

## 16.5 RULEMAKING OR POLICYMAKING BY ADJUDICATION

### 16.5.1 Introduction

Formal agency decision-making action usually can be classified as either adjudicatory or rulemaking in nature. Since the procedural rights and the agency obligations differ—depending on whether the action is properly adjudicatory or rulemaking—an important consideration is to determine which process is more appropriate. In most cases, adjudication is a determination of individual rights or duties.<sup>1</sup> Therefore, the adjudicatory action or the decision in a contested case will be similar to an adversarial process. Adjudication will focus on individuals and questions relating to existing or past facts.<sup>2</sup> In adjudicatory action by an agency, the agency normally applies existing law or policy to the facts of a particular case with an emphasis on the past.<sup>3</sup> Rulemaking or quasi-legislative agency action is, on the other hand, the determination of general regulation regarding the future conduct of persons, groups, or classes.<sup>4</sup>

The absence of a *stare decisis* rule, which would require the agency to follow previous adjudicatory decisions, permits agencies to establish new policy easily.<sup>5</sup> Also, the use of adjudication for rulemaking is an advantage to agencies because administrative adjudication may allow the agency to limit external lobbying in regard to proposed rulemaking or to preclude *ex parte* contacts by special interest groups with agency personnel.<sup>6</sup> Agencies are often not compelled to provide motives for a specific case decision even though the adjudicatory decision may reflect significant agency policy.

The primary problem that occurs when an agency uses adjudication rather than rulemaking in establishing new policies is the retroactive law making caused by the agency's adjudicatory decision. In most cases, when an agency decision is made, it guides the future conduct of the agency. However, the retroactive effect of law making through adjudication may cause unfairness to the parties involved in the adjudication. Courts occasionally reverse previous decisions (and such reversal may impose a certain degree of unfairness on the parties). But the retroactive effect of rulemaking through adjudication is particularly

<sup>1</sup> 1 K. DAVIS & R.J. PIERCE, ADMINISTRATIVE LAW TREATISE § 6.1 (5th ed. 2001).

<sup>2</sup> Fuller, *The Forms and Limits of Adjudication*, 92 HARV. L. REV. 353 (1978); see also *In re Investigation into Intra-LATA Equal Access & Presubscription*, 532 N.W.2d 583, 590-591, (Minn. Ct. App. 1995) (holding important questions of social or political policy are more appropriately adopted as rules, while the application of specific facts to specific parties is more appropriate within an adjudicatory-type setting. Here court could not say that failure to use rulemaking to implement equal access prescription was unfair or that the commission abused its discretion).

<sup>3</sup> B. SCHWARTZ, ADMINISTRATIVE LAW § 4.17 (3d ed. 1991).

<sup>4</sup> *Id.*; see also *Handicraft Block Ltd. P'ship v. City of Minneapolis*, 611 N.W.2d 16, 20-21 (Minn. 2000); *Interstate Power Co. v. Nobles Cnty. Bd. of Comm'rs*, 617 N.W. 2d 566, 574 (Minn. 2000) (articulating differences between agencies acting in their quasi-legislative and quasi-judicial capacities); *Minn. Ctr. for Env'tl. Advocacy v. Metro. Council*, 587 N.W.2d 838, 841-42 (Minn. 1999); David Schultz, *Quasijudicial and Quasilegisative Hearings in Minnesota Law*, 60 *Bench & B. Minn.* 15 (2003) (discussing differences between the two roles for administrative agencies).

<sup>5</sup> See § 12.2.

<sup>6</sup> Asimow, *When the Curtain Falls: Separation of Functions in the Federal Administrative Agency*, 81 *COLUM. L. REV.* 759 (1981).

troublesome when agencies could, through the use of general rulemaking procedures, give notice and opportunity for comment to the interested parties in advance.

### 16.5.2 The Federal Doctrine

The United States Supreme Court considered this issue of unfairness and retroactive lawmaking and has concluded in several cases that agencies can legally choose to use adjudication in establishing new policies rather than creating those policies through the rulemaking process. In the first U.S. Supreme Court case dealing with this issue,<sup>7</sup> the Securities Exchange Commission (SEC) was not barred from establishing a new principle through the use of adjudication even though the agency had the power to announce a new rule in advance through the normal rulemaking process. The SEC had refused to approve a corporation's reorganization that would allow a profit to its directors who had purchased the corporation's stock through inside knowledge even though the SEC had not previously objected to such inside dealings. The majority of the court believed it was necessary to approve the agency action in order to ensure that future agency discretion would not be limited or hampered by restricting the use of adjudication.

However, according to Judge Friendly, the Supreme Court indicated in clear language that . . . "it was normally desirable for agencies to lay down new principles through rulemaking rather than adjudication because the administrative process allows for new laws to be created through normal agency rulemaking powers rather than the adjudicatory methods most often used by courts."<sup>8</sup> From Judge Friendly's viewpoint, the Supreme Court believed quasi-legislative rulemaking was the more appropriate approach for agencies to use in establishing rules to be applied in the future.

The United States Supreme Court affirmed its *Chenery* decision in 1969 when it decided *NLRB v. Wyman-Gordon Co.*<sup>9</sup> In that case, the National Labor Relations Board attempted to enforce a decision it had made in a previous case. In the prior case (*Excelsior Underwear, Inc.*),<sup>10</sup> the board established a new rule requiring employers to furnish lists of employees to unions involved in elections. The board did not apply the new rule to the *Excelsior* situation, but it announced that the new rule would apply in the future. In the lower court opinion of *Wyman-Gordon*, the court held that the new rule created by the NLRB should have been established through the legislative rulemaking process. The lower court, however, was reversed by the United States Supreme Court, which refused to hold that the agency did not have power to establish new rules through the particular adjudicatory process the agency had used. The Supreme Court's decision in *Wyman-Gordon* was questionable, since the *Excelsior* rule was not really established in an adjudicatory setting, nor was it developed as a rule under the APA. Under the *Wyman-Gordon* plurality opinion, the *Excelsior* rule was void; however, *Wyman-Gordon* held that since the employer was directed to submit a list of employees as part of the lower court decision, *Excelsior* would be upheld as an adjudicatory proceeding. After *Wyman-Gordon*, agencies had even less incentive to establish rules through their rulemaking process, although federal courts

<sup>7</sup> SEC v. *Chenery Corp.*, 332 U.S. 194 (1947); 1 K. DAVIS & R.J. PIERCE, ADMINISTRATIVE LAW TREATISE § 6.8 (5th ed. 2001).

<sup>8</sup> *NLRB v. Majestic Weaving Co.*, 355 F.2d 854, 860 (2d Cir. 1966).

<sup>9</sup> 394 U.S. 759 (1969).

<sup>10</sup> 156 N.L.R.B. 1236 (1966).

continue to permit agencies to choose formal rule making or ad hoc adjudication as alternative means to articulate rules.<sup>11</sup>

Five years later, the United State Supreme Court again reversed a lower court decision in which the lower court had refused to enforce an NLRB order that significantly changed the definition of types of workers protected by the National Labor Relations Act.<sup>12</sup> In the Supreme Court's holding, rulemaking was not necessary in this situation, and the NLRB was not precluded from announcing the new definition in this adjudicative proceeding. According to the Court, the choice between rulemaking and adjudication was entirely within the agency's discretion. The Supreme Court implied that if serious or substantial consequences resulted from reliance on the agency's past decision, or if reliance on the agency pronouncements was substantial, or fines or damages were involved, then a different decision might be reached; however, until such circumstances arise, the agency may decide to proceed in developing its rules or policies in a case-by-case manner rather than through a generalized rulemaking process.

According to the Ninth Circuit in a recent case, the Federal Trade Commission (FTC) could not determine, in a cease and desist proceeding, that a particular credit practice generally used in the auto industry was unlawful.<sup>13</sup> This conclusion by the court rejected the idea that *Chenery* permitted agencies to make general law by adjudication. In this case, the court stressed that policy should be adopted through the FTC's rulemaking process. The court held that the FTC should not utilize its adjudication process to alter an existing rule because the rule in question had previous widespread application and because changing the rule through adjudication was unfair.

### 16.5.3 The Minnesota Approach

According to the Minnesota APA, an *agency* is any state officer, board, commission, bureau, division, department, or tribunal—other than a judicial branch court and the tax court—having a statewide jurisdiction and authorized by law to make rules or to adjudicate contested cases.<sup>14</sup> An agency in Minnesota affects the rights of persons through both adjudication and rulemaking. Agency policy may be formulated through general rules developed under Minnesota APA rulemaking procedures or in a case-by-case determination following APA adjudication procedures.<sup>15</sup> Under Minnesota case law, an agency may

<sup>11</sup> See, e.g., *Wyeth v. Levine*, 555 U.S. 555, 622-23 (2009); *Fed. Mar. Comm'n v. S.C. State Port Auth.*, 535 U.S. 743, 774 (2002); *Almy v. Sebelius*, 679 F.3d 297, 303 (4th Cir. 2012); *Garfias-Rodriguez v. Holder*, 702 F.3d 504, 514-15 (9th Cir. 2012).

<sup>12</sup> *NLRB v. Bell Aerospace*, 416 U.S. 267 (1974).

<sup>13</sup> *Ford Motor Co. v. FTC*, 673 F.2d 1008, 1010 (9th Cir. 1981); 1 K. DAVIS & R.J. PIERCE, ADMINISTRATIVE LAW TREATISE § 6.8 at 275-278 (5th ed. 2001).

<sup>14</sup> *Agency* also includes the capitol area architectural and planning board. MINN. STAT. § 14.02, subd. 2 (2014). As defined in the statute, *agency* does not include local boards having no statewide authority nor bodies not created and governed by the state legislature. See, e.g., *Minneapolis Area Dev. Corp. v. Common Sch. Dist. No. 1870*, 269 Minn. 157, 170, 131 N.W.2d 29, 39 (Minn. 1964) (finding school board's decision adopted in closed-door meeting was governed by state's public meeting statute, not the APA); *State ex rel. Sholes v. Univ. of Minn.*, 236 Minn. 452, 456, 54 N.W.2d 122, 125-26 (1952) (describing board of regents as a corporate entity, as the legislature does not have power to destroy, enlarge, or curtail the board, in contrast to legislative power over state agencies).

<sup>15</sup> *Bunge Corp. v. Comm'r of Revenue*, 305 N.W.2d 779, 784-85 (Minn. 1981) (finding commissioner

exercise its discretion when deciding which method is appropriate in a particular situation in formulating agency policy.<sup>16</sup> And a failure to adopt rules, even when directed to do so by the legislature, will not necessarily bar later action by the agency unless there is some specific indication that a bar was intended.<sup>17</sup>

The discretion is not without limits, however.<sup>18</sup> Minnesota courts have addressed the question of whether the Minnesota Public Utilities Commission can exercise discretion in deciding whether administrative policy should be determined or formulated through the rulemaking process or on a case-by-case basis.<sup>19</sup> According to the argument presented *in*

had not acted in arbitrary or capricious manner, nor had he abused his discretion by issuing order denying Bunge a deduction for certain commissions it had previously paid; in fact, court determined that agency had option of choosing most appropriate method available when promulgating rules); *Dullard v. Minn. Dep't of Human Servs.*, 529 N.W.2d 438, 445 (Minn. Ct. App. 1995); *In re DiVall Insured Income Props. 2 Ltd. P'ship*, 445 N.W.2d 856, 860-61 (Minn. Ct. App. 1989); *L & D Trucking v. MNDOT*, 600 N.W.2d 734, 736-38 (Minn. Ct. App. 1999) (department of transportation has discretion to apply its interpretation of the term "commercial establishments" on a case-by-case basis in enforcing the prevailing wage law, but the court of appeals encouraged formal rulemaking to adopt a definition).

<sup>16</sup> *Pietsch v. Bd. of Chiropractic Exam'rs*, 683 N.W.2d 303, 308-09 (Minn. 2004) (noting agency's authority to interpret statutory language, but finding agency's definition of "unprofessional conduct" unduly vague and reversing lower court's determination that chiropractor's conduct was unprofessional per se); *In re Universal Underwriters Life Ins. Co.*, 685 N.W.2d 44, 48 (Minn. Ct. App. 2004) (determining that insurance rates were "excessive in relation to benefits" as set out in statute, could properly be done on a case-by-case basis and did not constitute unpromulgated rulemaking); *In re Lawful Gambling License of Eagles Aerie 2341 v. State Lawful Gambling Control Bd.*, 533 N.W.2d 874, 876 (Minn. Ct. App. 1995) (stating once the board adopted a rule, it had no authority to formulate conflicting or limiting policy on a case-by-case basis); *In re Petitions of D & A Truck Line, Inc. et al.* 524 N.W.2d 1, 6 (Minn. Ct. App. 1994) (citing *Bunge Corp.*, 305 N.W.2d at 785) (finding agency has right and discretion to develop policies, either by rulemaking or on a case-by-case basis, and that the agency properly used adjudication to apply its interpretation of the term "points" to the facts of each of the relators' cases); *Minn. Chamber of Commerce v. Minn. Pollution Control Agency*, 469 N.W.2d 100, 105 (Minn. Ct. App. 1991) (the application of Minn. R. 7050.0128 will be based on facts as applied to a specific party and thus the agency's enforcement of this part will result in a "site-by-site and case-by-case" policymaking); *Reserve Life Ins. v. Comm'r of Commerce*, 402 N.W. 2d 631, 634 (Minn. Ct. App. 1987); *see also Lenning v. Iowa Dep't of Transp.*, 368 N.W.2d 98, 102 (Iowa 1985); *Arthurs v. Bd.*, 383 Mass. 299, 312-13, 418 N.E.2d 1236, 1246 (1981); *Mass. Elec. Co. v. Dept. of Pub. Utils.*, 383 Mass. 675, 678-80, 421 N.E.2d 449, 451-52 (1981); *Anheuser-Busch v. Dept. of Bus. Regulation*, 393 So. 2d 1177, 1182 (Fla. Dist. Ct. App. 1981); *In re Portland Gen. Elec. Co.*, 277 Or. 447, 460, 561 P.2d 154, 163 (1977).

<sup>17</sup> *Marshall Cnty. v. State*, 636 N.W.2d 570, 577 (Minn. Ct. App. 2001) (noting that an indication that a bar was intended might be arrived at from legislative history, statutory language setting consequences for a failure to adopt a rule, and the availability of less drastic action, such as a suit to compel agency action).

<sup>18</sup> *In re Application of Crown CoCo, Inc.*, 458 N.W.2d 132, 136-37 (Minn. Ct. App. 1990) (finding adjudication not appropriate where decision does not involve the application of specific facts to specific parties, but is one of "general applicability and future effect" and comes within the definition of a rule); *In re Appeal of Jongquist*, 460 N.W.2d 915, 917 (Minn. Ct. App. 1990) (finding formulation of policy on a case-by-case basis is not appropriate here where policy would be applied to more than just one individual); *In re Hibbing Taconite Co.*, 431 N.W.2d 885, 894-95 (Minn. Ct. App. 1988) (finding contested case not appropriate where agency's statutory policy-making authority is not broad, where issue is important question of social and political policy and where agency has announced a broad policy).

<sup>19</sup> *In re Proposal by Lakedale Tel. Co. to Offer Three Add'l Class Servs.*, 561 N.W. 2d 550, 555 (Minn. Ct. App. 1997) (finding MPUC's decision to initially require a \$1 per activation fee for call tracing service

*Northwestern Bell*, the public utilities commission could not adopt a unique accounting rule that might produce desired information without first going through Minnesota APA mandated rule procedures. The court concluded that administrative policy may be formulated either through rulemaking or by a case-by-case determination.

An agency's discretion to make policy through adjudication was limited somewhat by a 1995 statutory addition which states:

Upon request of any person, and as soon as feasible and to the extent practicable, each agency shall adopt rules to supersede those principles of law or policy lawfully declared by the agency as the basis for its decisions in particular cases it intends to rely on as precedents in future cases. This paragraph does not apply to the Public Utilities Commission.<sup>20</sup>

This provision is based upon § 2-104 (4) of the Model State Administrative Procedure Act. But the Minnesota statute adds "upon the request of any person" to the model language.<sup>21</sup>

Administrative agencies are, however, limited in the exercise of their power by statutes created in the Minnesota Legislature. The authority and duties delegated to the agency are created by the legislature to provide or direct administrative action, and although administrative agencies may make rules, agencies may not change substantive law, adopt rules that would change existing or current law, or make new law.<sup>22</sup>

did not require formal rulemaking, but was appropriately decided within the context of the adjudicatory forum); *In re Investigation into Intra-LATA Equal Access & Presubscription*, 532 N.W.2d 583, 589 (Minn. Ct. App. 1995) (citing *SEC v. Chenery Corp.*, 332 U.S. 194, 202 (1947) and 1 K. DAVIS & R.J. PIERCE, ADMINISTRATIVE LAW TREATISE, § 6.8 at 267 (5th ed. 2001)) (noting not every principle can or should be cast immediately into the mold of a rule because some principles must be adjusted to meet particular situations); *Dullard v. Minn. Dep't of Human Servs.*, 529 N.W.2d 438, 446 (Minn. Ct. App. 1995) (finding it inappropriate for agencies to adopt policy in a case-by-case method when dealing with issues of broad social and political importance); *In re Nw. Bell Tel. Co.*, 371 N.W.2d 563, 567-68 (Minn. Ct. App. 1985) (reaffirming *Bunge* by finding, because of circumstances, that public utilities commission had not erred in issuing order rather than promulgating rule; public utilities commission had right to exercise its discretion to decide which method, rulemaking or case-by-case determination, was most appropriate in formulating administrative policy).

<sup>20</sup> MINN. STAT. § 14.06(b) (2014).

<sup>21</sup> A. BONFIELD, STATE ADMINISTRATIVE RULEMAKING § 4.4 (Little, Brown & Co. 1986 & Supp. 1993).

<sup>22</sup> *Wallace v. Comm'r of Taxation*, 289 Minn. 220, 230, 184 N.W.2d 588, 594 (1971); *McGuire v. Viking Tool & Die Co.*, 258 Minn. 336, 348, 104 N.W.2d 519, 528 (1960); *State ex rel. Sholes v. Univ. of Minn.*, 236 Minn. 452, 456, 54 N.W.2d 122, 126 (1952); *Berlaw v. Minneapolis-Moline Power Implement Co.*, 9 N.W.2d 6, 12 (Minn. 1943); see also § 16.5 for an examination of Minnesota case law requiring agencies to use rulemaking to give their policy guidelines the force of law.