adoption action (see Appendix Y, Exhibit H-2). After either an agency or board has adopted rules, said rules, accompanied by the documentation specified in Atty. Gen. 302 and 303, should be remitted to the Attorney General for review as to form and legality.

5. Review by Attorney General

(Additional comments to follow.)

6. Filing with Secretary of State

7. Filing with Commissioner of Administration and Publication in the State Register

After adopted rules are filed with the Secretary of State they must be further filed with the Commissioner; then, (effective, July 1, 1975) according to 1974 Laws, (Chapter 344) the rules must be published in the State Register, and only then does a rule take effect.

The standards and procedures of rule review by the Attorney General have also been set forth with specificity in the Attorney General's Rules (and again commentary thereon has been prepared as follows by the Attorney General's Office):

Pursuant to Minn. Stat. §15.0412, Subd. 4 (1971), all rules promulgated under the APA must be submitted to the Attorney General for approval as to form and legality. Said submittal and review is governed by Rules and Regulations of the Attorney General, Chapter 3 (Atty. Gen. 301-306) which establishes a uniform set of required supporting documents and forms, and the manner in which they must be submitted, sets forth the requirements for the record, and provides for an independent forum in which any person may challenge the legality of the submitted rules prior to their approval.

1. Documentation and Time Limits

In submitting rules for approval, it is the individual agency's responsibility to assemble the required documents and record in the quantity and form prescribed by the Attorney General's rules. Upon the Attorney General's receipt of

same, rules must be approved or disapproved within 20 days unless they are returned to the submitting agency for revision, in which case the 20 day period is terminated and the Attorney General shall have an additional 10 days in which to review the rules upon their resubmission.

2. Review of Rules

In the Attorney General's review, rules shall be disapproved as to form if the rules, record, and supporting documentation do not comply with the above-cited Rules and Regulations of the Attorney General or the technical regulations of the Minnesota State Publishing Board regarding submittal of rules for publishing. A rule shall be disapproved as to legality if it:

a. Exceeds or is noncompliant with the agency's statutory authority.

b. Conflicts with the governing statute or other relevant law.

c. Has no reasonable realtionship to statutory purposes.

d. Is unconstitutional, arbitrary or unreasonable.

3. Review of Board

As Minn. Stat. §15.0412, Subd. 4 (1971) provides, in part, "Every rule hereafter proposed by an administrative agency, before being adopted, must be based upon a showing of need for the rule . . ." the examination of the record is of special import in the Attorney General's review in order to insure that the promulgatory agency has, in fact, shown why the proposed rule is necessary. Therefore, Atty. Gen. 303 requires that:

a. A transcript of all hearings on the proposed rule be made and submitted as part of the record.

b. The transcript shall demonstrate that the agency recited the reasons why the proposed rule is necessary at the hearing.

c. The record supports the rules and shows that all interested parties were afforded the opportunity to present oral and/or written testimony.

d. The record shall demonstrate that interested parties were allowed at least 20 days after the hearing in which to submit written material to the agency; additionally, said time limit must have been stated at the hearing.

4. Appeal to Attorney General

In regard to the approval of rules, Rules and Regulations of the Attorney General further provides for an appeal to the Attorney General, prior to his approval of the rule, by any person or association wishing to challenge the validity of the proposed rule. See Atty. Gen. 305(c). A party wishing to utilize this procedure must so notify the Attorney General and then, at the Attorney General's election, submit a written brief or present oral argument in support of his position within 10 days of the Attorney General's receipt of the rules. Due to the relatively short time period in which the Attorney General must review the rules and judge any appeals brought pursuant to Atty. Gen. 305(c), as a practical matter, parties wishing to utilize this appeal should stay in close contact with the promulgating agency as to the progress of the proposed rules and when they will be submitted to the Attorney General. Additionally, all requests for this appeal should be addressed to the Attorney General in writing as soon as possible so that the brief or oral argument can be adequately reviewed within the 20 day period.

15.0412 (Procedures, cont.)

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 days and may not immediately be reissued or continued in effect thereafter without following the procedure of subdivision 4.

Comments:

This subdivision was also amended by the "State Register Act" so as to require emergency rules in the register "as soon as possible."

A complete listing of agencies with emergency powers is not currently available.

15.0413 EFFECT OF ADOPTION OF RULES; PUBLICATION; APPROPRIATION

Subdivision 1. Every rule or regulation filed in the office of the secretary of state as provided in section 15.0412 shall have the force and effect of law upon its further filing in the office of the commissioner of administration. Standards or statements 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 register of rules filed with that office open to public inspection.

Comments:

See previous comments under Section 15.0411, Subd. 3, supra.

15.0413 (Adoption, Publication, cont.)

Subd. 2. Each rule hereafter adopted, amended, or repealed shall become effective or be repealed upon filing the new or amended rule or notice of repeal 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.

Subd. 3. Rules and regulations hereafter promulgated, amended or repealed of each 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 not defined as an "agency" in section 15.0411 shall not have the effect of law unless they are filed in the office of the commissioner of administration in the same manner as rules and regulations of an agency are so filed. This subdivision, however, shall not apply to rules and regulations of the regents of the University of Minnesota.

Subd. 4. Rules and regulations heretofore promulgated by an agency or a state officer, board, commission, bureau, division, department, or tribunal other than a court, including those governmental bodies referred to in subdivision 3, shall not have the effect of law unless filed in such form as the commissioner of administration shall prescribe on or before July 1, 1964 in the office of the commissioner of administration.

Comments:

The above subdivisions were also amended so as to require relevant notice and publication in the State Register, see Appendix X. The following subdivision (5) was amended to such an extent that its new provisions are set forth below.

15.0413 (Publication, Appropriation, cont.) As Amended by Laws 1974, Chapter 344

Subd. 5. ~~Not later than January 1, 1965 and annually thereafter but not later than January 1 of each year the commissioner of administration shall arrange for publication and distribution of all rules and regulations in such form and at such prices to be charged as he may determine.~~

~~No such published rules and regulations shall be distributed without charge except to the official depositories of state publications. The appropriation to any agency for supplies and expenses shall be deemed to include sufficient moneys for its purchase of necessary published rules and regulations.~~ Upon proper notification by the agency which issues a rule or regulation or notice, the commissioner of administration shall be accountable for the publication of the state register under the provisions of section 8. The commissioner of administration shall require each agency which requests the publication of rules, regulations, or notices 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 regular mailing of the state register to any person, agency, or organization if so requested provided that the total cost of the mailing is 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 each of the state register, however, shall be provided without cost to the legislative reference library and to the state law library.

15.0413 (Publication, Appropriation, cont.)

Subd. 6. An administrative rules publication account is hereby created in the state treasury. All receipts from the sale of rules and regulations authorized by this section shall be deposited in such account. The sum of $26,000 is appropriated from the general fund in the state treasury to such account. All moneys in the administrative rules publication account in the state treasury are appropriated annually to the commissioner of administration to carry out the terms and provisions of this section.

15.0415 PETITION FOR ADOPTION OF RULE

> Any interested person may petition an agency requesting the adoption, suspension, amendment or repeal of any rule. Each agency may prescribe by rule the form for such petitions and the procedure for their submission, consideration and disposition.

Comments:

The above section is particularly important because it provides a means whereby the public may activate the rule-making (suspending, amending, repeal) process at their own motion. Unfortunately, the application of this provision by administrative agencies has been neglected.

It will be noted that agencies "may" prescribe the procedures for acting on public petitions for rule-making. In a recent phone survey by House Research of five major state departments 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.

Admittedly, the statute itself is vague. It sets no standards nor does it establish any individual rights to be observed by agencies. Agencies are not even required to establish formal procedural rules for dealing with petitions.

15.0416 DETERMINATION OF VALIDITY OF RULE

> The validity of any rule may be determined upon the petition for a declaratory judgment thereon, addressed to the district court where the principal office of the agency is located, when it appears that the rule, or its threatened application, interferes with or impairs, or threatens to interfere with or impair the legal rights or privileges of the petitioner. The agency shall be made a party to the proceeding. The declaratory judgment may be rendered whether or not the petitioner has first requested the agency to pass upon the validity of the rule in question.

15.0417 RULE DECLARED INVALID

> In proceedings under section 15.0416 the court shall declare the rule invalid if it finds that it violates constitutional provisions or exceeds the statutory authority of the agency or was adopted without compliance with statutory rule-making procedures.

Comments:

Although the above sections provide important procedures of redress for individuals and concerns affected by administrative action, it is infrequently used. Thus, there is little record of judicial interpretation of these specific provisions. Generally, however, courts are reluctant to substitute their judgment for that of the agency in matters of substance and intervene only where statutory authority has been exceeded or where required due process has not been observed.

- 0 -

As stated in the introduction, little attention will be given at this point to the statutory provisions relating to contested cases. The following sections are, thus, set forth below with comment:

15.0418 CONTESTED CASE; HEARING, NOTICE. In any contested case all parties shall be afforded an opportunity for hearing after reasonable notice. The notice shall state the time, place and issues involved, but if, by reason of the nature of the proceeding, the issues cannot be fully stated in advance of the hearing, or if subsequent amendment of the issues is necessary, they shall be fully stated as soon as practicable, and opportunity shall be afforded all parties to present evidence and argument with respect thereto. The agency shall prepare an official record, which shall include testimony and exhibits, in each contested case, but it shall not be necessary to transcribe shorthand notes unless requested for purposes of rehearing or court review. If a transcript is requested, the agency may, unless otherwise provided by law, require the party requesting to pay the reasonable costs of preparing the transcript. Informal disposition may also be made of any contested case by stipulation, agreed settlement, consent order or default. Each agency may adopt appropriate rules of procedure for notice and hearing in contested cases.

[*1957 c 806 s 8*]

15.0419 EVIDENCE IN CONTESTED CASES. Subdivision 1. In contested cases agencies may admit and give probative effect to evidence which possesses probative value commonly accepted by reasonable prudent men in the conduct of their affairs. They shall give effect to the rules of privilege recognized by law. They may exclude incompetent, irrelevant, immaterial and repetitious evidence.

Subd. 2. All evidence, including records and documents (except tax returns and tax reports) in the possession of the agency of which it desires to avail itself, shall be offered and made a part of the record in the case, and no other factual information or evidence (except tax returns and tax reports) shall be considered in the determination of the case. Documentary evidence may be received in the form of copies or excerpts, or by incorporation by reference.

Subd. 3. Every party or agency shall have the right of cross-examination of witnesses who testify, and shall have the right to submit rebuttal evidence.

Subd. 4. Agencies may take notice of judicially cognizable facts and in addition may take notice of general, technical, or scientific facts within their specialized knowledge. Parties shall be notified in writing either before or during hearing, or by reference in preliminary reports or otherwise, or by oral statement in the record, of the material so noticed, and they shall be afforded an opportunity to contest the facts so noticed. Agencies may utilize their experience, technical competence, and specialized knowledge in the evaluation of the evidence presented to them.

[*1957 c 806 s 9*]

15.042 [Repealed, 1957 c 806 s 13]

15.0421 PROPOSAL FOR DECISION IN CONTESTED CASE. Whenever in a contested case a majority of the officials of the agency who are to render the final decision have not heard or read the evidence, the decision, if adverse to a party to the proceeding other 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, 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.

[*1957 c 806 s 10*]

15.0422 DECISIONS, ORDERS. Every decision and order adverse to a party of the proceeding, rendered by an agency in a contested case, shall be in writing or stated in the record and shall be accompanied by a statement of the reasons therefor. The statement of reasons shall consist of a concise statement of the conclusions upon each contested issue of fact necessary to the decision. Parties to the proceeding shall be notified of the decision and order in person or by mail. A copy of the decision and order and accompanying statement of reasons together with a certificate of service shall be delivered or mailed upon request to each party or to his attorney of record.

[*1957 c 806 s 11*]

15.0423 REVIEW OF LICENSING OR REGISTRATION PROCEEDINGS, STAY. Subdivision 1. Where an appeal is taken or certiorari proceeding is instituted to determine the right of a board or other administrative agency to revoke or refuse to issue or reissue a license or registration which expires upon a specified date, the term of such license or registration shall not expire until 30 days after final determination of such appeal or certiorari proceeding.

Subd. 2. This section does not alter, change or affect the determination made by the board or other administrative agency, or by the reviewing court, as to the suspension, revocation or denial of the license or registration during the pendency of the appeal or certiorari proceeding.

[1963 c 565 s 1, 2]

15.0424 JUDICIAL REVIEW OF AGENCY DECISIONS. Subdivision 1. **Application.** Any person aggrieved by a final decision in a contested case of any agency as defined in Minnesota Statutes, Section 15.0411, Subdivision 2 (including those agencies excluded from the definition of "agency" in section 15.0411, subdivision 2, but excepting the tax court, the workmen's compensation commission sitting on workmen's compensation cases, the department of manpower services, the director of mediation services, and the department of public service), whether such decision is affirmative or negative in form, is entitled to judicial review thereof, but nothing in this section shall be deemed to prevent resort to other means of review, redress, relief, or trial de novo provided by law now or hereafter enacted. The term "final decision" as herein used shall not embrace a proposed or tentative decision until it has become the decision of the agency either by express approval or by the failure of an aggrieved person to file exceptions thereto within a prescribed time under the agency's rules.

Subd. 2. **Petition, service.** (a) Proceedings for review shall be instituted by serving a petition thereof personally or by registered mail upon the agency or one of its members or upon its secretary or clerk and by filing such petition in the office of the clerk of district court for the county wherein the agency has its principal office or the county of residence of the petitioners, all within 30 days after the agency shall have served such decision and any order made pursuant thereto by mail on the parties of record therein; subject, however, to the following:

(1) In the case of a tentative or proposed decision which has become the decision of the agency either by express approval or by a failure by an aggrieved person to file exceptions within a prescribed time under the agency's rules, such 30-day period shall not begin to run until the latest of the following events shall have occurred: (a) such decision shall have become the decision of the agency as aforesaid; (b) such decision, either before or after it has become the decision of the agency, shall have been served by mail by such agency on the parties of record in such proceeding.

(2) In case a request for rehearing or reconsideration shall have been made within the time permitted and in conformity with the agency's rules, such 30-day period shall not begin to run until service of the order finally disposing of the application for rehearing or reconsideration, but nothing herein shall be construed as requiring that an application for rehearing or reconsideration be filed with and disposed of by the agency as a prerequisite to the institution of a review proceeding under this section.

(b) The petition shall state the nature of the petitioner's interest, the facts showing the petitioner is aggrieved and is affected by the decision, and the ground or grounds upon which the petitioner contends that the decision should be reversed or modified. The petition may be amended by leave of court although the time for serving the same has expired. The petition shall be entitled in the name of the person serving the same as petitioner and the name of the agency whose decision is sought to be reviewed as respondent. Copies of the petition shall be served, personally or by registered mail, not later than 30 days after the institution of the proceeding, upon all parties who appeared before the agency in the proceeding in which the order sought to be reviewed was made; and for the purpose of such service the agency upon request shall certify to the petitioner the names and addresses of all such parties as disclosed by its records, which certification shall be conclusive. The agency and all parties to the proceeding before it shall have the right to participate in the proceedings for review. The court in its discretion may permit other interested parties to intervene.

(c) Every person served with the petition for review as provided in this section and who desires to participate in the proceedings for review thereby instituted shall serve upon the petitioner, within 20 days after service of the petition upon such person, a notice of appearance stating his position with reference to the affirmance, vacation, reversal or modification of the order or decision under review. Such notice, other than by the named respondent, shall also be served on the named respondent and the attorney general and shall be filed, together with proof of service thereof, with the clerk of the reviewing court within ten days after such service. Service of all subsequent papers or notices in such proceedings need be made only upon the petitioner, the named respondent, the attorney general, and such other persons as have served and filed the notice as herein provided, or have been permitted to intervene in said proceedings as parties thereto by order of the reviewing court.

Subd. 3. **Stay of decision; stay of other appeals.** The filing of the petition shall not stay the enforcement of the agency decision; but the agency may do so, or the reviewing court may order a stay upon such terms as it deems proper. When an appeal from a final decision is commenced under this section in any district court of this state, any other later appeal under this section from such final decision involving the same subject matter shall be stayed until final decision of the first appeal.

Subd. 4. **Transmittal of record.** Within 30 days after service of the petition, or within such further time as the court may allow, the agency shall transmit to the reviewing court the original or a certified copy of the entire record of the proceeding under review; but, by stipulation of all parties to the review proceeding, the record may be shortened. Any party unreasonably refusing to stipulate to limit the record may be taxed by the court for the additional costs. The court may require or permit subsequent corrections or additions to the record when deemed desirable.

Subd. 5. **New evidence, hearing by agency.** If, before the date set for hearing, application is made to the court for leave to present additional evidence on the issues in the case, and it is shown to the satisfaction of the court that the additional evidence is material and that there were good reasons for failure to present it in the proceeding before the agency, the court may order that the additional evidence be taken before the agency upon such conditions as the court deems proper. The agency may modify its findings and decision by reason of the additional evidence and shall file with the reviewing court, to become a part of the record, the additional evidence, together with any modifications or new findings or decision.

Subd. 6. **Procedure on review.** The review shall be conducted by the court without a jury and shall be confined to the record, except that in cases of alleged irregularities in procedure before the agency, not shown in the record, testimony thereon may be taken in the court. The court shall, upon request, hear oral argument and receive written briefs. Except as otherwise provided all proceedings shall be conducted according to the rules of civil procedure.

[*1963 c 809 s 1; 1965 c 698 s 3; Ex1967 c 1 s 6; 1969 c 567 s 3; 1969 c 1129 art 2 s 1; 1971 c 25 s 67*]

15.0425 SCOPE OF JUDICIAL REVIEW. In any proceedings for judicial review by any court of decisions of any agency as defined in Minnesota Statutes, Section 15.0411, Subdivision 2 (including those agencies excluded from the definition of agency in section 15.0411, subdivision 2) the court may affirm the decision of the agency or remand the case for further proceedings; or it may reverse or modify the decision if the substantial rights of the petitioners may have been prejudiced because the administrative finding, inferences, conclusion, or decisions are:

(a) In violation of constitutional provisions; or

(b) In excess of the statutory authority or jurisdiction of the agency; or

(c) Made upon unlawful procedure; or

(d) Affected by other error of law; or

(e) Unsupported by substantial evidence in view of the entire record as submitted; or

(f) Arbitrary or capricious.

[*1963 c 809 s 2*]

15.0426 APPEALS TO SUPREME COURT. An aggrieved party may secure a review of any final order or judgment of the district court under section 15.0424 or section 15.0425 by appeal to the supreme court. Such appeal shall be taken in the manner provided by law for appeals from orders or judgments of the district court in other civil cases.

[*1963 c 809 s 3*]

15.046 PUBLICATION BOARD. There is hereby created a publication board which shall consist of the commissioner of administration, the secretary of state, and the attorney general. 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 secretary from its members. The board shall meet, from time to time, upon the call of the commissioner of administration or his duly designated assistant.

[1945 c 590 s 2]

15.047 REGULATIONS. 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.

Subd. 2. Rules and regulations published pursuant to this section may be sold by the commissioner of administration in the manner provided by Minnesota Statutes, Sections 648.42 to 648.44.

Subd. 3. [Repealed, 1963 c 822 s 4]

[1945 c 590 s 3; 1955 c 603 s 1-3; 1963 c 822 s 3]

NOTE: See also section 16.80.

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

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

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

(3) The copy of the rule or regulation 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.

[1945 c 590 s 4]

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.

[1945 c 590 s 5]

Comments:

Rules must be adopted in accordance with the form, printing and indexing standards of the Publication Board. As was noted earlier, the Attorney General will not approve rules which fail to conform to the Board's specifications.

The above provisions have been considerably affected by the 1974 law establishing a State Register (Chapter 344), as discussed previously. Section 8 of the act reads as follows:

LAWS 1974, CHAPTER 344

Sec. 8. Minnesota Statutes 1971, Chapter 15, is amended to adding a section to read:

[15.051] [STATE REGISTER.] Subdivision 1. [PURPOSE.] The commissioner of administration shall publish a state register containing all notices for hearings concerning rules or regulations, giving time, place and purpose of the hearing. Further, the register shall contain all rules or regulations, amendments thereof or repeals, as adopted under 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 further publish official notices in the register which he deems to be of significant interest to the public. 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 of administration shall ascertain that the content of the register is clearly ordered by the four categories described in this subdivision in order to provide easy access to this information by any interested party.

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 shall remain unpublished for more than ten calendar 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.

Subd. 3. [SUBMISSION OF ITEMS FOR PUBLICATION.] Any state agency which desires to publish a notice of hearing, rule or regulation or change thereof, or an executive order, shall submit a copy of the entire document, including dates when adopted, and filed with the secretary of state, to the commissioner of administration in addition to any other copies which may be required to be filed with the commissioner by other law.

Sec. 9. This act is effective on July 1, 1975.

SUPPLEMENT

April 30, 1974

TO: Members of House and Senate Governmental Operations Committees

FROM: Senate Counsel Division - Marcy Wallace

SUBJ: Rule-Making By State Agencies

On April 26 and 27 Jim Nobles and I attended a Continuing Legal Education program, sponsored by the Administrative Law Committee of the Minnesota State Bar Association on the topic of "Administrative Agencies - Minnesota Law and Practice." The program participants were specialists in the area of Minnesota administrative law and included both private practitioners and attorneys employed by state government. They presented prepared lectures and engaged in panel discussions and question and answer sessions. The topics discussed included general administrative practices, rule-making, contested case proceedings, licensing and the procedures of various specific state agencies. This memo will summarize those portions of the program relevant to the committees' study of rule-making procedure.

DUE PROCESS IN THE PROMULGATION OF RULES AND REGULATIONS

According to the program participants, the extent to which the principles of procedural due process apply to rule making by state agencies and whether current procedures are adequate to comply with constitutional standards are two of the newest and most significant areas of concern in administrative law today. The traditional view that the constitutional guarantees of a right to notice, a right to be heard, a right to confront opposing witnesses, and so forth, are applicable only when an agency is acting in its quasi-judicial capacity has begun to give way in recent years. As the power of regulatory agencies has increased, so has concern over the effects of that power on private individuals. The rule making authority that the state of Minnesota delegates to many of its agencies, the PCA for example, is no longer merely the power to interpret the language of the statutes or to fill in the details of the statutes regulatory scheme but now usually includes the power to promulgate substantive rules within the limits broad statutory guidelines. An agency exercising quasi-legislative power of this nature may have a much greater impact on private rights than an agency adjudicating the typical contested case.

Thus the view that some sort of procedural due process attaches to the rule-making process is gaining acceptance, and the program participants have predicted that persons whose economic interests are adversely affected by strict rules and regulations will begin to challenge those regulations by attacking the constitutionality of the procedure by which they were adopted. The possibility that rules may be invalidated on these grounds makes it important to determine

whether the procedures followed in Minnesota are vulnerable to attack. Such an inquiry is difficult due to the uncertain state of the law in the area. It may be safe to assume that due process requires at a minimum that rules be adopted only after some sort of notice to interested parties and public hearing, but beyond that what may ultimately be required is unclear. The panelists did, however, raise a number of due process issues regarding the Minnesota procedures which are of interest to consider.

1. Initiation of Rule-Making Process By A Private Citizen. Minn. Stat. Section 15.0415, provides that "any interested person" may petition an agency for the adoption, suspension, amendment or repeal of any rule the statute and the attorney general's regulations governing the adoption of rules are silent on the question of whether the agency must initiate the promulgation process and hold a public hearing regarding such suggested rules even though it disagrees with the petitioner as to the merits of the proposed action. The bare statutory language would appear to permit the agency to dispose of these petitions in an ex-parte fashion.

Although agency inaction may have effects that are as far reaching as agency action, the question of whether procedural due process attaches when an agency exercises its discretion not to act remains totally unanswered. The manner in which a court would interpret the statute permitting private persons to initiate rule-making is thus totally unsettled. It was suggested that further legislation would help to clarify the issue.

2. Burden of Proof. Minn. Stat. Section 15.0412, Subdivision 4, provides that all rules must be based upon a showing of need for the rule. The same subdivision requires that the attorney general review and approve all rules as to form and legality prior to their taking effect. The attorney's generals rules regarding review and approval provide that a rule shall be disapproved if "the required conditions have not been met."

In the opinion of the panelists, these provisions, taken together, require an agency to establish at the public hearing the need for the regulation in question by a preponderance of the evidence. It was pointed out, however, that many agencies fail to do this in practice, but rather establish the need for the regulation in very general terms and then open the meeting for public testimony. Thus, it was suggested that private interests faced with adverse agency actions may present a vast amount of evidence in opposition to a proposed rule and after its adoption attack it, arguing that the agency failed to meet its burden of establishing need by a preponderance of the evidence.

Whether such a court challenge would be successful is open to question, but it is clear that the attorney general attempts to apply a preponderance of the evidence standard in his review of agency rules. The point is that both the question of legislative intent and due process requirements as to the proof of need are unsettled.

3. The right of Cross-Examination at the Public Hearing. The statutes and attorney general's rules are silent on the question of whether an interested party has a right to cross examine witnesses and agency personnel at the public hearing. The panelists pointed out that in practice cross-examination of witnesses but not of agency personnel who do not testify is permitted. It is unclear whether due process requires that interested persons be allowed to cross-examine witnesses and agency members or whether there is any right of access to the written materials or records which support the agency's decision. It was emphasized that the question of the existence and extent of such rights is particularly important with respect to the hearings of the PCA and similar agencies and is in need of clarification.

4. Amendment of Proposed Rules at Public Hearing. Minn. Stat. Section 15.0412, Subdivision 4, provides that no rule may be adopted except after notice and public hearing. Interpreting that provision, the attorney general's rules provide that a further hearing must be held if the proposed rules are changed so that they relate to "another subject matter" or are "fundamentally different from that contained in the notice of hearing." The kind of notice required for the subsequent hearing and the definition of a fundamental difference remain unclear.

It is becoming a relatively common agency practice to use the public hearing as a working session for the amending and reworking of proposed rules, but the possibility that changes will necessitate re-instituting the hearing process makes agencies less willing to follow this practice.

Issues of statutory interpretation and of due process are both involved here. It is simply unclear how substantial a change in a proposed rule is required before the legislature intended or the constitution requires that notice and hearing be provided; yet an improper decision that further hearing is not required may invalidate the resulting rule.

5. Notice of Steps in the Adoption Process Other Than Hearing. Although the statutes require that notice of the public hearing be given to interested parties whose names are on the secretary of state's list and must be published in the state register, there is no requirement that an agency provide any notice of the final adoption of its regulations or that they have been forwarded to the attorney general for review. Since the attorney general's rules permit public input in the review and approval process and afford interested parties an opportunity to present legal objections to the rules by brief or oral argument, the dates of final adoption and review are very important information.

As a practical matter, agency personnel will provide this information to any person who telephones and inquires, but that does not alter the fact that interested parties frequently are unaware of these informal sources of information. Whether due process requires that notice of these steps be formally given to interested persons is unsettled. Some of the panel members suggested, however, that the new state register provides a convenient mechanism for giving notice, and commented that it might be desirable to require by statute or rule that the dates of final adoption and forwarding for review be published in the register.

STATUTORY INTERPRETATION

The second major class of issues discussed by the program participants involves the interpretation of and ambiguities in certain providions of the administrative procedures act.

1. Definitions of Rule-Making and Adjudication of Contested Cases. Although it is generally true that an agency acts in its quasi-legislative or rule-making capacity when it makes decisions which govern the future conduct or rights of a class of unspecified persons and that it acts in its quasi-judicial capacity when it makes decisions which relate to a specific individual's past conduct or present rights, those two categories are not necessarily either all-inclusive or mutually exclusive. Some agency actions such as investigations appear to fit in neither category, while other actions, rate-making for example, can be classified either way.

Since the procedural rights of persons affected by agency decisions will depend upon the classification of the agency action as rule-making or adjudicatory, the issue is an important one. Several of the panel members cited identification of a contested case or rule as one of the major problems they face in the practice of administrative law, and it was suggested that litigation or some other means was necessary to clarify these terms.

2. Exclusivity of Statutory Remedies and Exhaustion. Minn. Stat. Section 15.01416, permits any person to challenge the validity of a rule which threatens to interfere with his rights and privileges by bringing a declaratory judgment action in state district court. The new legislative review committee appears to permit any person to petition the committee to suspend a rule.

Two issues remain unclear from the statutory language. First, it is not certain whether the legislature intended these remedies to be exclusive or whether the aggrieved person may pursue other legal remedies. If he is threatened with immediate loss of rights or privileges, a person will wish to obtain injunctive relief to prevent the agency from enforcing the rule against him while he challenges its validity. As the panelists pointed out, it is impossible to say in the absence of clarifying language or supreme court decision whether injunctive remedies are available.

Second, the statutes give no indication whether the legislature intended the exhaustion doctrine to apply to the review committee established last section. As a very general rule one cannot challenge the validity of an agency action in court unless he has first exhausted all procedures available to obtain relief at the agency level. It was suggested that one might be required to seek relief from the review committee before challenging a rule in court and that some clarification of legislative intent would be helpful.

CONCLUSION

This memo is not intended as an exhaustive survey of the merits or problems of the rule-making procedure of the Minnesota Administrative Procedures Act. Rather, it is intended as a summary of certain legal issues and problems that were considered interesting or particularly pressing by the participants in the CLE program. Since those attorneys have a great deal of experience with the practical aspects of state administrative law, the committee members may find their views of interest.

MW:mc

APPENDIX X

Laws 1945

CHAPTER 452—H. F. No. 340

An act to prescribe uniform rules of practice for administrative agencies.

Be it enacted by the Legislature of the State of Minnesota:

Section 1. **Definitions.** Subdivision 1. Unless the language or context clearly indicates that a different meaning is intended, the following words, terms, and phrases, for the purposes of this act, shall be given the meaning subjoined to them.

Subd. 2. "Administrative agency" or "the agency" means and includes any officer, board, commission, bureau, division, department, or tribunal, other than a court, having a statewide jurisdiction and authority to make any order, finding, determination, award, or assessment.

Subd. 3. "Person" includes individuals, associations, partnerships, and corporation.

Subd. 4. "Rules and Regulations" means and includes rules, regulations, and amendments thereto, of general application issued by any administrative agency interpreting, regulating the application of, or regulating procedure under the statutes which the administrative agency is charged with administering, but shall not apply to rules and regulations adopted by an administrative agency relating solely to the internal operation of the agency nor to rules and regulations adopted relating to the management, discipline, or release of any person committed to any state institution.

Sec. 2. **Rules and regulations.** Subdivision 1. For the purpose of carrying out the duties and powers imposed upon and granted to administrative agencies, each agency may promulgate reasonable rules and regulations and may amend, modify, or annul the same, and may prescribe methods and procedure in connection therewith. They shall prescribe reasonable notice, a fair hearing, findings of fact based upon substantial evidence, and shall not exceed the powers vested by statute.

Subd. 2. After complying with Subdivision 4 of this section and not later than 90 days after the date on which this act becomes effective, each administrative agency shall prepare and file with the attorney general, its rules and regulations in effect at the time of the passage of this act, together with proposed new rules and regulations. The attorney general shall approve or disapprove on or before January 1, 1946, the rules and regulations so filed within said 90 days. The

failure on the part of any official whose duty it is to file with the attorney general the rules and regulations within 90 days as required by this subdivision to so file such rules and regulations shall constitute ground for his removal from office.

Subd. 3. Every rule or regulation filed in the office of the secretary of state as provided in subdivision 4 of this section shall have the force and effect of law. All rules and regulations in effect on the date of the passage of this act shall continue in effect until new rules and regulations are adopted pursuant to the provisions hereof, but not later than January 1, 1946.

Subd. 4. No rules or regulations shall be promulgated by any administrative agency subsequent to the effective date of this Act unless said agency shall have held a public hearing thereon following the giving, at least 30 days prior to said hearing, of notice of the intention to hold said hearing, by United States mail, to accredited representatives of trade associations or other interested groups who have registered their names with the secretary of state for that purpose. Every rule or regulation hereafter proposed by an administrative agency, before being adopted, shall be submitted, as to form and legality, with reasons therefor, to the attorney general, who, within 20 days, except as provided in subdivision 2 of this section, shall either approve or disapprove the same. If he approves the same, he shall file the rule or regulation in the office of the secretary of state. If the attorney general disapproves such rule, he shall state in writing his reasons therefor, and such rule shall not be filed in the office of the secretary of state. If he fails to approve or disapprove any rule or regulation within such 20 day period, the agency may file same in the office of the secretary of state. No rule or regulation hereafter made by an agency shall become effective until thirty (30) days after said rule or regulation has been filed in the office of the secretary of state. The secretary of state shall endorse on each rule or regulation the time and date of filing and maintain an index of such rule and regulation for public inspection.

Subd. 5. No fee shall be charged for any filing required by this section.

Sec. 3. **Petition for reconsideration.** Any person substantially interested or affected in his rights of person or property by a rule or regulation promulgated by an administrative agency may petition the agency for a reconsideration of such rule or regulation or for an amendment, modification, or waiver thereof. Such petition shall set forth a clear, con-

cise description of the facts, and the grounds, upon which such reconsideration, amendment, modification, or waiver is sought. The agency shall grant the petitioner a public hearing in the manner prescribed in Subd. 4 of Sec. 2.

Sec. 4. **Certain boards excepted.** This act shall not apply to the professional and regulatory examining and licensing boards enumerated in Minnesota Statutes 1941, Chapters 146 to 156, both inclusive, and Laws 1945, Chapter 242.

Approved April 21, 1945.

Laws 1945

CHAPTER 590—H. F. No. 571

An act relating to the filing, codification, and publication of the rules, regulations, and orders of state administrative agencies, and creating a publication board.

Be it enacted by the Legislature of the State of Minnesota:

Section 1. **Rules of administrative agencies.** Each administrative agency shall file one copy of each of its rules and regulations in the office of the clerk of the district court in each county for public inspection, and shall mail one copy to the secretary of the Minnesota State Bar Association, to the revisor of statutes, and to each district judge. It shall also prepare sufficient additional copies for distribution to interested parties requesting the same.

Sec. 2. **Publication board.** There is hereby created a publication board which shall consist of the commissioner of administration, the secretary of state, and the attorney general. 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 secretary from its members. The board shall meet, from time to time, upon the call of the commissioner of administration or his duly designated assistant.

Sec. 3. **Regulations.** The publication board shall prescribe regulations for carrying out the provisions of this act. 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 this act;

(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) Prorating the cost of these publications to the various state agencies.

Sec. 4. **Effect of publication of rules or orders.** The filing or publication of a rule, regulation, or order raises a rebuttable presumption that:

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

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

(3) The copy of the rule or regulation is a true copy of the original rule or regulation; and

(4) All requirements of this act and regulations prescribed thereunder relative to such regulations have been complied with.

Sec. 5. **Judicial notice taken.** Judicial notice of any rule, regulation, or order duly filed or published under the provisions of this act shall be taken.

Approved April 23, 1945.

CHAPTER 806—H. F. No. 114

[Coded in Part]

An act concerning procedure of state administrative agencies; and repealing Minnesota Statutes 1953, Sections 15.041 to 15.044.

Be it enacted by the Legislature of the State of Minnesota:

Section 1. [15.46] **Definitions.** Subdivision 1. For the purposes of this act 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. This act does not apply to (a) agencies directly in the legislative or judicial branches, (b) professional and regulatory examining and licensing boards enumerated in Minnesota Statutes 1953, Chapters 146 to 156, (c) Laws 1945, Chapter 242, (d) emergency powers in Laws 1951, Chapter 694, Title III, Sections 301 to 307, (e) the Parole and Pardon Boards, (f) the Youth Conservation Commission, (g) the Department of Employment Security, (h) the Labor Conciliator, (i) the Industrial Commission, (j) Commissioner of Insurance.

Subd. 3. "Rule" includes every regulation, including the amendment, suspension, or repeal thereof, adopted by an agency, whether with or without prior hearing, 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 1953, Section 97.53; or (d) 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.

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.

Sec. 2. [15.47] **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 this act. 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.

Subd. 2. To assist interested persons dealing with it, each agency shall, so far as deemed practicable, supplement its rules with descriptive statements of its procedures, which shall be kept current.

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, as far as practicable, publish or otherwise circulate notice of its intended action and afford interested persons opportunity to submit data or views orally or in writing.

Subd. 4. No rule shall be adopted by any agency subsequent to the effective date of this act unless the agency first holds a public hearing thereon, 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 registered their names with the secretary of state for that purpose. 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 attorney general, who, 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.

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 days and may not immediately be reissued or continued in effect thereafter without following the procedure of subdivision 4.

Sec. 3. [15.48] **Effect of adoption of rules.** Subdivision 1. Every rule or regulation filed in the office of the secretary of state as provided in section 2, shall have the force and effect of law. Standards or statements 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 2. This section does not apply to opinions of the attorney general. All rules and regulations in effect and filed in the office of the secretary of state on the date of the passage of this Act shall continue in effect. The secretary of state shall keep a permanent register of rules filed with that office open to public inspection.

Subd. 2. Each rule hereafter adopted, amended, or repealed shall become effective or be repealed upon filing the new or amended rule or notice of repeal in the office of the secretary of state 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 of first publication of each rule or amendment or repeal thereof.

Sec. 4. [15.49] **Publication of rules.** Subdivision 1. As soon as practicable after the effective date of this act, the publication board, or its successor, shall publish all rules adopted by each agency and remaining in effect, in accordance with Minnesota Statutes 1953, Section 15.046 to 15.049 as amended. Compilations shall be supplemented or revised as often as necessary, and at least once every year.

Subd. 2. The publication board, or its successor, may in its discretion omit from the compilation such rules, the publication of which would be unduly cumbersome, expensive or otherwise inexpedient if such rules are made available in printed or processed form on application to the adopting agency, and if the compilation and supplements or revisions contain a notice stating the general subject matter of the rules so omitted and stating how copies thereof may be obtained.

Sec. 5. [15.50] **Petition for adoption of rule.** Any interested person may petition an agency requesting the adoption, suspension, amendment or repeal of any rule. Each agency may prescribe by rule the form for such petitions and the procedure for their submission, consideration, and disposition.

Sec. 6. [15.51] **Determination of validity of rule.** The validity of any rule may be determined upon the petition for a declaratory judgment thereon, addressed to the district court where the principal office of the agency is located, when it appears that the rule, or its threatened application, interferes with or impairs, or threatens to interfere with or impair the legal rights or privileges of the petitioner. The agency shall be made a party to the proceeding. The declaratory judgment may be rendered whether or not the petitioner has first requested the agency to pass upon the validity of the rule in question.

Sec. 7. [15.52] **Rule declared invalid.** In proceedings under Section 6 of this act the court shall declare the rule invalid if it finds that it violates constitutional provisions or exceeds the statutory authority of the agency or was adopted without compliance with statutory rule-making procedures.

Sec. 8. [15.53] **Contested case; hearing, notice.** In any contested case all parties shall be afforded an opportunity for hearing after reasonable notice. The notice shall state the time, place and issues involved, but if, by reason of the nature of the proceeding, the issues cannot be fully stated in advance of the hearing, or if subsequent amendment of the issues is necessary, they shall be fully stated as soon as practicable, and opportunity shall be afforded all parties to present evidence and argument with respect thereto. The agency shall prepare an official record, which shall include testimony and exhibits, in each contested case, but it shall not be necessary to transcribe shorthand notes unless requested for purposes of rehearing or court review. If a transcript is requested, the agency may, unless otherwise provided by law, require the party requesting to pay the reasonable costs of preparing the transcript. Informal disposition may also be made of any contested case by stipulation, agreed settlement, consent order or default. Each agency may adopt appropriate rules of procedure for notice and hearing in contested cases.

Sec. 9. [15.54] **Evidence in contested cases.** Subdivision 1. In contested cases agencies may admit and give probative effect to evidence which possesses probative value commonly accepted by reasonable prudent men in the conduct of their affairs. They shall give effect to the rules of privilege recognized by law. They may exclude incompetent, irrelevant, immaterial and repetitious evidence.

Subd. 2. All evidence, including records and documents (except tax returns and tax reports) in the possession of the agency of which it desires to avail itself, shall be offered and made a part of the record in the case, and no other factual information or evidence (except tax returns and tax reports) shall be considered in the determination of the case. Documentary evidence may be received in the form of copies or excerpts, or by incorporation by reference.

Subd. 3. Every party or agency shall have the right of cross-examination of witnesses who testify, and shall have the right to submit rebuttal evidence.

Subd. 4. Agencies may take notice of judicially cognizable facts and in addition may take notice of general, technical, or scientific facts within their specialized knowledge.

Parties shall be notified in writing either before or during hearing, or by reference in preliminary reports or otherwise, or by oral statement in the record, of the material so noticed, and they shall be afforded an opportunity to contest the facts so noticed. Agencies may utilize their experience, technical competence, and specialized knowledge in the evaluation of the evidence presented to them.

Sec. 10. [15.55] **Proposal for decision in contested case.** Whenever in a contested case a majority of the officials of the agency who are to render the final decision have not heard or read the evidence, the decision, if adverse to a party to the proceeding other 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, 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.

Sec. 11. [15.56] **Decisions, orders.** Every decision and order adverse to a party of the proceeding, rendered by an agency in a contested case, shall be in writing or stated in the record and shall be accompanied by a statement of the reasons therefor. The statement of reasons shall consist of a concise statement of the conclusions upon each contested issue of fact necessary to the decision. Parties to the proceeding shall be notified of the decision and order in person or by mail. A copy of the decision and order and accompanying statement of reasons together with a certificate of service shall be delivered or mailed upon request to each party or to his attorney of record.

Sec. 12. **Severability.** If any provision of this act or the application thereof to any person or circumstance is held invalid, such invalidity shall not affect other provisions or applications of the act which can be given effect without the invalid provision or application, and to this end, the provisions of this act are declared to be severable.

Sec. 13. **Repealer.** Minnesota Statutes 1953, Section 15.041 to Section 15.044, are repealed on the effective date of this act.

Sec. 14. This act shall take effect January 1, 1958.

Approved April 27, 1957.

Laws 1961

CHAPTER 136—H. F. No. 309

An act relating to the commissioner of insurance, restoring rule-making power of the commissioner; amending Minnesota Statutes 1957, Section 15.0411, Subdivision 2.

Be it enacted by the Legislature of the State of Minnesota:

Section 1. Minnesota Statutes 1957, Section 15.0411, Subdivision 2, is amended to read:

Subd. 2. **Insurance, rule making power of commissioner.** "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 do not apply to (a) agencies directly in the legislative or judicial branches, (b) professional and regulatory examining and licensing boards enumerated in Minnesota Statutes, Chapters 146 to 156, (c) Laws 1945, Chapter 242, (d) emergency powers in Laws 1951, Chapter 694, Title III, Sections 301 to 307, (e) the Parole and Pardon Boards, (f) the Youth Conservation Commission, (g) the Department of Employment Security, (h) the Labor Conciliator, (i) the Industrial Commission; ~~(j) Commissioner of Insurance~~.

Approved March 21, 1961.

Laws 1963

CHAPTER 633—H. F. No. 918

An act relating to procedures of state administrative agencies and boards, and rules and regulations thereof; amending Minnesota Statutes 1961, Sections 15.0411, Subdivision 2 and 15.0412, Subdivision 5.

Be it enacted by the Legislature of the State of Minnesota:

Section 1. Minnesota Statutes 1961, Section 15.0411, Subdivision 2, is amended to read:

Subd. 2. **Administrative agencies; definition.** "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 do not apply to (a) agencies directly in the legislative or judicial branches, ~~(b) professional and regulatory examining and licensing boards enumerated in Minnesota Statutes, Chapters 146 to 156, (c) Laws 1945, Chapter 242, (d)~~ *(b)* emergency powers in Laws 1951, Chapter 694, Title III, Sections 301 to 307, ~~(e)~~ *(c)* the Parole and Pardon Boards, ~~(f)~~ *(d)* the Youth Conservation Commission, ~~(g)~~ *(e)* the Department of Employment Security, ~~(h)~~ *(f)* the Labor Conciliator, ~~(i)~~ *(g)* the Industrial Commission.

Approved May 13, 1963.

Laws 1963

CHAPTER 822—H. F. No. 1720

An act relating to rules and regulations promulgated by state agencies directing their publication and distribution by the commissioner of administration; appropriating moneys in connection therewith; amending Minnesota Statutes 1961, Sections 15.0413, and 15.047, Subdivision 1, and repealing Minnesota Statutes 1961, Sections 15.0414 and 15.047, Subdivision 3.

Be it enacted by the Legislature of the State of Minnesota:

Section 1. Minnesota Statutes 1961, Section 15.0413, is amended to read:

15.0413 **Administrative agencies; rules and regulations.** Subdivision 1. Every rule or regulation filed in the office of the secretary of state as provided in section 15.0412 shall have the force and effect of law *upon its further filing in the office of the commissioner of administration.* Standards or statements 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. ~~All rules and regulations in effect and filed in the office of the secretary of state on the date of the passage of sections 15.0411 to 15.0422 shall continue in effect.~~ The secretary of state shall keep a permanent register of rules filed with that office open to public inspection.

Subd. 2. Each rule hereafter adopted, amended, or repealed shall become effective or be repealed upon filing the new or amended rule or notice of repeal 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* ~~and of first publication of each rule or amendment or repeal thereof~~. *The commissioner of administration shall maintain a permanent record of all dates of publication of the rules.*

Subd. 3. Rules and regulations hereafter promulgated, amended or repealed of each 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 not defined as an "agency" in section 15.0411 shall not have the effect of law unless they are filed in the office of the commissioner of administration in the same manner as rules and regulations of an agency are so filed. This subdivision, however, shall not apply to rules and regulations of the regents of the University of Minnesota.

Changes or additions indicated by *italics*, **deletions by** ~~strikeout~~.

Subd. 4. Rules and regulations heretofore promulgated by an agency or a state officer, board, commission, bureau, division, department, or tribunal other than a court, including those governmental bodies referred to in subdivision 3, shall not have the effect of law unless filed in such form as the commissioner of administration shall prescribe on or before July 1, 1964 in the office of the commissioner of administration.

Subd. 5. Not later than January 1, 1965 and annually thereafter but not later than January 1 of each year the commissioner of administration shall arrange for publication and distribution of all rules and regulations in such form and at such prices to be charged as he may determine. No such published rules and regulations shall be distributed without charge except to the official depositories of state publications. The appropriation to any agency for supplies and expenses shall be deemed to include sufficient moneys for its purchase of necessary published rules and regulations.

Subd. 6. An administrative rules publication account is hereby created in the state treasury. All receipts from the sale of rules and regulations authorized by this section shall be deposited in such account. The sum of $26,000 is appropriated from the general revenue fund in the state treasury to such account. All moneys in the administrative rules publication account in the state treasury are appropriated annually to the commissioner of administration to carry out the terms and provisions of this section.

Sec. 2. *Any funds in the administrative rules revolving fund as provided in Minnesota Statutes, Section 15.047, Subdivision 3; are hereby appropriated to the administrative rules publication account.*

Sec. 3. Minnesota Statutes 1961, Section 15.047, Subdivision 1, is amended to read:

15.047 **Regulations.** 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 ~~revisor of statutes~~ *commissioner of administration* shall prepare the compilation and indexing of the rules and regulations for publication.

Sec. 4. *Minnesota Statutes 1961, Sections 15.0414 and 15.047, Subdivision 3, are hereby repealed.*

Approved May 22, 1963.

Laws 1969

CHAPTER 9—H. F. No. 110

[Coded in Part]

Sec. 6. Minnesota Statutes 1967, Section 15.0411, Subdivision 2 is amended in line 8 after "industry" by adding ", *(h) workmen's compensation commission*"

Laws of 1974, Chapter 344

Section 1, Minnesota Statutes 1971, Section 15.0412, Subdivision 3, 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, ~~as far as practicable~~, publish ~~or otherwise circulate~~ notice of its intended action in the state register as described in section 8 and afford interested persons opportunity to submit date or views orally or in writing.

Sec. 2. Minnesota Statutes 1971, Section 15.0412, Subdivision 4, is amended to read:

Subd. 4. No rule shall be adopted by any agency ~~subsequent to the effective date of sections 15.0411 to 15.0422~~ unless the agency first holds a public hearing thereon, following the giving of a 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 registered their names with the secretary of state for that purpose and in the state register as described in section 8. 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 attorney general, who, 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 after its publication in the state register as described in section 8. Any rule adopted after July 1, 1975 which is not published in the state register shall be of no effect.

Sec. 3. 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 days and may not immediately be reissued or continued in effect thereafter without following the procedure of subdivision 4. Emergency rules or regulations shall be published in the state register as soon as practicable.

Sec. 4. Minnesota Statutes 1971, Section 15.0413, Subdivision 1, is amended to read:

15.0413 [EFFECT OF ADOPTION OF RULES; PUBLICATION; APPROPRIATION.] Subdivision 1. Every rule or regulation filed in the office of the secretary of state as provided in section 15.0412 shall have the force and effect of law upon its publication in the state register and upon its further filing in the office of the commissioner of administration. Standards or statements 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 ~~register~~ record of rules filed with that office open to public inspection.

Sec. 5. Minnesota Statutes 1971, Section 15.0413, Subdivision 2, is amended to read:

Subd. 2. Each rule hereafter adopted, amended, or repealed shall become effective or be repealed upon ~~filing~~ publication of the new or amended rule or notice of repeal in the state register as provided in section 8 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.

Sec. 6. Minnesota Statutes 1971, Section 15.0413, Subdivision 3, is amended to read:

Subd. 3. Rules and regulations hereafter promulgated, amended or repealed of each 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 not defined as an "agency" in section 15.0411 shall not have the effect of law unless they are filed in the office of the commissioner of administration in the same manner as rules and regulations of an agency are so filed and unless they are published in the state register. This subdivision, however, shall not apply to rules and regulations of the regents of the University of Minnesota.

Sec. 7. Minnesota Statutes 1971, Section 15.0413, Subdivision 5, is amended to read:

Subd. 5. ~~Not later than January 1, 1965 and annually thereafter but not later than January 1 of each year the commissioner of administration shall arrange for publication and distribution of all rules and regulations in such form and at such prices to be charged as he may determine. No such published rules and regulations shall be distributed without charge except to the official depositories of state publications. The appropriation to any agency for supplies and expenses shall be deemed to include sufficient moneys for its purchase of necessary published rules and regulations.~~ Upon proper notification by the agency which issues a rule or regulation or notice, the commissioner of administration shall be accountable for the publication of the state register under the provisions of section 8. The commissioner of administration shall require each agency which requests the publication of rules, regulations, or notices 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 regular mailing of the state register to any person, agency, or organization if so requested provided that the total cost of the mailing is 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 each of the state register, however, shall be provided without cost to the legislative reference library and to the state law library.

Sec. 8. Minnesota Statutes 1971, Chapter 15, is amended to adding a section to read:

[15.051] [STATE REGISTER.] Subdivision 1. [PURPOSE.] The commissioner of administration shall publish a state register containing all notices for hearings concerning rules or regulations, giving time, place and purpose of the hearing. Further, the register shall contain all rules or regulations, amendments thereof or repeals, as adopted under 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 further publish official notices in the register which he deems to be of significant interest to the public. 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 of administration shall ascertain that the content of the register is clearly ordered by the four categories described in this subdivision in order to provide easy access to this information by any interested party.

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 shall remain unpublished for more than ten calendar 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.

Subd. 3. [SUBMISSION OF ITEMS FOR PUBLICATION.] Any state agency which desires to publish a notice of hearing, rule or regulation or change thereof, or an executive order, shall submit a copy of the entire document, including dates when adopted, and filed with the secretary of state, to the commissioner of administration in addition to any other copies which may be required to be filed with the commissioner by other law.

Sec. 9. This act is effective on July 1, 1975.

Laws of 1974, Chapter 355

Sec. 69. Minnesota Statutes 1971, Chapter 3, is amended by adding a section to read:

[3.965] [COMMITTEE RO REVIEW ADMINISTRATIVE RULES.] Subdivision 1. [COMPOSITION; MEETINGS.] A legislative joint committee for review of administrative rules defined pursuant to sections 15.0411 to 15.0422, consisting of five senators appointed by the committee on committees of the senate and five representatives appointed by the speaker of the house of representatives shall be appointed. The committee shall meet at the call of its chairman or upon a call signed by two of its members or signed by five members of the legislature. The joint committee chairmanship shall alternate between the two houses of the legislature every two years.

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

Subd. 3. [PUBLIC HEARINGS BY STATE DEPARTMENTS.] By a vote of a majority of its members, the committee may request any department issuing rules to hold a public hearing in respect to recommendations made pursuant to subdivision 2. The department shall give notice as provided in section 15.0412, subdivision 4 of a hearing thereon, to be conducted in accordance with section 15.0412. The hearing shall be held not more than 60 days after receipt of the request.

APPENDICES Y AND Z

ATTORNEY GENERAL'S RULES OF RULE-MAKING PROCEDURES AND MODEL RULES FOR CONTESTED CASES

In an effort to limit expenses, the Attorney General's Rules are provided separately as obtained from the Documents Section.

II. Revised Model State Administrative Procedure Act

A. Commentary and Draft by National Conference of Commissioners on Uniform State Laws

UNIFORM LAW COMMISSIONERS' REVISED MODEL STATE ADMINISTRATIVE PROCEDURE ACT*

PREFATORY NOTE

Administrative agencies have, during the last four decades become an essential and accepted part of state governmental organization, and the procedures by which such agencies adopt their rules and reach their decisions have attained paramount importance. Due very largely to the influence of the American Bar Association, the National Conference of Commissioners on Uniform State Laws and the state bar associations, substantial progress has been made in the direction of statutory codification of the procedures of state administrative agencies. Assurance has thereby been given of reasonable uniformity of practice and fair procedural methods for the benefit of all persons affected by state administrative action.

Preparation of the Model State Administrative Procedure Act

A brief resumé of the steps taken in the development of the Model State Administrative Procedure Act will reveal the careful attention it has received throughout the years. The act had its origin in the Section of Judicial Administration of the American

* Drafted by the National Conference of Commissioners on Uniform State Laws and by it approved at its Annual Conference Meeting at St. Louis, Missouri, July 31-August 5, 1961.

The Committee which acted for the National Conference of Commissioners on Uniform State Laws in preparing the Revised Model State Administrative Procedure Act was as follows:

E. BLYTHE STASON, Vanderbilt University, Nashville, Tennessee, *Chairman.*
JAMES J. BURKE, Revisor of Statutes, Capitol Bldg., Madison, Wis.
GLEN HATCH, Professional Bldg., Heber City, Utah.
EARL SACHSE, Joint Legislative Council, Capitol Bldg., Madison, Wis.
JOHN B. BOATWRIGHT, JR., State Capitol, Richmond, Va., *Chairman of Section E, Ex-Officio.*
FRANK E. COOPER, 11th Floor, Ford Bldg., Detroit, Mich., *Consultant.*

Bar Association. In 1937, that Section created a Committee on Administrative Agencies and Tribunals. In 1938, at the American Bar Association meeting, the Committee presented a comprehensive report on the subject of Judicial Review of State Administrative Action in State Courts. The report was a scholarly and comprehensive document and drew much favorable comment. Again, in 1939, at the winter Section meeting, the same Committee reported,—this time setting forth a draft of a proposed act dealing with certain major phases of state administrative procedure. The act was prepared to serve as a model for state legislation on the subject.

In accordance with established practice, this draft act was referred by the Section to the National Conference of Commissioners on Uniform State Laws, and at the 1939 meeting of the Conference after discussion of the measure, a Conference Committee was appointed for the purpose of further study and development of the measure.

During the year 1939-1940, the Conference Committee met with the Committee of the Section on Judicial Administration, and numerous changes in the original draft were mutually agreed upon. A revised draft was presented at the 1940 session of the National Conference, and after careful revision it was adopted and forwarded to the House of Delegates of the American Bar Association for approval. However, in January of 1941, before action was taken by the House of Delegates, the United States Attorney General's Committee on Administrative Procedure filed its notable final report on the subject of federal administrative law, setting forth majority and minority drafts of bills for the regulation of federal administrative procedure. Thereafter, the Executive Committee of the National Conference decided that, in view of the Attorney General's Committee Report, it would be advisable to give still further consideration to the Conference measure, and accordingly it was recalled from the House of Delegates and recommitted to the Conference Committee.

Then in March of 1942, the so-called "Benjamin Report" was submitted to the Governor of New York. This report, entitled "Administrative Adjudication in the State of New York," was prepared by Robert M. Benjamin of the New York Bar as Commissioner appointed under Section 8 of the Executive Law of New York, for the purpose of studying the exercise of quasi-judi-

cial functions of boards, commissions, and departments within the state. The report is a thorough critique of state administrative practice in New York and is at the same time a most valuable contribution to the general subject of state administrative procedure. The value of the report is by no means limited to New York State. It does for state administrative law and procedure what the Attorney General's Committee Report did for federal procedure.

With the advantage afforded by these two reports, a completely revised and much improved draft of the Model State Administrative Procedure Act was prepared and submitted for consideration at the 1942 session of the National Conference. There the act was re-examined once more and was again recommitted for final study. During the succeeding year the act was specially printed and widely submitted to members of state administrative commissions and also to bar associations, and other interested persons and groups in every state of the Union. Hundreds of helpful suggestions were received and acted upon. The then current draft of the measure was enacted almost verbatim by the state legislature of Wisconsin, where it received careful attention and much favorable comment. Again, at the 1943 session the process of careful Conference examination was repeated and the measure was set up for final action at the next session of the Conference.

In the meantime, there was additional activity in the federal field. The Special Committee on Administrative Law of the American Bar Association had prepared a draft of a proposed federal administrative procedure statute, paralleling in general nature the minority report of the Attorney General's Committee. This federal proposal finally was presented to and received the approval of the House of Delegates of the American Bar Association at its meeting held in March of 1944, and it was introduced into Congress, sponsored by the Association. This measure, after being thoroughly studied by the Judiciary Committees of Congress and revised in many particulars, was finally adopted on June 11, 1946. It is known as the Federal Administrative Procedure Act.

Finally, the Model State Administrative Procedure Act, after being held in abeyance pending Congressional action on the federal measure, was approved by the National Conference of Commissioners at its October, 1946 annual meeting. For the

last fifteen years it has been available as an aid to states considering such legislation.

During the intervening years since the adoption of the original Model Act, further considered study has been given the subject of administrative procedure at both federal and state levels.

On April 29, 1953, the President of the United States, at the instance of the Chief Justice of the Supreme Court in his capacity as chairman of the Judicial Conference, called a conference concerning unnecessary delays, expense and volume of records in adjudication and rule-making proceedings in the federal agencies. Some 56 agencies were represented in this Conference. Also present were members of the Federal Judiciary, Federal trial examiners and members of the bar. The Conference formulated its recommendations and reported to the President in March, 1955.

Also on July 10, 1953, Congress, by Public Law 108, established the Commission on Organization of the Executive Branch of the Government, known as the "Second Hoover Commission." One of the Task Forces of this Commission was the Task Force on Legal Services and Procedure. It consisted of 14 members under the Chairmanship of James M. Douglas, former Chief Justice of the Supreme Court of Missouri. This Task Force undertook a major study of the procedures of federal administrative agencies. Its report included some 74 recommendations, together with proposed legislation for complete recodification of federal legal services and procedures. This report was submitted to Congress with the Hoover Commission Report dated March 28, 1955.

Subsequently, in May of 1955, the Board of Governors of the American Bar Association established a Special Committee on Legal Services and Procedure, under the chairmanship of Ashley Sellers, Esq., a member of the Washington, D.C. Bar. This Committee, in cooperation with the Section on Administrative Law of the American Bar Association, undertook a thorough re-examination of the Federal Administrative Procedure Act in the light of the recommendations of the Hoover Commission Task Force. As a result, a new "Code of Federal Administrative Procedure" has been prepared and introduced into Congress. It was known as S-1070 of the 86th Congress. Many of the changes herein recommended in the revision of the Model State Administrative Procedure Act herewith presented are derived from S-1070.

At the same time, all through the years, there has been a substantial amount of activity at the state level. In recent years states statutes have been enacted based in whole or in part on the Model State Administrative Procedure Act.

* * *

All of the foregoing activities have resulted in a very substantial maturing of ideas with respect to administrative procedures which must be fair to the parties and at the same time effective from the standpoint of government. This ripening of thought has induced the National Conference of Commissioners on Uniform State Laws to undertake a revision of the 1946 edition of its Model Act. In 1958, a special committee was appointed for the purpose. The present revision is the result of committee studies and Conference action.

Content of the Model State Administrative Procedure Act

A brief explanation of the content of the Model Act and the principles involved in it will be helpful. The act deals primarily with major principles, not with minor matters of detail. Every student of administrative law recognizes that many of the procedural details involved in administrative action must necessarily vary more or less from state to state and even from agency to agency within the same state. Each state and each agency must work out these details for itself according to the necessities of the situation. However, there are certain basic principles of common sense, justice, and fairness that can and should prevail universally. The proposed act incorporates these principles, with only enough elaboration of detail to support the essential major features.

The major principles embraced in the Act as adopted by the Conference are:

(1) Requirement that each agency shall adopt essential procedural rules, and, except in emergencies, that all rule making, both procedural and substantive, shall be accompanied by notice to interested persons, and opportunity to submit views or information;

(2) Assurance of proper publicity for all administrative rules;

(3) Provision for advance determination of the validity of administrative rules, and for "declaratory rulings," af-

fording advance determination of the applicability of administrative rules to particular cases;

(4) Assurance of fundamental fairness in administrative adjudicative hearings, particularly in regard to such matters as notice, rules of evidence, the taking of official notice, the exclusion of factual material not properly presented and made a part of the record, and proper separation of functions;

(5) Assurance of personal familiarity with the evidence on the part of the responsible deciding officers and agency heads in quasi-judicial cases;

(6) Provision for proper proceedings for and scope of judicial review of administrative orders, thus assuring correction of administrative errors.

There is no good reason why these general principles should not govern throughout the entire administrative structure. They are not details; they are essential safeguards of fairness in the administrative process. Yet too many state statutes are altogether deficient in regard to them.

Recent years have, however, been bringing forth in many quarters profound apprehension over the undisciplined growth of administrative powers, and this is the reason why the Congress and several state legislatures have been sufficiently concerned to take affirmative action.

The Model State Administrative Procedure Act is offered by the National Conference of Commissioners in the hope that it will serve a good purpose in states that may be considering the adoption of such legislation or the revision of acts already on the statute books. The Model Act will, of course, require careful adjustment to the special statutory conditions peculiar to the state under consideration, but the general principles set forth are of universal applicability and the suggested language will also be found helpful.

REVISED MODEL STATE ADMINISTRATIVE PROCEDURE ACT*

AN ACT Concerning Procedure of State Administrative Agencies and Review of Their Determinations.

[*Be it enacted*. . . . . .]

SECTION 1. [*Definitions.*] As used in this Act:

(1) "agency" means each state [board, commission, department, or officer], other than the legislature or the courts, authorized by law to make rules or to determine contested cases;

COMMENT

The several sections of the Revised Model Act are annotated with appropriate comments and also by setting forth the corresponding or related provisions of the Federal Administrative Procedure Act, thus affording opportunity for comparison with the measure designed to cover the much larger and more complex federal agencies.

The following are the provisions of the Federal Administrative Procedure Act corresponding to Section 1(1) of the Revised Model Act:

"SEC. 2(a). *Agency.*—'Agency' means each authority (whether or not within or subject to review by another agency) of the Government of the United States other than Congress, the courts, or the governments of the possessions, Territories, or the District of Columbia. Nothing in this Act shall be construed to repeal delegations of authority as provided by law. Except as to the requirements of section 3, there shall be excluded from the operation of this Act (1) agencies composed of representatives of organizations of the parties to the disputes determined by them, (2) courts-martial and military commissions, (3) military or naval authority exercised in the field in time of war or in occupied territory, or (4) functions which by law expire on the termination of present hostilities, within any fixed period thereafter, or before July 1, 1947, and the functions conferred by the following statutes: Selective Training and Service Act of 1940; Contract Settlement Act of 1944; Surplus Property Act of 1944."

It will be noted that the term "agency" in the Model Act is made all inclusive. It is desirable that it be so, although it is not always possible to get it through the legislature in that form. In Michigan, for example, the Workmen's Compensation Commission, the Employment Security Com-

* The National Conference of Commissioners on Uniform State Laws in the promulgation of its Uniform Acts urges, with the endorsement of the American Bar Association, their enactment in each jurisdiction. Where there is a demand for an Act covering the subject matter in a substantial number of the states, but where in the judgment of the National Conference of Commissioners on Uniform State Laws it is not a subject upon which uniformity between the states is necessary or desirable, but where it would be helpful to have legislation which would tend toward uniformity where enacted, Acts on such subjects are promulgated as Model Acts.

mission, the Department of Revenue, and the Public Service Commission have been expressly excluded from the term "agency."

It may also be desirable, at least in certain states, to add some of the city or county agencies. Where they have substantial powers over persons and property it is proper to expect them to be governed by the same procedural standards as those prescribed for statewide agencies.

(2) "contested case" means a proceeding, including but not restricted to ratemaking, [price fixing], and licensing, in which the legal rights, duties, or privileges of a party are required by law to be determined by an agency after an opportunity for hearing;

COMMENT

The corresponding section of the Federal Administrative Procedure Act reads as follows:

"SEC. 2(d). *Order and Adjudication.*—'Order' means the whole or any part of the final disposition (whether affirmative, negative, injunctive, or declaratory in form) of any agency in any matter other than rule making but including licensing. 'Adjudication' means agency process for the formulation of an order."

The term "contested case" is used in the Model Act, instead of the word "adjudication" as found in the Federal Act, to avoid the possible confusion in terminology that might result from the fact that ratemaking under the Federal Act is classified as "rule making" with special procedures applicable to it, whereas under the Model Act it is desired to apply the contested case procedures to ratemaking.

"Price fixing" is bracketed for two reasons, first, certain states do not have price fixing laws and hence will not wish to include the reference, and, second, some states that have price fixing on their statute books may prefer to utilize less formal procedures than those set up for contested cases under the Model Act.

(3) "license" includes the whole or part of any agency permit, certificate, approval, registration, charter, or similar form of permission required by law, but it does not include a license required solely for revenue purposes;

(4) "licensing" includes the agency process respecting the grant, denial, renewal, revocation, suspension, annulment, withdrawal, or amendment of a license;

(5) "party" means each person or agency named or admitted as a party, or properly seeking and entitled as of right to be admitted as a party;

(6) "person" means any individual, partnership, corpora-

tion, association, governmental subdivision, or public or private organization of any character other than an agency;

(7) "rule" means each agency statement of general applicability that implements, interprets, or prescribes law or policy, or describes the organization, procedure, or practice requirements of any agency. The term includes the amendment or repeal of a prior rule, but does not include (A) statements concerning only the internal management of an agency and not affecting private rights or procedures available to the public, or (B) declaratory rulings issued pursuant to Section 8, or (C) intra-agency memoranda.

COMMENT

The corresponding section of the Federal Administrative Procedure Act reads as follows:

"SEC. 2(c). *Rule and Rule Making.*—'Rule' means the whole or any part of an agency statement of general or particular applicability and future effect designed to implement, interpret, or prescribe law or policy or to describe the organization, procedure, or practice requirements of any agency, and includes the approval or prescription for the future of rates, wages, corporate or financial structures or reorganizations thereof, prices, facilities, appliances, services or allowances therefor or of valuations, costs, or accounting, or practices bearing upon any of the foregoing. 'Rule making' means agency process for the formulation, amendment, or repeal of a rule."

The phrase "or particular applicability" in the federal act is omitted from the Model Act, thus limiting its scope but clarifying its meaning. Attention should be called to the fact that rules, like statutory provisions, may be of "general applicability" even though they may be of immediate concern to only a single person or corporation, provided the form is general and others who may qualify in the future will fall within its provisions.

SECTION 2. [*Public Information; Adoption of Rules; Availability of Rules and Orders.*]

(a) In addition to other rule-making requirements imposed by law, each agency shall:

(1) adopt as a rule a description of its organization, stating the general course and method of its operations and the methods whereby the public may obtain information or make submissions or requests;

(2) adopt rules of practice setting forth the nature and requirements of all formal and informal procedures available, including a description of all forms and instructions

used by the agency;

(3) make available for public inspection all rules and all other written statements of policy or interpretations formulated, adopted, or used by the agency in the discharge of its functions;

(4) make available for public inspection all final orders, decisions, and opinions.

(b) No agency rule, order, or decision is valid or effective against any person or party, nor may it be invoked by the agency for any purpose, until it has been made available for public inspection as herein required. This provision is not applicable in favor of any person or party who has actual knowledge thereof.

COMMENT

This section goes far beyond the provisions of Section 2 of the original Model State Administrative Procedure Act. Public information is substantially increased in scope. Subsection (a)(1) is made mandatory, whereas under the original act the obligation to promulgate descriptions of organization and the general course of operations was required only "so far as practicable." Also included are recommendations of the Hoover Commission Task Force to the effect that statements of policy and interpretive materials, as well as rules, orders, and opinions shall be made available for public inspection. Finally, the sanctions of Subsection (b) are included for the first time.

The corresponding provisions of the Federal Administrative Procedure Act are as follows:

"SEC. 3. Except to the extent that there is involved (1) any function of the United States requiring secrecy in the public interest or (2) any matter relating solely to the internal management of an agency—

"(a) *Rules.*—Every agency shall separately state and currently publish in the Federal Register (1) descriptions of its central and field organization including delegations by the agency of final authority and the established places at which, and methods whereby, the public may secure information or make submittals or requests; (2) statements of the general course and method by which its functions are channeled and determined, including the nature and requirements of all formal or informal procedures available as well as forms and instructions as to the scope and contents of all papers, reports, or examinations; and (3) substantive rules adopted as authorized by law and statements of general policy or interpretations formulated and adopted by the agency for the guidance of the public, but not rules addressed to and served upon named persons in accordance with law. No person shall in any manner be required to resort to organization or procedure not so published.

"(b) *Opinions and Orders.*—Every agency shall publish or, in accordance with published rule, make available to public inspection all final opinions or orders in the adjudication of cases (except those required for good cause to be held confidential and not cited as precedents) and all rules.

"(c) *Public Records.*—Save as otherwise required by statute, matters of official record shall in accordance with published rule be made available to persons properly and directly concerned except information held confidential for good cause found."

SECTION 3. [*Procedure for Adoption of Rules.*]

(a) Prior to the adoption, amendment, or repeal of any rule, the agency shall:

(1) give at least 20 days' notice of its intended action. The notice shall include a statement of either the terms or substance of the intended action or a description of the subjects and issues involved, and the time when, the place where, and the manner in which interested persons may present their views thereon. The notice shall be mailed to all persons who have made timely request of the agency for advance notice of its rule-making proceedings and shall be published in [here insert the medium of publication appropriate for the adopting state];

(2) afford all interested persons reasonable opportunity to submit data, views, or arguments, orally or in writing. In case of substantive rules, opportunity for oral hearing must be granted if requested by 25 persons, by a governmental subdivision or agency, or by an association having not less than 25 members. The agency shall consider fully all written and oral submissions respecting the proposed rule. Upon adoption of a rule, the agency, if requested to do so by an interested person either prior to adoption or within 30 days thereafter, shall issue a concise statement of the principal reasons for and against its adoption, incorporating therein its reasons for overruling the considerations urged against its adoption.

(b) If an agency finds that an imminent peril to the public health, safety, or welfare requires adoption of a rule upon fewer than 20 days' notice and states in writing its reasons for that finding, it may proceed without prior notice or hearing or upon any abbreviated notice and hear-

ing that it finds practicable, to adopt an emergency rule. The rule may be effective for a period of not longer than 120 days [renewable once for a period not exceeding ———— days], but the adoption of an identical rule under subsections (a)(1) and (a)(2) of this Section is not precluded.

(c) No rule hereafter adopted is valid unless adopted in substantial compliance with this Section. A proceeding to contest any rule on the ground of non-compliance with the procedural requirements of this Section must be commenced within 2 years from the effective date of the rule.

COMMENT

This section corresponds to, but is a substantial enlargement of the requirements of Section 2(3) of the original Model State Administrative Procedure Act. It prescribes the specific method of giving advance notice of intended rule making. Also it insures, so far as feasible, that all interested persons will have an opportunity to present their views, and it adopts a Hoover Commission Task Force recommendation intended to give some degree of assurance that the agency will, in fact, consider the arguments advanced by the affected parties. Finally in subsection (c) it includes a sanction of considerable force.

The corresponding provisions of the Federal Administrative Procedure Act are as follows:

"SEC. 4. Except to the extent that there is involved (1) any military, naval, or foreign affairs function of the United States or (2) any matter relating to agency management or personnel or to public property, loans, grants, benefits, or contracts—

"(a) *Notice.*—General notice of proposed rule-making shall be published in the Federal Register (unless all persons subject thereto are named and either personally served or otherwise have actual notice thereof in accordance with law) and shall include (1) a statement of the time, place, and nature of public rule-making proceedings; (2) reference to the authority under which the rule is proposed; and (3) either the terms or substance of the proposed rule or a description of the subjects and issues involved. Except where notice or hearing is required by statute, this subsection shall not apply to interpretative rules, general statements of policy, rules of agency organization, procedure, or practice, or in any situation in which the agency for good cause finds (and incorporates the finding and a brief statement of the reasons therefor in the rules issued) that notice and public procedure thereon are impracticable, unnecessary, or contrary to the public interest.

"(b) *Procedures.*—After notice required by this section, the agency shall afford interested persons an opportunity to participate in the rule-making through submission of written data, views, or arguments with or

without opportunity to present the same orally in any manner; and, after consideration of all relevant matter presented, the agency shall incorporate in any rules adopted a concise general statement of their basis and purpose. Where rules are required by statute to be made on the record after opportunity for an agency hearing, the requirements of sections 7 and 8 shall apply in place of the provisions of this subsection."

It should be noted that the Revised Model Act goes beyond the Federal Act by requiring notice prior to the promulgation of "interpretative rules, general statements of policy, [and] rules of agency organization, procedure, or practice." This accords with the Hoover Commission Task Force recommendations and seems wholly desirable although it may involve a certain amount of administrative inconvenience in application in certain agencies.

SECTION 4. [*Filing and Taking Effect of Rules.*]

(a) Each agency shall file in the office of the [Secretary of State] a certified copy of each rule adopted by it, including all rules existing on the effective date of this Act. The [Secretary of State] shall keep a permanent register of the rules open to public inspection.

(b) Each rule hereafter adopted is effective 20 days after filing, except that:

(1) if a later date is required by statute or specified in the rule, the later date is the effective date;

(2) subject to applicable constitutional or statutory provisions, an emergency rule becomes effective immediately upon filing with the [Secretary of State], or at a stated date less than 20 days thereafter, if the agency finds that this effective date is necessary because of imminent peril to the public health, safety, or welfare. The agency's finding and a brief statement of the reasons therefor shall be filed with the rule. The agency shall take appropriate measures to make emergency rules known to the persons who may be affected by them.

COMMENT

This section differs from the corresponding section of the original Model State Administrative Procedure Act by making the rule effectual 20 days after filing instead of on the filing date. This is a more realistic arrangement.

The corresponding provisions of the Federal Administrative Procedure Act read as follows:

"SEC. 4(c). *Effective Dates.*—The required publication or service of any substantive rule (other than one granting or recognizing exemption or

relieving restriction or interpretative rules and statements of policy) shall be made not less than thirty days prior to the effective date thereof except as otherwise provided by the agency upon good cause found and published with the rule."

SECTION 5. [*Publication of Rules.*]

(a) The [Secretary of State] shall compile, index, and publish all effective rules adopted by each agency. Compilations shall be supplemented or revised as often as necessary [and at least once every 2 years].

(b) The [Secretary of State] shall publish a [monthly] bulletin setting forth the text of all rules filed during the preceding [month] excluding rules in effect upon the adoption of this Act.

(c) The [Secretary of State] may omit from the bulletin or compilation any rule the publication of which would be unduly cumbersome, expensive, or otherwise inexpedient, if the rule in printed or processed form is made available on application to the adopting agency, and if the bulletin or compilation contains a notice stating the general subject matter of the omitted rule and stating how a copy thereof may be obtained.

(d) Bulletins and compilations shall be made available upon request to [agencies and officials of this State] free of charge and to other persons at prices fixed by the [Secretary of State] to cover mailing and publication costs.

COMMENT

Basic principles of fairness require that before individuals are required to comply with administrative rules, a reasonable attempt should be made to give notice and opportunity to become familiar with their contents. Sections 3 and 5 should accomplish the desired result. Similar considerations gave rise to the Federal Register Act adopted by Congress in 1935. That act provides for the filing with and the serial publication of administrative rules by a division of the National Archives Establishment. *Federal Register Act,* 44 U.S.C.A., Secs. 302 and 303. Section 307 of that act provides that no rule shall be valid as against any person who has not had actual knowledge thereof until it has been filed and made available for public inspection. In view of the fact that the Federal Register Act already covers the subject of publication of Federal administrative rules, no provision corresponding to Section 5 of the Model State Act is to be found in the Federal Administrative Procedure Act.

SECTION 6. [*Petition for Adoption of Rules.*] An interested person may petition an agency requesting the promulgation, amendment, or repeal of a rule. Each agency shall prescribe by rule the form for petitions and the procedure for their submission, consideration, and disposition. Within 30 days after submission of a petition, the agency either shall deny the petition in writing (stating its reasons for the denials) or shall initiate rule-making proceedings in accordance with Section 3.

COMMENT

The original Model Act contained the substance of the first two sentences, but the third sentence has been added, in conformity with recommendations of the Hoover Commission Task Force, to bring pressure to bear on the agency to induce action on petitions.

The corresponding provision of the Federal Administrative Procedure Act reads as follows:

"SEC. 4(d). *Petitions.*—Every agency shall accord any interested person the right to petition for the issuance, amendment, or repeal of a rule."

SECTION 7. [*Declaratory Judgment on Validity or Applicability of Rules.*] The validity or applicability of a rule may be determined in an action for declaratory judgment in the [District Court of . . . County], if it is alleged that the rule, or its threatened application, interferes with or impairs, or threatens to interfere with or impair, the legal rights or privileges of the plaintiff. The agency shall be made a party to the action. A declaratory judgment may be rendered whether or not the plaintiff has requested the agency to pass upon the validity or applicability of the rule in question.

COMMENT

It should be noted that in Section 3 setting up the procedure for the adoption of rules, it is provided in subsection (c) that failure to comply substantially with the prescribed procedures shall be ground for invalidating the rule. However, actions on this ground must be brought within two years, whereas no such time limitation is included in Section 7.

Under the Federal Administrative Procedure Act rule making is reviewable under the provisions of the section dealing with judicial review of administrative orders. Hence, there is no section in that act similar to Section 7.

* * *

SECTION 8. [*Declaratory Rulings by Agencies.*] Each agency shall provide by rule for the filing and prompt disposition of petitions for declaratory rulings as to the applicability of any statutory provision or of any rule or order of the agency. Rulings disposing of petitions have the same status as agency decisions or orders in contested cases.

COMMENT

The following is the corresponding provision of the Federal Administrative Procedure Act:

"SEC. 5(d). *Declaratory Orders.*—The agency is authorized in its sound discretion, with like effect as in the case of other orders, to issue a declaratory order to terminate a controversy or remove uncertainty."

SECTION 9. [*Contested Cases; Notice; Hearing; Records.*]

(a) In a contested case, all parties shall be afforded an opportunity for hearing after reasonable notice.

(b) The notice shall include:

(1) a statement of the time, place, and nature of the hearing;

(2) a statement of the legal authority and jurisdiction under which the hearing is to be held;

(3) a reference to the particular sections of the statutes and rules involved;

(4) a short and plain statement of the matters asserted. If the agency or other party is unable to state the matters in detail at the time the notice is served, the initial notice may be limited to a statement of the issues involved. Thereafter upon application a more definite and detailed statement shall be furnished.

(c) Opportunity shall be afforded all parties to respond and present evidence and argument on all issues involved.

(d) Unless precluded by law, informal disposition may be made of any contested case by stipulation, agreed settlement, consent order, or default.

(e) The record in a contested case shall include:

(1) all pleadings, motions, intermediate rulings;

(2) evidence received or considered;

(3) a statement of matters officially noticed;

(4) questions and offers of proof, objections, and rulings thereon;

(5) proposed findings and exceptions;

(6) any decision, opinion, or report by the officer presiding at the hearing;

(7) all staff memoranda or data submitted to the hearing officer or members of the agency in connection with their consideration of the case.

(f) Oral proceedings or any part thereof shall be transcribed on request of any party.

(g) Findings of fact shall be based exclusively on the evidence and on matters officially noticed.

COMMENT

This section enlarges considerably upon the corresponding provisions of the original Model Act. The contents of the notice are spelled out in greater detail, as are the contents of the record. Of especial significance is the provision that includes in the record "all staff memoranda submitted to the hearing officer or members of the agency in connection with their consideration of the case." In some circumstances it may prove desirable to go even further and prescribe that such staff memoranda shall be submitted for the record in time to permit adverse parties to offer evidence in reply. This careful specification of the content of the record is in accordance with the recommendations of the Hoover Commission Task Force report.

The corresponding provisions of the Federal Administrative Procedure Act are:

"SEC. 5. In every case of adjudication required by statute to be determined on the record after opportunity for an agency hearing, except to the extent that there is involved (1) any matter subject to a subsequent trial of the law and the facts de novo in any court; (2) the selection or tenure of an officer or employee of the United States other than examiners appointed pursuant to section 11; (3) proceedings in which decisions rest solely on inspections, tests, or elections; (4) the conduct of military, naval, or foreign affairs functions; (5) cases in which an agency is acting as an agent for a court; and (6) the certification of employee representatives—

"(a) Persons entitled to notice of an agency hearing shall be timely informed of (1) the time, place, and nature thereof; (2) the legal authority and jurisdiction under which the hearing is to be held; and (3) the matters of fact and law asserted. In instances in which private persons are the moving parties, other parties to the proceeding shall give prompt notice of issues controverted in fact or law; and in other instances agencies

may by rule require responsive pleading. In fixing the times and places for hearing, due regard shall be had for the convenience and necessity of the parties or their representatives.

"(b) The agency shall afford all interested parties opportunity for (1) the submission and consideration of facts, arguments, offers of settlement, or proposals of adjustment where time, the nature of the proceeding, and the public interest permit, and (2) to the extent that the parties are unable so to determine any controversy by consent, hearing, and decision upon notice and in conformity with sections 7 and 8."

SECTION 10. [*Rules of Evidence; Official Notice.*] In contested cases:

(1) irrelevant, immaterial, or unduly repetitious evidence shall be excluded. The rules of evidence as applied in [non-jury] civil cases in the [District Courts of this State] shall be followed. When necessary to ascertain facts not reasonably susceptible of proof under those rules, evidence not admissible thereunder may be admitted (except where precluded by statute) if it is of a type commonly relied upon by reasonably prudent men in the conduct of their affairs. Agencies shall give effect to the rules of privilege recognized by law. Objections to evidentiary offers may be made and shall be noted in the record. Subject to these requirements, when a hearing will be expedited and the interests of the parties will not be prejudiced substantially, any part of the evidence may be received in written form;

[(2) documentary evidence may be received in the form of copies or excerpts, if the original is not readily available. Upon request, parties shall be given an opportunity to compare the copy with the original;]

(3) a party may conduct cross-examinations required for a full and true disclosure of the facts;

(4) notice may be taken of judicially cognizable facts. In addition, notice may be taken of generally recognized technical or scientific facts within the agency's specialized knowledge. Parties shall be notified either before or during the hearing, or by reference in preliminary reports or otherwise, of the material noticed, including any staff memoranda or data, and they shall be afforded an opportunity to contest the material so noticed. The agency's experience, technical competence, and specialized knowledge may be utilized in the evaluation of the evidence.

In this section, two substantial changes from the original Model Act are included: (1) Agencies are required (not merely permitted) to exclude irrelevant, immaterial and unduly repetitious evidence; (2) agencies are required to follow the rules of evidence applied in [non-jury] civil cases in the state courts (subject to the "escape clause" in cases of hardship). Accordingly the standards of proof in administrative adjudication are equated in reasonable degree and so far as possible with those applicable in the courts, thus leading to uniform treatment of evidence in all types of adjudication within the state. The phrase "non-jury" is bracketed because in some states it is difficult to differentiate between the rules followed in jury and non-jury cases.

It is difficult to provide any single standard of evidence which is suitable for all agencies, in all circumstances. A review of State legislation in this area reveals wide departures from the standards of the present Model Act. The departures are in all directions—some, in the direction of permitting the agencies to receive any testimonial offer; others, in the direction of limiting them to common law rules of evidence. The proposed language represents a compromise that owes much to the suggestions of the Hoover Commission Task Force and to provisions in the California, Michigan, North Dakota, Virginia, and Wisconsin statutes.

In addition to these two changes which are of substantial importance, several minor refinements in the provisions of the original Model Act are included.

Provision is made in subsection (2) for use of copies of documentary evidence. This subsection is bracketed to indicate that it is intended for states where the rules of evidence applied in court proceedings impose stricter limits on the use of copies of documentary evidence.

Again the right of cross-examination is made more explicit than in the original Model Act by the use of language similar to that found in the Federal Administrative Procedure Act.

The following are the corresponding provisions of the Federal Act:

"SEC. 7(c). *Evidence.*—Except as statutes otherwise provide, the proponent of a rule or order shall have the burden of proof. Any oral or documentary evidence may be received, but every agency shall as a matter of policy provide for the exclusion of irrelevant, immaterial, or unduly repetitious evidence and no sanction shall be imposed or rule or order be issued except upon consideration of the whole record of such portions thereof as may be cited by any party and as supported by and in accordance with the reliable, probative, and substantial evidence. Every party shall have the right to present his case or defense by oral or documentary evidence, to submit rebuttal evidence, and to conduct such cross-examination as may be required for a full and true disclosure of the facts. In rule-making or determining claims for money or benefits or applications for initial licenses any agency may, where the interest of any party will not be prejudiced thereby, adopt procedures for the submission of all or part of the evidence in written form.

"SEC. 7(c). *Record.*—The transcript of testimony and exhibits, together with all papers and requests filed in the proceeding, shall constitute the exclusive record for decision in accordance with section 8 and, upon payment of lawfully prescribed costs, shall be made available to the parties. Where any agency decision rests on official notice of a material fact not appearing in the evidence in the record, any party shall on timely request be afforded an opportunity to show the contrary."

SECTION 11. [*Examination of Evidence by Agency.*] When in a contested case a majority of the officials of the agency who are to render the final decision have not heard the case or read the record, the decision, if adverse to a party to the proceeding other than the agency itself, shall not be made until a proposal for decision is served upon the parties, and an opportunity is afforded to each party adversely affected to file exceptions and present briefs and oral argument to the officials who are to render the decision. The proposal for decision shall contain a statement of the reasons therefor and of each issue of fact or law necessary to the proposed decision, prepared by the person who conducted the hearing or one who has read the record. The parties by written stipulation may waive compliance with this section.

COMMENT

The purpose of this section is to make certain that those persons who are responsible for the decision shall have mastered the record, either by hearing the evidence, or reading the record or at the very least receiving briefs and hearing oral argument. It is intended to preclude "signing on the dotted line."

The corresponding provisions of the Federal Administrative Procedure Act are:

"SEC. 8(a). *Action by Subordinates.*—In cases in which the agency has not presided at the reception of the evidence, the officer who presided (or, in cases not subject to subsection (c) of section 5, any other officer or officers qualified to preside at hearings pursuant to section 7) shall initially decide the case or the agency shall require (in specific cases or by general rule) the entire record to be certified to it for initial decision. Whenever such officers make the initial decision and in the absence of either an appeal to the agency or review upon motion of the agency within time provided by rule, such decision shall without further proceedings then become the decision of the agency. On appeal from or review of the initial decisions of such officers the agency shall, except as it may limit the issues upon notice or by rule, have all the powers which it would have in

making the initial decision. Whenever the agency makes the initial decision without having presided at the reception of the evidence, such officers shall first recommend a decision except that in rule making or determining applications for initial licenses, (1) in lieu thereof the agency may issue a tentative decision or any of its responsible officers may recommend a decision or (2) any such procedure may be omitted in any case in which the agency finds upon the record that due and timely execution of its functions imperatively and unavoidably so requires."

SECTION 12. [*Decisions and Orders.*] A final decision or order adverse to a party in a contested case shall be in writing or stated in the record. A final decision shall include findings of fact and conclusions of law, separately stated. Findings of fact, if set forth in statutory language, shall be accompanied by a concise and explicit statement of the underlying facts supporting the findings. If, in accordance with agency rules, a party submitted proposed findings of fact, the decision shall include a ruling upon each proposed finding. Parties shall be notified either personally or by mail of any decision or order. Upon request a copy of the decision or order shall be delivered or mailed forthwith to each party and to his attorney of record.

COMMENT

An attempt is here made to require agency findings to go beyond a mere statement of a general conclusion in the statutory language (e.g., that "public interest, convenience and necessity" will be served) or in language of similar generality. The intent is to require the degree of explicitness imposed by such decisions as *Saginaw Broadcasting Company v. Federal Communications Commission* (Ct. App. D.C., 1938), 96 Fed. 2d 554, where the court required a statement of the "basic or underlying facts." Several states have concerned themselves with this problem. Missouri has adopted the requirement that findings of fact and conclusions of law shall be "separated." North Dakota and Virginia require that findings shall be "explicit." The desire is to find the proper middle course between a detailed reciting of the evidence on the one hand and the bare statement of the conclusions of fact or the "ultimate" facts on the other. The phrase "underlying facts supporting the finding" seems about right.

The following are the provisions of the Federal Administrative Procedure Act:

"SEC. 8(b). *Submittals and Decisions.*—Prior to each recommended, initial, or tentative decision, or decision upon agency review of the decision of subordinate officers the parties shall be afforded a reasonable opportunity to submit for the consideration of the officers participating in such

decisions (1) proposed findings and conclusions, or (2) exceptions to the decisions or recommended decisions of subordinate officers or to tentative agency decisions, and (3) supporting reasons for such exceptions or proposed findings or conclusions. The record shall show the ruling upon each such finding, conclusion, or exception presented. All decisions (including initial, recommended, or tentative decisions) shall become a part of the record and include a statement of (1) findings and conclusions, as well as the reasons or basis therefor, upon all the material issues of fact, law, or discretion presented on the record; and (2) the appropriate rule, order, sanction, relief, or denial thereof."

SECTION 13. [*Ex Parte Consultations.*] Unless required for the disposition of *ex parte* matters authorized by law, members or employees of an agency assigned to render a decision or to make findings of fact and conclusions of law in a contested case shall not communicate, directly or indirectly, in connection with any issue of fact, with any person or party, nor, in connection with any issue of law, with any party or his representative, except upon notice and opportunity for all parties to participate. An agency member

(1) may communicate with other members of the agency, and

(2) may have the aid and advice of one or more personal assistants.

COMMENT

This section is intended to preclude litigious facts reaching the deciding minds without getting into the record. Also precluded is *ex parte* discussion of the law with the party or his representative. No objection is interposed to discussion of the law with other persons, e.g., the attorney general, or an outside expert.

The following are somewhat related provisions of the Federal Administrative Procedure Act:

"SEC. 5(c). *Separation of Functions.*—The same officers who preside at the reception of evidence pursuant to section 7 shall make the recommended decision or initial decision required by section 8 except where such officers become unavailable to the agency. Save to the extent required for the disposition of *ex parte* matters as authorized by law, no such officer shall consult any person or party on any fact in issue unless upon notice and opportunity for all parties to participate; nor shall such officer be responsible to or subject to the supervision or direction of any officer, employee or agent engaged in the performance of investigative or prosecuting functions for any agency. No officer, employee, or agent engaged in the performance of investigative or prosecuting functions for any agency in any case shall, in that or a factually related case, participate or

advise in the decision, recommended decision, or agency review pursuant to section 8 except as witness or counsel in public proceedings. This subsection shall not apply in determining applications for initial licenses or to proceedings involving the validity or application of rates, facilities, or practices of public utilities or carriers; nor shall it be applicable in any manner to the agency or any member or members of the body comprising the agency."

SECTION 14. [*Licenses.*]

(a) When the grant, denial, or renewal of a license is required to be preceded by notice and opportunity for hearing, the provisions of this Act concerning contested cases apply.

(b) When a licensee has made timely and sufficient application for the renewal of a license or a new license with reference to any activity of a continuing nature, the existing license does not expire until the application has been finally determined by the agency, and, in case the application is denied or the terms of the new license limited, until the last day for seeking review of the agency order or a later date fixed by order of the reviewing court.

(c) No revocation, suspension, annulment, or withdrawal of any license is lawful unless, prior to the institution of agency proceedings, the agency gave notice by mail to the licensee of facts or conduct which warrant the intended action, and the licensee was given an opportunity to show compliance with all lawful requirements for the retention of the license. If the agency finds that public health, safety, or welfare imperatively requires emergency action, and incorporates a finding to that effect in its order, summary suspension of a license may be ordered pending proceedings for revocation or other action. These proceedings shall be promptly instituted and determined.

COMMENT

In this revision of the Model State Administrative Procedure Act licensing has been specifically included among "contested cases" (see Section 1(2) and (3), and, in view of the widespread importance of the subject in state affairs, it would seem desirable to take notice of certain other facets of the matter. Hence this section is included. There is a corresponding provision in the Federal Administrative Procedure Act reading as follows:

"SEC. 9(b). In any case in which application is made for a license required by law the agency, with due regard to the rights or privileges of all the interested parties or adversely affected persons and with reasonable dispatch, shall set and complete any proceedings required to be conducted pursuant to sections 7 and 8 of this Act or other proceedings required by law and shall make its decision. Except in cases of willfulness or those in which public health, interest, or safety requires otherwise, no withdrawal, suspension, revocation, or annulment of any license shall be lawful unless, prior to the institution of agency proceedings therefor, facts or conduct which may warrant such action shall have been called to the attention of the licensee by the agency in writing and the licensee shall have been accorded opportunity to demonstrate or achieve compliance with all lawful requirements. In any case in which the licensee has, in accordance with agency rules, made timely and sufficient application for a renewal or a new license, no license with reference to any activity of a continuing nature shall expire until such application shall have been finally determined by the agency."

SECTION 15. [*Judicial Review of Contested Cases.*]

(a) A person who has exhausted all administrative remedies available within the agency and who is aggrieved by a final decision in a contested case is entitled to judicial review under this Act. This Section does not limit utilization of or the scope of judicial review available under other means of review, redress, relief, or trial *de novo* provided by law. A preliminary, procedural, or intermediate agency action or ruling is immediately reviewable if review of the final agency decision would not provide an adequate remedy.

(b) Proceedings for review are instituted by filing a petition in the [District Court of the _____ County] within [30] days after [mailing notice of] the final decision of the agency or, if a rehearing is requested, within [30] days after the decision thereon. Copies of the petition shall be served upon the agency and all parties of record.

(c) The filing of the petition does not itself stay enforcement of the agency decision. The agency may grant, or the reviewing court may order, a stay upon appropriate terms.

(d) Within [30] days after the service of the petition, or within further time allowed by the court, the agency shall transmit to the reviewing court the original or a certified copy of the entire record of the proceeding under

review. By stipulation of all parties to the review proceedings, the record may be shortened. A party unreasonably refusing to stipulate to limit the record may be taxed by the court for the additional costs. The court may require or permit subsequent corrections or additions to the record.

(e) If, before the date set for hearing, application is made to the court for leave to present additional evidence, and it is shown to the satisfaction of the court that the additional evidence is material and that there were good reasons for failure to present it in the proceeding before the agency, the court may order that the additional evidence be taken before the agency upon conditions determined by the court. The agency may modify its findings and decision by reason of the additional evidence and shall file that evidence and any modifications, new findings, or decisions with the reviewing court.

(f) The review shall be conducted by the court without a jury and shall be confined to the record. In cases of alleged irregularities in procedure before the agency, not shown in the record, proof thereon may be taken in the court. The court, upon request, shall hear oral argument and receive written briefs.

(g) The court shall not substitute its judgment for that of the agency as to the weight of the evidence on questions of fact. The court may affirm the decision of the agency or remand the case for further proceedings. The court may reverse or modify the decision if substantial rights of the appellant have been prejudiced because the administrative findings, inferences, conclusions, or decisions are:

(1) in violation of constitutional or statutory provisions;

(2) in excess of the statutory authority of the agency;

(3) made upon unlawful procedure;

(4) affected by other error of law;

(5) clearly erroneous in view of the reliable, probative, and substantial evidence on the whole record; or

(6) arbitrary or capricious or characterized by abuse of discretion or clearly unwarranted exercise of discretion.

COMMENT

An important question that arises under subsection (a) is whether or not the review provisions should be made exclusive and all other review provisions on the statute books should be repealed. Each state will have to deal with this matter as the local circumstances dictate. On the one hand, if there is but one mode and scope of review, the state procedural structure is greatly simplified. On the other hand, local considerations, including practical considerations connected with obtaining adoption of the Model Act, may indicate or even require the retention, at least for the moment, of the pre-existing methods of judicial review.

Two important changes are made in subsection (g) from the corresponding provisions in the original Model Act.

First, the "substantial evidence rule" has been replaced by the "clearly erroneous rule," thus following the recommendation of the Hoover Commission Task Force and the American Bar Association Special Committee on Legal Services and Procedure. This change places court review of administrative decisions on fact questions under the same principle as that applied under the Federal Rules of Civil Procedure in connection with review of trial court decision. See Rule 52(a). Also see *United States v. U.S. Gypsum Company* (1948), 333 U.S. 364, 68 Sup. Ct. 525, and *Barron and Holtzoff, Federal Practice and Procedure,* Par. 1133. This standard of review does not permit the court to "weigh" the evidence, or to substitute its judgment on discretionary matters, but it does permit setting aside "clearly" erroneous decisions. Certainly a clearly erroneous decision should not be permitted to stand.

Second, it should be noted that "clearly unwarranted exercise of discretion" has been specifically equated to "arbitrary action"—as it should be. A clearly unwarranted exercise of discretion should be set aside.

The following are the corresponding provisions of the Federal Administrative Procedure Act:

"SEC. 10. Except so far as (1) statutes preclude judicial review or (2) agency action is by law committed to agency discretion—

"(a) *Right of Review.*—Any person suffering legal wrong because of any agency action, or adversely affected or aggrieved by such action within the meaning of any relevant statute, shall be entitled to judicial review thereof.

"(b) *Form and Venue of Action.*—The form of proceeding for judicial review shall be any special statutory review proceeding relevant to the subject matter in any court specified by statute or, in the absence or inadequacy thereof, any applicable form of legal action (including actions for declaratory judgments or writs of prohibitory or mandatory injunction or habeas corpus) in any court of competent jurisdiction. Agency action shall be subject to judicial review in civil or criminal proceedings for judicial enforcement except to the extent that prior, adequate, and exclusive opportunity for such review is provided by law.

"(c) *Reviewable Acts.*—Every agency action made reviewable by statute and every final agency action for which there is no other adequate

remedy in any court shall be subject to judicial review. Any preliminary, procedural, or intermediate agency action or ruling not directly reviewable shall be subject to review upon the review of the final agency action. Except as otherwise expressly required by statute, agency action otherwise final shall be final for the purposes of this subsection whether or not there has been presented or determined any application for a declaratory order, for any form of reconsideration, or (unless the agency otherwise requires by rule and provides that the action meanwhile shall be inoperative) for an appeal to superior agency authority.

"(d) *Interim Relief.*—Pending judicial review any agency is authorized, where it finds that justice so requires, to postpone the effective date of any action taken by it. Upon such conditions as may be required and to the extent necessary to prevent irreparable injury, every reviewing court (including every court to which a case may be taken on appeal from or upon application for certiorari or other writ to a reviewing court) is authorized to issue all necessary and appropriate process to postpone the effective date of any agency action or to preserve status or rights pending conclusion of the review proceedings.

"(e) *Scope of Review.*—So far as necessary to decision and where presented the reviewing court shall decide all relevant questions of law, interpret constitutional and statutory provisions, and determine the meaning or applicability of the terms of any agency action. It shall (A) compel agency action unlawfully withheld or unreasonably delayed; and (B) hold unlawful and set aside agency action, findings, and conclusions found to be (1) arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law; (2) contrary to constitutional right, power, privilege, or immunity; (3) in excess of statutory jurisdiction, authority, or limitations, or short of statutory right; (4) without observance of procedure required by law; (5) unsupported by substantial evidence in any case subject to the requirements of sections 7 and 8 or otherwise reviewed on the record of an agency hearing provided by statute; or (6) unwarranted by the facts to the extent that the facts are subject to trial de novo by the reviewing court. In making the foregoing determinations the court shall review the whole record or such portions thereof as may be cited by any party, and due account shall be taken of the rule of prejudicial error."

[SECTION 16. [*Appeals.*] An aggrieved party may obtain a review of any final judgment of the [District Court] under this Act by appeal to the [Supreme Court]. The appeal shall be taken as in other civil cases.]

[SECTION 17. [*Severability.*] If any provision of this Act or the application thereof to any person or circumstance is held invalid, the invalidity does not affect other provisions or applications of the Act which can be given effect without

the invalid provision or application, and for this purpose the provisions of this Act are severable.]

SECTION 18. [*Repeal.*] The following acts and parts of acts are repealed:

(1) ;

(2) ;

(3) .

COMMENT

The preparation of this section will require careful and detailed work in each state. General repealers will ordinarily not suffice, and hence attention must be paid to each agency enabling act and the changes necessary therein.

SECTION 19. [*Time of Taking Effect and Scope of Application.*] This Act takes effect ..... and (except as to proceedings then pending) applies to all agencies and agency proceedings not expressly exempted.

AMENDMENT SET NO. 1

The amendments of this first set cover a number of areas of concern discussed by the committee. They also address those areas for which there seemed to be general agreement as to a corrective approach. They do not incorporate the office of hearing examiners proposal (see No. 2) nor are they directed at the issues involving the Legislative Joint Committee for Review of Rules.

Specifically, Amendment Set No. 1 addresses the following problems with accompanying corrective suggestions:

I. PUBLIC NOTICE AND ACCESS

(A) Informal information gathering process to formulate rules. Suggestion: Require notice in the State Register and an open opportunity for participation. See Section 7, p. 4.

(B) Copy of the proposed rule prior to hearing. Suggestion: Require notice of hearing (30 days prior to hearing) to include full text of proposed rule. See Section 5, p. 3.

(C) Public petition. Suggestion: Require agencies to reply in writing within 30 days to every petition of 50 signatures which request action on a rule and authorize the Attorney General to require the agency to hold a hearing on the subject of the petition if the agency refuses to do so under the initial citizens petition. Section 15, p. 8.

II. DEFINITION OF "RULE" - THE PROBLEM OF "GUIDELINES" OR "INFORMAL RULE-MAKING"

(A) Vagueness in definition of "Rule". Suggestion: Amend to conform more closely to Model APA. Section 1, p. 1.

(B) Legal status of statements or standards not adopted according to the process of the APA. Suggestion: Specify, not have the "force and effect of law." See Section 8, p. 4-5, and Section 19, p.10.

(C) Public access to informal rule-making. Suggestion: (i) Require public notice of agency intent to adopt "statement or standard of policy or interpretation of general application . . . without rule-making hearing"; (ii) require notice to include text of proposed action;

(iii) allow petition of 50 signatures to require a public hearing on the statement or standard; (iv) authorize the Attorney General to require an agency to proceed to adopt statement or standard as a rule; and (v) require statements or standards not adopted as rules to be published in the state register.

III. MISCELLANEOUS

Additionally, there are within amendment No. 1 various suggestions to help better organize and clarify the APA. The only other substantive suggestion which should be called to your attention is the amendment that would have rules or statements or standards not adopted as rules go into effect 20 days after publication in the state register rather than upon publication. See Section 9, p. 5 and Section 10, p. 6.

F I R S T W O R K I N G D R A F T
for purposes of discussion - subject to change.

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:

15.0411 DEFINITIONS. Subdivision 1. For the purpose of section 15.0411 to ~~15.0422~~ 15.051 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~~ 15.051 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, (e)~~ the Department of Manpower Services, ~~(f) the Director of Mediation Services, (g) the department of labor and industry, (h)~~ (e) the workmen's compensation commission.

Subd. 3. "Rule" includes every agency statement of general applicability and future effect ~~regulation~~, 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)~~ 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.

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.

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 proceedures 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 its rules in accordance with the procedures specified in Sections 15.0411 through 15.051, and only pursuant to authority delegated in law and in full compliance with its duties and obligations.

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, ~~so far as deemed practicable,~~ publish and maintain in the state register a current description of its organization, stating the methods whereby the public may obtain information or make submissions or requests ~~supplement its rules with descriptive statements of its proceedures, which shall be kept current.~~

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 of practice setting forth the nature and requirements of all formal and informal procedures related to the administration of official agency duties, including all forms and instructions used by the agency.

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 in the state register of its intention to hold such a hearing at least 30 days prior to the date set for the hearing, including with such notice a printing of the proposed rule in full. ~~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 registered their names with the secretary of state for that purpose and in the state register as described in section 15.051.~~ 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 attorney general, who, 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~~. Any rule adopted after July 1, 1975 which is not published in the state register shall be of no effect.

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 days and may not immediately be reissued or continued in effect thereafter without following the procedure of subdivision 4.

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

Subd. 6. An agency may initiate efforts preparatory to proposing action to adopt, amend, suspend or repeal a rule, in which the agency may seek to obtain information on the subject to be dealt with or seek to ascertain the opinions of those who may be interested or affected by an agency rule. However, if an agency does initiate such efforts it shall make notice to that effect in the state register and shall afford all affected or interested persons an opportunity to submit data or views on the subject of concern in writing or orally.

Sec. 8. Minnesota Statutes 1971, section 15.0412, is amended by adding the following new subdivision:

Subd. 7. When an administrative agency sets forth any statement or standard of policy or interpretation of general application, or the suspension, amendment or repeal thereof, without adherence to the procedure set forth in section 15.0412, subdivision 4, and without reference to the provisions of section 15.0412, subdivision 5, such statement or standard shall not have the force and effect of law and the agency shall not compel adherence to it. Thirty days prior to the adoption of such statement or standard of policy or interpretation the agency shall publish notice of its intended action in the state register, including the full text of the proposed statements or standards, and shall afford affected or interested persons an opportunity to submit data or views thereon in writing or orally. If before or after the statement or standard is adopted, a petition with 50 (signatures) is submitted to the agency requesting that a public hearing be held on the proposed statement or standard such a public hearing shall be required of the agency within 60 days of the receipt of such petition, with notice of the hearing to be published in the state register at least 30 days prior to the date set for the hearing. Further, if requested to do so by the attorney general the agency shall proceed to adopt the statement or standard as a rule according to the procedure set forth in 15.0412, subdivision 4. This subdivision does not apply to opinions of the attorney general.

Sec. 9. 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 ~~and upon the 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.

Sec. 10. 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, or repealed shall become ~~effective~~ amended or be repealed ~~upon~~ 20 days after publication of the new or amended rule or notice of repeal 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.~~

Sec. 11. 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 or repealed of each 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 not defined as an "agency" in section 15.0411 shall not have the effect of law unless 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 they are properly submitted to the commissioner of administration and published in the state

register. This subdivision, however, shall not apply to rules and regulations of the regents of the University of Minnesota.

Sec. 12. Minnesota Statutes 1971, Section 15.0413, subdivision 4, is amended to read:

Subd. 4. Rules and ~~regulations~~ statements or standards of policy or interpretation of general application not adopted as rules, heretofore promulgated by an agency ~~or a state officer, board, commission, bureau, division, department, or tribunal other than a court~~, including those governmental bodies ~~referred to in subdivision 3~~ excepted from the definition of "agency" in Section 15.0411, shall not ~~have the~~ be in effect after July 1, 1976, ~~of law~~ unless ~~filed~~ submitted, in such form as the commissioner of administration shall prescribe on or before ~~July 1, 1964~~ September 1, 1975, ~~in~~ to the office of the commissioner of administration for publication in the state register.

Sec. 13. Minnesota Statutes 1971, Section 15.0413, subdivision 5, as amended by Laws 1974, Chapter 344, is amended to read:

Subd. 5. Upon proper ~~notification~~ submittal by the agency which issues a rule, ~~or regulation or~~ notice, or other action, the commissioner of administration shall be accountable for the publication of the same in the state register under the provisions of section 15.051. The commissioner of administration shall require each agency which requests the publication of rules, ~~regulations, or~~ notices, or other action 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

regular mailing of the state register to any person, agency, or organization if so requested provided that ~~the total cost of the mailing is~~ 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 each of the state register, however, shall be provided without cost to the legislative reference library and to the state law library.

Sec. 14. Minnesota Statutes 1971, Section 15.0413, subdivision 6, is amended to read:

Subd. 6. ~~An administrative rules~~ A state register publication account is hereby created in the state treasury. All receipts from the sale of ~~rules and regulations~~ the state register authorized by this section shall be deposited in such account. The sum of $26,000 is appropriated from the general fund in the state treasury to such account. All moneys in the ~~administrative rules~~ 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.

Sec. 15. Minnesota Statutes 1971, Section 15.0415, is amended to read:

15.0415 PETITION FOR ADOPTION OF RULE. By petition bearing fifty signatures ~~Any~~ any interested ~~person~~ group may ~~petition~~ request that an agency ~~requesting the adoption~~, ~~suspension~~ suspend, 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 30 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; but if the agency states its intention not to hold a public hearing on the

request, the requesting fifty persons may petition the attorney general, who is hereby authorized to require that the agency hold a public hearing on the subject of the request. ~~Each agency may~~ The attorney general shall prescribe by rule the form for ~~such~~ all petitions under this section and may prescribe further ~~the~~ procedures for their submission, consideration, and disposition.

Sec. 16. 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 and the revisor of statutes. 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.

Sec. 17. Minnesota Statutes 1971, Section 15.047, is repealed.

Sec. 18. 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, statement or standard of policy or interpretation, ~~regulation,~~ or order in the state register raises a rebuttable presumption that the material published:

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

(2) ~~The rule or regulation~~ was duly filed with the secretary

of state and available for public inspection at the day and hour endorsed thereon;.

(3) ~~The copy of the rule or regulation~~ 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.~~

Sec. 19. 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, but the requirement that such notice be taken shall not be construed as conferring the full force and effect of law on agency statements or standards not accorded the full force and effect of law by the provisions of sections 15.0412 and 15.0413.

Sec. 20. 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~~, statements or standards of policy or interpretation of general application not adopted as rules, 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~~, statements or standards of policy or interpretation of general application not adopted as rules, amendments thereof or repeals, as adopted under 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 further publish official notices in the register which he deems to be of significant interest to the public. 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 of administration shall ~~ascertain~~ see to it that the ~~content~~ contents of the register ~~is~~ are clearly labeled as to their status in law and ordered ~~by-the-four-categories-described-in-this-subdivision-in-order~~ to provide easy access to ~~this~~ its information by any interested party.

Sec. 21. 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~~ five calendar 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.

Sec. 22. This act is effective July 1, 1975.

AMENDMENT SET NO. 2

This is a redrafting of the proposal presented to the committee by the Administrative Law Section of the Minnesota Bar Association. The amendment would establish an independent office of hearing examiners which would be responsible for conducting all hearings under the Administrative Procedures Act.

One significant deviation in No. 2., from the originally drafted proposal is the addition of certain duties. You will note that the hearing examiner is to (1) only conduct hearings that have been given proper notice; and (2) make a report on each proposed administrative action, stating findings of fact, conclusions and recommendations, with notice taken of the degree to which the agency (i) documented its statutory authority to take the proposed action; (ii) fulfilled its subtantive and procedural statutory duties; and (iii) demonstrated the need for and reasonableness of its proposed action with an affirmative presentation of facts.

- NOT HAVE TO BE LAWYERS

FIRST WORKING DRAFT
for purposes of discussion - subject to change

A bill for an act

Relating to administrative procedure; creating a state office of hearing examiners; amending section . . .

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

Section 1. Minnesota Statutes 1971, Chapter 15, is amended by adding a section to read:

[15.050] [OFFICE OF HEARING EXAMINERS.] Subdivision 1. A state office of hearing examiners is hereby created, under the direction of a chief hearing examiner to be appointed by the governor, with the advice and consent of the senate, for a term of six years. The chief hearing examiner shall appoint such additional hearing examiners to serve in his office as necessary to fulfill the duties prescribed in this section. All hearing examiners shall be in the unclassified service but may be removed from their 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 of the state office of hearing examiners, and it shall be the duty of the hearing examiner to: (1) conduct

only hearings that have been given proper notice; (2) see to it that all hearings are conducted in a fair and impartial manner; and (3) 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 of its substantive and procedural statutory requirements, and (iii) demonstrated the need for and reasonableness of its proposed action with a comprehensive and 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 hearing examiner shall maintain a court reporter system. 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. In such action and in the chief hearing examiner's initial appointments of hearing examiners to his office, first consideration shall be given to those persons currently employed in state service to perform the functions of a hearing examiner.

Sec. 2. 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 any agency unless the agency first holds a public hearing thereon, 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 registered their names with the secretary of state for that purpose and in the state register as described in section 15.051. Nor shall any rule be adopted until the report of the hearing examiner as required by section 15.050, has been available to all interested persons for at least 10 days. Further, ~~Every~~ 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 attorney general, who, 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 after its publication in the state register as described in section 15.051. Any rule adopted after July 1, 1975 which is not published in the state register shall be of no effect.

Sec. 3. 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.

Sec. 4. 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. 5. 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 reoccuring appropriation.

Sec. 6. This act is effective on January 1, 1976.

AMENDMENT SET NO. 3

No. 3 is related to two issues discussed by the committee: the role of the Attorney General and his staff in reviewing and approving proposed agency rules; and secondly, the role of the new Legislative Joint Committee for Review of Rules with power to suspend existing rules. The suggestion involved in this amendment would change the current process by removing the Attorney General's role and reversing that of the Joint Committee from post-rule-adoption review and suspension to pre-rule-adoption review and approval (disapproval).

F I R S T W O R K I N G D R A F T
for purposes of discussion - subject to change

A Bill for an Act

Relating to the legislative joint committee for review of administrative rules.

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

Section 1. Laws 1974, Chapter 355, Section 69, Subdivision 1 is amended to read:

Subdivision 1. [COMPOSITION; MEETINGS.] A legislative joint committee for review of administrative rules ~~defined pursuant to section 15.0411 to 15.0422~~, consisting of five senators appointed by the committee on committees of the senate and five representatives appointed by the speaker of the house of representatives ~~shall be appointed,~~ is hereby created. The committee shall meet at the call of its chairman or upon a call signed by two of its members or signed by five members of the legislature. The joint committee chairmanship shall alternate between the two houses of the legislature every two years.

Sec. 2. Laws 1974, Chapter 355, Section 69, Subdivision 2 is amended to read:

Subd. 2. [REVIEW OF RULES BY COMMITTEE.] The committee shall ~~promote adequate and proper rules by agencies and an understanding upon the part of the public respecting them. It may hold public hearings to investigate complaints with respect to rules if it considers the complaints meritorious and worthy of attention and may, on the basis of the testimony received at the public hearings, suspend any rule complained of by the affirmative vote of at least six members provided the provisions of subdivision 4 have been met. If any rule is suspended, the committee shall as soon as possible place before the legislature, at the next year's session, a bill to repeal the suspended rule. If the bill is defeated, or fails~~

~~of enactment in that year's session, the rule shall stand and the committee may not suspend it again. If the bill becomes law, the rule is repealed and shall not be enacted again unless a law specifically authorizes the adoption of that rule. The committee shall make a biennial report to the legislature and governor of its activities and include therein its recommendations.~~ establish procedures to fairly and efficiently fulfill the duties imposed upon it by Chapter 15.

Sec. 3. Laws 1974, Chapter 355, Section 69, Subdivision 3 is repealed.

Sec. 4. 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 in the state register of its intention to hold such a hearing at least 30 days prior to the date set for the hearing, including with such notice a printing of the proposed rule in full. ~~following the giving of at least 30 days prior to the hearing of notice of the intention to hold such hearings, by United States mail, to representatives of associations or other interested groups or persons who have registered their names with the secretary of state for that purpose and in the state register as described in section 15.051.~~ 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 ~~attorney general~~ legislative joint committee for review of administrative rules, ~~who~~ which, within 20 days, shall either approve or disapprove the rule. If ~~he approves~~ the rule he is approved it shall be promptly filed ~~it~~ in the office of the secretary

of state. If ~~he disapprove~~ the rule is disapproved, ~~he~~ the committee shall state in writing ~~his~~ the reasons therefor, and the rule shall not be filed in the office of the secretary, nor published. If ~~he~~ the committee 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 in section 15.051~~. Any rule adopted after July 1, 1975 which is not published in the state register shall be of no effect.

Sec. 5. Minnesota Statutes 1971, Section 15.0412, is amended by adding the following new subdivision:

Subd. 7. When an administrative agency sets forth any statement or standard of policy or interpretation of general application, or the suspension, amendment or repeal thereof, without adherence to the procedure set forth in section 15.0412, subdivision 4, and without reference to the provisions of section 15.0412, subdivision 5, such statement or standard shall not have the force and effect of law and the agency shall not compel adherence to it. Thirty days prior to the adoption of such statement or standard of policy or interpretation the agency shall publish notice of its intended action in the state register, including the full text of the proposed statements or standards, and shall afford affected or interested persons an opportunity to submit data or views thereon in writing or orally. If before or after the statement or standard is adopted, a petition with 50 signatures is submitted to the agency requesting that a public hearing be held on the proposed statement or standard such a public hearing shall be required of the agency within 60 days of the receipt of such petition, with notice of the hearing to be published in the state register at least 30 days prior to the date set for the hearing. Further,

if requested to do so by the legislative joint committee for review of administrative rules the agency shall proceed to adopt the statement or standard as a rule according to the procedure set forth in 15.0412, subdivision 4. This subdivision does not apply to opinions of the attorney general.

Sec. 6. Minnesota Statutes 1971, Section 15.0415, is amended to read:

15.0415 PETITION FOR ADOPTION OF RULE. By petition bearing fifty signatures ~~Any~~ any interested ~~person~~ group may ~~petition~~ request that an agency ~~requesting the~~ adoption, ~~suspension~~ suspend, amendment or repeal ~~of~~ any rule. The petition shall be specific as to what action is being requested and as to the need for such action. Upon receipt of such a petition an agency shall have 30 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; but if the agency states its intention not to hold a public hearing on the request, the requesting fifty persons may petition the legislative joint committee for review of administrative rules, which is hereby authorized to require that the agency hold a public hearing on the subject of the request. ~~Each agency may prescribe by rule the form for such petitions and the procedure for their submission, consideration, and disposition.~~

Note: A further suggestion for this approach would be to have the chief hearing examiner appointed by the legislative joint committee.

AMENDMENT SET NO. 4

The subject of this final amendment again is the Legislative Joint Committee for Review of Administrative Rules. Rather simply, the amendment would establish the committee only as a body of inquiry and oversight, with a duty to make reports and advisory recommendations to the full legislature.

JN
Aug. 1974

No. 4
Leg. Review
Comm.
Advisory

F I R S T W O R K I N G D R A F T
for purposes of discussion - subject to change

A bill for an act

Relating to the legislative joint committee for review of administrative rules. . .

Section 1. Laws 1974, Chapter 355, Section 69, Subdivision 1 is amended to read:

Subdivision 1. [COMPOSITION; MEETINGS.] A legislative joint committee for review of administrative rules ~~defined pursuant to section 15.0411 to 15.0422~~, consisting of five senators appointed by the committee on committees of the senate and five representatives appointed by the speaker of the house of representatives ~~shall be appointed.~~ is hereby created. The committee shall meet at the call of its chairman or upon a call signed by two of its members or signed by five members of the legislature. The joint committee chairmanship shall alternate between the two houses of the legislature every two years.

Sec. 2. Laws 1974, Chapter 355, Section 69, Subdivision 2 is amended to read:

Subd. 2. [REVIEW OF RULES BY COMMITTEE.] The committee shall ~~promote adequate and proper rules by agencies and an understanding upon the part of the public respecting them. It may hold public hearings to investigate complaints with respect to rules if it considers the complaints meritorious and worthy of attention and may, on the basis of the testimony received at the public hearings, suspend any rule complained of by the affirmative vote of at least six members provided the provisions of subdivision 4 have been met. If any rule is suspended, the committee shall as soon as possible place before the legislature, at the next year's session, a bill to~~

~~repeal the suspended rule. If the bill is defeated, or fails of enactment in that year's session, the rule shall stand and the committee may not suspend it again. If the bill becomes law, the rule is repealed and shall not be enacted again unless a law specifically authorizes the adoption of that rule. The committee shall make a biennial report to the legislature and governor of its activities and include therein its recommendations.~~ : 1. On a continuing basis review rules which are proposed or adopted by agencies to determine their harmony with state law, their clarity and reasonableness;

2. When authorized by a majority vote of the committee, make a report of its findings and recommendations known to the appropriate agency; and

3. Report to the legislature annually no later than January 15, of each year, and at such other times as authorized by a majority vote of the committee, on its findings and recommendations, and if appropriate make suggestions as to legislation that is needed to correct improper administration or interpretation of the law by rules.

Sec. 3. Laws 1974, Chapter 355, Section 69, Subdivision 3 is repealed.

Sec. 4. This act is effective upon enactment.

A. Relating to Exclusions From the APA

1. Memorandum From Robert L. Herbst, Commissioner, Department of Natural Resources.

2. Letter From Emmet J. Cushing, Commissioner, Minnesota Department of Manpower Services.

3. Memorandum From Chester J. Moeglein, Adjutant General, State of Minnesota.

4. Letter From E. I. Malone, Commissioner, Department of Labor and Industry.

5. Memorandum From Kenneth F. Schoen, Commissioner, Department of Corrections.

6. Letter From Kenneth F. Schoen, Commissioner, Department of Corrections.

7. Memorandum From Dianne Heins, Office of Senate Research, Regarding Legal Rights of Adults Incarcerated in Correctional Institutions.

DEPARTMENT OF NATURAL RESOURCES

Office Memorandum

TO : Jan Hobles
170 Capitol Building

DATE: June 27, 1974

FROM : Robert L. Herbst, Commissioner
Department of Natural Resources

GAME & FISH RULE EXEMPTION FROM APA

SUBJECT: The Department of Natural Resources and the Administrative Procedure Act.

In response to Representative E. W. "Bill" Quirin's two letters to us dated May 20, we submit the attached packet of materials.

The first item in the packet is a list of the Department of Natural Resources rules which have already been promulgated or are being developed now. All were or will be adopted according to the procedures specified in Minnesota Statutes 15.0412 and 15.0413. In fact, in the last 6 months alone we have held seven APA rules hearings.

The second item is a sampling of letters, bulletins, memorandums, etc. intended to be representative of how we interpret and implement state law other than through the rule-making process. You will find Commissioner's orders, policy directives, instructions to field personnel, internal memoranda, an interagency agreement, and more. May I say we are well aware that there is some threshold above which the establishment of a policy or a standard or a decision guideline has enough impact on the rights or opportunities of the public so that the public should be welcomed into the process. We think the sampling we send you shows we try hard not to violate that threshold.

The third item reaffirms our long-held conviction that regulations directed to the protection and management of our fish and wildlife resources must continue to be exempt from the Administrative Procedure Act. The statement explains why. I want to make sure there is no confusion about the extent of this examption. It applies only to our responsibilities for managing the wild animals of the state for the benefit of all its people. It does not apply to our stewardship over public waters, or to outdoor recreation or mining or forestry or management of the state's lands. For all Department of Natural Resources functions which should require rules and regulations fish and wildlife management, we have no APA exemption and want none.

The Department of Natural Resources has a statutory public hearing process of its own which applies to the consideration of applications for water permits under Minnesota Statutes, Chapter 105. We have included no materials on that subject, because, since it relates to the consideration of individual cases it has no rule-making aspects. See Minnesota Statutes 105.44 and .45.

If you need more, we'll supply it.

WHY FISH AND WILDLIFE REGULATIONS ARE EXEMPTED FROM THE CHAPTER 15 RULES PROCESS

Minnesota Statutes, Section 15.0411, subdivision 2, exempts "rules of the division of game and fish published in accordance with Minnesota Statutes, Section 97.53" from the definition of "rule" and therefore exempts such rules from the Administrative Procedure Act. This exemption has been in effect since the Act was passed - Laws of Minnesota, 1957, chapter 806, section 1.

The referenced Minnesota Statute, section 97.53 reads, in relevant part:

> subd. 2. All orders and all rules and regulations promulgated by the commissioner or the director which effect matters in more than three counties, shall be published once in a qualified legal newspaper in Minneapolis, St. Paul, and Duluth. All such orders, rules and regulations not affecting more than three counties shall be published once in a qualified legal newspaper in each county affected. No order, rule or regulation shall be effective until seven days after such publication and when so executed and published, shall have the force and effect of law, and violation shall entail the same penalties as though such order, rule or regulation had been duly adopted by the legislature.

Section 97.53 has been in the fish and wildlife statutes, essentially unchanged, since Laws of Minnesota, 1919, chapter 400, section 135. Although by its own terms it appears to apply to any rule of the Commissioner of Natural Resources, in fact it applies - as it has historically - only to regulations related to the "game and fish" statutes, which are Minnesota Statutes, chapters 97 through 102.

A reasonably accurate list of extant (not superceded or rescinded) fish and wildlife regulations is attached as Appendix A, showing the Commissioner's order number, a brief description, and the

dated signed. They number approximately 80. An aging analysis reveals:

20%	published in	1940's and 1950's
30%	"	" 1960's
25%	"	" 1970-1972
25%	"	" 1973-1974

From 1967 through 1973, an average of 23 orders per year were published, the range being from 20 to 28. Appendix B is Appendix A rearranged by subject matter.

One-half or more of the regulations issued each year are unsuited to the Chapter 15 rules process because they must be promulgated under severe time constraints. Regulations containing seasons and limits are modified every year to reflect the latest field analysis of stock size distribution, health, reproduction success, etc. Appendix A shows the large number of such regulations that must be published during a very few weeks of mid-summer. Migratory birds are a particular case in point. The federal government does not present its hunting season framework to the state until well into the summer, and it gives the state only 10 days to accept all, part, or none of the plan. If, after field analyses and federal plans were available, a minimum of 70 additional days had to be taken to fulfill Chapter 15 requirements (30 days for notice, 20 days to keep the record open, 20 days for attorney general review), the season could be underway or half over. Even on present schedules, the department is hard pressed to publish the synopsis of hunting regulations by mid-September - any further delay would severely jeopardize the tourist industry, and make the enforcement of laws impossible.

The condition of a wild animal population is subject to sudden change, and successful management requires prompt response to such changes. Any promulgated season or limit must be swiftly

modifiable. See for example, Commissioner's order number 1891 shortening the frog season by one month after discovery of a population shortage. See also order number 1892 closing Lake Superior to commercial herring fishing for 2 months because of depressed stocks. Several such emergency orders are issued each year, and are absolutely essential to successful execution of the Commissioner's responsibility for wild animals.

Minnesota has significant fishing waters on her boundaries common to Wisconsin, Iowa, South Dakota, North Dakota, Manitoba, and Ontario. Regulation of both sport and commercial fishing in these waters is developed through mutual agreement with adjacent states and provinces. A public hearings requirement would preclude a reasonable working relationship with these adjoining agencies.

The essence of the Commissioner's responsibility for fish and wildlife is stated in Minnesota Statutes, section 97.42:

> The ownership of wild animals, and of all wild rice and other aquatic vegetation growing in the public waters of the state, insofar as they are capable of ownership, is in the state in its sovereign capacity for the benefit of all its people...

Whether the public hearing process would result in better fulfillment of that trusteeship is open to question. For one thing, the public is not in a position to contribute much data. For example, DNR uses designed sampling techniques to determine fish populations. These methods are illegal for the public to use, and are far more accurate than impressions gained by anglers from the size of their catches. The problem of how to react to the data is extensive, and in fact requires professionals. Nearly all DNR fish and wildlife supervisors have university degrees in fish and wildlife related fields. These people

have to be able to collect and analyze data and respond intelligently to it on 21 species of ducks alone in working up the annual migratory bird regulations. They must understand the interrelationships of the average of 25 species of fish that occupy a typical Minnesota lake. Fish and wildlife management is in fact a science, and there is doubt whether public hearings will improve the quality of the job our professionals are doing in fulfilling the state's stewardship over wild animals.

In fact, inserting public hearings into the fish and wildlife management decision process risks degrading the quality of the conduct of the stewardship. People get very emotional about animals, be they hunters or preservationists. DNR people responsible for the wildlife are human and therefore sensitive to public pressures. They would be unusual if they did not drift into making decisions more expedient than professional, just in order to reduce the clamor of vocal but possibly unrepresentative or irrational segments of the public. This would not contribute to the objective of managing the wild animals for the benefit of all the people.

We do not, of course, advocate a benevolent bureaucracy regulating by fiat. For one thing, the statutes require that some of the fish and wildlife regulations be put through a notice and hearing process. See, for example, Minnesota Statute 97.48, subd. 11, requiring a hearing before waters may be reserved in aid of propagation and protection of wildlife, or for management for their primary wildlife and benefit. Minnesota Statute 97.48, subd. 26 requires public hearing before designating experimental waters. Section 97.488, subdivision 2 requires a chapter 15 public hearing before an animal may be added to the endangered species list. Section 99.25, subdivision 4

specifies notice and hearing requirements before a certain kind of game refuge may be established. Section 101.425 requires notice and hearing before designating muskie lakes. Further, public meetings are sometimes held even though not statutorily required, an example being one that was held on the North Shore in connection with Commissioner's Fish and Wildlife order number 1892. Also, the department receives many letters of advice from concerned citizens, and their advice is seriously considered. Clearly, the department does not operate in isolation - there is a wealth of public input.

To summarize the reasons why fish and wildlife regulations have been and must be continued to be exempt from the APA rules process

- The department receives and utilizes public input as things are.
- It is doubtful that chapter 15 hearings would improve the way in which the department's professionals manage the state's wild animals for the benefit of all the people of the state.
- Any additional time burdens on the fish and wildlife regulations issuing process would simply cause the process to fail.

I would be most pleased to appear before your Committee and to give testimony personally and through my staff in depth regarding the above matters.

Yours sincerely,

Emmet J. Cushing

Emmet J. Cushing
COMMISSIONER

ADMIN 1000

STATE OF MINNESOTA

DEPARTMENT of Military Affairs

Office Memorandum

TO : Department of Legislative Research
ATTENTION: James Nobles

DATE: 13 Sep 74

FROM : CHESTER J. MOEGLEIN
Major General, Minn ARNG
The Adjutant General

SUBJECT: State Administrative Procedures

This department has reviewed the four sets of amendments relating to State Administrative Procedures as distributed to department heads by your office under the date of 16 August 1974.

Rules and regulations published or distributed by the Department of Military Affairs are issued in exercise of command and control of State Military Forces under the provisions of Sections 190.03 and 190.04, Minnesota Statutes.

The Department of Military Affairs should be exempt from the provisions of Subdivision 2, Section 15.0411 of Minnesota Statutes, by reason of the complexity and continuous relationship we have with federal military agencies having substantial authority to establish rules and regulations governing our activities.

For reasons stated above, it is requested that the amendments you propose include the exemption of the Department of Military Affairs from the provisions of Subdivision 2, Section 15.0411, of the statutes.

STATE OF MINNESOTA
DEPARTMENT OF LABOR AND INDUSTRY
SAINT PAUL 55101

IN REPLY REFER TO

May 29, 1974

Honorable E. W. "Bill" Quirin
District 33B
Olmsted County
P. O. Box 6537
Rochester, Minnesota 55901

Dear Representative Quirin:

This is in reply to your letter of May 20, 1974 requesting that I submit a written statement as to why the Department of Labor and Industry's exemption from the APA should be continued.

In my opinion, the exemption should continue as far as the Workmen's Compensation Division is concerned, but not so far as any of the other divisions of the Department of Labor and Industry are concerned.

Since the Department of Labor and Industry was created and since 1968 when I was made Commissioner, the rule making activities of all divisions except workmen's compensation have followed the requirements of Chapter 15.

The OSHA Division began functioning on August 1, 1973. Minnesota Statutes 182.657 and 182.665 require this division to follow the provisions of Chapter 15 in its rule and regulation making activities.

The other divisions in the Department of Labor and Industry, with the exception of the Workmen's Compensation Division, have been following the requirements of Chapter 15 in their rule and regulation making activities as I indicated above. The statutes governing these various divisions vary somewhat in their contents. Minnesota Statutes 177.28, Subdivision 6 of the Labor Standards Act incorporates Chapter 15 into that act. Minnesota Statutes 178.041, Subdivision 2 of the Apprenticeship Act does the same thing. Minnesota

Statute 181A.09, Subdivision 3 of the Child Labor Act provides the requirements that are equal to Chapter 15. Minnesota Statutes 181B.15 of the Private Pension Benefits Protection Act provides certain special rules for that act. The prevailing wage act has some special provisions. Boiler and Steamfitting are governed by the provisions of Chapter 175.

The Workmen's Compensation Division has a need for special consideration, in my opinion.

The Industrial Commission was created in 1921. It was given rule and regulation making authority under Chapter 175. This continued undisturbed until approximately 1957 when Chapter 15 came into being. Workmen's Compensation Commissioner James Pomush states that at that time in the discussions in the Senate Judiciary Committee, the question was raised whether or not the Industrial Commission should continue under Chapter 175 or be subjected to Chapter 15. Commissioner Pomush indicates that he attended several hearings in this matter, and that the Senate Judiciary Committee decided that the Industrial Commission should not be included in Chapter 15. When the Department of Labor and Industry was created in 1967, and its authority increased in 1973, rule and regulation making authority of the Industrial Commission was transferred to the Department of Labor and Industry, continuing in Chapter 175.

I believe it is beneficial that the rule and regulation making authority of the Workmen's Compensation Division be retained under Chapter 175. It has been maintained in that manner successful for 53 years. There have been no complaints of any abuses. In addition, it should be pointed out that a decision of the Minnesota Supreme Court or a new statute can cause need for changes in the method of operation in the Workmen's Compensation Division quite rapidly. It is more efficient, and in fact, necessary that flexibility in rule and regulation making be retained to meet the changing needs.

For these reasons, I would strongly suggest that the Workmen's Compensation Division rule and regulation making authority be retained as stated in Chapter 175 and that all other divisions of the Department of Labor and Industry, for purposes of rules and regulations, be placed in Chapter 15. If I can be of any other assistance or furnish any additional information regarding this matter, please let me know.

Very truly yours,

DEPARTMENT OF LABOR AND INDUSTRY

Bud Malone

E. I. "Bud" MALONE
Commissioner

EIM:dn6

cc: Honorable Edward J. Gearty
1102 West Broadway
Minneapolis, Minnesota 55411

STATE OF MINNESOTA

DEPARTMENT of Corrections

Office Memorandum

TO : Jim Nobles
Legislative Analyst
House Research Division

DATE: Sept 10, 1974

FROM : Kenneth F. Schoen
Commissioner

SUBJECT: Proposed Amendment to Administrative Procedures Act

The proposed amendment to Minn. Stat. 1971, § 15.0411, subd. 2, conforms to the enactment of Laws 1973, chap. 654 (Minn. Stat. 1973 Supp. § 241.045) the Act creating the Minnesota Corrections Authority, in that it strikes the "Adult Corrections Commission" and the "Youth Conservation Commission," which agencies were abolished by chap. 654. However, your proposed amendment fails to substitute the Minnesota Corrections Authority, which agency replaces the two Commissions and assumes their powers and duties.

The same rationale which dictated the inclusion of the Adult Corrections Commission and the Youth Conservation Commission within the exceptions provided in subd. 2 applies with equal relevance to the Minnesota Corrections Authority.

The Minnesota Corrections Authority is authorized and empowered to grant parole to persons convicted of felony and committed to the custody of the Commissioner of Corrections for confinement according to law; the Authority may also revoke parole for cause and grant discharges. The Authority may also receive persons committed to its care pursuant to Minn. Stat. 242.13, and order their confinement, parole or discharge.

The Rules of the Minnesota Corrections Authority as authorized by law (Minn. Stat. § 243.12) deal only with the parole function, i.e., the granting, revocation and supervision of parolees.

Thus their rules do not directly or indirectly affect the rights of or procedure available to the public.

Their rules, just as do the rules of the Board of Pardons, affect a very limited "public," and to a large extent affect only the internal management of the Authority as an agency.

The granting and revocation of parole, the decision to discharge from parole or to order confinement in an institution are all acts involving the exercise of discretion. They are substantive decisions based upon factors not subject to objective measurement by hard and fast rule. To the extent there are no hard and fast rules by which a court would exercise its discretion to conditionally release a person on probation, the equally judgmental function of deciding when one may be conditionally released from confinement or discharged from field supervision is not and cannot be made the subject of hard and fast rules.

For the foregoing reasons it is respectfully submitted that your proposed amendment be modified to include the Minnesota Corrections Authority within the exceptions delineated in subd. 2 of § 15.0411.

KFS:JNB:lka

STATE OF MINNESOTA
DEPARTMENT OF CORRECTIONS
SUITE 430 METRO SQUARE BLDG. • 7th & ROBERT STREETS • ST. PAUL, MINN. 55101

OFFICE OF THE
COMMISSIONER

612-296-3565

June 26, 1974

Mr. Jim Nobles
Legislative Analyst
Office of Legislative Research
House Research Division
Room 17-G State Capitol
St. Paul, Minnesota 55155

Re: Letters from Representative E.W. (Bill) Quirin

Dear Mr. Nobles:

Receipt is hereby acknowledged of your letter of June 21, 1974, together with the enclosed copies of letters dated May 20, 1974, and signed E.W. "Bill" Quirin, State Representative.

Minnesota Statutes § 15.0411, subd. 2, defines "Agency" to mean"

> '''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 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 Pardon Board, (d) Youth Conservation Commission, (e) the Department of Manpower Services, (f) the Director of Mediation Services, (g) the Department of labor and industry, (h) workmen's compensation commission."

Thereafter, Subd. 3 of § 15.0411 defines "Rule" as:

> '''Rule' includes every regulation, including the amendment, suspension, or repeal thereof, adopted by an agency, whether with or without prior hearing, 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) 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."

Except for the Rules required by Minn. Stat. 1973 Supplement, Chapter 401 (the Community Corrections Act) the Department of Corrections has not issued any rules except those dealing with the internal management of the Department and the "management, discipline or release" of persons under commitment as persons convicted of crime or adjudicated delinquent.

However, because of enabling legislation and provision for the payment of subsidies to local units of government provided such local units conform to the standards and rules of the Commissioner of Corrections, such rules and standards are being developed and will be promulgated as provided in §§ 15.0411 - 15.0422.

The Department of Corrections is not excluded from the coverage of §§ 15.0411 - 15.0422, nor has the Department in any way attempted to evade the provisions thereof.

It is our considered opinion that the exclusion by the legislature of rules governing the internal management of departments and agencies, and of persons committed to penal institutions was both wise and expedient. Rules effecting the general public and having the force and effect of law stand on a different basis and the Department subscribes to the wisdom and necessity for their promulgation as provided in the appropriate sections of chapter 15.

Sincerely,

Kenneth F. Schoen
Commissioner

KFS:JNB:snk

December 7, 1973 MEMORANDUM

TO: Members of the House Subcommittee on Stillwater Prison

FROM: Office of Senate Research - Dianne Heins

RE: Legal Rights of Adults Incarcerated in Correctional Institutions

This memorandum will briefly describe some of the rights now afforded adult inmates of correctional institutions. The only statutory right now granted to Minnesota prisoners is the right to communicate with the warden or commissioner. Minnesota Statutes 1971, Sec. 243.56. The bulk of the law of prisoners' rights consists of court decisions. Until recently, courts took a "hands off" position; that is, unless action by the supervising agency was clearly and grossly unconstitutional, the courts refrained from interfering with the administration of penal institutions. Within the last five years, hundreds of federal and state courts, prompted perhaps by national legislative inaction, have repudiated the "hands off" doctrine and have begun to create the law of prisoners rights.

Three dominant themes are reflected in most court decisions: (1) upon incarceration, a convicted individual necessarily loses some rights and privileges afforded most members of society; (2) he does not lose all of his civil rights; (3) the courts will not interfere unless some fundamental constitutional right is involved.

The body of case law on prisoners' rights is constantly changing and often conflicting. Minnesota courts must follow decisions by the United States Supreme Court, the 8th Circuit Court of Appeals, the federal district courts sitting in Minnesota, and the Minnesota Supreme Court. Decisions from other jurisdictions, while not binding on Minnesota courts, may well influence future Minnesota decisions. It is therefore necessary to examine them in the absence of a definitive decision binding Minnesota courts.

The following is a summary of the trends in the law of prisoners' rights:

I. SUBSTANTIVE RIGHTS

A. Freedom of expression. Recent court decisions have shown a trend towards relaxing some of the rigid rules concerning communication amongst inmates and with the outside world.

A Rhode Island judge has held that officials may impose no restrictions on mail except searches for contraband. Palmigiano v. Travisono, 317 F. Supp. 776 (D.R.I. 1970). Other decisions have upheld the right of an inmate

to criticize the institution. Even if prison officials are allowed to read the mail, it is difficult to justify censorship except for escape plans or highly inflamatory writings.

Concerning visits, officials have a freer hand. Burham v. Oswald, 342 F. Supp. 880 (W.D.N.Y. 1972); is one of the few cases which have favored inmates. There, the court held that the prisoners at Attica following the riot could talk to the news media. S.F. No. 1225 on General Orders seeks to establish a right to reach the news media. S.F. No. 2525 would permit children to visit their incarcerated parents.

The right to read and to write articles has recently been recognized. In Fortune Society v. McGinnis, 319 F. Supp. 901 (S.D.N.Y. 1970), the court ruled that officials could not bar a prison newsletter. Other articles protected by courts have included law books (Laaman v. Hancock, 351 F.Supp. 1265 (D.N.H. 1972)), Black Panther newsletters (Shakur v. McGrath, 69 Civ. 4493 (S.D.N.Y. 1969)), and communist materials (Sostre v. Otis, 330 F.Supp. 941 (S.D.N.Y. 1971)). [However, inmates probably do not have the right to write articles and send them outside the prison. See Berrigan v. Norton, 451 F.2d 790 (2d Cir. 1971).]

Within the institution prisoners do not have the right to communicate with their colleagues. Roberts v. Pepersack, 256 F.Supp. 415 (D.Md. 1966). Yet at least one case has held that an inmate has a right to associate with other inmates unless he is segregated for a specific reason. Davis v. Lindsay, 321 F.Supp. 1134 (S.D.N.Y. 1970). S.F. No. 1751 which permits inmates to form organizations is far ahead of the case law.

B. Freedom of Religion. Most of the cases involving religion have been brought by Black Muslims. The courts have upheld the right to study and worship by choice and have even required prisons to reduce the amount of pork served. Barnett v. Rogers, 410 F.2d 995 (D.C.Cir. 1969); Sostre v. McGinnis, 334 F.2d 906 (2d Cir. 1964).

C. Freedom of Appearance. Hair length restrictions at Sandstone have been upheld in Blake v. Pyrse, 315 F.Supp. 625 (D.Minn. 1970). That is still the general rule although there is at least one case which allowed a pre-trial detainee to wear a beard. Seale v. Manson, 326 F. Supp. 1375 (D.Conn. 1971).

D. Protection from Unreasonable Search and Seizure. The courts have been virtually unanimous in declaring that officials have a right to search prisoners at any time for any reason. See, e.g., Daugherty v. Harris, 476 F.2d 292 (8th Cir. 1973).

E. Right to Just Compensation. The amount of pay to inmates is discretionary and courts have held that they have no right to just compensation. Sims v. Parke-Davis Co., 334 F.Supp. 774 (E.D. Mich. 1971).

F. Freedom from Double Jeopardy. If a prisoner commits an offense which is also against state law, he can be punished in a disciplinary proceeding and also be tried for the crime.

G. Cruel and Unusual Punishment. Every prisoner is protected by the constitution from cruel and unusual punishment. Courts have, however, been reluctant to declare certain punishments cruel and unusual. An Arkansas case which enjoined the use of the strap is broad enough to include most forms of corporal punishment. Jackson v. Bishop, 404 F.2d 571 (8th Cir. 1968). While solitary confinement is not cruel and unusual in itself, segregation facilities in some prisons have been so bad as to violate the constitution. Wright v. McMann, 387 F.2d 519 (2d Cir. 1967). In the cases which have found cruel and unusual punishment, the conditions have been subhuman, including a starvation diet, no heat, no toilet facilities, and no clothes.

The most far reaching case in this area is Holt v. Sarver, 309 F. Supp. 362 (E.D.Ark. 1970), in which the entire Arkansas penal system was declared unconstitutional.

H. Right to Medical Treatment. The cases have found no right to medical, dental or psychiatric treatment except for intentional mistreatment or gross neglect. United States ex rel. Hyde v. McGinnis, 429 F. 2d 864 (2d Cir. 1970); Newman v. State, 349 F.Supp. 278 (M.D.Ala. 1972); Bretz v. Superintendent Correctional Field Unit No. 9, 354 F. Supp.7 (D.Va. 1973).

I. Right to Rehabilitation. No court has ever given an inmate this right except to indicate that a lack of rehabilitation goals along with other things may constitute cruel and unusual punishment.

J. Freedom from Sex Assaults. Courts have dismissed civil actions against prison officials for assaults by fellow inmates unless the official had knowledge of an assault and failed to prevent it. Kish v. City of Milwaukee, 441 F.2d 901 (7th Cir. 1971); Penn v. Oliver, 351 F. Supp. 1292 (D.C.Va. 1972).

K. Right to Conjugal Visitation. No court has ever recognized this right. Presently only the state of Mississippi provides conjugal rights--along with 31 countries including Canada and Mexico. S.F. No. 1749, if passed, would add Minnesota to the list.

L. Right to Equal Protection. Racial segregation is no longer permitted. Cruz v. Beto, 405 US 319, 92 S Ct. 1029 (1972). More subtle forms of discrimination such as banning black magazines has also been held unconsitituional. Jackson v. Godwin, 400 F.2d 529 (5th Cir. 1968).

II. PROCEDURAL RIGHTS

Prison officials have the right to discipline inmates as long as they do so in a manner consistant with due process. Until very recently courts would not interfere with the procedure by which inmates were disciplined. Now general agreement exists that the procedure must include at least rudimentary concepts of due process. See, e.g., Clutchette v. Procunier, 328 F.Supp. 767 (N.D.Cal. 1971), and Nolan v. Scafati, 306 F. Supp. 1 (D.Mass. 1969), aff'd, 430 F. 2d 548 (1st Cir. 1970). One court in New York was very specific about such things as notice, right to a hearing, cross-examination of witnesses, written record of the proceedings, and the right to counsel or counsel/substitute. This decision was, however, reversed because the higher court felt it was too detailed. Sostre v. Rockefeller, 312 F.Supp 863 (S.D.N.Y. 1970), rev'd sub nom. Sostre v. McGinnis, 442 F. 2d 178 (2d Cir. 1971).

The issue is moot in Minnesota, at least for adult male prisoners. See attached memorandum and court order of September 7, 1973.

Some courts have indicated that a form of due process must be incorporated in transfer procedures. If the transfer is in the nature of a punishment and involves segregation or a transfer to a distant facility, then the inmate should have the same due process rights as in disciplinary hearings. See Gomes v. Travisono, 353 F. Supp. 457 (D.R.I. 1973); Urbano v. McCorkle, 334 F. Supp. 161 (D.N.J. 1971). In Minnesota, disciplinary transfers are also covered by the attached federal court order of September 7, 1973.

While no inmate has a constitutional right to be placed on parole, the United States Supreme Court has ruled that once an inmate has been paroled, his right to remain on parole is of significant value to him, and he cannot be deprived of his parole without some modicum of due process. Morrissey v. Brewer, 408 U.S. 471, 92 SCt 2593. Specifically, an informal parole revocation hearing must be held before a decision to revoke parole is made, and the procedure must include written notice of the charges to the parolee, an opportunity to be confronted with the evidence against him, an opportunity to testify on his own behalf and introduce other supportive evidence, a hearing before a neutral body, and a written statement of the body's decision.

DH

DH:db

September 19, 1973 MEMORANDUM

TO: Members of the Health, Welfare and Corrections Committee

FROM: Office of Senate Research - Dianne Heins

RE: Federal court order of September 7, 1973, relating to the introduction of new disciplinary hearing procedures at the Minnesota State Prison and the Minnesota State Reformatory for Men

1. BACKGROUND

A class action was filed in federal district court earlier this year on behalf of all inmates incarcerated at the Minnesota State Prison (Stillwater) and at the Minnesota State Reformatory for Men (St. Cloud). The named defendants were Kenneth Schoen, Commissioner of Corrections; Bruce McManus, Warden, Minnesota State Prison; and William McRea, Superintendent, Minnesota State Reformatory for Men. The complaint alleged, in part, that disciplinary hearing procedures presently in force at both institutions violate due process of law.

On September 5, 1973, the parties entered into a stipulation as to the nature of new procedures to be implemented at both institutions. Judge Philip J. Neville, at the request of all parties, signed an Order incorporating the stipulated procedures, and directed that they be implemented at the Minnesota State Prison (Stillwater) by October 15, 1973; and at the Minnesota State Reformatory for Men (St. Cloud) by November 1, 1973.

Generally, parties are bound by stipulations voluntarily made and relief from such stipulations is warranted only under exceptional circumstances. Fenix v. Finch, 436 F.2d 831, C.A.Mo. 1971; Enlers v. Vinal 382 F.2d 58, C.A.Neb. 1967. A defendant who has stipulated to specific terms and has asked the court to appoint them cannot later claim to be prejudiced by those terms. U.S. v. Hill, 298 F. Supp. 1221, D.C.Conn. 1969. In the present case, Judge Neville specifically incorporated the parties' stipulation in his Order. Since the court had both personal and subject matter jurisdiction over the parties, the Order is binding on all parties; and it would require grave and unusual circumstances to release the parties from compliance with the terms of the stipulation.

2. SUMMARY OF THE PROCEDURES

(a) Every inmate is guaranteed a hearing by a disciplinary board before any action may be taken against him for violation of a rule at an institution. The board must be composed of one or more impartial persons and may not include the staff member who filed the complaint, investigated the complaint or who will review the proceedings on appeal.

(b) Written notice must be given within five days after the inmate has been charged with a rules violation; or if he has been detained prior to a hearing, within twenty-four hours of his detention. The notice must consist of two parts. Part A must cite the rule allegedly violated; summarize the facts upon which the alleged violation is based; list the adverse witnesses and summarize their testimony; list physical evidence to be introduced; state the time and date of the hearing; recite the rights to which the inmate is entitled at the hearing; and declare the maximum penalty for violation of the rule. An optional statement may inform the inmate of the sentence he will receive should he waive his right to a hearing and plead guilty.

Part B of the notice must be detachable and must contain a form on which the inmate may list the names of witnesses he will call and summarize their testimony; a space in which he may waive his rights and plead guilty; and a space in which he may make additional comments.

The notice must be personally delivered to the inmate, and he must be informed that he has twenty-four hours to complete and return Part B. Various receipting provisions are made to ensure proper delivery and return of service. If the inmate returns Part B but fails to request the appearance of the adverse witnesses or fails to list his own witnesses, he forfeits his right to have those witnesses appear at the hearing. If he fails to return Part B, the inmate forfeits his right to have both adverse and defense witnesses appear. The hearing board can, however, call any witness if the ends of justice would be better served by the appearance of that witness.

(c) As a rule, hearings will not be scheduled sooner than four days after delivery of notice to the inmate. If the inmate is being detained prior to the hearing, the hearing must be held within four days of delivery of notice. Provisions are also made for continuances at the request of the inmate.

(d) Each institution must establish pre-hearing detention procedures. The warden or his designee must determine whether the charge and circumstances warrant pre-hearing detention; and the detention order must be reviewed by the warden or his designee within twenty-four hours of the detention. Failure to review the original detention order will result in the release of the inmate from detention.

(e) At the hearing, the inmate shall have the following rights:

(1) to appear personally and be heard
(2) to cross examine all adverse witnesses (unless waived)
(3) to introduce three defense witnesses (unless waived)
(4) to be represented by counsel or counsel substitute

The right to counsel attaches as soon as the inmate is notified of the alleged rules violation, and extends until all appeals have been exhausted. Counsel shall have access to the inmate for the duration of the representation. Counsel may be chosen by the inmate only from among the following groups:

(1) any staff member
(2) any member of the Minnesota Department of Corrections
(3) any licensed attorney retained by the inmate
(4) any person directly supervised by a licensed attorney and approved by the warden

Slightly different rules apply to mentally retarded inmates. Counsel must be appointed for a mentally retarded inmate prior to the delivery of notice.

A complete record must be kept of the hearing, and it shall be available to the inmate and his counsel for inspection and copying at no expense to the institution.

(f) A majority of the board must find the accused guilty. The standard shall be that the accused's guilt is more probable than his innocence. A written statement must be given to the inmate within four hours of the imposition of sentence. The statement must include:

(1) the board's decision
(2) the sentence imposed
(3) the evidence on which the decision and sentence are based
(4) a statement of whether the sentence may be stayed during appeal and the reasons supporting that decision
(5) the names of the board members hearing the case

(g) An appeal to the warden or his designee may be made within forty-eight hours after imposition of sentence. Notice of appeal must be written. The inmate may prepare and submit additional material. The warden may affirm, reverse or remand the disciplinary board's decision. He may reduce, but not increase, the original sentence.

(h) Provisions are made for the staying of sentence pending appeal. The board must decide whether or not to stay execution of the sentence pending appeal. If sentence is stayed, the warden or his designee must act on the appeal within thirty days. If sentence is not stayed, the warden or his designee must act on the appeal within five days.

(i) Both institutions must make available to inmates a list of violations which may result in disciplinary action, as well as a copy of the rules by which the disciplinary proceedings are conducted. A list of the maximum penalty for each violation shall also be included.

(j) Each institution must establish criteria for a general lock up and suspension of all rights and privileges without disciplinary hearings. Each institution shall also establish criteria for protective segregation, both voluntary and involuntary.

(k) If an inmate is transferred between institutions for non-disciplinary purposes, a written statement of reasons for the transfer must be placed in the inmate's file and a copy provided to the inmate. Transfers for disciplinary purposes must be preceded by a disciplinary hearing.

(l) Each institution must establish guidelines for the use of force and chemicals in the punishment sections of the institutions.

(m) Provisions are made for posting suspensions, additions, deletions and ammendments of any of the procedures or guidelines established in the order.

3. EFFECT

Recent court decisions have increasingly recognized the rights of incarcerated individuals to due process hearings before the imposition of punishment. However, this Order is unique in that no state has yet spelled out, in such great detail, what procedures are to be followed by prison officials in disciplining inmates. The federal prison system has no equivalent procedure. The Minnesota model will undoubtedly be studied and copied by other states.

It is possible that the Legislature will wish to pass a statute incorporating the procedures in the Order. If so, there will be several problems in these procedures that must be worked out. Briefly:

1. The increased staff necessary to implement these procedures

2. The problem of contacting counsel within 24 hours of the inmate's receipt of notice of a rules violation

3. Constitutional problems of placing the burden on the inmate to request the appearance of adverse witnesses; of not requiring testimony to be under oath; of not making free transcripts of the hearings available to indigent inmates; and of limiting the inmate's choice of counsel

4. Lack of provision for meaningful appeal in Rule XII (B) and (C)

5. Possible variation of the standard of proof required to find the inmate guilty from "more probable than not" to "preponderance of the evidence" or "beyond a reasonable doubt"

6. Establishing legislative guidelines for the commissioner to implement Rule XIII (Use of force or chemicals)

These problems are not exhaustive, and they have not been discussed in great detail at this point. They are listed merely to provoke thought and discussion, and to serve as a starting point in discussing the procedures with the staff at both institutions.

DH:mc

B. Relating to "Informal Rule-Making"

1. Memorandum From Jim Nobles, Legislative Analyst, House Research Division, Regarding Definition of Rule.

2. Memorandum From Jim Nobles, Legislative Analyst, House Research Division and Marcy Wallace, Senate Research Division, Regarding Definition of Rule.

3. Memorandum From Marcy Wallace and Jim Nobles, Office of Legislative Research, Regarding Informal Rule Making by State Agencies.

4. Letter From Richard B. Allyn, Special Assistant Attorney General, Minnesota State College System.

5. Memorandum From Norman Dybdahl, Vice Chancellor for Administration, Minnesota State College System.

6. Letter From Edward J. Driscoll, Commissioner of Securities, Department of Commerce.

definition of "rule"

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STATE OF MINNESOTA
OFFICE OF LEGISLATIVE RESEARCH
HOUSE RESEARCH DIVISION

THE CAPITOL
ST. PAUL 55155
(612) 296-6753

May 23, 1974

TO: [redacted]

FROM: Jim Nobles, Legislative Analyst

RE: Administrative Procedure Act "RULE"

As supplement to the information enclosed (where your attention is directed particularly to pp. I-8 through I-13) the following is addressed to your specific interest in the subject of "informal rule-making":

In the time allotted, a thorough survey of situations in other states was not possible. Therefore, Frank Cooper's State Administrative Law is the best resource, although published in 1965. The Cooper two-volume work presents a comprehensive review of rule-making and administrative adjudication procedures in state governments. The American Bar Foundation and the University of Michigan Law School sponsored Cooper's research project and it is considered the most authoritative work on the subject.

It is implicit in Professor Cooper's treatment that the issue you raise is one of reoccurring significance. As in the enclosed report, particular attention is drawn to potential difficulties with the definition of "rule." It is my current opinion that problems of informal rule-making (i.e., abusive utilization of "policy statements", "directive", etc., as a means to get around the proper due process procedures of the APA) should be resolved through refining the statutory definition of "rule".

Cooper's attention to this point is most useful: (pp. 107-9)

> To achieve a successful and workable definition of the term "rule," the statute should incorporate certain basic inclusions and certain equally important exclusions.

(A) WHAT SHOULD BE INCLUDED WITHIN DEFINITION

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.[61]

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 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.

Fifth, and closely related to the fourth requirement, is the desirability of including within the definition of rule any statement which describes the organization of an agency. Frequently, those doing business with an agency staff may properly be approached, and this can be known only if the organization of the agency is a matter of public knowledge.

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.

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[61]In Michigan, for example, in the early days of the Michigan Unemployment Compensation Commission, the statute required that there be a hearing in case of the adoption of rules but permitted the adoption of regulations without public hearing. Over a period of several years the Commission adopted more than twenty regulations but only two rules.

Cooper is not, however, rigid in recommending specific language in defining rule. He says: ". . .best results can be achieved by careful periodic revisions of the statutory definition of the term "rule," based upon experience. . ." (p. 111). Cooper points to Wisconsin as a state that has followed such an approach with effective results. As time permits, I will look closer at the Wisconsin experience.

Since Wisconsin has followed the Model APA to a significant extent, it is also useful to give it attention. The full text of the Revised Model State Administrative Procedure Act is provided in the enclosed report (and for material related to the definition of "rule" see pages II-9 through II-11). For convenience, the relevant section is reproduced below:

(7) "rule" means each agency statement of general applicability that implements, interprets, or prescribes law or policy, or describes the organization, procedure, or practice requirements of any agency. The term includes the amendment or repeal of a prior rule, but does not include (A) statements concerning only the internal management of an agency and not affecting private rights or procedures available to the public, or (B) declaratory rulings issued pursuant to Section 8, or (C) intra-agency memoranda.

COMMENT

The corresponding section of the Federal Administrative Procedure Act reads as follows:

"SEC. 2(c). *Rule and Rule Making.*—'Rule' means the whole or any part of an agency statement of general or particular applicability and future effect designed to implement, interpret, or prescribe law or policy or to describe the organization, procedure, or practice requirements of any agency, and includes the approval or prescription for the future of rates, wages, corporate or financial structures or reorganizations thereof, prices, facilities, appliances, services or allowances therefor or of valuations, costs, or accounting, or practices bearing upon any of the foregoing. 'Rule making' means agency process for the formulation, amendment, or repeal of a rule."

The phrase "or particular applicability" in the federal act is omitted from the Model Act, thus limiting its scope but clarifying its meaning. Attention should be called to the fact that rules, like statutory provisions, may be of "general applicability" even though they may be of immediate concern to only a single person or corporation, provided the form is general and others who may qualify in the future will fall within its provisions.

SECTION 2. [*Public Information; Adoption of Rules; Availability of Rules and Orders.*]

(a) In addition to other rule-making requirements imposed by law, each agency shall:

(1) adopt as a rule a description of its organization, stating the general course and method of its operations and the methods whereby the public may obtain information or make submissions or requests;

(2) adopt rules of practice setting forth the nature and requirements of all formal and informal procedures available, including a description of all forms and instructions used by the agency;

(3) make available for public inspection all rules and all other written statements of policy or interpretations formulated, adopted, or used by the agency in the discharge of its functions;

(4) make available for public inspection all final orders, decisions, and opinions.

(b) No agency rule, order, or decision is valid or effective against any person or party, nor may it be invoked by the agency for any purpose, until it has been made available for public inspection as herein required. This provision is not applicable in favor of any person or party who has actual knowledge thereof.

COMMENT

This section goes far beyond the provisions of Section 2 of the original Model State Administrative Procedure Act. Public information is substantially increased in scope. Subsection (a)(1) is made mandatory, whereas under the original act the obligation to promulgate descriptions of organization and the general course of operations was required only "so far as practicable." Also included are recommendations of the Hoover Commission Task Force to the effect that statements of policy and interpretive materials, as well as rules, orders, and opinions shall be made available for public inspection. Finally, the sanctions of Subsection (b) are included for the first time.

The corresponding provisions of the Federal Administrative Procedure Act are as follows:

"SEC. 3. Except to the extent that there is involved (1) any function of the United States requiring secrecy in the public interest or (2) any matter relating solely to the internal management of an agency—

"(a) *Rules.*—Every agency shall separately state and currently publish in the Federal Register (1) descriptions of its central and field organization including delegations by the agency of final authority and the established places at which, and methods whereby, the public may secure information or make submittals or requests; (2) statements of the general course and method by which its functions are channeled and determined, including the nature and requirements of all formal or informal procedures available as well as forms and instructions as to the scope and contents of all papers, reports, or examinations; and (3) substantive rules adopted as authorized by law and statements of general policy or interpretations formulated and adopted by the agency for the guidance of the public, but not rules addressed to and served upon named persons in accordance with law. No person shall in any manner be required to resort to organization or procedure not so published.

"(b) *Opinions and Orders.*—Every agency shall publish or, in accordance with published rule, make available to public inspection all final opinions or orders in the adjudication of cases (except those required for good cause to be held confidential and not cited as precedents) and all rules.

"(c) *Public Records.*—Save as otherwise required by statute, matters of official record shall in accordance with published rule be made available to persons properly and directly concerned except information held confidential for good cause found."

In contrast to Cooper's criteria of what "rule" should include (along with the specific language of the Model APA in defining "rule") the Minnesota APA leaves much to be desired. As I tried to point out in the enclosed anlaysis of M.S. Chapter 15, various kinds of rules are authorized--substantive, interpretative, and procedural. The overriding problem, however, involves ambiguities in 15.0412 as to which type of rules require adoption after public hearing.

You will find that I have emphas[illegible]d this issue (see pp. I-8 through I-13, and I-17 throug[illegible] I-20). That is, in analyzing the APA, I find that you have pointed out one of Minnesota's major failings relative to its rule-making process.

My personal recommendation would be that the definition of "rule" in Section 15.0411, Subd. 3, be amended to be more inclusive of interpretative administrative action, i.e., to be in greater harmony with the Model APA and Professor Cooper's suggested criteria. This would also involve some additional amending of section 15.0412, so as to remove ambiguities over alternative rule-making procedures.

I trust that the above materials and commentary have been of some assistance. Frankly, there has been considerable limitation on the amount of time available during the past several weeks. I look forward to additional attention to this issue in the future.

JN/bh

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OFFICE OF LEGISLATIVE RESEARCH
HOUSE RESEARCH DIVISION

May 10, 1974

THE CAPITOL
ST. PAUL 55155
(612) 296-6753

TO: Members, House and Senate Governmental Operations Committee

FROM: Jim Nobles, House Research
Marcy Wallace, Senate Research

RE: Administrative Procedures, "Rule"

At the May 7, meeting of the House and Senate Governmental Operations Committees, concern was expressed over the adequacy of Minnesota's definition of "rule" with respect to the Administrative Procedure Act [M.S. Section 15.0411, Subd. 3]. As noted previously, the APA definition of rule largely sets the standard for what administrative action requires adherence to rule-making procedures (see pp. I-8 to I-13 of reference materials). It was noted that governmental agencies may have a tendency to issue "interpretative statements", "policy bulletins", "directives", etc., in their execution of the law as a means of circumventing the public hearing rule-making process. Investigations by the Minnesota Legislative Research Committee in 1954 and the Legislative Interim Commission on Administrative Rules, Regulations, Procedures and Practices in 1968, indicated that such administrative activity (so-called "informal rule-making") was a problem. Reference was also made to the work of Professor Frank Cooper on this issue and it was requested that his commentary be supplied (attached).

Also, by request the Committees' staff will undertake its own inquiry as to the status of "informal rule-making" among state agencies currently. Documents relating to administrative application and interpretation of law will be requested to determine if agencies are improperly going around the procedures of the APA. Hopefully, this material will be available to you at our next meeting.

Finally, as a matter of emphasis, your attention is directed to M.S. 15.0412, subdivision 3, as amended by Laws 1974, Chapter 344, Section 1 (see p. I-18) which says:

> 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, ~~as far as practicable~~, publish ~~or otherwise circulate~~ notice of its intended action in the state register as described in section 8 and afford interested persons opportunity to submit data or views orally or in writing.

(The reference to subdivision 4 is to the normal 30-day notice and full public hearing process of rule-making.) The above subdivision 3 is particularly ambiguous since it seems to imply that agencies may adopt "any rule" simply by giving notice of intended action and receiving comments at the agency's discretion.

It may be that such an abbreviated procedure would suffice for adoption of "rules" that are not substantive, i.e., rules that are only procedural or interpretative, but which may affect more than "internal management". However, in order to provide such an intermediate "rule-making" procedure (as subdivision 3, seemingly attempts to do) the type of rule which qualifies for the process should be more clearly defined. It is inconsistent with the thrust of the Administrative Procedure Act that agencies can at their discretion choose to formulate "any rule" without full public hearings.

Subdivision 3 could, of course, simply be repealed. Yet, it may be that if the definition of rule can be refined so as to differentiate types of rules (see pp. I-9 through I-11) a simple notice of intended action procedure may be advisable for a limited category of "rules" (those less than substantive, but more than managerial). Such an approach may be worth pursuing.

We would welcome your suggestions on this or other subjects. We intend our efforts to be responsive to your interests and concerns.

JN:MW:bh

COOPER'S SUGGESTIONS ON DEFINING "RULE"*

In State Administrative Law

Professor Frank Cooper points out that to achieve a successful and workable definition of the term "rule", the statute should ". . .incorporate certain basic inclusions and certain equally important exclusions." First, with respect to what should be included, he says 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.[61]
>
> A second element which is important is that the term "rule" be confined, by definition, to statements of general applicability. . . .

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*From Frank Cooper, State Administrative Law. New York: The Bobbs-Merrill Company, Inc., 1965, Vol. 1, p. 107-119. Professor' Cooper's two volume work presents a comprehensive review of rule-making in state governments. The publication is sponsored as a research project of the American Bar Foundation and the University of Michigan Law School.

[61] In Michigan, for example, in the early days of the Michigan Unemployment Compensation Commission, the statute required that there be a hearing in case of the adoption of rules but permitted the adoption of regulations without public hearing. Over a period of several years the Commission adopted more than twenty regulations but only two rules.

A third essential inclusion in any workable definition of 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.

Fifth, and closely related to the fourth requirement, is the desirability of including within the definition of rule any statement which describes the organization of an agency. Frequently, those doing business with an agency staff may properly be approached, and this can be known only if the organization of the agency is a matter of public knowledge.

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.

With respect to what should be expressly excluded from the definition of "rule," Cooper specifically mentions matters ". . .concerning only the internal management of an agency and not affecting private rights or procedures available to the public."

Cooper is not, however, rigid in recommending specific language in defining rule. He says: ". . .best results can be achieved by careful periodic revisions of the statutory definition of the term 'rule,' based upon experience. . . ." (p. 111).

June 18, 1974 MEMORANDUM

TO: Members of Joint Senate and House Governmental Operations Committees

FROM: Office of Legislative Research - Marcy Wallace
Jim Nobles

SUBJ: Informal Rule Making by State Agencies

Since the last meeting the Committees' staff has attempted to read and analyze the various guidelines, policy statements, interpretive bulletins and other documents supplied by various state agencies pursuant to Representative Quirin's request. Although we attempted to determine whether state agencies are improperly avoiding the provisions of the APA, we can only conclude that an answer to that question is necessarily subjective.

Consequently, we have attempted a rough classification of the various documents submitted to us and attached brief examples of documents that appear to fall into each class. The selection of these exhibits is not intended to reflect upon the broad practices of the agency involved with respect to informal rule making. All three types of guidelines are frequently found within the submissions of any one agency. We have also attached copies of guidelines provided by the state department of education but have not undertaken to classify these materials.

We have divided these guidelines into three general classes. The boundaries of these classes are not necessarily distinct, but rather merely provide what may be a useful tool of analysis. The criteria used for classification are semantic and substantive. We would describe these classes as follows:

I. Informational (See Exhibit A)

A. Semantic Characteristics

1. Factual style
2. Avoids "may" and "shall"
3. Often includes statistical or technical data
4. Language is normally informal

B. Substantive Characteristics

1. Does not discuss legal rights and duties of regulated person vis a vis issuing agency
2. Discusses a non-legal or extra-legal subject of special interest to regulated persons

3. Neither requires nor suggests conduct which will determine legal status
4. Agency would normally not have the statutory authority to promulgate the same document as a rule

II. Interpretive (See Exhibit B)

A. Semantic Characteristics

1. Precatory in style
2. Uses terms such as "may", "is desirable", "would be acceptable"
3. Avoids "shall"
4. Language may be either formal or informal

B. Substantive Characteristics

1. Usually interprets legislation or case law and explains how the agency intends to apply this law when faced with an administrative decision or contested case
2. May be a restatement of agency precedents which it intends to follow in the future
3. Normally suggests conduct which will affect legal status
4. Agency does not necessarily have the authority to promulgate the same document as a rule or regulation

III. Declaratory (See Exhibit C)

A. Semantic Characteristics

1. Mandatory in style
2. Uses "shall"
3. Resembles a statute or rule
4. Language is formal

B. Substantive Characteristics

1. Purports to require conduct affecting legal rights, duties or status
2. Does not merely interpret existing legislation or case law but purports to add new substance to the existing regulatory scheme
3. Agency normally has a grant of legislative authority to promulgate the same document as a rule or regulation

mc

STATE OF MINNESOTA
LIVESTOCK SANITARY BOARD
555 WABASHA ST.
ST. PAUL 55102

TO MINNESOTA RESIDENTS ORDERING CALVES UNDER 2 MONTHS OF AGE

Enclosed are two copies of the permit that you requested for the importation of calves under 2 months of age. One copy is to be sent by you to the individual from whom you ordered the calves. His veterinarian will not issue the necessary health certificate until he has received a copy of the permit.

Death losses in calves under 2 months of age that are imported into Minnesota continue to be about 11%. Many of these calves are too young, less than ten days old. When ordering calves, be specific as to the age of calves you want. When the calves are delivered, check them for age or have your veterinarian do so for you. If they are not what you ordered, refuse to accept the shipment.

Check the calves for health before you accept the shipment. If there are sick calves in the lot, refuse to accept the entire shipment. Disease moves rapidly through assembled calves this young.

If sickness shows up in calves after you have accepted them, call your veterinarian immediately. Don't wait to see if they get better by tomorrow - they won't.

Remember - it is easier to refuse to accept a shipment of obviously sick or under age calves than it is to get things straightened out after they have been paid for and the trucker has left your premises.

J. G. Flint, D.V.M.
Secretary and Executive Officer

FORM 38 (2-74)

STATE OF MINNESOTA

DEPARTMENT OF COMMERCE

ST. PAUL, MINNESOTA 55155

July 18, 1973

TO: ALL MINNESOTA LICENSED CARRIERS AUTHORIZED TO WRITE ACCIDENT AND SICKNESS INSURANCE

FROM: POLICY FORM APPROVAL DIVISION
ACCIDENT AND SICKNESS SECTION

RE: 1973 LEGISLATION AFFECTING POLICY FORMS

This informational Bulletin is intended to assist in answering the many inquiries this Division has received regarding 1973 legislative enactments dealing with accident and sickness coverages and policy forms. The nature of each piece of legislation is presented in summary form and companies are instructed to carefully examine the respective acts when drafting riders, endorsements and new policy form contracts for submittal.

1. Chapter 252 (Group Insurance Only)

All benefits relating to expenses incurred for medical treatment or services of a physician shall also include chiropractic treatment and services of a chiropractor.

2. Chapter 339 (Group Insurance Only)

Every employer shall not, except upon the written consent, terminate, suspend or otherwise restrict the participation of the survivor or survivors (as defined) of any deceased covered employee under the group insurance within one year of the covered employee's death. The survivor or survivors may be required to pay the entire cost of such protection.

3. Chapter 340 (Group Insurance Only)

No employer or insurer of that employer shall terminate, suspend or otherwise restrict the participation in any group insurance to any covered employee who becomes totally disabled (as defined) while employed by the employer solely on account of absence caused by such total disability.

4. Chapter 430 (Individual and Group Insurance)

Any policy which provides coverage for services which can be lawfully performed within the scope of the license of a duly licensed dentist, shall provide benefits for such services whether performed by a duly licensed physician or dentist.

5. Chapter 471 (Individual and Group Insurance)

No policy shall contain any provision denying or prohibiting payments for services rendered by a hospital or medical institution owned or operated by the federal, state or local government or practitioners therein in any instance wherein charges for such services are imposed against the policyholder.

6. Chapter 585 (Group Insurance Only)

Policies must include and provide health service benefits on the same basis as othere benefits for the treatment of alcoholism, chemical dependency or drug addiction in (1) a licensed hospital, or (2) confinement in a residential primary treatment program as licensed by the State of Minnesota pursuant to diagnosis or recommendation by a doctor of medicine. Coverage shall be for at least 20 percent of the total patient days allowed by the policy and in no event shall coverage be for less than 28 days in each calendar year.

7. Chapters 303 and 651 (Individual and Group Insurance)

Non-group policies insuring more than one person and group policies providing coverage for family members and dependents shall include as insured members any newborn infants immediately from the moment of birth and thereafter (Chapter 303). Group and non-group policies shall provide the same coverage for maternity benefits to unmarried women and minor female dependents as that provided for married women. Also, both such policies shall provide the same coverage for the child of an unmarried mother as that provided for the child of an employee or insured choosing dependent family coverage. Coverage for legal abortions, if provided, must be recited as a benefit and cannot be interpreted as being provided under the usual "Maternity Benefit" provision. (Chapter 651)

Comment

These two enactments, although having different effective dates (see below) are related as to their respective benefit requirements and must, therefore, be considered jointly. The Division acknowledges that there may be minor variations in interpretation of the two statutes. The Division, therefore, hereby advises

that, although other acceptable options are available, the following are options which the Division will accept and approve for use in Minnesota:

a) Any individual non-group policy or individual group certificate that provides maternity benefits in all cases (regardless of sex or marital status of the individual insured) when the complementary family non-group policy or family group certificate provides maternity benefits.

b) Any individual non-group policy or individual group certificate that permits conversion to family coverage and thereby provides immediate newborn infant coverage for the child of an unmarried mother.

c) Any family policy or family group certificate that permits conversion by a minor female dependent to her own family coverage and thereby provides immediate newborn infant coverage for the child of the minor female dependent, or any family policy or family group certificate that provides immediate newborn infant coverage for the child of a minor female dependent.

EFFECTIVE DATES

All of the above statutes are effective on August 1, 1973 as required by M.S. Section 645.02, excepting as follows:

(a) Chapter 471 is effective for all policies issued or renewed on and after May 22, 1973.

(b) Chapter 585 is effective for all group policies issued or renewed on and after September 30, 1973.

(c) Chapter 303 is effective for all newly issued policies after December 31, 1973 and for policies in force on January 1, 1974 on the first renewal or premium anniversary following January 1, 1974.

FILING PROCEDURE

The Division anticipates that because the above enactments are in some cases material and exceptional requiring the careful redrafting of contract provisions, and further, that because almost all have a common effective date as specified above, a large number of filings will be received within a short time span. Companies, therefore, are hereby advised to take the following steps to expedite the processing of the filings:

1) Identify all filings as being relative to this Bulletin.

2) Recite in the cover letter whether the filings follow the contents of the Bulletin

3) When filings deviate from the contents of the Bulletin, clearly specify the nature of the deviation.

4) Enclose a copy of the prior policy, endorsement or rider together with the revised copy and underscore and identify by reference, the revisions and amendments of the contract language.

The Division is diverting personnel to handle the expected heavy work load and every effort will be made to process the filings on a timely basis. Companies may contact the Division by telephone (612) 296-2488 for further information, but are requested to do so only on matters of substance and materiality.

John T. Ingrassia, Supervisor
Life and Health Section
INSURANCE DIVISION

pas

SCBOP 7 Residence Halls

(a) The following provisions shall govern the Residence Hall program of the Minnesota State College System:

(1) All students not residing in the home of a parent or legal guardian are required to participate in the program unless excused by the President or his designated representative.

(2) A student entering the program shall be required to live in the residence hall for an academic quarter or summer session, pay the cost of damages caused by the student, adhere to applicable Board and College rules and policies and pay his or her account regularly and in advance. A signed statement which acknowledges the above provisions shall be kept on file and a copy shall be made available to the student.

(b) The following rates shall apply to room and board in the Residence Hall program:

(1) Regular Year - Room and Board Rates

	15 Meal Option	20/21 Meal Option	Non-optional 20/21 Meals
Multiple occupancy room	$795	$855	$840
Double occupancy room	825	885	870
Single occupancy room	900	960	945
Double used as single	930	990	975
Multiple used as double	930	990	975

Units which have private bath facilities or are equipped with special furniture shall have an additional charge of $60 per year.

(2) Regular Year - Room Only Rates

To insure maximum utilization of existing facilities, the colleges may offer a limited number of rooms on a "room only" basis provided approval is obtained from the Board. Where such approval is granted, the following rates shall apply:

Double occupancy room	$ 425 per year
Single occupancy room	525 per year
Double room used as single	550 per year
Double room - Richards Hall	350 per year
Single room - Richards Hall	450 per year

(3) Summer Session

Rates for room and board during the summer session shall shall not be less than the pro rata rate for the regular academic year.

(c) Special Events

Charges for special events such as banquets, housing and feeding of special groups, etc., shall be established by the college President at a rate which will insure that no financial loss will result to the revenue fund.

(d) Enforceability of Charges

The President of each college shall require students in the Residence Hall program to comply with the provisions of this Operating Policy. In case of non-compliance, the college shall take appropriate disciplinary measures which may include the suspension of the student and the withholding of all records.

Approved by the Board 8/23/71
Amended by the Board 9/27/71
Amended by the Board 5/22/73

minnesota
state college
system
office of the chancellor

PHONE 612 / 296-2844

407 CAPITOL SQUARE BUILDING / 550 CEDAR STREET, ST. PAUL, MINNESOTA 55101

June 3, 1974

Mr. Jim Nobles
Research Analyst, House Governmental
Operations Committee
17G State Capitol
St. Paul, Minnesota 55155

Dear Mr. Nobles:

Chancellor G. Theodore Mitau has asked that I supply you with the information requested by Representative Quirin in his letter concerning the Administrative Procedure Act.

In the spirit of Representative Quirin's inquiry I am enclosing an up-to-date set of all actions taken by the State College Board which are treated like rules but which were not adopted in strict compliance with Chapter 15. However, these Internal Rules, Operating Policies and Administrative Procedures have been adopted in accordance with the following College Board Governing Rules (rules which are Chapter 15 rules):

Minnesota Regulations State College Board 304 provides:

Policy Making. The State College Board makes policy by adopting:

(a) Governing Rules for the System,

(b) Internal Rules and Operating Policies for the System,

(c) Constitutions for each College,

(d) Parking Rules and Regulations for the Colleges as provided for in Minnesota Statutes (M.S. 1969, Chapter 169.669),

(e) Administrative Procedures, including resolutions instructing particular officers or agencies of the System or the Colleges to perform specific duties,

(f) Rules of Order for the conduct of Board business.

Internal Rules are defined as follows:

Minn. Reg. SCB 105 Internal Rules. Internal Rules are regulations of the State College Board concerning the internal management of the System. (M.S. 1969, Chapter 15.0411 Subd. 3(a).) They apply throughout the System and shall be codified and remain in effect until explicitly repealed. Prior to the adoption, repeal, or amendment of an Internal Rule, a hearing for individuals within the System shall be held by the Board or its designee, previous to which a copy of the proposed Rule or modification, together with the notice of the date, time, and place of the required hearing, shall be distributed by the Office of the Chancellor to each College President, to the principal agencies for faculty and for student participation in College governance, and to any other individuals or groups within the System which request in writing to the Office of the Chancellor that they receive copies of such documents. Said notice shall be distributed at least 15 and not more than 90 days prior to the hearing. The Office of the Chancellor shall codify all Internal Rules and distribute current copies to each President, to each College library, and to the organizations mentioned in SCB 431 and SCB 432. The copies in each library shall be available for inspection and duplication by any individual in accordance with the normal procedures of each library.

Operating Policies are defined as follows:

Minn. Reg. SCB 106 Operating Policies. Operating Policies are acts of the State College Board which the Board declares to be applicable to a specified College or to be in effect for a specified period of time for one or more Colleges. Operating Policies shall include the annual budget and modifications thereof, and authorization for a particular College to offer new degrees or programs. Notice of the intention to act on such Policies shall be included in the agenda for State College Board meetings. Operating Policies shall be published in minutes of the State College Board meeting at which they are adopted.

Finally, Administrative Procedures are defined as follows:

Minn. Reg. SCB 109 Administrative Procedures. Administrative Procedures which implement these Governing Rules, Internal Rules, College Constitutions, College Regulations, and which are intended to facilitate the routine and continuing functions of the System

or of a College may be adopted. Administrative Procedures of a College are subject to the approval of the College President. Administrative Procedures for the System as a whole are subject to the approval of the Chancellor, after written notice to each President. They shall be available for public inspection.

All of the attached rules were discussed at a public hearing prior to being adopted. While it is arguable that some of the attached rules should be made into Chapter 15 rules, there is a public hearing scheduled for July 9, 1974, at which time the Chapter 15 Governing Rules will be amended to properly include those informal rules which should be Chapter 15 rules.

If I can be of further assistance do not hesitate to call me at 296-3854. I am also enclosing a copy of the College Board Governing Rules for your information.

Very truly yours,

Dick Allyn

RICHARD B. ALLYN
Special Assistant Attorney General

RBA:mp

Enclosures

cc: The Honorable E. W. Quirin

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system

office of the chancellor

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December 4, 1974

MEMO TO: Senator Edward J. Gearty
Representative E. W. Quirin
Attention: Jim Nobles, House Research

FROM : Norman Dybdahl
Vice Chancellor for Administration

SUBJECT: Amendments to Administrative Procedures Act

Thank you for the opportunity to comment on the proposed amendments to the Administrative Procedures Act. Unfortunately, we did not attend all of the joint committee meetings dealing with this matter and recognize that our observations come at a late stage in your deliberations.

Before turning to specifics, let me indicate that the State College Board is in full agreement with the objective of enhancing public understanding of, and participation in, the adoption of state agency rules and regulations. In fact, the Board's own Governing Rules (adopted on July 30, 1971) were a product of extensive public hearings and provide systematic, open procedures for amendment and determination of policy.

In addition to the Governing Rules, however, the Board also adopts Internal Rules, Operating Policies, Administrative Procedures, College Constitutions and College Regulations as "regulations concerning only the internal management of the agency". While the Governing Rules provide for the participation of faculty, students and the general public in the discussion and adoption of such rules and policies, they are not considered as "rules and regulations" having the force and effect of law under the present language and interpretation of Chapter 15.

Since all Board actions relative to the above matters are taken at public meetings, our sole concern with the impact of the proposed amendments is the timeframe involved. Specifically, the notification period contemplated is considerably longer than that currently provided. As an example, Operating Policies notice requirements currently are met by placing the items on the Board agenda. The agenda is mailed to approximately 185 individuals and organizations at least ten days prior to the Board meeting.

A change in this timeframe would cause considerable difficulties for the State College System because Board Operating Policies deal with such issues as tuition, student fees, room and board rates and operating budgets for the individual colleges. The problem which would arise is as follows:

1. revised tuition and fee rates cannot be calculated until the Legislature enacts an appropriations bill because tuition rates must be set to generate the level of dedicated receipts contemplated by legislative action.

2. to become effective in the next fiscal year, and to allow the students completing spring quarter to know what tuition rates will be in the coming year, the Board must act on tuition at its May meeting.

3. since legislative appropriations are generally not finalized until late May, there simply would not be enough time available between the passage of the appropriations act and the end of May to meet the contemplated notice period.

Similar problems would arise in revising room and board rates where increases in state employee salaries enacted by the Legislature in late May must be reflected in the rate structure adopted for the next year.

To defer action on issues of this type to June or July would create budgetary problems. Moreover, since students are the most concerned "public", they do not wish to see such issues debated and resolved after spring quarter has concluded and many students have left the campuses for the summer. Finally, it is important that students leaving campus at the end of May know what the cost of attending college will be in the coming year.

Moreover, if the proposed provision enabling 50 individuals to petition for a public hearing is applied to matters of this type, it is a virtual certainty that any action of the Board dealing with tuition, fees and budgets will involve the procedure proposed. The uncertainty which would result would severely limit sound budgetary planning and management.

In light of these circumstances, then, we would suggest that the proposed amendments include a provision which exempts the type of internal "housekeeping" rules and policies not having the force and effect of law as mentioned above from the notification requirements contemplated for rules and regulations affecting the general public. Such an exemption, of course, would not in any way diminish the Board's responsibility to insure that all concerned parties are given an opportunity to be heard in an open, public session on these matters.

I trust the above material is adequate to explain what we perceive to be a virtually unique problem. If we can provide any additional information concerning this matter, please do not hesitate to call.

NED:skm

STATE OF MINNESOTA
DEPARTMENT OF COMMERCE
ST. PAUL, MINNESOTA 55155

July 1, 1974

The Honorable E. W. "Bill" Quirin
State Representative
State Capitol
St. Paul, Minnesota 55155

Re: Joint House - Senate Governmental Operations Committee
Review of Minnesota Administrative Procedure Act.

Dear Representative Quirin:

In response to your letter of May 20, 1974, requesting copies of letters, bulletins and memorandum which manifest administrative actions taken during the course of the past ten months, I enclose herewith copies of ten interpretive opinions rendered by the undersigned construing various statutes within my jurisdiction. These interpretive opinions are but a sampling of a larger number which have issued during this period of time. If the Joint Committee wishes copies of all such interpretive opinions, copies will be made available to you. Your letter of May 20 seems to indicate a desire to review the nature of these documents rather than each individual document.

Interpretive opinions are new to the Securities Division of the Department of Commerce. Such opinions are authorized by legislative enactments during the 1973 Legislative Session. Specifically, Minnesota Statutes 1973 Supplement, Chapter 80A, 80B, 80C, and Chapter 83 all specifically authorize interpretive opinions upon the payment of a $25.00 fee. The inclusion of this authority within the various statutes aforementioned is upon the recommendation of the Department of Commerce. The rationale advanced in justification of this authority included the observation that federal agencies issued interpretive opinions and that such interpretive opinions have contributed greatly to the clarity of federal statutes and federal rules. Also, it was argued that it is unjust and unfair to require individuals subject to regulation to guess at their rights and that the device of an interpretive opinion is useful in providing the agency's interpretation of the statutes which it is charged with administering. Such interpretive opinions are further of assistance to courts in construing statutes where the court might lack understanding of particular applications of such statutes.

It is the intention of the Department of Commerce to periodically publish all interpretive opinions so that the advice provided in these opinions can be available to the bar association and the public as a whole. The reaction which we have had to this procedure can only be described as extremely positive.

If you wish further assistance in connection with this matter or a complete set of the opinions in questions, please do not hesitate to contact me.

Very truly yours,

EDWARD J. DRISCOLL
Commissioner of Securities

EJD:sh
Encs.

cc: Edward J. Gearty
✓James Nobles

C. MACI Response to "First Working Draft"

1. Memorandum From James T. Shields, Director of Environmental Affairs, Minnesota Association of Commerce and Industry.

2. Memorandum From James T. Shields, Director of Environmental Affairs, Minnesota Association of Commerce and Industry.

MINNESOTA ASSOCIATION OF COMMERCE AND INDUSTRY

TO: Interested Parties

FROM: James T. Shields, Director of Environmental Affairs

DATE: October 9, 1974

RE: Suggested Amendments to Draft Proposals to the Administrative Procedures Act received from Senator Ed Gearty and Representative Bill Quirin August 19, 1974.

This memorandum will outline suggested amendments to the draft proposals, along with reasons therefore. A set of "clean bills" also is being drafted incorporating the suggested amendments.

SET I.

Page 2, Sec. 2, Subdivision 1. The stricken old language provided for amending, suspending and repealing rules as well as adopting them. To clarify that the newly defined procedures include these processes, the new language should be changed to read (added words double underlined):

> Each agency shall adopt, amend, suspend or repeal its rules in accordance with the procedures---.

Page 3, Sec. 4, Subd. 3. For the same reasons stated immediately above, the new language in this subdivision should be changed to read:

> Each agency shall adopt and may suspend, amend or repeal rules of practice---.

Page 3, Sec. 5, Subd. 4. One of the more important areas of reform should be the further clarification of the duties and responsibilities of an agency in promulgating regulations authorized by the legislature. To accomplish this, all of the old language in the last six lines on page 3 should be stricken and replaced with new language, as follows:

> The agency shall present facts and materials at the public hearing establishing the need for and reasonableness of the rule and make an affirmative presentation of facts fulfilling all of its substantive and procedural statutory requirements. Before adopting the rule the agency shall submit it, its reasons therefore and the record of the public hearing to the attorney general who shall review the rule as to form and legality and, within 20 days, either approve or disapprove the rule. If he approves the rule he (continued on page 4)

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Page 4, Sec. 5, Subd. 4. There should be more flexibility in the date on which regulations take effect, especially in complicated situations where an agency may want the regulations to become effective a month or more following adoption so that affected persons can make orderly plans to comply. To accommodate such situations, the following change should be made in the ninth line from the top of page 4, which is consistent with the provisions in Sec. 10, Subd. 2, on page 6:

> ---20 days after its publication in the state register or at such later time as is designated in the rule.

Page 5, Sec. 8, Subd. 7. There is serious question as to the desirability of establishing a petition system regardless of the largeness or smallness of the number of petitioners required. What is important is that there be valid reason for the holding of a public hearing. Also, the "court of last resort" for determining whether or not an unenforceable standard or policy should be converted to an enforceable rule should be determined by some body other than the attorney general since the decision is more of a technical or policy nature than it is a legal one.

The legislative joint committee for review of administrative rules is the logical body to function in this capacity. To accomplish this, the last three sentences of Subd. 7 (beginning in the 14th line from the top of page 5) should be stricken and replaced with the following:

> Before or after the statement or standard is adopted, any person may request the agency to hold a public hearing on the proposed statement or standard and shall submit material evidence in support of the request. Such request may include a recommendation that the statement or standard be adopted as a rule according to the procedure set forth in 15.0412, subdivision 4. Upon receipt of such a request the agency shall have 30 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 timely public hearing or to adopt the statement or standard as a rule, it shall proceed according to section 15.0412; but if the agency states its intention not to hold a public hearing or to adopt the statement or standard as a rule, if recommended by the requesting person, the requesting person may submit the request and supporting evidence to the legislative joint committee for review of administrative rules. The committee shall determine within 60 days whether the request is in harmony with state law and is consistent with requirements that rules and statements or standards of policy have clarity and reasonableness. If by majority vote of six or more members the committee decides that the agency should hold a public hearing on the statement or standard of policy or that the agency should adopt the statement or standard of policy as a rule, it shall so notify the agency and the agency shall proceed in a timely manner in accordance with the notification and according to section 15.0412. The attorney general shall prescribe by rule the form, procedures and requirements for requests and material evidence submitted under this subdivision. This subdivision does not apply to opinions of the attorney general.

Page 5, Sec. 9, Subdivision 1. For the same reasons given for changes in Sec. 5, Subd. 4 on page 4, the third line from the bottom of page 5 should be changed as follows:

---20 days after its publication in the state register or at such later time as is designated in the rule.

Page 6, Sec. 10, Subd. 2. To be consistent with changes and deletions made in this subdivision, the word "filing" in the ninth line of the subdivision should be stricken and replaced with the words:

its effectiveness.

Page 8, Sec. 15, 15.0415. A serious question is raised again here with regard to the desirability of establishing a petition system that may or may not relate to validity. Also, it is questionable whether the attorney general should be the "court of last resort" on matters that are more apt to involve technical and policy questions than they are legal questions. It is proposed that this entire section be stricken and replaced with the following:

15.0415 PETITION FOR ADOPTION OF RULE. Any person may request an agency to adopt, suspend or repeal any rule. Such person shall be specific as to what action is being requested and shall submit material evidence in support of the request. Upon receipt of such a request the agency shall have 30 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 timely public hearing on the subject of the request, it shall proceed according to section 15.0412; but if the agency states its intention not to hold a timely public hearing, the requesting person may submit the request and supporting evidence to the legislative joint committee for review of administrative rules. The committee shall determine within 60 days whether the request is in harmony with state law and is consistent with requirements that rules have clarity and reasonableness. If by majority vote of six or more members the committee decides that the agency should hold a public hearing on the subject of the request, it shall notify the agency to do so and the agency shall proceed with a timely public hearing according to section 15.0412. The attorney general shall prescribe by rule the form, procedures and requirements for requests and material evidence submitted under this section.

Page 9, Sec. 18, 15.048. The first sentence of 15.048 should specify that we are dealing here with an adopted rule rather than a proposed rule. This is necessary since earlier in the bill there is a requirement to publish proposed rules. The following language is suggested:

The publication of a final rule, statement or standard of policy ---.

Page 9, Sec. 18, 15.048. In the last line on page 9, there is reference to filing with the secretary of state. However, the filing requirement has been omitted from Sec. 10, Subd. 2, page 6. To be consistent, the last line on page 9 and the first two lines on page 10 should be changed to read:

(2) was duly ~~filed with~~ endorsed by the secretary of state and available for public inspection at the day and hour endorsed thereon; and

Page 11, Sec. 20, Subdivision 1, last paragraph. This paragraph is unclear. The following language is suggested as a replacement for the entire paragraph.

The commissioner of administration shall see to it that the contents of the register are clearly labeled as to their status in law and are readily accessible to any interested party.

SET II

Page 1, Section 1, Subdivision 1. It should be specified that the chief hearing examiner be learned in the law. Also, the term of the chief hearing examiner should be more definite and the method of determining compensation should be specified. Finally, to further separate the office of the chief hearing examiner from other state agencies and to assure that all hearings will be conducted in the manner prescribed by the legislature, the chief hearing examiner should be appointed by the legislative joint committee for review of administrative rules. To accomplish this, subdivision 1 should be stricken and replaced with the following:

[15.050] [OFFICE OF HEARING EXAMINERS.]

Subdivision 1. A state office of hearing examiners is hereby created, under the direction of a chief hearing examiner who shall be learned in the law and who shall be appointed by the legislative joint committee for review of administrative rules for a term ending on June 30 of the sixth calendar year after appointment. The rate of compensation of the chief hearing examiner shall be set by the commissioner of administration unless otherwise set by law. The chief hearing examiner shall appoint such additional hearing examiners to serve in his office as necessary to fulfill the duties prescribed in this section. All hearing examiners, including the chief hearing examiner, shall be in the unclassified service but may be removed from their position only for cause. Additionally, all hearing examiners, including the chief hearing examiner, 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.

Page 1, Section 1, Subd. 2. Limiting the use of temporary hearing examiners only to occasions when regularly appointed examiners are "unavailable" is too restrictive. To allow greater flexibility the first sentence in Subd.2 should be revised to read as follows:

Subd. 2. When regularly appointed hearing examiners are not available, or when the use of a regularly appointed hearing examiner is considered to be inappropriate for reasons including economic or special circumstances, the chief hearing examiner may contract with qualified individuals to serve as hearing examiners for specific assignments.

Page 1, Section 1, Subd. 3. It is important that the duties and responsibilities of the hearing examiners be spelled out in objective and specific terms, and that these terms be consistent with the language and requirements of Section 15.0412. In this manner, the legislature and the public can be reasonably assured that the rule making authority of state agencies is executed properly and in accordance with Section 15.0412. Also, it should be specified that contested cases be conducted by a hearing examiner who is learned in the law. To accomplish this, Subd. 3 should be revised to read as follows:

> Subd. 3. Every hearing of state agencies required to be conducted under this chapter shall be conducted by a hearing examiner assigned by the chief hearing examiner. 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) determine after consultation with the agency and interested parties the location(s) at which the hearing will be held so as to be as convenient as is practical to interested parties; (2) conduct the hearing only after proper notice has been given; (3) see to it that the hearing is conducted in a fair and impartial manner; and (4) make a report within 30 days after the hearing record is closed to the chief hearing examiner, the state agency and participating parties 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 of its substantive and procedural statutory requirements, and (iii) demonstrated the need for and reasonableness of its proposed action with a comprehensive and affirmative presentation of facts.

Page 2, Section 1, Subd. 4. There are a number of questions left unanswered by this subdivision including (1) who should conduct the procedural rules hearing and under what provisions; and (2) who should determine that an agency be required to hold a new hearing when its proposed final rule is substantially different than the proposed rule which was considered at the public hearing. To answer these and other questions, Subd. 4 should be amended to read as follows:

> 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 rules shall be adopted in accordance with the provisions of Section 15.0412 and the hearings thereon shall be conducted by a hearing examiner assigned by the attorney general. The procedural rules for hearings shall include in addition to normal procedural matters, provisions relating to recessing and reconvening hearings, requiring new hearings when the proposed final rule of an agency is substantially different from that which was proposed at the public hearing, and shall establish a procedure whereby the proposed final rule of an agency shall be reviewed by the chief hearing examiner to determine whether or not a new hearing is required by reason of substantial changes or failure of the agency to adequately meet the

requirements of Section 15.0412, Subd. 4. Such procedural rules for hearings shall be binding upon all agencies and shall supersede the provisions of any other agency procedural rules with which they may be in conflict.

Page 2, Section 1, Subd. 5. For purposes of clarification, the first paragraph of this subdivision should be amended as follows:

Subd. 5. The chief hearing examiner shall maintain a court reporter system. The court reporter shall keep a record at any hearing which takes place under this chapter and may additionally be utilized as-a-chief the hearing examiner assigned to the hearing directs.

Page 3, Section 1, Subd. 9. To assure that all hearings examiners "grandfathered" into the new office of hearing examiners are qualified to carry out the duties of this section, the last sentence of Subd. 9 should be amended as follows:

In such action and in the chief hearing examiner's initial appointments of hearing examiners to his office, first consideration shall be given to those persons who are currently employed in the state service to perform the functions of a hearing examiner and who meet the requirements of Subdivision 1.

Page 3, Sec. 2, Subd. 4. The changes that have been suggested for page 1, Section 1, Subd. 3 and for page 2, Section 1, Subd. 4 negate the need for any amendment to this subdivision. Therefore, Sec. 2 should be omitted in its entirety and the subsequent sections renumbered accordingly.

Page 5, Sec. 6. It would seem appropriate to make the effective date of this act the same as the effective date of the act incorporated in Set I. Accordingly, Sec. 6 should be amended as follows:

Sec. 6. This act is effective on-January-1, July 1, 1975.

SET III

The approach taken in this proposal is to require the legislative joint committee for review of rules to review all rules proposed for adoption by state agencies. This would place an excessive burden on a joint legislative committee and would seem to be unnecessary if the basic provisions and concepts proposed in Set I and Set II (as revised herein) are accepted. Therefore, it is proposed that Set III be dropped in its entirety.

SET IV

The suggestions for changes in the Laws 1974, Chapter 355, Section 69 are consistent with the changes suggested in Set I and Set II. It would appear that the establishment of an office of hearing examiners with a chief hearing examiner appointed by the legislative joint committee for review of administrative rules, along with the authority placed in the joint committee to require an agency to hold new hearings on a rule which may not be clear, reasonable or in harmony with state law, negates the desireability or necessity of maintaining the controversial rule suspension authority presently placed in the joint committee. Accordingly, the basic concepts proposed in Set IV appear to be in order. The changes proposed below incorporate the further duties and responsibilities of the joint committee which are proposed in Set I and Set II.

Page 2, Sec. 2, Subd. 2. All of the new language should be stricken and replaced with the following:

: 1. Appoint a chief hearing examiner as established in Section 15.050;

2. Take action on requests for review of agency statements, standards or rules as provided in Section 15.0412, Subd. 7, and Section 15.0415;

3. On its own motion, review any statement, standard or rule proposed or adopted by any state agency to determine its clarity, reasonableness and harmony with state law, and, when authorized by majority vote, make a report of its findings and recommendations known to the appropriate agency and to the chief hearing examiner; and

4. Report to the legislature no later than January 15 of each year, and at such other times as authorized by a majority vote of the committee, on its findings and recommendations, and, if appropriate, make suggestions as to legislation that is needed to correct improper administration or interpretation of the law by agency statements, standards or rules.

# # #

MINNESOTA ASSOCIATION OF COMMERCE AND INDUSTRY

TO: Interested Parties

FROM: James T. Shields, Director of Environmental Affairs

DATE: October 22, 1974

RE: "Clean Bill" Drafts - Administrative Procedures Act

As per the amendments proposed in my memo dated October 9, 1974, relating to the Administrative Procedures Act, enclosed are "clean bills" incorporating those amendments. These "clean bills" should make it easier to comprehend the proposals, and also make it easier for you to make changes, corrections or comments.

Your comments, suggestions and criticisms are sincerely solicited.

Please note that the original DRAFT SET NO. 3 has been omitted entirely.

JTS:djd
Encl.

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D. Miscellaneous

1. Report of Administrative Law Committee on Hearing Examiners Bill.

2. Letter From George A. Beck, Hearings Examiner, Department of Commerce.

3. Memorandum From Lawrence E. McCabe, Commissioner of Aeronautics, Department of Aeronautics.

4. Information Submitted by Gerald Pahl, Research Attorney for Department of Revenue.

5. Document of Testimony - Joint House and Senate Government Operations Committee.

6. Testimony by Norman Osterby, Department of Administration.

7. Article From December 11, 1974, Minneapolis Tribune, "Judge rules state agency was right to fire atheist."

8. Letter From Peter Sajevic, President, ARRM, (Association of Residences for the Retarded of Minnesota).

9. Letter From James T. Tackes, Executive Director, Minnesota Association for Retarded Citizens, Inc.

10. Memorandum From Peter Sajevic, President, ARRM, (Association of Residences for the Retarded of Minnesota).

V

REPORT OF ADMINISTRATIVE LAW COMMITTEE ON HEARING EXAMINERS BILL

The draft bill is the result of numerous meetings of various subcommittees on hearing examiners over the past several years. The bill as it is drafted presents the consensus of those deliberations and the subcommittee's final determinations.

The bill creates a separate office of hearing examiners (Section _) appointed by the Governor with a specific salary range. Other hearing examiners are to be appointed by the Chief Hearing Examiner (page 2, line 13). The concept is to gather into the office first all of those hearing examiners now in state service.

The agencies affected by the bill are those presently covered by Chapter 15. Your committee anticipates some pressure to exempt the Public Service Commission from operation of this bill, but it was the subcommittee's position that the bill should fit into the present framework of the chapter and that we should not propose exceptions.

The bill further contemplates part-time hearing examiners from a list of qualified attorneys who can be appointed on specific cases where the full-time staff is unavailable or where a conflict situation may arise.

The bill contemplates appointment of a hearing examiner for all hearings, i.e. both for rule-making hearings and for contested case hearings.

The bill also provides that in a contested case the hearing examiner shall prepare proposed Findings of Fact and that the parties will have an opportunity to respond, both orally and in writing, to the proposed Findings before the agency decision is rendered.

The bill gives the Office of Hearing Examiners rule-making power for procedural rules. The thought is that this office will adopt the kinds of procedural rules that the Attorney General has suggested in contested cases and will regularize procedures for rule-making hearings by applying the Attorney General's rules for such hearings.

It is also contemplated that this office will become a focal point for all court reporters employed by the state and will be assigned on an as needed basis from that office.

Section 7 of the bill (page 4, line 11) gives the office the authority to enter into contracts with municipalities, counties, or other agencies not presently covered by Chapter 15 to provide qualified hearing examiners if they chose to use them.

The cost of the system should be essentially nominal because the bill provides that the Department of Administration will, in effect, charge back to the agencies using the services of the office the costs of those services. But the transfer of functions to the office initially will mean lower budgets in departments now maintaining their own systems.

The draft bill provided at first that all hearing examiners and the Chief Hearing Examiner shall have been admitted to practice for at least five years in Minnesota. This was the consensus of the subcommittee, but among points to be considered is whether we should remove the restriction that the practice have been in Minnesota. For example, a qualified federal hearing officer might be interested in applying, but not be eligible because he had not been admitted to practice in this state. As finally approved by the committee, five years practice in any state, territory or the District of Columbia, and admission to practice in this state, are required.

Adopted at the regularly authorized meeting of the Administrative Law Committee on March 2, 1974.

Robert C. Morton, Chairman

relating to administrative procedure; creating a state office of hearing examiners; appropriating money; amending Minnesota Statutes 1971, Sections 15.0411, Subdivision 1, and by adding subdivisions; 15.0421; and Chapter 15, by adding sections.

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

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

15.0411 [DEFINITIONS.] Subdivision 1. For the purposes of sections 15.0411 to 15.0422 and sections 5 to 11 of this act the terms defined in this section have the meanings ascribed to them.

Sec. 2. Minnesota Statutes 1971, Section 15.0411, is amended by adding a subdivision to read:

Subd. 5. "State office of hearing examiners" means the office of administrative hearing officers for the state, which acts by its chief and the hearing officers on its staff.

Sec. 3. Minnesota Statutes 1971, Section 15.0411, is amended by adding a subdivision to read:

Subd. 6. "Chief hearing examiner" means the executive officer of the state office of hearing examiners.

Sec. 4. Minnesota Statutes 1971, Section 15.0411, is amended by adding a subdivision to read:

Subd. 7. "Hearing examiner" means a hearing officer on the staff of the state office of hearing examiners.

Sec. 5. Minnesota Statutes 1971, Section 15.0421, is amended to read:

15.0421 [PROPOSAL FOR DECISION IN CONTESTED CASES.]

~~Whenever~~ When in a contested case a majority of the officials of the agency who are to render the final decision have not heard or read the evidence, or when a hearing is conducted by a hearing examiner, the decision, if adverse to a party to the proceeding other than the agency itself, shall not be made until a proposal for decision, including ~~the statement of reasons therefor~~ proposed findings of fact, has been served on the parties, 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.

Sec. 6. Minnesota Statutes 1971, Chapter 15, is amended by adding a section to read:

[15.0430] [OFFICE OF HEARING EXAMINERS.] Subdivision 1. The state office of hearing examiners is established.

Subd. 2. The state office of hearing examiners shall be composed of the chief hearing examiner and additional hearing examiners as may be appointed.

Subd. 3. The chief hearing examiner shall be appointed by the governor, subject to confirmation by the senate, for a term of six years, and his annual salary shall be $30,000.

Subd. 4. Appointments to the office of hearing examiners shall be made by the chief hearing examiner. Initial appointments shall be made from a list of the persons who have acted as hearing examiners or referees for a state agency prior to the effective date of this act. The salary range for hearing examiners shall be $18,000 to

$26,000.

Subd. 5. The chief hearing examiner and the other hearing examiners shall be in the unclassified service, but may be removed only for cause.

Subd. 6. The chief hearing examiner shall compose and maintain a list of names from which list additional hearing examiners may be appointed for short periods of time when regularly appointed hearing examiners are not available not exceeding the duration of the hearing to which the temporary hearing examiner is assigned. Temporary hearing examiners shall be paid $150 per day by the agency using the hearing examiner. They shall not be deemed employees of the state.

Subd. 7. Each hearing examiner, including the chief hearing examiner, (a) shall have been admitted to practice law in any state, territory or the District of Columbia for at least five years immediately preceding his appointment, and (b) shall have been admitted to practice in this state, and (c) shall possess any additional qualifications established by the state office of hearing examiners for the class or position to which he is appointed.

Sec. 7. Minnesota Statutes 1971, Chapter 15, is amended by adding a section to read:

[15.0431] [POWERS AND DUTIES.] Subdivision 1. All hearings of state agencies required to be conducted by chapter 15 shall be conducted by the chief hearing examiner or a hearing examiner.

Subd. 2. The state office of hearing examiners may promulgate rules and regulations for the procedural conduct

conflicts with any rule promulgated by the state office of hearing examiners, the rule of the individual agency shall be superseded.

Sec. 8. Minnesota Statutes 1971, Chapter 15, is amended by adding a section to read:

[15.0432] [REPORTERS.] Subdivision 1. The state office of hearing examiners shall maintain a court reporter system. Reporters shall keep a record at any hearing which takes place under chapter 15 and may additionally be utilized as the chief hearing examiner directs.

Subd. 2. 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 effective date of this act.

Sec. 9. Minnesota Statutes 1971, Chapter 15, is amended by adding a section to read:

[15.0433] [COST OF OFFICE OF HEARING EXAMINERS.] The total cost to the state of maintaining and operating the state office of hearing examiners shall be determined and collected by the department of administration in advance, or upon such other basis as may be determined, from the state or other public agencies for which services are provided by the office.

Sec. 10. Minnesota Statutes 1971, Chapter 15, is amended by adding a section to read:

[15.0434] [POWER TO CONTRACT.] The chief hearing

the state to provide hearing examiners for their administrative proceedings and set charges for providing the service.

Sec. 11. Minnesota Statutes 1971, Chapter 15, is amended by adding a section to read:

[15.0435] [COMMISSIONER OF ADMINISTRATION TO AID IN REORGANIZATION.] Subdivision 1. The commissioner of administration, pursuant to authority vested in him by section 16.13, shall transfer from divisions, departments, boards and commissions the employees he deems necessary to perform the functions transferred from those agencies to the state office of hearing examiners.

Subd. 2. The commissioner of administration shall, in connection with the transfer of functions from the various departments, divisions, boards and commissions, determine the fractional part of the appropriation attributable to each transferred function. He shall certify the amounts to the commissioner of finance and to the treasurer. The appropriations of the several amounts for transferred functions are cancelled.

Subd. 3. The commissioner of administration shall determine which of the books, papers, records, files and other properties and effects associated with and necessary to the performance of each function transferred from the departments, divisions, boards and commissions shall be transferred to the state office of hearing examiners.

Sec. 12. [APPROPRIATION.] The amount certified

the general fund to the state office of hearing examiners for the purposes of this act. Notwithstanding Minnesota Statutes, Section 16,17 or other law this appropriation shall cancel June 30, 1977.

Sec. 13. This act shall be effective on the day following its final enactment.

STATE OF MINNESOTA
DEPARTMENT OF COMMERCE
ST. PAUL, MINNESOTA 55101

November 15, 1974

Mr. James Nobles
Legislative Analyst, House Research Division
Office of Legislative Research
State of Minnesota
Capitol
Saint Paul, Minnesota 55155

HEARING EXAMINER

Dear Mr. Nobles:

In Reference: Administrative Procedure Act Reform

I have been employed as the Hearing Examiner for the State Department of Commerce since October 3, 1973. I am an attorney at law, admitted to practice in the State of Minnesota since October, 1970. Prior to my employment with the Department of Commerce, I was in private practice in Minneapolis for three years. The purpose of this letter is to forward to you comments concerning the first working draft of the bill creating a State Office of Hearing Examiners.

You and your staff are to be complimented for the thoughtful effort which obviously has been made in preparing the working draft for the bills amending Chapter 15. I was particularly impressed by your clear and careful presentation made to the Joint Committee at the hearing on November 14, 1974. I would like to strongly support the testimony of Mr. Bernard Singer, Hearing Examiner for the Public Service Commission, given at the public hearing, in regard to requiring admission to the Bar as a prerequisite to employment as a hearing examiner. It is my belief that legal training is essential in order to adequately fulfill the functions required of a hearing examiner in state government. I believe that the goal of the Legislature should be to create a professional corps of quasi-judicial officers to aid state agencies in making the increasingly important decisions before them. As Mr. Singer pointed out, in effect, hearing examiners are administrative law judges. They are asked to apply and interpret rules of evidence, to make findings of fact and conclusions of law, and to interpret rules and statutes much as any judge must do. It is, of course, exactly the goal of legal training to develop the ability to exercise these judicial functions. Except for the hearsay rule, the rules of evidence are applied in administrative hearings and a proper application of the rules is beneficial in terms of economy, e.g. in excluding irrelevant and repetitious evidence from the record. In the context of contested cases, both attorneys for respondents and members of the Attorney General's staff bring into the hearings their courtroom instincts and behavior. I believe that the hearing examiner should have at least equal training and at least some actual legal experience, hopefully in a court-room, in order to properly perform his duties.

The suggestion was made at the November 14 hearing, by the Minnesota Association of Commerce and Industry (MACI), that perhaps hearing examiners assigned to contested cases should be learned in the law. I believe that this is preferable to the first working draft as it now exists. However, as far as the Department of Commerce is concerned, the vast majority of the hearings are contested cases. We have very few "default" contested cases. The only other type of hearing held is a rule-making procedure, which, of course, is much less frequent. There would be very little use for a hearing examiner not learned in the law within the Department of Commerce should the MACI proposal be accepted. If there would be few opportunities for the use of non-attorney hearing examiners, it would appear to me to be highly desirable to simply require admission to the Bar as a prerequisite and thereby develop a highly motivated professional corps of hearing officers. Given the large number of Minnesota law graduates in the last few years, and should the office be exclusively attorneys, the State should have little trouble in hiring talented people with legal training.

In regard to Subdivision 3 of the proposed Minn. Statute 15.050, I would make the following comments: The section requires the hearing examiner to state his findings of fact and his conclusions and recommendations. Under the current statutes administered by the Department of Commerce, my findings of fact are proposed only. The final decision is made either by the Commissioner or the Commerce Commission. For the most part, there is no statutory authority allowing me to make conclusions or recommendations in regard to contested case matters that I hear. The question arises in my mind as to whether the language in the proposed bill intends to make a substantive change in the law, which would allow the hearing examiner to make an independent decision, or whether the bill should be reworded to indicate that the hearing examiner's decision is a proposed one only. In addition, although the language "findings of fact and conclusions of law" has a clear legal meaning, it is less clear as to what would be covered by "conclusions and recommendations." Normally, proposed conclusions of law will indicate the hearing officer's opinion as to the merits of the case. I would prefer to see the use of the word "recommendation" avoided, since it may be interpreted to include a suggestion as to suspension or revocation of a license, and this decision should be made only by the agency head, for he alone is properly equipped to make a judgment in that regard.

The same subdivision also makes it the responsibility of the hearing examiner to document three items which are listed at the end of the subdivision. In the context of a contested case, these items would appear to be superfluous, since each of them would have to be proved as a matter of due process and each would be subject to challenge by an individual respondent either at a contested case hearing or in the course of a judicial review of the final agency action. I am concerned by the vagueness of the items, in particular the requirement that the agency fulfill all of the substantive and procedural statutory requirements. It is not readily apparent what would be necessary to satisfy this particular language. In

the context of a rule-making proceeding, the three items have a more logical application. They appear to be a duplication of that which is presently done by the Attorney General in his review of the form and procedure in regard to the rules; however, I recognize that it is apparently the Joint Committee's intent to duplicate this function. I would suggest that these three items, if retained, be clearly made applicable to rule-making proceedings only, so as to avoid confusion as to what the language means in the course of a contested case.

I would also like to comment concerning the proposed amendment of Minn. Stat. 15.0421, contained in Section 3 of the first working draft. The amended statute would allow argument to a majority of the officials who are to render the decision after the report of the hearing examiner has been made available to the parties. It is not clear what type of argument, whether oral or written, would satisfy this provision. While I think it is quite proper to file exceptions and written argument concerning the hearing examiner's proposed findings, oral arguments to the officials who are to make the final decision would, in my opinion, be simply impractical. Such oral argument could easily be done during the contested case hearing, since the transcript is reviewed by the Commissioner or Commission. Furthermore, as a practical matter, considering the large number of contested case hearings held in the Department of Commerce, oral argument before an individual Commissioner or the Commission would consume too large a portion of the time of those officials and would slow down and hamper the work of the agency, without any appreciable benefit to the individual respondent.

I would also like to express support for the idea which was set forth at the November 14 hearing, in regard to developing expertise within the office of hearing examiners. An individual hearing examiner might well regularly hear the cases of specific agencies, so as to develop expertise concerning their subject matter and rules and statutes. Presumably, hearing examiners would be free to apply to the chief hearing examiner for reassignment should they desire.

Thank you for your consideration of my comments.

Very truly yours,

George A Beck

GAB:d
cc to Com'r E. J. Driscoll

GEORGE A. BECK
Hearings Examiner

ADMINISTRATION BLDG.
ST. PAUL DOWNTOWN AIRPORT
(HOLMAN FIELD)
SAINT PAUL 55107
TELEPHONE: 222-4741

STATE OF MINNESOTA
DEPARTMENT OF AERONAUTICS

September 20, 1974

TO: Jim Nobles, Legislative Analyst

FROM: Lawrence E. McCabe, Commissioner of Aeronautics

SUBJECT: Administrative Procedure Act (APA) Reform

I have the following recommendations and suggestions to make concerning the above subject. I have reviewed your memo dated August 16, 1974, together with Amendment Sets 1 through 4, inclusive. My comments are as follows:

1. The number of petitioners required to compel an agency to act as set forth in the proposals should be increased from 50 to 100 signatures.

2. The proposals indicate that the hearing examiner should be in the unclassified service. Our view is that the chief hearing examiner should be in the unclassified service but that the hearing examiners should be in the classified service so that certain hearing examiners may develop some aeronautical expertise and familiarity with aeronautical procedures and problems.

3. Your proposals provide that the hearing examiner shall state his conclusions and recommendations. We have strong objections to this. Aeronautical conclusions and aeronautical recommendations should be made by administrators who have aeronautical expertise--that is the entire purpose of administrative law. The hearing examiner should state his findings of fact but he should not set forth any conclusions or recommendations--those decisions should continue to rest in the hands of the administrator.

4. We object to Amendment No. 3 because it decreases the authority of an administrative expert. The legislative committee should not have the authority--because it does not have aeronautical expertise--to review and reject regulations of the administrator.

My name is Gerald Pahl. I am Research Attorney for the Department of Revenue, appearing at the request and on behalf of Arthur Roemer, Commissioner of Revenue. May I preface my comments by stating that we welcome the opportunity to discuss this subject matter and recognize the need for this discussion. We do, however, see two problem areas which are of major concern to us.

The first is found at Section 8 in the first set of amendments at page 5. This is the new Subdivision 7, which outlines the informal rule making procedure. As drafted, this provision would severely handicap the Department in issuing information to the public and to persons affected by tax laws.

I would like to cite a few examples when time may be of the essence in implementing a new law. The sales tax law was enacted on June 1 of 1967 and became effective August 1--a mere 60 days later. Hardly enough time to discover the problems involved and not enough time to come up with the answers. What was of utmost importance at the time was the dissemination of information, not that it had the full force and effect of law. Essentially, the public wanted to know what the Department's position was on these matters. Adherence to procedures prescribed in Section 8 of set 1 of proposed legislation for "informal rule making" would have seriously hampered dissemination of sales tax information.

Another example illustrating this problem of time is when legislation is passed late in a session involving local property taxes, the law may be effective on enactment. The assessment books are closed on the first Monday in May and it is absolutely essential to get information out to the 87 county assessors and the various large cities. The Department of Revenue does not presently have emergency powers to issue rules, and I see this a real problem here unless this draft is changed.

Another example would be a lack of time involved in the implementation of the Fiscal Disparities Law after it was delcared to be constitutional.

The petition provision of 50 signatures in Subdivision 7 is also troublesome. We question its necessity and fear the possibility that the provision may be used to obstruct administration of tax laws, and could constitute a serious burden on our manpower. If time limitations must be imposed, I suggest that it be couched in terms of "within a reasonable period of time."

An unintended result of a restrictive time limitation might be an increase in Attorney General's Opinions requested by the Commissioner of Revenue. Such opinions rendered in tax matters have the full force and effect of law without the benefit of public input. All of us know the controversies that can be prompted by an unpopular Attorney General Opinion.

I'd also like to comment on that portion of the bill relating to hearing examiners in contested cases. With respect to this area the Department of Revenue is quite unique. In most cases these decisions are appealable to the Tax Court instead of the District Court and many of the model rules by the Attorney General in these matters are not relevant. The issues are very diverse and may involve sales tax, income tax, cigarette tax, petroleum tax, levy limitations, and other taxes. It is difficult to assure that a hearing examiner will be learned in all fields of taxation

On the other hand, the issues presented at a hearing may be very simple. For example, the Commissioner has the power to revoke sales tax permits of retailers who fail to pay the sales tax due. In the vast majority of cases, the retailer either fails to appear or admits that he owes the tax, but seeks additional time to pay. The question then primarily becomes one of policy--whether he should be allowed to pay in installments or whether a bond or other security shall be required.

In the past all hearings have been held in the central office in St. Paul, and the taxpayers have complained of the inconvenience of travel. The Revenue Department would like to hold such hearings in several locations throughout the state to accommodate taxpayers. I question the efficiency of such a system with hearing examiners, particularly where a

large portion of the scheduled cases result in default.

Because of growing delinquency, we anticipate a significant increase in the number of hearings, perhaps as many as 500 per year. This is a very realistic figure. The cost under the proposed bill would be very substantial. In addition, there is the logistics problem of court reporters.

TESTIMONY - JOINT HOUSE AND SENATE GOVERNMENT OPERATIONS COMMITTEE

SUBJECT: AMENDMENTS TO THE ADMINISTRATIVE PROCEDURES ACT

MR. CHAIRMAN, MEMBERS OF THE COMMITTEE, THANK YOU FOR THE OPPORTUNITY TO DISCUSS THE PROPOSED AMENDMENTS TO THE ADMINISTRATIVE PROCEDURES ACT WITH YOU THIS MORNING.

AS I HAVE STATED IN PRIOR TESTIMONY BEFORE THIS COMMITTEE, I SHARE THE CONCERNS OF THE LEGISLATURE RELATIVE TO RULE-MAKING AUTHORITY GIVEN TO THE SO-CALLED FOURTH BRANCH OF GOVERNMENT, ADMINISTRATIVE OR OPERATING AGENCIES.

I HAVE STUDIED THE four WORKING DRAFTS SUBMITTED TO YOUR COMMITTEE AND FIND SOME SECTIONS AN IMPROVEMENT OVER PRESENT METHODS. OTHERS, HOWEVER, I DO NOT UNDERSTAND, AND, GIVEN CERTAIN INTERPRETATIONS, I FEEL THE CURE COULD BE WORSE THAN THE DISEASE.

UNFORTUNATELY, GOVERNMENT AT ALL LEVELS HAS NEVER ENJOYED A REPUTATION FOR PROMPT ACTION, ECONOMY, OR FOR BEING ABLE TO PINPOINT RESPONSIBILITY. WHILE I DO NOT UNDERSTAND ALL THE RAMIFICATIONS OF THE PROPOSED AMENDMENTS, I CAN SEE THE POSSIBILITY OF SLOWING DOWN THE DECISION-MAKING PROCESS. FURTHER, AT THIS TIME MY STAFF IS UNABLE TO PUT A COST FIGURE ON THE PROPOSED LEGISLATION BUT WE HAVE THE FEELING THE COST TO THE OPERATING DEPARTMENTS THAT ARE INVOLVED WITH THE PROMULGATION OF RULES COULD BE CONSIDERABLE. SHOULD THE LEGISLATURE DECIDE TO PROCEED WITH THE LEGISLATION AS IT HAS BEEN DRAFTED, I WOULD RECOMMEND SOME TYPE OF A CONTINGENCY APPROPRIATION THEREBY ALLOWING US SOME FLEXIBILITY AS WE GET INTO THE ACTUAL OPERATION OF THE NEW PROCEDURES.

ASSISTANT COMMISSIONER OSTERBY WILL TESTIFY AFTER ME REGARDING CERTAIN DIRECT COSTS AND PROBLEMS THAT WE SEE RELATIVE TO THE STATE REGISTER. I WOULD LIKE TO MAKE SOME SPECIFIC COMMENTS ON THE OVERALL PROBLEMS THAT POSSIBLY COULD AFFECT MANY DEPARTMENTS.

FIRST OF ALL, I WOULD LIKE TO ADDRESS MYSELF TO THE DEFINITION OF A RULE (SEC. 15.0411) ON THE FIRST AMENDMENT, PAGE 1, SUBD. 3.

THE PROPOSED LANGUAGE READS "RULE" INCLUDES EVERY AGENCY STATEMENT OF GENERAL APPLICABILITY AND FUTURE EFFECT. I FEEL THAT THIS LANGUAGE IS MOST AMBIGUOUS BECAUSE OF THE VARIETY OF INTERPRETATIONS THAT COULD BE DERIVED. FOR EXAMPLE, ALMOST EVERYTHING WE DO IN THE DEPARTMENT OF ADMINISTRATION, AS A CENTRAL STAFF AGENCY, AFFECTS ALL STATE AGENCIES. DOES THE PROPOSED IMPOSITION OF THIS REQUIREMENT IMPLY THAT WE CAN ONLY EXERCISE GOOD JUDGMENT AND OUR MANAGERIAL RESPONSIBILITIES PURSUANT TO RULES THAT HAVE BEEN ADOPTED THROUGH THE PUBLIC HEARING PROCESS? MOST COMMUNICATIONS ISSUED BY THE DEPARTMENT OF ADMINISTRATION WOULD FIT INTO THIS CATEGORY.

I AM AWARE THAT PROVISIONS HAVE BEEN MADE IN THIS SECTION TO EXEMPT THOSE ITEMS RELATING TO THE INTERNAL MANAGEMENT OF AN AGENCY OR AGENCIES - BUT THE PROBLEM AS I SEE IT WOULD AGAIN BE - WHERE DO YOU DRAW THE LINE BETWEEN WHAT IS A RULE AND WHAT IS INTERNAL MANAGEMENT?

WHAT ABOUT BUDGET PROCEDURES OR ENERGY CONSERVATION POLICIES OR SPACE UTILIZATION STANDARDS ESTABLISHED BY THE DEPARTMENT OF ADMINISTRATION? A RULE OR INTERNAL MANAGEMENT?

I AM NOT SURE WHAT THE INITIAL PROBLEMS ARE OR WHY A CHANGE IN DEFINITION SEEMS TO BE IN ORDER. I FEEL THE PRESENT LANGUAGE IS SUFFICIENT. TO THE BEST OF MY KNOWLEDGE, THE DEPARTMENT OF

ADMINISTRATION HAS NOT RECEIVED COMPLAINTS ON OUR RULE-MAKING PROCEDURES. MAY I SUGGEST PERHAPS, THAT PART OF THE PROBLEMS WITH THE PRESENT LAW COULD BE ADMINISTRATIVE? I WOULD BE MOST HAPPY TO WORK WITH THE LEGISLATURE AND CORRECT THESE DEFICIENCIES, IF THIS IS THE CASE.

ON PAGE 3, SUBD. 3 I HAVE DIFFICULTY IN UNDERSTANDING THE NEED FOR THIS PROVISION. EACH AGENCY SHALL ADOPT RULES OF PRACTICE SETTING FORTH THE NATURE AND REQUIREMENTS OF ALL FORMAL AND INFORMAL PROCEDURES RELATED TO THE ADMINISTRATION OF OFFICIAL AGENCY DUTIES, INCLUDING ALL FORMS AND INSTRUCTIONS USED BY THE AGENCY.

SOME MEMBERS OF ~~OUR~~ my STAFF INTERPRET THIS PROVISION TO MEAN EVERY FORM AND OPERATING PROCEDURE THAT IS USED BY A DEPARTMENT TO EXECUTE ITS OFFICIAL AGENCY DUTIES. WOULD THE DEPARTMENT OF PERSONNEL, FOR EXAMPLE, HAVE TO HOLD A PUBLIC HEARING ON ITS EMPLOYMENT APPLICATION FORM? I COULD NAME HUNDREDS OF FORMS THAT WOULD FIT INTO THIS CATEGORY. I BELIEVE THAT THIS WOULD BE A MOST DIFFICULT AND COSTLY SECTION FOR MOST AGENCIES TO MANAGE.

ON PAGE 4, SEC. 7, SUBD. 6 - I STRONGLY SUPPORT THIS PROVISION. I BELIEVE THERE IS A NEED FOR THIS ACTION AND WOULD ENCOURAGE, AS DID MR. MILES FROM THE ATTORNEY GENERAL'S OFFICE, THAT ALL MATERIALS PERTAINING TO THIS INFORMATION GATHERING PROCESS SHOULD BE INCORPORATED IN THE OFFICIAL HEARING RECORD.

PAGE 5, SUBD. 7. I BELIEVE THAT THIS SECTION ONLY SERVES TO CONFUSE PEOPLE EVEN FURTHER. AS I UNDERSTAND THIS PROVISION WE ARE NOT DISCUSSING RULES - ONLY STATEMENTS THAT APPEAR TO BE RULES WHICH HAVE NO FORCE AND EFFECT OF LAW. DOES THIS MEAN WE CAN NO LONGER COMPEL ADHERENCE TO POLICY STATEMENTS SUCH AS ENERGY CONSERVATION PROCEDURES, ETC. IS THE CONFLICT WITH THE DEFINITION OF A RULE ON PAGE ONE?

FURTHER, I SEE NO NEED FOR ALL AGENCIES TO BE REQUIRED TO RESPOND ~~IN~~ IN THE MANNER PRESCRIBED IN THIS SECTION, EVERYTIME IT RECEIVES A PETITION WITH 50 SIGNATURES. CONSIDERABLE STAFF TIME WILL HAVE TO BE DEVOTED TO THIS EFFORT AND AGAIN THE COSTS FOR THE ENTIRE PUBLIC HEARING PROCESS ARE UNOBTAINABLE AT THIS TIME. I AM CONFIDENT, HOWEVER, THAT THEY WILL BE SIGNIFICANT.

THEREFORE, BECAUSE OF THE AMBIGUITIES, INCONSISTENCIES AND UNNECESSARY WORK ~~DESCRIBED IN THIS SECTION~~ ARISING FROM SUBDIVISION, I URGE THAT IT BE DELETED.

ON PAGE 8, SEC. ~~15.0415~~ 15.0415 "PETITION FOR ADOPTION OF RULE." THIS SECTION DOES PROVIDE SOME FLEXIBILITY FOR AGENCIES RELATIVE TO THE DISPOSITION OF A PETITION WHICH EXPRESSES CONCERN OVER PROPOSED RULES. I WOULD NOTE, HOWEVER, THAT I FEEL ANY INTERESTED PERSON SHOULD STILL BE ENTITLED TO AN ANSWER CONCERNING THE PROMULGATION OF A RULE. ~~PLEASE NOTE, THIS PROVISION HAS BEEN DELETED.~~

IT IS STATED HERE THAT AN AGENCY SHALL RESPOND WITHIN 30 DAYS. I FEEL THAT THIS TIME FRAME IN SOME INSTANCES WOULD BE UNREASONABLE.

THIS CONCLUDES MY REMARKS RELATIVE TO PROPOSED AMENDMENT ~~AE1 #2~~ Set #1.

AMENDMENT SET #2

FIRST OF ALL, I WOULD LIKE TO EXPRESS MY RESERVATIONS OVER THE PORTION OF THIS AMENDMENT WHICH PROVIDES THAT HEARING EXAMINERS BE LEARNED IN THE LAW. IF THIS IS TO BE CONSTRUED AS MEANING ATTORNEYS, I BELIEVE THAT THE ONLY CRITERIA NECESSARY SHOULD BE A BASIC KNOWLEDGE OF THE ADMINISTRATIVE PROCEDURES WHICH MUST BE ADHERED TO - AND SOME FAMILIARITY WITH THE LEGAL REQUIREMENTS OF THE LAW.

I BELIEVE THERE IS A NEED FOR AN OFFICE OF HEARING EXAMINERS. I BELIEVE THIS GROUP SHOULD BE EITHER UNDER THE JURISDICTION OF THE SECRETARY OF STATE OR PERHAPS MORE LOGICALLY, THE DEPARTMENT OF ADMINISTRATION. ADMINISTRATION DOES NOT NEED ANY MORE RESPONSIBILITIES, HOWEVER, THE CLIENTELE WE SERVE ARE THE OTHER STATE AGENCIES. THIS SERVICE SEEMS TO LOGICALLY FIT IN THIS CATEGORY.

AMENDMENT SET NO 3 AND 4 DEAL WITH THE LEGISLATIVE JOINT COMMITTEE FOR REVIEW OF ADMINISTRATIVE RULES. MY ONLY COMMENT DEALS WITH AMENDMENT SET NO. 3 ON PAGE 2, SEC. 15.0412, SUBDIVISON 4 WHICH REQUIRES THAT THIS COMMITTEE REVIEW EVERY RULE PRIOR TO ITS BECOMING LAW. THIS COULD MEAN THAT THIS COMMITTEE COULD HAVE AN EXTREMELY HEAVY WORK LOAD. IT COULD CAUSE FURTHER TIME DELAYS, AND THE NECESSITY OF ADDITIONAL STAFF TO REVIEW AND ADVISE ON THE NEED FOR THE LAW.

THANK YOU FOR THE OPPORTUNITY TO APPEAR BEFORE YOU AND MAKE MY COMMENTS RELATIVE TO THE PROPOSED LEGISLATION. I SINCERELY HOPE THAT MY RESERVATIONS AND COMMENTS ARE NOT INTERPRETED AS BEING AGAINST THE STRENGTHENING OF THE ADMINISTRATIVE PROCEDURES ACT.

TESTIMONY BEFORE THE JOINT COMMITTEE ON GOVERNMENTAL OPERATIONS REGARDING AMENDMENT #1 RELATING TO STATE ADMINISTRATIVE PROCEDURES

MR. CHAIRMAN, SENATOR GEARTY AND MEMBERS OF THE JOINT COMMITTEE, MY REMARKS WILL BE RELATED ONLY TO THE CREATION AND PUBLICATION OF A STATE REGISTER. FOR THE RECORD, I AM NORMAN OSTERBY AND REPRESENT THE STAFF MEMBERS OF THE DEPARTMENT OF ADMINISTRATION.

FIRST OF ALL, I WOULD LIKE TO STATE THAT MEMBERS OF THE DEPARTMENT OF ADMINISTRATION HAVE DISCUSSED THE CONTENTS OF AMENDMENT #1 WITH MR. JAMES NOBLES OF YOUR STAFF AND MANY OF THE CONCLUSIONS OR RATHER REMARKS THAT WERE PREFACED EARLIER BY MR. NOBLES WILL ALSO BE SUGGESTIONS OR INPUTS FROM THE DEPARTMENT OF ADMINISTRATION IN REGARD TO THE STATE REGISTER. OUR MAIN CONCERNS ARE THE GENERAL SCOPE OF A STATE REGISTER, THE ADMINISTRATION OF THE PROCESS NECESSARY FOR SUPPLYING THE STATE REGISTER TO THE PUBLIC AND COST. WHAT FOLLOWS WILL REFLECT INPUTS OR SUGGESTIONS REGARDING THOSE GENERAL CONCERNS.

REFERRING TO THE FIRST WORKING DRAFT AND TURNING TO PAGE 2, CHAPTER 15.0412, SEC 3, SUBD 2 . . . . . PUBLISH AND MAINTAIN IN THE STATE REGISTER . . . . . WE SUGGEST THE WORDAGE BE CHANGED TO . . . . PUBLISH AND MAKE AVAILABLE THRU THE STATE REGISTER . . . . . WITH MORE THAN 150 AGENCIES IN STATE GOVERNMENT IT WOULD SEEM APPROPRIATE THAT THE INFORMATION REQUIRED IN THIS PARAGRAPH BE LIMITED TO PRINTING . PERHAPS ONCE A YEAR OR WHEN SIGNIFICANT CHANGES ARE MADE OR MAYBE A GENERAL STATEMENT OR TWO AT DESIGNATED TIMES. OTHERWISE EACH REGISTER WOULD BE PROLIFERATED WITH SEVERAL PAGES OF PRINTING FROM EACH DEPARTMENT.

TURNING TO PAGES 3 AND 4 SUBD 4 OUR QUESTION AT THIS POINT WOULD BE THE NECESSITY FOR THE DOUBLE PRINTING IN FULL TEXT OF EACH PROPOSED RULE OR ADOPTED RULE IN THE STATE REGISTER. PROBABLY SOME THOUGHT SHOULD BE GIVEN TO PUBLISHING A GENERAL STATEMENT OR RESUME OF THE

OF THE PROPOSED RULE AND FOR THOSE WHO ARE INTERESTED, OFFER THE OPPORTUNITY FOR SECURING THAT RULE IN FULL TEXT WITHOUT HAVING TO SUBSCRIBE TO THE FULL REGISTER ON A REGULAR BASIS. RULES SHOULD CONTINUE TO BE PUBLISHED SUCH THAT THEY NOW ARE SO THAT THE AVERAGE CUSTOMER CAN BE SATISFIED AND YET MEET AGENCY NEEDS.

PAGE 6 SUBD 3

AT THIS POINT, IT SHOULD BE NOTED THAT THE DEPARTMENT OF ADMINISTRATION IN DISCUSSION WITH MR. NOBLES SUPPORTS THE IDEA THAT THE SECRETARY OF STATE BE RESPONSIBLE FOR FILING THE APPROVED RULES FROM THE ATTORNEY GENERALS OFFICE. HOWEVER, THE PUBLISHING OF THE STATE REGISTER IS ANOTHER MATTER. THE REGISTER SHOULD BE HANDLED BY A STAFF WITH SOME LEGAL BACKGROUND OR TRAINING TO HANDLE PROOF-READING AND HANDLING OF COPY BECAUSE OF A SHORT TIME BETWEEN FILING AND PUBLICATION AND THE NECESSITY OF LEGAL CORRECTNESS IN THE INFORMATION PRINTED. THIS COULD PREVENT PROBLEMS ARISING FROM ERRORS IN COPY. IT HAS BEEN SUGGESTED THAT THE REVISORS OFFICE BE GIVEN THIS RESPONSIBILITY. IN ANY EVENT, PUBLICATIONS OF THE STATE REGISTER WILL REQUIRE STAFF WITH PROPER BACKGROUND FOR COPY EDITING.

ON PAGE 8 SEC 14 SUBD 6

. . . . . THE SUM OF $26,000 IS APPROPRIATED FROM THE GENERAL FUND . . . . . ETC. WITH THE FOREGOING DISCUSSIONS AND WHAT HAS BEEN PROPOSED FOR THE CONTENTS AND SCOPE OF THE STATE REGISTER IT APPEARS THAT THE $26,000 IS AN EXTREMELY MODEST RESOURCE FOR THE INITIAL PUBLICATION OR SETTING UP THE STATE REGISTER. AT THIS POINT IN TIME AND BASED ON WHAT THE REQUIREMENTS OF A STATE REGISTER SHALL CONTAIN, NO REASONABLE FIGURE OR ESTIMATE CAN BE ASCERTAINED. HOWEVER, BASED ON PAST EXPERIENCE, IT IS FELT THAT THE MAGNITUDE OF THE STATE REGISTER PROPOSES TO BE AT LEAST FOUR (4) TIMES GREATER THAN THE PRESENT

PUBLICATION PROCESS FOR RULES AND REGULATIONS AND THEREFORE IT SEEMS APPROPRIATE TO SAY THAT PUBLICATION OF THE STATE REGISTER WILL PROBABLY COST FOUR (4) TIMES AS MUCH OR MORE. THE SALE OF PRESENT RULES AND REGULATION IS NOT SELF SUPPORTING AND THE PROCEEDS FROM THE SALE OF OTHER DOCUMENTS HAS TO HELP DEFRAY THE EXPENSES FOR PUBLISHING RULES (NOW 9,000/YR IN THE RED).

PAGE 9 SEC 17, MINN STAT 1971 SEC 15.047

WE SUGGEST THAT THIS SECTION NOT BE REPEALED SINCE IT IS FELT THAT THE FLEXIBILITY FOR SALE OF PORTIONS OF RULES AND REGULATIONS TO THE PUBLIC SHOULD BE RETAINED AS PROVIDED FOR IN THIS CHAPTER. ELIMINATING THIS SECTION MEANS THAT ANYONE WISHING A PARTICULAR RULE WILL BE REQUIRED TO PURCHASE OR SUBSCRIBE TO THE STATE REGISTER UNLESS OTHER PROVISIONS ARE MADE.

PAGE 11 SEC 21, SUBD 2

BECAUSE OF THE CRITICAL TIME PERIODS INVOLVED IN THE GATHERING, PROCESSING, AND PUBLICATION OF THE PROPOSED STATE REGISTER IT IS SUGGESTED THAT THE STATEMENT ... "REMAIN UNPUBLISHED FOR MORE THAN FIVE CALENDAR DAYS". . . . BE AMENDED TO READ . . . "FOR MORE THAN TEN WORKING DAYS".

THIS THEN WILL ALLOW FOR THE PUBLICATION OF THE REGISTER ON A WEEKLY BASIS AND CATCH THE PUBLICATION OF THE PROPOSED RULE EVEN WHEN HOLIDAYS ARE INVOLVED.

FINALLY THE DEPARTMENT OF ADMINISTRATION - SUBSCRIBES TO A PROPOSED STATE REGISTER AND WILL WORK WITH THE LEGISLATURE AND ITS STAFF TOWARD THE ACCOMPLISHMENT OF THE MACHANIX FOR SETTING UP SUCH A VEHICLE IN THE BEST INTERESTS OF STATE GOVERNMENT. IN THE MEANTIME WE WILL MEET WITH MR. NOBLES AND OTHERS WHO ARE INVOLVED IN THIS ISSUE IN GATHERING FURTHER INPUTS FOR YOUR REVIEW AND CONSIDERATION.

I THANK YOU.

Misc. Material

MINNEAPOLIS TRIBUNE 12/11/74

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Judge rules state agency was right to fire atheist

Ramsey District Judge David E. Marsden ruled Tuesday that the Minnesota Highway Department had fired Garry DeYoung for just cause. DeYoung had claimed he was fired because he is an atheist.

Judge Marsden based his decision on evidence that DeYoung, in his militant advocacy of atheism, had been insubordinate and had shown a complete lack of courtesy and consideration of other workers in the department.

The action came on appeals, both by DeYoung and the highway department, from a finding by the Minnesota Human Rights Commission that the department either reinstate DeYoung as an information writer, or pay him $2,500. The department refused to reinstate DeYoung.

Judge Marsden was critical of the Human Rights Commission in his decision, citing its power to appoint hearing examiners before whom its attorneys appear. This, he noted, constitutes a "grant of authority ... to be both judge and advocate in the same proceeding." Such a concept, he wrote, violates basic principles of fair play and due process.

He also was critical of the hearing examiner, Charles Quaintance Jr., whose finding he characterized as "an amazing mixture of selective inclusion and exclusion of events which occurred during DeYoung's years of employment by the highway department. Their major thrust was to place sole responsibility for the entire scenario leading to the ultimate fact of termination (on) DeYoung's supervisors and none on DeYoung."

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ARRM

ASSOCIATION OF RESIDENCES FOR THE RETARDED OF MINNESOTA

June 10, 1974

Representative E. W. Quirin, Chairman
House Government Operations Committee
335 State Office Building
St. Paul, Minnesota

Senator E. Gearty, Chairman
Senate Government Operations Committee
335 State Office Building
St. Paul, Minnesota

Re: Rule Making Procedures and the Administrative Procedures Act

Dear Representative Quirin and Senator Gearty:

The Association of Residences for the Retarded in Minnesota (ARRM) represents non-governmental providers of residential programs for mentally retarded persons in Minnesota.

Not only do members of ARRM deliver services on an everyday basis that are thoroughly affected by governmental decision-making, but these providers act also as surrogate representatives for a population whose activities are largely determined by government operations.

Representatives of ARRM have worked closely with representatives of various state agencies (Department of Public Welfare, Department of Health, Building Code Division, etc.) in the preparation of regulations that affect residential programs and the individuals to whom services are provided. DPW Rules 34 and 52 as well as the Health Department Standards for Supervised Living Facilities are good examples of cooperative work accomplished through joint efforts of public and private sectors.

The goal is to promote quality services. It is necessary, then, in the face of many regulations, to prepare a prescriptive package of laws, regulations, policies and procedure that link together in a comprehensive manner so that the goal can be achieved.

Because a wide variety of governmental agencies promulgate regulations and policies, it is difficult to recognize a common order. Within a single agency, policy bulletins may introduce requirements that are contradictary to other regulations and policies used by the same agency.

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MINNEAPOLIS MINN. 55408

Since more than one government agency issues requirements, the situation becomes very confusing to providers, residents, and families.

The tragedy that exists is real -- on an every day basis -- when patchwork planning breeds overlapping and underlapping situations.

It is my hope that the legislative committee would discuss ways by which the system could work to make possible a common goal -- quality services.

Perhaps consideration can be given to the formation of a "State Register". A mechanism akin to the Federal Register, whereby a centralized form of dissemination may provide at least an access point to necessary information.

Further consideration might be given to formalizing the process of input and review by people concerned and affected by decision making prior to the effect of law.

The distinctions between law, regulation, policy and procedure are frequently fuzzy. It might serve a useful purpose to clarify the distinctions as well as providing a mechanism for access to information, input to decisions and review of the decisions.

I recognize the need for prompt decision-making on the part of the bureaucracy in the interest of efficiency, patchwork planning only causes greater confusion.

Representatives of ARRM would be most willing to discuss these matters with you.

Sincerely,

Peter Sajevic
President, ARRM
c/o Nor-Haven
1394 Jackson Street
St. Paul, Minnesota 55117
488-0275

PS:no

Minnesota Association for Retarded Citizens, Inc.

3225 LYNDALE AVENUE SO. • MINNEAPOLIS, MINNESOTA 55408 • (612) 827-5641

June 14, 1974

Representative E. E. Quirin
Chairman, House Government Operations Committee

Senator E. Gearty, Chairman
Senate Government Operations Committee

335 State Office Building
St. Paul, Minn.

Dear Sirs;

The Minnesota Association for Retarded Citizens wish to register their support for the request of the Association of Residences for Retarded in Minnesota for the publishing in a state registry for the purpose of public reaction and input, all internal policies and directives of the various state departments.

We corroborate the statement of the problem in their letter to your committee (enclosed). As representatives of over ten thousand parents and consumers, we often must seek to intercede for the consumer or parents because of internal policies or directives which conflict with other state department's objectives and actually victimize those recipients for whom these needful services exist.

We would therefore request that you look into this very real problem and we are hopeful you can be of assistance in making the service system more functional in its delivery.

Thank you for your consideration in this matter.

Sincerely,

James T. Tackes
Executive Director

Encl:

CC: Skip Sajevic
Tom Peterson

DJC/jm

ARRM

ASSOCIATION OF RESIDENCES FOR THE RETARDED OF MINNESOTA

June 18, 1974

TO: Mark Warren

FROM: Peter Sajevic, President, ARRM

RE: Internal Policy and Procedure/State Register

A vast distinction can be made between department policies and procedures necessary for effective and efficient internal operations of state agencies and those policies and procedures which affect people outside the department. (In our case, providers, residents and families) No formal mechanism exists for input and review of far-reaching policy and procedure.

In order to foster continuity in planning, to alleviate confusion and to provide necessary communication, thought might be given to incorporate a formal process of input and review of policy and procedure in the State Register. The process could be similar to that used in the Federal Register:

a) require departments to "publish" propsed far-reaching statements of policy and procedure

b) establish a reasonable amount of time for response

c) designate to whom and where response should be sent

d) publish statements of policy and procedure a second time and include acknowledgement of response and any changes accepted or rejected as a result of the response

e) include effective date of policy or procedure

This mechanism would provide a vehicle to solicit responsiveness of state agencies and the people directly affected by them, as well as serve as a formal record of a part of the decision making process.

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