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REPORT

FROM: Thomas J. Triplett, Senate Counsel
James Nobles, Legislative Analyst,
House of Representatives

RE: Administrative Procedure Act Questionnaire

In 1975, Minnesota's Administrative Procedure Act was substantially amended in respect to rule-making by Minnesota state agencies. The main purpose of the amendments was to strengthen the ability of the public to be knowledgeable of and participate in rule-making proceedings. The definition of "rule" was expanded so as to reduce the amount of discretion possessed by each agency in determining whether an agency statement should be promulgated as a rule. State Register publication requirements were expanded and an independent Office of Hearing Examiners was created in order to provide an unbiased presiding officer for both rule-making and contested case hearings. Rules were not to be promulgated unless the agency could affirmatively demonstrate that the proposed rules were necessary and reasonable.

Although the 1975 amendments protected the interests of the public, they placed additional constraints upon state agencies. As a result, many agency staff persons have complained to legislators and legislative staff over the past year. In order to compile these agency concerns in a coherent fashion, Senator Winston W. Borden and Representative Harry Sieben, Jr., chief authors of the 1975 legislation, authorized us to distribute questionnaires to all state agencies having rule-making or contested case powers. Because the questionnaires were distributed exclusively to state agencies, we did not anticipate receiving an unbiased cross-section of opinion about the APA. The authors of the 1975 amendments fully intended to place additional burdens on the agencies. Through the use of this questionnaire, we hoped to measure the intensity of these agency concerns.

Response Data

A copy of the questionnaire is attached to this report as Appendix A. Appendix B is a listing of the 87 state departments, boards, agencies and authorities who received the questionnaire. Fifty-five of those agencies (63%) responded to the questionnaire, and the responding agencies are identified with an asterisk. Appendix C separates the responding agencies into four categories: (a) agencies which had rule-making experience since July 1, 1976 (27 agencies), (b) agencies which had not had rule-making experience since January 1, 1976, but which were in the process of proposing rules (4 agencies), (c) agencies which had not proposed rules or were not in the process of proposing them, but which had comments relating to the APA (13 agencies), and (d) agencies which are exempt from coverage under the APA or which chose not to comment in a substantive manner (11 agencies). The questionnaire responses are available for viewing at our offices.

1. Frequency of rule-making and contested case adjudications. The question read as follows:

Approximately how many rule-making and contested case hearings has your agency conducted since January 1, 1976? How many of those were held after July 1, 1976?

Twenty-seven of the responding agencies indicated that they had initiated a total of 63 rule-making proceedings after January 1, 1976, the effective date of the 1975 amendments. Twenty of the responding agencies indicated that they had participated in 337 contested cases subsequent to January 1, 1976. Not all of these rule proceedings or contested cases were maintained entirely consistent with the 1975 APA amendments. Some portions of the proceedings were initiated prior to January 1. In addition, the State Register publication modifications became effective July 1, 1976, and therefore were not a factor in many of the proceedings.

2. Disposition of proposed rules. The question read as follows:

What was the disposition of your rule-making hearings? Were rules promulgated as originally published, were they promulgated after amendment, was a new hearing required because of substantive amendments, or was promulgation suspended?

Only six (10%) of the 63 rules were promulgated as originally proposed. Thirty-two (50%) of the rules were promulgated with minor amendments made as a result of testimony at the hearing or hearing examiner recommendations. Five (8%) of the rules were scheduled for rehearing, and five (8%) of the rule proceedings were suspended after completion of the hearing.

Rule-making proceedings on the remaining fifteen rules were not completed as of the date of submission of the questionnaire responses. Five of these fifteen rules (8%) were awaiting attorney general review, and the remaining 10 (16%) were awaiting the hearing examiner report.

3. Affected agency statements. The question read as follows:

Have the 1975 amendments changed the type of statements which your agency has elected to promulgate formally, as rules? In what ways?

The intent of this question was to determine how the redefinition of "rule" and the new requirements of reasonableness and necessity altered the types of agency statements which the agency determined should be promulgated as a rule. In some ways, the asking of this question was premature. Only those few agencies which had had substantial rule-related activity in the past year could give an intelligent answer to the question.

Only 11 agencies indicated that the 1975 amendments would change the type of statements promulgated as rules. Only three of these agencies indicated that the 1975 amendments would expand rule-making because of various cost and timing factors. Two of the agencies indicated the only change would be more "detailed" or "legalistic" language in the rules, and two others indicated that agency procedures would now have to be promulgated as rules.

During the 1975 hearings, many agencies complained that the new definition of "rule" (agency statement of general applicability and future effect) would require substantial additional rule-making. Therefore, it is surprising that only three agencies now anticipate an increase in rule-making.

4. Promulgation time period. The question read as follows:

To the best of your recollection, what was the minimum length of time required by your agency to promulgate a rule prior to the effective date of the 1975 amendments to the APA? How has this time period changed, if at all, after the 1975 amendments?

This question attempted to discern the increased amount of time required for rule promulgation as a result of the 1975 amendments. The 1975 amendments added certain specific time requirements, but no time limits were placed on such things as the submission of the hearing examiner's report.

The average estimated time to promulgate a rule for 29 responding agencies prior to January 1, 1976, was 125 days. Only one of the responding agencies indicated that this time period included the internal agency drafting process.

Thirty agencies provided estimates or factual data on the time required to promulgate a rule after the 1975 amendments. The average promulgation time for all 30 agencies was 225 days. Eight of the 30 agencies provided exact data based upon prior experience. The average for these eight was 208 days for each rule-making proceeding. Thus, the time period for promulgation of a rule has

doubled as a result of the 1975 amendments. Four of the responding agencies volunteered that the two major causes for this increase was delay by the Office of Hearing Examiners in submitting their required reports and the rule publishing procedures adopted by the Office of State Register.

5. Cost impact. The question read as follows:

What was the average cost to your agency of promulgating a rule or set of rules prior to the 1975 amendments? How has this cost changed as a result of the 1975 amendments?

Similar to the preceding question, the intent here was to elicit actual or estimated cost increases. Here again, only a few agencies were able to provide statistical data in respect to completed rule proceedings.

Twenty agencies provided data on the cost of rule-making prior to the 1975 amendments. The average cost for these 20 agencies was \$675, but this figure did not include agency staff time.

Twenty-seven agencies provided estimates or data in respect to the cost of rule promulgation subsequent to the 1975 amendments. The average cost for 27 rule-making proceedings initiated since the 1975 amendments was \$2,700. Fifteen of these 27 rule costs were actual costs incurred in respect to completed proceedings. The average of the 15 actual costs was \$2,020. Thus the average rule promulgation cost tripled as a result of the 1975 amendments. (Note: In past years most agencies used agency staff as hearing officers; the cost of using these staff persons was not included in arriving at pre-1975 cost figures.)

6. Drafting procedures. The question read as follows:

Who drafts rules within your agency? What is the role of the Attorney General staff persons assigned to your agency?

The intent of this question was to determine the effect of the 1975 amendments on internal agency drafting procedures. Since the Attorney General is charged with reviewing proposed agency rules, the question also attempted to determine his role in the initial drafting.

Forty-two agencies responded to this question. Of this number, 24 (58%) indicated the drafting was done by agency staff persons, board members or staff attorneys not assigned to the Attorney General's Office. Five of the agencies (12%) indicated that initial drafting was exclusively the responsibility of the Attorney General's staff person assigned to the agency. The remaining 13 agencies (31%) indicated that the Attorney General participated with the staff in the initial drafting. Therefore, the same office charged with final review authority over rule-making is also heavily involved in initial drafting (Note: although the same office performed drafting and review, the same personnel in the office did not perform both functions.) Twenty of the responding agencies (48%) indicated that the attorney general's staff person assigned to the agency reviewed the rules after initial drafting.

7. Internal review procedures. The question read as follows:

Within your agency, what internal drafting and review procedures are required prior to the promulgation of a rule? How, if at all, were these procedures changed as a result of the 1975 amendments?

One of the goals of the 1975 amendments was to encourage tighter drafting and more attention to procedural safeguards. Hopefully, responses to this question would indicate whether this goal was being achieved.

Thirty-seven agencies responded to this question. Twenty-six of the responding agencies (70%) indicated that no changes in internal review procedures resulted from the 1975 amendments. Five of the agencies (14%) indicated the most significant change was usage of the Notice of Intent to Solicit Comments and Opinions in respect to a proposed rule. Other changes mentioned by three or fewer agencies include: higher staff level review (2 agencies, 5%), more attention by staff review persons to the "need" requirement (1 agency, 3%), more attention to stylistic review (1 agency, 3%), more attention to matters of timing in the promulgation procedures (3 agencies, 8%), and greater reliance on extra-agency comments and opinions (1 agency, 3%).

8. Necessary amendments. The question read as follows:

Do you have any general comments on the workability and effectiveness of the APA or relevant rules of the Chief Hearing Examiner or Attorney General? Are amendments necessary?

The intent of this question was to encourage agencies to independently evaluate the APA and to offer constructive suggestions for improvement from their perspective.

It is, of course, difficult to generalize on the nature of these comments. However, the responses of the 38 responding agencies can be divided into the following statements:

- (a) Rule promulgation takes too much time (13 agencies, 34%). More specifically, the office of hearing examiners is too slow in its review processes and in the submission of reports (3 agencies, 8%) and waiting periods required by statute or rule are unnecessary or excessive (3 agencies, 8%).
- (b) The revised rule process is substantially more costly (11 agencies, 29%). More specifically, the required notice and publication procedures are too expensive (1 agency, 3%).
- (c) The 1975 amendments are desirable improvements in the APA or, at least, are satisfactory and do not require further amendment (9 agencies, 24%).

- (d) Work by agency staff is substantially increased as a result of the 1975 amendments. The statute and rule requirements are cumbersome and overly complex (9 agencies, 24%).
- (e) The statute and rules do not provide a clear separation of functions between the office of hearing examiners, the attorney general, and the office of State Register (7 agencies, 19%).
- (f) The creation of the office of hearing examiners was unnecessary and results in substandard rule-making (3 agencies, 8%).
- (g) The definition of "rule" is too broad (2 agencies, 5%).
- (h) Rehearing of a rule is inappropriate even though the rule as promulgated is substantially different from the rule as proposed (1 agency, 3%).
- (i) Agencies should be granted appeal from a decision of the attorney general that the rule may not become effective (1 agency, 3%).

9. Emergency rule-making. The question read as follows:

Have the 1975 APA amendments altered your agency's need for "emergency" rule-making authority (see section 15.0412, subdivision 5)? If so, how and in what areas?

It was clear when the 1975 amendments were being considered that agencies would be required to spend additional time in the promulgation of a rule. To avoid problems where immediate agency action was required, provision was made for emergency rule-making. The intent of this question was to determine whether the 1975 amendments require an expansion of emergency rule-making authority.

Only seven of the responding agencies indicated that the 1975 amendments may result in increased need for emergency rule-making powers. Of the seven, only two cited specific duties or programs which should now have emergency rule-making authority attached to them. One other agency suggested an extension of the effective period for emergency rules from 150 days to 180 days.

Conclusions

The preceding summary is a clear indication of those areas where agencies feel APA amendments are necessary. In addition to specific concerns about complexity, cost and timing, several agencies offered specific suggestions for improvement. Some of these include the following:

- (a) Define the concept of "statewide jurisdiction" as applied to the definition of agency.
- (b) Specify whether the APA should be viewed as an independent grant of rule-making authority; or, conversely, whether each agency should be forced to rely on a grant of rule-making authority in its enabling legislation.
- (c) Clarify the respective roles of the Attorney General and the Chief Hearing Examiner in determining whether a promulgated rule is substantially different from a proposed rule.
- (e) Abolish the Secretary of State's listing of persons interested in proposed rule-making; rely on increased usage of the State Register and provide for free distribution to persons expressing an interest in a certain area or to county libraries.

Acknowledgments

The authors of this report extend their sincere appreciation to those agencies that took the time to respond to this questionnaire. We regard the 63% response rate as excellent and, if nothing else, clearly indicates a high degree of interest by state agencies in the APA. We are especially grateful to the following agencies which submitted particularly thoughtful and comprehensive responses to the questionnaire: the Attorney General, the State Planning Agency, the Energy Agency, the Board of Dentistry, and the departments of Education, Health, Natural Resources, Public Safety, Public Welfare and Revenue.

It is our hope that the responses from this questionnaire will give members of the Legislature clear insight into the effects of the APA upon state agencies and possible areas for additional improvement.

TJT:ld

October 1976

Agency _____

Name _____

Title _____

APA Questionnaire

1. Approximately how many rule-making and contested case hearings has your agency conducted since January 1, 1976? How many of those were held after July 1, 1976?

2. What was the disposition of your rule-making hearings? Were rules promulgated as originally published, were they promulgated after amendment, was a new hearing required because of substantive amendments, or was promulgation suspended?

3. Have the 1975 amendments changed the type of statements which your agency has elected to promulgate formally as rules? In what ways?

4. To the best of your recollection, what was the minimum length of time required by your agency to promulgate a rule prior to the effective date of the 1975 amendments to the APA? How has this time period changed, if at all, after the 1975 amendments?

5. What was the average cost to your agency of promulgating a rule or set of rules prior to the 1975 amendments? How has this cost changed as a result of the 1975 amendments?

6. Who drafts rules within your agency? What is the role of the Attorney General staff persons assigned to your agency?

7. Within your agency, what internal drafting and review procedures are required prior to the promulgation of a rule? How, if at all, were these procedures changed as a result of the 1975 amendments?

8. Do you have any general comments on the workability and effectiveness of the APA or relevant rules of the Chief Hearing Examiner or Attorney General? Are amendments necessary?

9. Have the 1975 APA amendments altered your agency's need for "emergency" rule-making authority (see section 15.0412, subdivision 5)? If so, how and in what areas?

Please return to:

Thomas J. Triplett
Senate Counsel
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State Capitol

Appendix B

* Department of Administration	Designer Selection Board
* Department of Aeronautics	Board of Education
* Department of Agriculture	* Board of Electricity
* Attorney General	Environmental Education Council
Department of Commerce	Environmental Quality Board
* Banking Division	* Ethical Practices Board
* Consumer Services Division	Gillette Hospital Board
* Insurance Division	* Higher Education Coordinating Board
* Securities Division	Higher Education Facilities Authority
* Department of Corrections	Indian Affairs Board
* Department of Economic Development	* Iron Range Resources & Rehabilitation Board
* Department of Education	Board of Law Examiners
* Department of Employment Services	Levy Limitations Review Board
* Energy Agency	* Livestock Sanitary Board
* Department of Finance	* Bureau of Mediation Services
* Department of Health	Board of Medical Examiners
Office of Chief Hearing Examiner	* Municipal Board
* Department of Highways	* Board of Nursing
* Housing Finance Agency	* Board of Nursing Home Administrators
Department of Human Rights	Occupational Safety & Health
* Department of Labor and Industry	Review Board
* Department of Natural Resources	Board of Optometry
* Department of Personnel	* Peace Officers Training Board
* Pollution Control Agency	* Personnel Board
* Department of Public Safety	* Board of Pharmacy
Public Service Commission	Board of Podiatry
* Department of Public Service	* Board of Private Detective &
* Department of Public Welfare	Protective Agents Services
* Department of Revenue	* Board of Psychology
Secretary of State	* Public Employment Relations Board
* State Planning Agency	State Retirement System Board
* Department of Veterans Affairs	Soil and Water Conservation Board
	Tax Court
Board of Abstractors	* Board of Teacher Standards & Certification
Board of Accountancy	* State Universities Board
Minnesota Board on Aging	* Board of Veterinary Medicine
* Board of Architects, Engineers &	State Board for Vocational Education
Land Surveyors	* Board of Examiners-Watchmaking
* State Arts Board	* Water Resources Board
Board of Assessors	Workmen's Compensation Board
* Board of Barber Examiners	* Zoological Board
Board of Boxing	
Cable Communications Board	
Capitol Area Architectural &	
Planning Board	
* Board of Chiropractic Examiners	
* State Board of Community Colleges	
Corrections Board	
Cosmetology Board	
* Crime Victims Reparations Board	
* Board of Dentistry	

* - agencies that responded to questionnaire

Appendix C

Agencies which had rule-making experience since 7/1/76	Agencies which had not had rule-making experience since 7/1/76 but which were in the process of proposing rules	Agencies which had not proposed rules or were not in the process of proposing them, but which had comments relating to the APA	Agencies which are exempt from coverage under the APA or which chose not to comment in a substantive manner
<p>Department of Agriculture</p> <p>Board of Architects, Engineers & Land Surveyors</p> <p>Attorney General</p> <p>Division of Banking</p> <p>Board of Chiropractic Examiners</p> <p>Board of Dentistry</p> <p>Department of Education</p> <p>Energy Agency</p> <p>Ethical Practices Board</p> <p>Department of Health</p> <p>Higher Education Coordinating Board</p> <p>Division of Insurance</p> <p>Department of Labor & Industry</p> <p>Livestock Sanitary Board</p> <p>Department of Natural Resources</p> <p>Board of Nursing Home Administrators</p> <p>Peace Officers Training Board</p> <p>State Planning Agency</p> <p>Board of Psychology</p> <p>Department of Public Safety</p> <p>Department of Public Service</p> <p>Department of Public Welfare</p> <p>Department of Revenue</p> <p>Department of Transportation</p> <p>State Universities Board</p> <p>Department of Veterans Affairs</p> <p>Board of Veterinary Medicine</p>	<p>Department of Administration</p> <p>State Arts Board</p> <p>Municipal Board</p> <p>Board of Teacher Standards & Certification</p>	<p>Department of Aeronautics</p> <p>Board of Barber Examiners</p> <p>Consumer Services Division</p> <p>Department of Corrections</p> <p>Board of Electricity</p> <p>Housing Finance Agency</p> <p>Board of Nursing</p> <p>Department of Personnel</p> <p>Board of Pharmacy</p> <p>Pollution Control Agency</p> <p>Public Employment Relations Board</p> <p>Division of Securities</p> <p>Water Resources Board</p>	<p>State Board of Community College</p> <p>Crime Victims Reparations Board</p> <p>Department of Economic Development</p> <p>Department of Employment Service</p> <p>Department of Finance</p> <p>Iron Range Resources & Rehabilitation Bd.</p> <p>Bureau of Mediation Services</p> <p>Personnel Board</p> <p>Board of Private Detective & Protective Agents Services</p> <p>Board of Examiners-Watchmaking</p> <p>Zoological Board</p>