21.7 JUDICIAL REVIEW OF EXEMPT AND EXPEDITED RULES

As with other rules, the validity of an emergency or exempt and expedited rule may be challenged through a preenforcement declaratory judgment or contested case action in the court of appeals.[1] The court may decide, as it did with temporary rules, that an exempt or expedited rule must be declared invalid if it "finds that it violates constitutional provisions or exceeds the statutory authority of the agency or was adopted without compliance with statutory rulemaking procedures."[2] Although these standards are stated in rather general terms,[3] they are sufficient to provide a basis for a declaratory judgment that a temporary, and now an exempt or expedited rule is invalid because (1) the rule violates provisions of the United States or Minnesota constitutions,[4] (2) the rule exceeds the agency's statutory authority,[5] (3) the agency has failed to comply with applicable provisions of the APA[6] or other requirements governing rulemaking,[7] (4) the rule conflicts with applicable state or federal law,[8] (5) the rule is not reasonable,[9] (6) the rule is not necessary, or (7) the rule is substantially different from the rule as proposed.[10]

With respect to emergency, exempt, or expedited rules, the question is unsettled as to the extent of the record on which the court of appeals is to base its decision in a preenforcement challenge to temporary rule. In 1984, a section was added to the APA requiring that agencies maintain an "official rulemaking record" for every rule adopted.[11] That section provides that the record "constitutes the official and exclusive agency rulemaking record with respect to agency action on or judicial review of the rule.[12] The

1 MINN. STAT. § 14.44 (2014). An exempt or expedited rule could also be challenged in an enforcement action commenced by the agency. *See, e.g.*, Broen Memorial Home v. Minn. Dep't of Human Servs., 364 N.W.2d 436, 440 (Minn. Ct. App. 1985) (considering validity of a rule used for calculating Medicaid paybacks as a "matter properly raised in a contested case hearing and fully briefed"); *see also* ch. 25 (providing a general discussion of judicial review).

2 MINN. STAT. § 14.45 (2014); Hirsch v. Bartley-Lindsay Co., 537 N.W.2d 480, 485-87 (Minn. 1995) (finding emergency rules invalid where they conflict with purpose of the parent statute and where they infringe on judge's discretion).

3 For a general discussion of the scope of judicial review under the standards prescribed in MINN. STAT. § 14.45, see Carl Auerbach, *Administrative Rulemaking in Minnesota*, 63 MINN. L. REV. 151, 214-22 (1979).

4 MINN. STAT. § 14.45 (2014).

5 *Id.*

6 *Id.;* White Bear Lake Care Ctr. v. Minn. Dep't of Pub. Welfare, 319 N.W.2d 7, 9 (Minn. 1982). Although the qualification is not stated, the word *compliance* might be interpreted to mean "substantial compliance." Auerbach, *supra* note 3, at 215. *But cf.* Johnson Bros. Wholesale Liquor Co. v. Novak, 295 N.W.2d 238, 241-42 (Minn. 1980) (recognizing that doctrine of substantial compliance could be read into Minnesota APA through application of the harmless error doctrine but declining to do so in this case).

7 While the reference in MINN. STAT. § 14.45 (2014) is to "statutory" rulemaking procedures, the court should also review the issue of compliance with the rules of the OAH governing exempt rulemaking. *See* Auerbach, *supra* note 3, at 216.

8 *E.g.*, Sellner Mfg. Co. v. Comm'r of Taxation, 295 Minn. 71, 74, 202 N.W.2d 886, 888 (2013).

9 *E.g.*, Mfrd. Hous. Inst. v. Pettersen, 347 N.W.2d 238, 243 (1984); Lee v. Delmont, 228 Minn. 101, 114, 36 N.W.2d 530, 539 (1949); Juster Bros., Inc. v. Christgau, 214 Minn. 108, 118, 7 N.W.2d 501, 507 (1943).

10 MINN. STAT. § 14.05, subd. 2 (2014); *see* § 23.5 (providing a general discussion of the "substantial difference" doctrine).

11 MINN. STAT. § 14.365 (2014); 1984 MINN. LAWS ch. 640, § 23, at 1792.

12 MINN. STAT. § 14.365 (2014).

APA does not limit judicial review to this official rulemaking record.[13] But in *Manufactured Housing Institute v. Pettersen,*[14] the supreme court held that in a preenforcement declaratory judgment action challenging the validity of a permanent rule, the court's review is limited to the rulemaking record.[15] In support of this holding, the court noted that the petitioner had participated vigorously in the rulemaking hearing, and emphasized that the permanent rulemaking process facilitates the gathering, review, and close scrutiny of relevant evidence and allows for the development of a complete hearing record.[16]

However, a different result may be possible in an exempt or expedited rule proceeding where the parties may not have had the same opportunity to participate in the rulemaking process. By contrast, the exempt and expedited rulemaking process requires no presentation of the agency's basis for a proposed rule, allows for no questioning of agency representatives, limits the participation of interested persons to the submission of written comments, and results in a rulemaking record that contains no explanation of the basis for the adopted rule. Thus, unlike the process in permanent rulemaking, the exempt and expedited rulemaking process does not require the preparation by an agency of a statement of need and reasonableness,[17] and the agency is not required to present facts establishing the need for and the reasonableness of the proposed exempt or expedited rule.[18]

Nevertheless, an exempt and expedited rule must be necessary and reasonable, and while it may be appropriate to the nature of exempt rulemaking to allow an agency considerable latitude and flexibility in the adoption of the rule, an exempt rule has the force of law,[19] and should be subject to meaningful scrutiny after adoption. Accordingly, in a preenforcement declaratory judgment action, the petitioner should be afforded the opportunity to introduce evidence to prove that there is no rational basis for the rule and that the agency has acted in an arbitrary and capricious manner.[20] Concomitantly, the agency should be afforded the opportunity to introduce evidence demonstrating a rational basis for the rule and showing that it made a "reasoned determination."[21] Depending on the nature of the emergency or exempt rule at issue, a detailed factual inquiry may be necessary.[22]

13 *Id.* §§ 14.44, .45; *see also id.* § 480A.06, subd. 4 (giving the Minnesota Court of Appeals jurisdiction for administrative review of rules and administrative decisions in contested cases); § 25.6 (discussing the record for judicial review).

14 347 N.W.2d 238 (Minn. 1984).

15 *Id.* at 240-41.

16 *Id.* at 241.

17 *Cf.* MINN. STAT. §§ 14.131, .23 (2014).

18 *Cf. id.* §§ 14.14, subd. 2, .26, subds. 1, 3.

19 *Id*. § 14.38, subd. 1.

20 *See* Mfrd. Hous. Inst. v. Pettersen, 347 N.W.2d 238, 243-44 (Minn. 1984).

21 *Id.* at 245-46.

22 For a thorough discussion of the subject of requiring a demonstrated factual basis for a rule, see 1 RICHARD J. PIERCE, JR., ADMINISTRATIVE LAW TREATISE § 7.5, at 628 (5th ed. 2010).