

16.4 AGENCY POLICYMAKING AS IMPROPER OR ILLEGAL RULEMAKING

State agencies make policy in a variety of ways. Agency administrators make policy on a daily basis as they make informal decisions. These decisions do not usually involve matters of great public concern, but they constitute the most common form of agency policymaking. As the following section of this chapter explains, agencies also make policy in the course of contested case proceedings, which is the adjudicatory function of the agency. The adoption of new policies through a trial-type hearing procedure is probably more common at the federal level than at the state level. However, the Minnesota Public Utilities Commission frequently adopts new public policy in the course of its ratemaking proceedings, which are conducted as contested cases.

The most procedurally well-defined method for making policy is rulemaking under the APA. The adoption of permanent rules under the APA requires an agency to complete a series of steps allowing for meaningful public input into the substance of the rule being adopted. Rulemaking under the APA, however, can take a substantial amount of time and can be expensive for the agency, at least where the rule is challenged. Consequently, state agencies sometimes seek other methods of disseminating their policy determinations. Agencies must, of course, distribute written information and interpretations to their employees and other agencies and to the public in order to perform their duties properly. Most of these written statements are merely explanations or instructions and are not controversial. However, the issuance of policy statements by state agencies has been described as improper or illegal rulemaking where the appellate courts have discerned a legislative intent to adopt the policy through the APA.¹

16.4.1 Guidelines, Bulletins, and Policy Statements

The administrative policymaking device that has sparked both judicial and legislative examination is the issuance of a written statement describing the agency's policy, outside and apart from rulemaking or adjudication. Such statements are often described as internal guidelines, bulletins, manuals, policy statements, directives, or instructions. The issuance of a policy statement by an agency without recourse to APA rulemaking allows the agency to retain more discretion than if it had adopted a rule for several reasons. First, the agency is not required to obtain the public input guaranteed by the APA and thus has more latitude to adopt policies of its own choosing. Second, the agency retains greater procedural flexibility by being able to implement, withdraw, or modify its policy statement without an APA proceeding of any type. Third, the agency has greater discretion in whether or not to enforce its policy in every case. However, an agency issuing a policy statement or guideline must accept the less certain effect of such a device as opposed to a duly adopted rule. While rules have the effect of law, policy statements or guidelines do not. The question of whether policy statements are entitled to any deference in a contested case or on judicial review is considered below.

The proliferation of policy statements and guidelines by certain state agencies led to the 1975 revision of the APA, placing on agencies, for the first time, detailed procedural

¹ Cable Commc'ns Bd. v. Nor-West Cable Commc'ns P'ship, 356 N.W.2d 658, 667-68 (Minn. 1984).

requirements for rulemaking.² The issuance of guidelines and policy statements by state agencies also has provoked critical examination by the courts regarding whether the statements constitute rules within the meaning of the APA. The Minnesota Supreme Court has characterized the issuance of written policy statements or interpretations of rules or statutes as “improper” or “illegal” rulemaking where the legislature intended the policy-making to be governed by the APA.³ The inquiry is of greater significance in Minnesota than other jurisdictions because interpretative rules—those that make specific the law enforced by the agency—are required to be adopted through the APA, along with substantive and procedural rules.⁴

The beginning point for most judicial inquiries about the effect of policy statements is a consideration of whether the statement comes within the definition of a rule. As the first section of this chapter indicates, the definition of *rule* contained in the APA is very broad. It includes “every agency statement of general applicability and future effect . . . adopted to implement or make specific the law enforced or administered by that agency or to govern its organization or procedure.”⁵ Most policy statements or guidelines fall within this very inclusive definition. The definition does, however, contain an important exception for “rules concerning only the internal management of the agency or other agencies that do not directly affect the rights of or procedure available to the public.”⁶ The courts have found that some policy statements are simply guidelines for internal management of the agency and, as such, are statutorily excepted from the rulemaking procedure.⁷ Internal guidelines are

² Triplett & Nobles, *Rulemaking under Minnesota's Administrative Procedure Act: 1975 Amendments*, 43-6 HENNEPIN LAWYER 14 (July-August 1975).

³ *Cable Commc'ns Bd.*, 356 N.W.2d at 667-68. Unadopted “rules” can only be challenged in a contested case proceeding, *not* in a preenforcement action under MINN. STAT. § 14.44. *Minnesota Ass'n of Homes for the Aging v. Dept. of Human Serv.*, 385 N.W.2d 65, 69 (Minn. Ct. App. 1986).

⁴ See MINN. STAT. § 14.38, subds. 1-3 (2014); *St. Otto's Home v. Dep't of Human Servs.*, 437 N.W.2d 35, 42 (Minn. 1989); *Minnesota-Dakotas Retail Hardware Ass'n v. State*, 279 N.W.2d 360, 364 (Minn. 1979); *Dullard v. Minn. Dep't of Human Servs.*, 529 N.W.2d 438, 445 (Minn. Ct. App. 1995).

⁵ MINN. STAT. § 14.02, subd. 4 (2014). An application of the statute is illustrated by *Hanna Mining Co. v. Minn. Pub. Utils. Comm'n*, 375 N.W.2d 550, 553 (Minn. Ct. App. 1985). See also *Minn. Chamber of Commerce v. Minn. Pollution Control Agency*, 469 N.W.2d 100, 105 (Minn. Ct. App. 1991) (“The development of site-specific criteria does not come within the definition of a rule because it is not an agency statement of general applicability and future effect.”). *But cf. In re Proposal by Lakedale Tel. Co. to Offer Three Additional Class Servs.*, 561 N.W. 2d 550, 555 (Minn. Ct. App. 1997) (concluding that MPUC's decision to require a \$1 per activation fee, although based on policy concerns, was not a statement of general applicability and future effect and did not, therefore, require formal rulemaking procedures).

⁶ MINN. STAT. § 14.03, subd. 3(a)(1) (2014).

⁷ *E.g., In re Alleged Labor Law Violation of Chafoulias Mgmt. Co.*, 572 N.W.2d 326, 332 (Minn. Ct. App. 1997) (holding that contested case hearing is not a procedure affecting the rights of or procedures available to the general public but concerns only the parties to that action, and Relator was, therefore, not deprived of due process when the Department of Labor and Industry did not adopt rules regarding procedure for filing exceptions); *In re Assessment Issued to Leisure Hills Health Care Ctr.*, 518 N.W.2d 71, 74 (Minn. Ct. App. 1994) (holding that department is not required to promulgate its inspection procedures pursuant to the rulemaking requirement of the APA, because the department's inspection procedures involve only the internal management of the agency and neither directly affect the rights of the public or the procedures available to the public); *Stony Ridge & Carlos View Terrace Ass'n v. Alexander*, 353 N.W.2d 700, 703 (Minn. Ct. App. 1984). ; *But see Evenson v. Minn. Dep't of Human Servs.*, 489 N.W.2d 256, 261 (Minn. Ct. App. 1992) (holding that by requiring an individual to rent out her property, the commissioner

described by the courts as those statements that are “so remote from the public as to be exempt” from the rulemaking process.⁸

The Minnesota court of appeals found that an “internal guideline” of the commissioner of public safety that determined the length of a driver's license revocation was within the definition of a rule. Because it had not been adopted through the APA, the guideline could not have the force of law. The court of appeals determined, however, that this only deprived the revocation period in the guideline of “its conclusive presumption of reasonableness that a formal rule would provide.” The court held that the specified revocation period was still presumptively valid but was open to greater scrutiny. The court remanded the case to the trial court for a determination of the appropriate length of the revocation.⁹ In another driver's license case involving the department of public safety, the court of appeals decided that internal guidelines, although without the force of law, could be followed if the resulting agency action was not arbitrary or unreasonable.¹⁰ In a similar approach, the Iowa Supreme Court has permitted an unadopted “rule” to be considered as a “relevant factor,” but not as a valid rule with the force of law.¹¹

16.4.2 Permissible Interpretation Versus Improper Adoption

As stated in the previous section, the starting point for most judicial inquiries about the effect of policy statements, or other agency interpretations, is whether the statement comes within the definition of a rule, “every agency statement of general applicability and future effect, adopted to implement or make specific the law enforced or administered by that agency or to govern its organization or procedure.” Because interpretative rules “make specific” the law administered by agencies, they are subject to the rulemaking requirements of the APA, if not they are invalid and cannot be used as the basis for agency action.¹²

In applying this rule, the question or test considered by the Minnesota appellate courts in cases of alleged illegal rulemaking is whether the agency policy is a permissible interpretation of a rule or statute consistent with its plain meaning, or whether it constitutes the improper adoption of a new rule. The answer to this question requires a judgment by the court about how far the agency interpretation varies from the existing rule or statute.

If an interpretation is consistent with the plain meaning of the rule or statute interpreted, the agency action is authorized by the statute itself, and the fact that no rule was adopted does not render the interpretation invalid, although it does not have the force and effect of

has evidenced an intent to implement a policy that some people must rent their property to make it marketable for MSA purposes, and construing the commissioner's policy as an unadopted rule and therefore invalid); *In re Appeal of Jongquist*, 460 N.W.2d 915, 916 (Minn. Ct. App. 1990) (holding that Department of Jobs and Training, Division of Rehabilitative Services had no authority to require disabled persons to take out loans in absence of rule adopted pursuant to APA, because division procedures directly affected the rights of or procedures available to the public and did not come within any statutory exception).

⁸ *Johnson Bros. Wholesale Liquor Co. v. Novak*, 295 N.W.2d 238, 242 (Minn. 1980).

⁹ *Benson v. Comm'r of Pub. Safety*, 365 N.W.2d 799, 801 (Minn. Ct. App. 1984).

¹⁰ *Schultz v. Comm'r of Pub. Safety*, 365 N.W.2d 304, 306-7 (Minn. Ct. App. 1985).

¹¹ *Young Plumbing & Heating Co. v. Iowa Natural Res. Council*, 276 N.W.2d 377, 383 (Iowa 1979).

¹² *In re Salary Determinations Affecting Emps. of the City of Duluth*, 820 N.W. 2d 563 (Minn. Ct. App. 2012).

law.¹³ The interpretation is valid already based on the rule or statute. The court will look to the plain words of the statute in making this determination. Conversely, if the interpretation is not within the plain meaning of the statute or rule, the agency action is not authorized by the statute itself and the fact that no rule was adopted renders the interpretation invalid.¹⁴

In considering whether an agency is merely interpreting a rule, the Minnesota Supreme

¹³ *Flores v. Dep't of Jobs & Training*, 411 N.W.2d 499, 504 (Minn. 1987) (citing *Dumont v. Commissioner of Taxation*, 154 N.W.2d 196, 199 (Minn. 1967)) (holding unemployment compensation rule imposed additional requirements beyond those required by statute and was therefore inconsistent with the statute); *Cable Commc'ns Bd. v. Nor-West Cable Commc'ns P'ship*, 356 N.W.2d 658, 667 (Minn. 1984); *Sellner Mfg. Co. v. Comm'r of Taxation*, 202 N.W.2d 886, 888-89 (Minn. 1972); *see also Boedingheimer v. Lake Country Transp.*, 485 N.W.2d 917, 921 (Minn. 1992) (reversing a rule interpretation by the Department of Labor and Industry but holding that, if properly interpreted, the rule was valid as consistent with the governing statute); *City of Mapleton Cmty. Home, Inc., v. Minn. Dep't of Human Servs.*, 391 N.W.2d 798, 801 (Minn. 1986) (holding not all interpretations constitute interpretative rules – if the agency's interpretation corresponds with the plain meaning of the rule it construes, the agency is deemed not to have adopted a new rule); *Care Providers of Minn., Inc. v. Gomez*, 545 N.W.2d 45, 48 (Minn. Ct. App. 1996) (holding that department's internal use of assessment letters is means of effectuating its interpretation of existing law and does not involve the promulgation of a new rule); *Faribault Cnty. v. Minn. Dep't of Transp.*, 472 N.W.2d 166, 169 (Minn. Ct. App. 1991) (concluding that DOT's notice regarding state-aid funds constituted an announcement of a clear statutory requirement that the prevailing wage law be applied to state-aid funded projects contracted for by counties and cities and is not a rule); *City of Morton v. Minn. Pollution Control Agency*, 437 N.W.2d 741, 746-47 (Minn. Ct. App. 1989) (holding administrative agency exceeds its statutory authority when it promulgates a rule that is inconsistent with the agency's enabling legislation); *Good Neighbor Care Ctr. Inc. v. Minn. Dep't of Human Servs.*, 428 N.W.2d 397, 403-04 (Minn. Ct. App. 1988) (finding commissioner's interpretation of rules and statute was consistent with plain meaning and not an unpromulgated rule); *Nw. Bell Tel. Co. v. Minn. Pub. Utils. Comm'n*, 420 N.W.2d 646, 650 (Minn. Ct. App. 1988) (determining that MPUC interpretation of statutory terms "telephone service" and "public" was not adoption of new rule but mere interpretation); *Christian Nursing Ctr. v. Dep't of Human Servs.*, 419 N.W.2d 86, 91 (Minn. Ct. App. 1988) (holding that even though DHS interpretation of rule was not longstanding, it is consistent with the plain meaning of the rule and is not a new rule).

¹⁴ *St. Otto's Home v. Dep't of Human Servs.*, 437 N.W.2d 35, 43 (Minn. 1989) (holding commissioner's definitions inconsistent with the plain meaning of the rule); *White Bear Lake Care Ctr., Inc. v. Minn. Dep't of Pub. Welfare*, 319 N.W.2d 7, 8 (Minn. 1982); *In re Rate Appeal of Elim Homes, Inc. v. Minn. Dep't of Human Servs.*, 575 N.W.2d 845, 849 (Minn. Ct. App. 1998) (holding Commissioner of Health's interpretation of the nursing home rate statute was not an improper promulgation of a new rule, but was an interpretation and application of the plain language of the statute); *Dullard v. Minn. Dep't of Human Servs.*, 529 N.W.2d 438, 445 (Minn. Ct. App. 1995) (holding DHS interpretation of medical assistance benefits statute was inconsistent with statute and, because the interpretation was not adopted pursuant to the APA, it was not binding on the court); *Donovan Contracting of St. Cloud, Inc. v. Minn. Dep't of Transp.*, 469 N.W.2d 718, 722 (Minn. Ct. App. 1991) (determining that the illegal rule was not consistent with the plain meaning of the statute and concluding that the position of the department would not be viewed by a reasonable person as having a reasonable basis in fact or law); *In re Application of Crown CoCo, Inc.*, 458 N.W.2d 132, 137 (Minn. Ct. App. 1990) (finding Petrofund Board's action not consistent with the plain meaning of the act and, therefore, board's policy determination to make insured costs non-reimbursable an invalid rule which must be adopted properly through the APA); *Sa-Ag, Inc. v. Minn. Dep't of Transp.*, 447 N.W.2d 1, 5 (Minn. Ct. App. 1989) (holding agency interpretation of a statutory term in an "addendum" was unauthorized rulemaking where the statutory term was subject to more than one interpretation); *Ebenezer Society v. Minn. Dep't of Human Servs.*, 433 N.W.2d 436, 439 (Minn. Ct. App. 1988) (holding new standard introduced into Rule 50 was not consistent with plain meaning and rule was not ambiguous, therefore interpretation was invalid).

Court also has held that where the rule is ambiguous and the interpretation advanced by the agency is a long-standing one, the agency is deemed to be interpreting its rule rather than adopting a new rule.¹⁵ This holding is consistent with the custom of giving judicial deference to an agency's interpretation of its own rule where the rule is ambiguous and the interpretation is long-standing.¹⁶ Conversely, if an interpretation has not been consistently applied in the past, a court may cite this as an important factor and find it to be an invalid interpretative rule.¹⁷ In general, state agency construction of state statutes through agency rules are presumed correct, often because of the agency's technical expertise.¹⁸ The Minnesota courts have devised their own rules of deference to state agency construction of state statutes.¹⁹ Under federal law, federal courts defer to agency construction of federal statutes when it is clear Congress intended to give the agency the authority to make rules.²⁰ The basic test for deference is articulated in *Chevron U.S.A. Inc. v. Natural Resources Defense Council, Inc.*²¹ In cases where Minnesota courts are reviewing state agency construction of federal law in an area of agency expertise, the Minnesota courts appear to follow the *Chevron* deference rules.²²

16.4.2(1) Consistency with Adopted Rule or Statute as a Factor

In a number of cases, the courts have found mere interpretation consistent with the plain meaning of the rule or statute when examining an agency policy. The Minnesota Supreme Court examined a department of public welfare (now the department of human services) policy bulletin that directed counties to consider a recipient's income tax refund as income available to meet needs. A consequence of this directive would be a reduction in the

¹⁵ *White Bear Lake Care Ctr.*, 319 N.W.2d at 8; see also *In re Administrative Order Issued to Wright Cnty.*, 748 N.W. 2d 398 (Minn. Ct. App. 2010); *In re Deregulation of the Installation & Maint. of Inside Wiring*, 420 N.W.2d 650, 659 (Minn. Ct. App. 1988) (finding a PUC show-cause procedure used for ten years without challenge was mere statutory interpretation and not adoption of a new rule); *In re Application of Crown CoCo, Inc.*, 458 N.W.2d at 137 (finding Petrofund Board's action not consistent with the plain meaning of the act and, therefore, board's policy determination to make insured costs non-reimbursable an invalid rule which must be properly adopted through the APA); Note, *Definition of "Rule" under the Minnesota Administrative Procedure Act*, 7 WM. MITCHELL L. REV. 665, 681 (1981).

¹⁶ *St. Otto's Home*, 437 N.W.2d at 40; *Resident v. Noot*, 305 N.W.2d 311, 312 (Minn. 1981); *In re Application of Q Petroleum*, 498 N.W.2d 772, 776 (Minn. Ct. App. 1993) (holding where rule was ambiguous, the agency's interpretation will be upheld because its requirement to submit a formal CAD letter or closure letter before its application would be considered is reasonable and consistent with plain meaning of rule).

¹⁷ *Wenzel v. Meeker Cnty. Welfare Bd.*, 346 N.W.2d 680, 684 (Minn. Ct. App. 1984); *White Bear Lake Care Ctr.*, 319 N.W.2d at 9.

¹⁸ *In re Excess Surplus Status of Blue Cross & Blue Shield of Minn.*, 624 N.W.2d 264, 278 (Minn. 2001); *St. Otto's Home v. Minn. Dep't of Human Servs.*, 437 N.W.2d 35, 40 (Minn. 1989); *Reserve Mining Co. v. Herbst*, 256 N.W.2d 808, 824-25 (Minn. 1977).

¹⁹ *In re Excess Surplus Status of BCBS Minn.*, 624 N.W.2d at 278 (Minn. 2001); *St. Otto's Home v. Minn. Dep't of Human Servs.*, 437 N.W.2d 35, 39-40 (Minn. 1989); *Reserve Mining Co. v. Herbst*, 256 N.W.2d 808, 24-25 (Minn. 1977).

²⁰ *United States v. Mead Corp.*, 533 U.S. 218, 229 (2001); *Chevron U.S.A. Inc. v. Natural Res. Def. Council, Inc.*, 467 U.S. 837, 865-66 (1984).

²¹ 467 U.S. 837 (1984).

²² See, e.g., *In re Cities of Annandale & Maple Lake Permit Issuance for the Discharge of Treated Wastewater*, 731 N.W.2d 502, 513-14 (Minn. 2007) (applying *Chevron* deference where state agency "legally charged with the day-to-day enforcement and administration of [federal] regulation.").

recipient's welfare grant. The court determined that the existing substantive federal law already was clear on this point and that the policy bulletin "constitutes merely a restatement of existing welfare policy and a directive concerning internal management requiring notification by county welfare agencies to welfare recipients of the existing policy with respect to income tax refunds."²³

An allegation of improper rulemaking was also raised in litigation involving the St. Paul cable television franchise, where the Minnesota Supreme Court considered the cable communication board's interpretation of its rule requiring a contested case when an application for a cable franchise is "substantially contested." The board had employed a three-part test to determine if an application was substantially contested: first, whether the allegations were within the board's jurisdiction; second, whether each allegation was material to the disposition; and third, whether the board already had sufficient evidence to resolve each allegation. The court held that the board's interpretation was consistent with the plain meaning of the rule and did not constitute improper rulemaking.²⁴ Similarly, where the department of health interpreted a rule requiring "practical plumbing experience" to mean actual experience physically installing plumbing systems, the court simply found that the agency's interpretation of its rule was "consistent" with the rule and its authorizing statute.²⁵ In another department of public welfare case, the supreme court found that the agency's interpretation of its rule was "reasonable" in light of the statutory directive and the proper and efficient operation of the agency program. Even though the interpretation was different from the literal wording of the rule, the court examined the overall statutory scheme in finding that no illegal rulemaking had occurred.²⁶

Similarly, the supreme court found that the DHS's interpretation of the "rate limitations" language reflected the plain meaning of the rule, as well as the plain meaning of the statute the rule was adopted to implement and was not improper rulemaking. In this case, no additional rulemaking was required to change the words of a rule into mathematical steps. The court held that the mathematical ratio used by the DHS to adjust property-related costs under temporary Rule 50 did not need to be adopted under the Minnesota Administrative Procedure Act to be valid.²⁷

In *Application of Peoples Natural Gas Co.*,²⁸ the supreme court considered the effect of

²³ *Wacha v. Kandiyohi Cnty. Welfare Bd.*, 242 N.W.2d 837, 839 (Minn. 1976); *see also Faribault Cnty. v. Minn. Dep't of Transp.*, 472 N.W.2d 166, 169 (Minn. Ct. App. 1991) (holding DOT notice on availability of state-aid funds was not a rule when it was an announcement of a clear statutory requirement that the prevailing wage law be applied to state-aid funded projects contracted for by counties and cities).

²⁴ *Cable Commc'ns Bd. v. Nor-West Cable Commc'ns P'ship*, 356 N.W.2d 658, 668 (Minn. 1984); *see also Voettiner v. Comm'r of Educ.*, 376 N.W.2d 444, 451 (Minn. Ct. App. 1985).

²⁵ *Jones v. Minn. State Bd. of Health*, 301 Minn. 481, 483, 221 N.W.2d 132, 134 (1974).

²⁶ *Koronis Manor Nursing Home v. Dep't of Pub. Welfare*, 311 Minn. 375, 379, 249 N.W.2d 448, 451 (Minn. 1976).

²⁷ *City of Mapleton Cmty. Home, Inc., v. Minn. Dep't of Human Servs.*, 391 N.W.2d 798, 802 (Minn. 1986); *Care Providers of Minn., Inc. v. Gomez*, 545 N.W.2d 45, 48 (Minn. Ct. App. 1996) (holding DHS's use of assessment letters is merely a means of effectuating its interpretation of existing law and does not involve the promulgation of a new rule); *In re Ins. Agent License of Casey*, 540 N.W.2d 854, 859 (Minn. Ct. App. 1995), *rev'd on other grounds*, 543 N.W.2d 96 (Minn. 1996) (finding Commissioner of Commerce's interpretation of the rule was "overly narrow and rigid," but court deferred to it as applied to the facts of this case).

²⁸ 389 N.W.2d 903 (Minn. 1986).

a policy statement issued by the Public Utilities Commission, which interpreted two statutes. The court, in finding that the MPUC correctly interpreted and applied the statutory provisions in this case, stated:

That MPUC may have articulated its construction of a statute in a rule improperly promulgated does not render a correct interpretation incorrect. (citation omitted) While slavish adherence to a defective rule might well be troublesome, MPUC recognizes that, unlike a properly promulgated rule, its policy statement does not have the force and effect of law. The statement expressly noted that in each case the policy set out in the statement will merely provide the starting point for deliberation, “but the final decision will depend upon the facts of the case.”²⁹

The Minnesota Supreme Court clarified this language in the subsequent cases of *St. Otto’s Home v. Minnesota Department of Human Services*, and *In re Application of Crown CoCo, Inc.*³⁰ In *St. Otto’s Home* the court observed that *Peoples Natural Gas* should not be read to stand for the principle that if the agency’s interpretation of a statute or rule is correct, it is irrelevant that the rule was improperly adopted.³¹ In *St. Otto’s Home*, the court stated that it normally invalidates an agency’s action when the agency fails to follow proper rulemaking procedures. It proceeded to reverse a medical assistance rate decision of the human services department because the commissioner’s interpretation of a rule constituted unpromulgated rulemaking at variance with the Administrative Procedure Act.³² The court distinguished the two cases by stating that in *Peoples Natural Gas* the PUC issued its policy statement a year in advance and recognized that it did not have the effect of law while DHS’s action was done without notice and had the effect of law because it created new mandatory requirements.³³

16.4.2(2) *Inconsistency with Adopted Rule or Statute as a Factor*

Where the agency’s policy is inconsistent with its adopted rule, the courts have often invalidated that policy or interpretation. The Minnesota Supreme Court invalidated a department of public welfare decision to reduce developmental achievement center services for mentally retarded persons from five days to three days per week. The rule in question required the services to be provided to all persons who needed them in accordance with an individual service plan. Although the plaintiffs clearly needed services five days a week, the department decided to reduce the services to three days a week because of fiscal restrictions. The court held that the reduction violated the rule and that any change in the

²⁹ *Peoples Natural Gas Co.*, 389 N.W.2d 903, 906 (Minn. 1986).

³⁰ *St. Otto’s Home v. Dep’t of Human Servs.*, 437 N.W.2d 35 (Minn. 1989); *In re Application of Crown CoCo, Inc.*, 458 N.W.2d 132 (Minn. Ct. App. 1990) (stating that in *Peoples Natural Gas*, the agency’s action fell within the case-by-case exception to the APA rulemaking requirements. In this case, the Petrofund Board’s action did not come within the case-by-case exception to rulemaking).

³¹ *St. Otto’s Home*, 437 N.W.2d at 44; see also *Good Neighbor Care Ctr. Inc. v. Minn. Dep’t of Human Servs.*, 428 N.W.2d 397, 402-03 (Minn. Ct. App. 1988) (stating if an interpretation is consistent with the plain meaning of the statute or rule, the agency’s action is authorized by the statute itself, and the fact that no rule was adopted does not render that interpretation invalid, although it does not have the force and effect of law).

³² *St. Otto’s Home*, 437 N.W.2d at 43, 45.

³³ *Id.* at 44.

implementation of the rule had to be channeled through the rulemaking process.³⁴ The court in another case also invalidated the department of public welfare's practice of computing Medicaid cost change implementation on a per diem basis where the department's rule specified that the patient day figure to be used was that of the prior fiscal year but did not mention taking into account current occupancy rates.³⁵ In another approach to a similar situation, the supreme court found that a department of public welfare rule "did not prohibit" a nursing home from receiving payments for nonmedical assistance covered items and services and that the agency policy to the contrary could not stand.³⁶ The supreme court has also found that a 1992 DHS Memorandum written to its rate-setting staff regarding the "not-to-exceed-claims-paid policy," as applied, did not reflect a proper interpretation of Rule 50's related organization rule and was inconsistent with DHS's "not-to-exceed-premiums policy." Accordingly, the court concluded that the Memorandum was an unpromulgated rule that was not entitled to deference.³⁷

A determination of illegal rulemaking does not always weigh against an agency. The court of appeals stated that the interpretation of the nursing home welfare rate rule urged by the nursing home would constitute improper promulgation of a new rule if adopted by the department of public welfare.³⁸

The Minnesota Supreme Court found that the commissioner of public safety's practice of requiring consent from the owner of a registered brand of intoxicating liquor before that brand could be imported by an out-of-state wholesaler was, in effect, a rule that interpreted the statute. The court observed that the policy could not be found to be a "directive" that merely interpreted a statute, since there was no existing law on the point. The court found that the practice was invalid and stated that the commissioner could not continue enforcing the policy without adopting it under the APA.³⁹ Similarly, the supreme court found that the Minnesota Public Utilities Commission had no authority to award an intervenor compensation based on a "statement of policy" it had issued in rate cases. Because the policy had not been adopted through the APA, it had no force of law.⁴⁰ The court of appeals has determined that the long-standing unwritten practice of the transportation regulation board and its predecessors requiring motor carriers to intervene as objectors rather than appearing as witnesses for another objector was an unadopted rule and was therefore not

³⁴ Swenson v. State Dep't of Pub. Welfare, 329 N.W.2d 320, 324 (Minn. 1983).

³⁵ White Bear Lake Care Ctr., Inc. v. Minn. Dep't of Pub. Welfare, 319 N.W.2d 7, 9 (Minn. 1982).

³⁶ Resident v. Noot, 305 N.W.2d 311, 317 (Minn. 1981); *In re* Application of Orr, 396 N.W.2d 657, 663 (Minn. Ct. App. 1986) (holding agency cannot institute an absolute moratorium by consistently denying permits for activities allowed under its rule without first engaging in rulemaking procedures).

³⁷ *In re* Rate Appeal of Benedictine Health Ctr., 728 N.W.2d 497, 507 (Minn. 2007).

³⁸ Richview Nursing Home v. Minn. Dep't of Pub. Welfare, 354 N.W.2d 445, 456 (Minn. Ct. App. 1984).

³⁹ Johnson Bros. Wholesale Liquor Co. v. Novak, 295 N.W.2d 238, 242-43 (Minn. 1980); *see also In re* Application of Crown CoCo, Inc., 458 N.W.2d 132, 136 (Minn. Ct. App. 1990); Sa-Ag, Inc. v. Minn. Dep't of Transp., 447 N.W.2d 1, 5 (Minn. Ct. App. 1989) (holding trial court properly enjoined enforcement of DOT "addendum" which interpreted statutory term); Ebenezer Society v. Minn. Dep't of Human Servs., 433 N.W.2d 436, 439 (Minn. Ct. App. 1988) (finding standard not adopted as rule was invalid); Good Neighbor Care Ctr. Inc. v. Minn. Dep't of Human Servs., 428 N.W.2d 397, 402 (Minn. Ct. App. 1988) (rules not adopted in accordance with rulemaking procedures are invalid and cannot be used as a basis for agency action - citing this treatise, §16.4).

⁴⁰ Senior Citizen Coal. v. Minn. Pub. Utils. Comm'n, 355 N.W.2d 295, 303 (Minn. 1984).

entitled to any deference. The court directed the board to consider the excluded testimony of witnesses who had withdrawn as objectors.⁴¹

Other state and federal courts have arrived at similar dispositions. In Michigan, a policy directive of the bureau of correctional facilities allowed a prisoner to transfer only one duffel bag and one footlocker to another prison. Because the policy was not adopted pursuant to the Michigan APA, the court found it to be “without legal authority” and allowed a prisoner to transfer extra briefcases of legal materials with him.⁴² Some case law at the federal level also has assigned no weight to policy statements that have not been published in accordance with the federal APA.⁴³ The United States Supreme Court has determined that an interpretative rule in the bureau of Indian affairs manual was ineffective because it limited eligibility for general assistance benefits and had to be accomplished through a legislative rule.⁴⁴

Professor Auerbach and Professor Davis have criticized judicial dispositions that result in no weight being given to agency policy statements. Professor Auerbach has urged that a general statement of policy by an agency should be entitled to weight on judicial review even though it would not be binding on the court.⁴⁵ Professor Davis states that many nonlegislative “rules” have an actual effect even though not adopted through formal APA rulemaking.⁴⁶ It is generally true that in the federal system, an agency can issue a policy statement that has no binding effect on a court but that may be accorded some weight. The District of Columbia Court of Appeals observed that a general statement of policy was neither a rule nor a precedent but “merely an announcement to the public of the policy which the agency hopes to implement in future rulemakings or adjudications.” The court further stated that the policy was entitled to less deference than a rule or order but that the expertise and experience of the agency should not be ignored.⁴⁷ Additionally, Minnesota courts will give substantial deference to agency fact-finding.⁴⁸

16.4.2(3) *Need for Public Input and Similarity to Other Rule as Factors*

Another element that commonly appears in appellate decisions invalidating agency policies is a determination by the court that the policy advanced demands full public input and participation before it is implemented. This principle was strongly set forth by the

⁴¹ N. Messenger, Inc. v. Airport Couriers, Inc., 359 N.W.2d 302, 304-05 (Minn. Ct. App. 1984).

⁴² Schinzel v. Marquette Prison Warden, 123 Mich. App. 763, 765, 333 N.W.2d 348, 349 (1983); *see also* American Trust Adm’rs, Inc. v. Sebelius, 273 Kan. 694, 703-04, 44 P.3d 1253, 1260 (2002) (ruling agency bulletin withdrawing approval of stop loss insurance policy was an unadopted regulation and could not be enforced by the agency without rulemaking under the APA). *Contra* Detroit Edison Co. v. Mich. Pub. Serv. Comm’n, 680 N.W. 2d 512, 519-20 (Mich. 2004), *vacated in part on other grounds*, 695 N.W. 366 (Mich. 2005) (stating that some agency statements are exempt from the definition of rule or regulation and therefore not subject to same deference as would be a rule). In Minnesota, rules of the commissioner of corrections relating to internal management of institutions are exempted from APA rulemaking. MINN. STAT. § 14.03, subd. 3(b)(1) (2014).

⁴³ Hartnett v. Cleland, 434 F. Supp. 18, 21-22 (D.S.C. 1977).

⁴⁴ Morton v. Ruiz, 415 U.S. 199, 231-32, 234-35 (1974).

⁴⁵ Auerbach, *Administrative Rulemaking in Minnesota*, 63 MINN. L. REV. 151, 160 (1979).

⁴⁶ 1 K. DAVIS & R.J. PIERCE, ADMINISTRATIVE LAW TREATISE § 6.3 (5th ed. 2001).

⁴⁷ Pacific Gas & Elec. Co. v. Fed. Power Comm’n, 506 F.2d 33, 38-39 (D.C. Cir. 1974).

⁴⁸ *In re* Proposal by Lakedale Tel. Co. to Offer Three Additional Class Servs., 561 N.W. 2d 550, 554 (Minn. Ct. App. 1997).

Minnesota Supreme Court in a 1975 case in which the department of health cited a policy or practice as grounds for denying a requested review of plans for a new nursing home. The department had a policy of not reviewing new nursing home construction plans unless other nursing facilities under the same ownership were free of deficiencies for six months and the metropolitan health board had reviewed the plans for need. While it noted that the department had a duty to use existing laws and regulations in carrying out its duties, the court stated:

We feel compelled further to point out that any regulations of the Department of Health referred to by the department in any proceedings are subject to the Administrative Procedure Act, MINN. [STAT. §§] 15.01, to 15.41, and must be promulgated in accordance with that act. A person dealing with the department is entitled to proper notice of what regulations are being promulgated and are applicable to him. The purpose of the Administrative Procedure Act is to ensure that we have a government of law and not of men. Under that act, administrative officials are not permitted to act on mere whim, nor their own impulse, however well-intentioned they might be, but must follow due process in their official acts and in the promulgation of rules defining their operations.⁴⁹

The theme of public participation was also involved in a case in which the Minnesota Supreme Court considered a policy bulletin that allowed reimbursement for abortions under the medical assistance program. The court found the policy to be invalid because it was within the definition of a rule and “involved a question of social and political policy so important to the public as a whole as to require that the rulemaking process of the APA be followed.”⁵⁰ Similarly, the Minnesota court of appeals has described an aid to families with dependent children (AFDC) manual setting out welfare guidelines as an adoption of “far-reaching interpretative rules without allowing public input and debate through the procedures provided in the Administrative Procedure Act.”⁵¹ Underlying the supreme court’s

⁴⁹ *Monk & Excelsior v. Minn. State Bd. of Health*, 302 Minn. 502, 509–10, 225 N.W.2d 821, 825 (1975).

⁵⁰ *McKee v. Likins*, 261 N.W.2d 566, 577-78 (Minn. 1977); *see also Swenson v. State Dep’t of Pub. Welfare*, 329 N.W.2d 320, 324 (Minn. 1983) (“In questions of social and political importance such as the allocation of resources to the disabled, an opportunity for participation by all interested parties, as is required by MINN. STAT. § 14.14, subd. 1 (1982) is both necessary and desirable.”); *Dullard v. Minn. Dep’t of Human Servs.*, 529 N.W.2d 438, 445 (Minn. Ct. App. 1995) (stating it is inappropriate for agencies to adopt policy in a case-by-case method for issues involving broad social and political importance); *Evenson v. Minn. Dep’t of Human Servs.*, 489 N.W.2d 256, 260-61 (Minn. Ct. App. 1992); *In re Appeal of Jongquist*, 460 N.W.2d 915, 916 (Minn. Ct. App. 1990); *In re Application of Crown CoCo, Inc.*, 458 N.W.2d 132, 138 (Minn. Ct. App. 1990); *In re Hibbing Taconite Co.*, 431 N.W.2d 885, 894 (Minn. Ct. App. 1988) (holding PCA announcement of broad policy whereby parent corporations are listed as co-permittees with subsidiary corporations was important question of social and political policy requiring rulemaking).

⁵¹ *Wenzel v. Meeker Cnty. Welfare Bd.*, 346 N.W.2d 680, 684 (Minn. Ct. App. 1984). *But see Nat’l Min. Ass’n v. McCarthy*, 758 F.3d 243, 252 (D.C. Ct. App. 2014) (finding EPA’s Final Guidance to be “meaningless” as a legal matter where the guidance “does not tell regulated parties what they must do or may not do in order to avoid liability [and] imposes no obligations or prohibitions on regulated entities”); *Mid Continent Nail Corporation v. United States*, No. 10-00247, slip op. 14-118, 2014 WL 4959025, at *5-6 (Ct. Int’l Trade 2014) (upholding Department of Commerce policy formulation “from ‘pre-existing public sources’” where the public sources were publicly available at the time policy was formed, without notes-and-comments period required under federal APA).

concern that public input is an important element of policymaking is the view that proper notice of new policies or changes in policy is an essential element of due process.⁵²

Another factor of significance to the appellate courts in identifying illegal rulemaking is whether the policy asserted has, in fact, been adopted elsewhere in rule or statute. When the policy advanced by the agency appears in a similar rule administered by the agency, the supreme court has found this to be evidence that it was not intended to be included in the rule under consideration.⁵³ Similarly, where the policy asserted by the agency appears in a statute of another state but is absent in a similar statute in Minnesota, the appellate courts have found this to be an indication of an intent not to have such a policy enforced in Minnesota.⁵⁴ Another significant factor is whether or not the authorizing legislation directs the agency in a mandatory fashion to adopt rules. If the statute says the agency head must adopt rules to implement a program, then the establishment of elements of the program outside of rulemaking will not be permitted.⁵⁵

16.4.3 Conclusion

A state agency advancing an important written policy outside of rulemaking or adjudication, or a private party advocating a particular interpretation of a rule or statute apart from its plain meaning, will face close judicial scrutiny if challenged. An agency must establish that its policy is merely an internal guideline or is consistent with existing law, or is a longstanding administrative interpretation, in order to prevail. Matters of obvious public concern and debate seem likely to be deemed rules requiring APA proceedings. Substantial reinterpretations of rules or statutes that result in implementation of a policy in conflict to some degree with the rule or statute will likely be prohibited. A finding of illegal rulemaking may result in no judicial deference being given to the policy and in a reversal of the agency decision. In some cases, however, the policy may nonetheless be considered as a factor, but without the force of law.

⁵² *Monk & Excelsior v. Minn. State Bd. of Health*, 302 Minn. 502, 509-10, 225 N.W.2d 821, 825 (1975); *see also* *Citizens Comm'n Ctr. v. FCC*, 447 F.2d 1201, 1212 n.33 (D.C. Cir. 1971).

⁵³ *White Bear Lake Care Center*, 319 N.W.2d at 9.

⁵⁴ *E.N. v. Special Sch. Dist. No. 1*, 603 N.W.2d 344 (Minn. Ct. App. 1999) (calling the application of the Rules of Civil Procedure by a hearing review officer in the administrative review of a special education decision *improper rulemaking*); *Wenzel*, 346 N.W.2d at 684.

⁵⁵ *Ins. Fed'n v. Hatch*, 370 N.W.2d 636, 639 (Minn. Ct. App. 1985).