1.3 PERCEIVED INADEQUACIES IN THE ADMINISTRATIVE PROCEDURE ACT

By the early 1970s, public and legislative interest in administrative activities of state agencies increased dramatically. This increase in interest corresponded to the transfer of regulatory activity from the federal government to state governments, a trend that accelerated in the 1980s. Complaints arose about the manner in which state agencies applied the APA in rulemaking. Agencies were purportedly adopting "rules" (i.e., statements or standards given the force of law) without following APA procedural requirements. The state house and senate governmental operations committees began to accumulate communications from dissatisfied constituents that provided examples of these activities,[1] including the following:

> 1. On May 17, 1971, the state department of public welfare adopted a statement of "official policy" governing the performance of prefrontal lobotomies on patients in state hospitals;
> 2. In November 1973, the state board of education published its "Guidelines for the Collection, Maintenance and Release of Pupil Records," which defined limitations on the accessibility of certain personal files of students;
> 3. On November 20, 1973, the state college board issued its "Operating Procedure 19" which regulated the consumption of alcoholic beverages in residence halls; and
> 4. On June 7, 1974, the income tax division of the department of revenue issued a memo to department tax examiners governing the eligibility for rent credits on personal income tax forms.

The above state agency pronouncements were not necessarily in conflict with underlying substantive laws. For the most part, the agencies acted on these items after having given some opportunity for public notice and hearing. However, these activities clearly indicated that the dictates of the APA were not being followed. The agencies intended these “memos” and “guidelines” to have the effect of law, and administered them accordingly, without following the precise dictates of the APA.

In defense of these and other agencies, the 1957-based APA was unclear about certain definitions and standards crucial to the application of the act. For example, the act defined *rule* in a circular fashion to mean "every regulation adopted by an agency, whether with or without prior hearing, to implement or make specific the law enforced or administered by it".[2] In addition, the act was vague about what sort of prehearing notice was required, the procedures to be used in the public hearing, and the impact and applicability of "emergency rules”.[3]

Another handicap faced by state agencies was the increasing activism of the legislature during this period. New programs were being initiated more frequently by lawmakers, with

[1] Many of these individual communications, together with a summary report, are on file with the Legislative Reference Library, State Office Building, in St. Paul, Minnesota.

[2] 1957 Minn. Laws ch. 806, § 1, at 1101.

[3] 1957 Minn. Laws ch. 806, §2, at 1102.

implementation and enforcement of the programs delegated to state agencies. Often, the legislature gave substantial responsibility to the agencies to define technical standards and to enforce a wide range of possible violations. Typically, the agencies were not given enough financial resources to carry out their duties, and they naturally looked for implementation techniques that required the least amount of dollars and staff time.

A second area of concern to legislators was the affiliation of "hearing examiners" in the APA rulemaking proceedings. These individuals were charged with conducting the public hearings on the proposed rules and submitting recommendations to each agency head. Invariably, these hearing examiners were employees of the same agency (often the agency head or deputy) that would ultimately adopt the rule. Although there was little, if any, evidence of actual bias on the part of these hearing examiners, the perception of bias existed and was noted in testimony before legislative committees.[4]

Another reason for urging the creation of an independent hearings office was the perceived need for consistency in conducting rulemaking hearings. The individuals who had been serving as hearing examiners rarely performed such duties on a regular basis. They usually had other responsibilities in their agencies and serving as a hearing examiner was a rare event for most of these individuals. It was understandable, therefore, that few agency hearing examiners developed the experience and skills needed to ensure procedural consistency in conducting rulemaking hearings. Advocates of an independent office of hearing examiners noted the increasing popularity of such offices in other states and urged the Minnesota Legislature to create a similar entity.

[4] The Minnesota State Bar Association was an example of one interest group that sought to correct this perceived bias by recommending the creation of an independent office of administrative hearing examiners. The bar association maintained that the office should be staffed exclusively by individuals having no affiliation with the agency involved in the administrative action.