

1.5 AMENDMENTS TO THE RULEMAKING PROCEDURES 1975-1995

Because of the new constraints posed by Chapter 380 and rules adopted by the office of hearing examiners in response to the new statute, demand soon grew for less restrictive and less costly procedures. In 1977, Chapter 443 was enacted to reduce some of the time and cost restraints imposed by the 1975 amendments. Various time and publication requirements were reduced, and alternative rulemaking procedures were enacted for certain categories of rules.¹ One way the legislature sought to control rulemaking costs was to expressly prohibit agencies from adopting a rule that simply repeated statutory language.²

Occasionally, legislators themselves urged a retrenchment from the 1975 amendments when they realized that implementation of their favorite legislative programs was being slowed by these new time requirements. An example of a response to this concern was 1977 Minnesota Laws Chapter 443, which expanded opportunities for "temporary" rulemaking.³

After 1977, the pendulum continued to swing in the direction of further loosening of the 1975 APA reforms. Such action was encouraged by commentators such as Professor Carl Auerbach of the University of Minnesota Law School, who conceded that the 1977 changes were helpful, but complained that the Minnesota APA was still in need of further simplification and reform. Auerbach described the rulemaking procedure as "unnecessarily complicated, cumbersome, costly and time-consuming."⁴ He concluded that the process scattered authority and responsibility, had become overly judicialized, and, ultimately discouraged rulemaking.⁵ He argued further that the APA encouraged competition between the office of hearing examiners and the office of the attorney general.⁶ Auerbach called for a series of additional reforms designed to streamline the rulemaking process.⁷

The suggestions of Professor Auerbach, the complaints of state agencies, and the recommendations of the administrative law section of the state bar association as well as informal groups such as the 1979 Task Force on the Administrative Procedure Act, prompted further legislative consideration of APA amendments. The result was a series of amendments between 1979 and 1984 that clarified, streamlined, and improved the cost efficiency of APA rulemaking.

Perhaps the most significant of these changes was the enactment in 1980 of Chapter 615. The act made a number of APA changes, but the most important change allowed state agencies to engage in "noncontroversial" rulemaking if an agency determined that its proposed rule was not likely to be challenged.⁸ To take advantage of noncontroversial rulemaking, the agency was required to publish notice of its intentions, with a copy of the proposed noncontroversial rule, in the *State Register*.⁹ If less than seven persons (now 25

1 1977 Minn. Laws ch. 443, §2, at 1218-20.

2 1977 Minn. Laws ch. 443, § 2, at 1218.

3 1977 Minn. Laws ch. 443, §2, at 1219.

4 Auerbach, *Administrative Rulemaking in Minnesota*, 63 MINN. L. REV. 151 (1979).

5 *Id.*

6 *Id.*

7 *Id.*

8 1980 Minn. Laws ch. 615, §47, at 1561.

9 1980 Minn. Laws ch. 615, §47, at 1562.

persons) objected, the agency was permitted to adopt its rule without public hearing.¹⁰ However, review by the attorney general was still required.¹¹

Chapter 615 also made significant changes in the roles of the attorney general and the chief hearing examiner relating to the determination of "substantial change." The issue of "substantial change" or "substantial difference" deals with the extent to which an agency may change a rule during the rulemaking proceeding. This issue had long plagued administrative law practitioners and arose when the final form of the rule as adopted by the agency differed from the rule as proposed. Although Chapter 615 attempted to deal with this issue by dividing functions between both the attorney general and the chief hearing examiner, the issue continued to cause some uncertainty.¹²

In the early 1980s, two other legislative enactments and one action of the revisor of statutes are worthy of note. Before the publication of 1984 Minnesota Statutes, the revisor exercised his discretion and recodified the APA into a separate chapter of the codified laws of the state. Thereafter, Minnesota Statutes Chapter 14, was set aside exclusively for laws governing rulemaking and contested case provisions, the operations of the LCRAR, judicial review of administrative actions, and the structure and duties of the (renamed) Office of Administrative Hearings (OAH).

In 1983, the legislature enacted Chapter 210, which clarified the responsibilities of the revisor of statutes with respect to rulemaking. The revisor began to share, with the attorney general and the chief administrative law judge, various responsibilities for drafting and reviewing rules.¹³ Form review is now the responsibility of the revisor, and the revisor's staff has drafting, codification, and technical change authority for rulemaking.¹⁴ Other changes by the 1983 legislature include clarifications of attorney general responsibilities and time lines.¹⁵

Chapter 640 of the 1984 enactments contains a number of clarifications of APA provisions. The subjects of these 1984 changes include approval of rule form, hearing and publication requirements, correction of defects, and emergency (formerly temporary) rulemaking.¹⁶

There were relatively few significant amendments to the APA from 1985 through 1994. In 1987, the chief administrative law judge was given explicit authority to hear cases, and to appoint workers' compensation judges.¹⁷ In 1989, the small business in rulemaking act (since repealed) was broadened to specifically include farms and other agricultural operations¹⁸ as well as public utilities and telephone companies.¹⁹ The legislature also provided that a notice had to be published in the *State Register* before rules exempt from the APA have the force and effect of law.²⁰ In 1989, the LCRAR was given authority to

¹⁰ *Id.*

¹¹ *Id.*

¹² 1980 Minn. Laws ch. 615, §6, at 1544-45.

¹³ 1983 Minn. Laws ch. 209, §2, at 604.

¹⁴ 1983 Minn. Laws ch. 209, §1, at 602.

¹⁵ 1983 Minn. Laws ch. 209, §8, at 607.

¹⁶ 1984 Minn. Laws ch. 641, §§1-34, at 1783-95.

¹⁷ 1987 Minn. Laws ch. 332, §1, at 962

¹⁸ 1989 Minn. Laws ch. 131, §1, at 263

¹⁹ 1989 Minn. Laws ch. 87 §1, at 194.

²⁰ 1989 Minn. Laws ch. 155, §1, at 383.

periodically review statutory exemptions to the rulemaking provisions of Chapter 14.²¹ In addition, several rulemaking exemptions were deleted²², and one exemption was added in the rules for the commissioner of corrections relating to the placement and supervision of inmates serving a supervised release term.²³ In 1990, the legislature added a statement of purpose to the APA, which was intended to be an indication of legislative intent in the application of the APA.²⁴

In 1991, the Department of Natural Resources lost its exemption for game and fish rules, and a special expedited procedure was created to adopt these rules.²⁵ The same year, an exemption was added for revenue notices and tax bulletins from the commissioner of revenue.²⁶ The 1992 legislature passed two important additions to the APA. The first was a “harmless error” provision intended to address an agency complaint that too many rules were being ruled invalid by the attorney general and OAH due to technical violations. The statute directed the attorney general and the administrative law judge reviewing the rule to disregard errors in a rulemaking proceeding unless the defect deprived someone of an opportunity to participate.²⁷ The same statute also authorized “dual notice” rulemaking, a procedure that agencies had been using for several years without explicit legislative approval.²⁸ Under dual notice rulemaking, an agency may give notice of a hearing on the rules but later cancel the hearing unless 25 persons request it be held.²⁹ The legislature directed that there must be at least ten calendar days between the last day for requesting a hearing and the day of the hearing to allow interested persons time to prepare.³⁰ The 1992 legislature also extended the time period for response to earlier submissions or comments from three business days to five working days.³¹

The legislature adopted only two minor changes to the APA in 1993 and 1994. In 1993, the requirements of the notice of intent to solicit outside information were expanded to require agencies to include within the notice information on any advisory task force formed, and mail the notice to its rulemaking list.³² In 1994, the commissioner of commerce was granted an exemption from rulemaking for uniform real estate conveyancing forms.³³

21 1989 Minn. Laws ch. 155, §2, at 383.

22 1989 Minn. Laws ch. 155, §5, at 385.

23 1989 Minn. Laws ch. 290, art. 2, §1, at 1586

24 1990 Minn. Laws ch. 422, §1, at 422.

25 1991 Minn. Laws ch. 259, §3, at 926. The procedure was removed from the APA and put in the DNR statutes in 1995.

26 1991 Minn. Laws ch. 291, art. 21, §1, at 1639.

27 1992 Minn. Laws ch. 494, §3, at 399.

28 1992 Minn. Laws ch. 494, §5, at 400.

29 *Id.*

30 *Id.*

31 1992 Minn. Laws ch. 494, §3, at 399.

32 1993 Minn. Laws ch. 370, §10, at 2692

33 1994 Minn. Laws ch. 388, art. 1, §1, at 27.