23.2 STATUTORY AUTHORITY

An agency may adopt, amend, suspend, or repeal a rule pursuant only to authority delegated by law,[1] and a court shall declare a rule invalid if the rule exceeds statutory authority.[2] As stated by the courts: "It is a fundamental tenet of administrative law that the powers of an administrative agency can only be exercised in the manner prescribed by its legislative authorization";[3] and "The extent of jurisdiction or authority bestowed on an administrative agency is measured by the statute from which it derives its authority."[4] As stated in the often cited *McKee v. County of Ramsey*[5] case:

> An administrative agency's jurisdiction . . . is limited and is dependent entirely upon the statute under which it operates. "Jurisdiction of an administrative agency consists of the powers granted it by statute. Lack of statutory power betokens lack of jurisdiction. It is therefore well settled that

[1] MINN. STAT. § 14.05, subd. 1 (2014); Dullard v. Minn. Dep't of Human Servs., 529 N.W.2d 438, 445 (Minn. Ct. App. 1995).

[2] MINN. STAT. § 14.45 (2014); *e.g.*, State v. Hopf, 323 N.W.2d 746, 752 (Minn. 1982); Stasny by Stasny v. Minn. Dep't of Commerce, 474 N.W.2d 195, 198-99 (Minn. Ct. App. 1991) (finding Department rule invalid as inconsistent with express language of statute); Wangen v. Comm'r of Pub. Safety, 437 N.W.2d 120, 124 (Minn. Ct. App. 1989) (holding rule invalid as inconsistent with the statute: "Rules that are inconsistent [with the statute] are ineffective and do not carry the force and effect of law."); *see also* Rocco Altobelli v. Minn. Dep't of Commerce, 524 N.W.2d 30, 37 (Minn. Ct. App. 1994) (finding Department of Commerce rule did not exceed the scope of the statute where chair leasing has been regulated for over 30 years and the legislature declined to ban chair leasing in 1992); Minn. Chamber of Commerce v. Minn. Pollution Control Agency, 469 N.W.2d 100, 103-04 (Minn. Ct. App. 1991) (finding the MPCA was within its statutory authority in adopting its water quality rules because the agency did not fail to consider social and economic factors as required by statute); Norman v. Comm'r of Pub. Safety, 404 N.W.2d 315, 318 (Minn. Ct. App. 1987) (finding limited driver's license rule did not exceed statutory authority, as rule was within a broad rulemaking mandate granted by statute).

[3] Waller v. Powers Dep't Store, 343 N.W.2d 655, 657 (Minn. 1984) (concluding lack of statutory power results in lack of jurisdiction); *see also* Hirsch v. Bartley-Lindsay Co., 537 N.W.2d 480, 485 (Minn. 1995) ("An agency has the power to issue binding administrative rules only if, and to the extent, the legislature has authorized it to do so."); McKee v. Ramsey Cnty., 310 Minn. 192, 195, 245 N.W.2d 460, 462 (1976) ("An administrative agency's jurisdiction . . . is limited and is dependent entirely upon the statute under which it operates."); State *ex rel*. Spurck v. Civil Serv. Bd., 226 Minn. 253, 259, 32 N.W. 2d 583, 586 (1948) ("Jurisdiction of an administrative agency consists of the powers granted it by statute. Lack of statutory power betokens lack of jurisdiction. It is therefore well settled that a determination of an administrative agency is void and subject to collateral attack where it is made either without statutory power or in excess thereof."); *In re* Hibbing Taconite Co., 431 N.W. 2d 885, 890 (Minn. Ct. App. 1988) (concluding agency exceeded its statutory authority and engaged in unpromulgated rulemaking: "[A]uthority bestowed upon an administrative agency is measured by the statute from which it derives its authority.").

[4] Frost-Benco Elec. Ass'n v. Minn. Pub. Utils. Comm'n, 358 N.W.2d 639, 642 (Minn. 1984); *In re* Eigenheer, 453 N.W.2d 349, 354 (Minn. Ct. App. 1990) (finding DNR rule which prohibits a private person from filling a cross-section of a protected water is not in excess of Department statutory authority); *see also* *Spurck*, 226 Minn. at 259, 32 N.W. 2d at 586 ("Jurisdiction of an administrative agency consists of the powers granted it by statute. Lack of statutory power betokens lack of jurisdiction."); *In re* Application of Crown CoCo, Inc., 458 N.W.2d 132, 136 (Minn. Ct. App. 1990) (citing *Spurck*, 226 Minn. at 259, 32 N.W.2d at 586)).

[5] 310 Minn. 192, 245 N.W.2d 460 (1976).

©2015 William Mitchell College of Law. All Rights Reserved

a determination of an administrative agency is void and subject to collateral attack where it is made either without statutory power or in excess thereof."[6]

Accordingly, a rule is invalid if it conflicts with a statute,[7] is inconsistent with the statutory authority pursuant to which it was adopted,[8] is contrary to the legislative intent,[9] limits the agency's appellate jurisdiction without statutory authorization,[10] or adopts a standard beyond the scope of the agency's authority, express or implied by the legislature.[11] On the other hand, an agency's authority to regulate has been held to

[6] *Id.* at 195, 245 N.W.2d at 462 (quoting *Spurck*, 226 Minn. at 259, 32 N.W. 2d at 586).

[7] *Hirsch*, 537 N.W.2d at 486 (finding durational limits on medical care in the rule conflicted with the basic statutory medical benefits provision which has long been recognized to place no limitation on the duration of care, but rather to return the employee to a pre-injury state of wellness); Scalf v. LaSalle Convalescent Home, 481 N.W.2d 364, 366 (Minn. 1992) (finding rule limiting admissibility of medical records conflicted in part with statute); Flores v. Dep't of Jobs & Training, 411 N.W.2d 499, 504 (Minn. 1987) (finding rule imposing additional requirements on aliens inconsistent with statute); Green v. Whirlpool Corp., 389 N.W.2d 504, 506-07 (Minn. 1986) (finding rule in conflict with statute and, accordingly, of no effect); GH Holdings, LLC v. Minn. Petroleum Tank Release Comp. Bd., 840 N.W.2d 838, 843 (Minn. Ct. App. 2014) (declaring invalid rule promulgated rule in direct conflict with provisions of the Minnesota APA); J.C. Penney Co. v. Comm'r of Econ. Sec., 353 N.W.2d 243, 246 (Minn. Ct. App. 1984) (finding regulation invalid where commissioner's interpretation conflicted with clear and unambiguous language of statute); *see also In re* Peace Officer License of Woollett, 540 N.W.2d 829, 831 (Minn. 1995) (finding administrative rule on licensing of peace officers consistent with statute).

[8] United Hardware Distrib. Co. v. Comm'r, 284 N.W.2d 820, 822 (Minn. 1979) (finding revenue rules drawn too restrictively and "not justified by the statutory language," therefore invalid); Guerrero v. Wagner, 310 Minn. 351, 357, 246 N.W.2d 838, 841 (1976); Dumont v. Comm'r of Taxation, 278 Minn. 312, 315-16, 154 N.W.2d 196, 199 (1967); Stasny by Stasny v. Minn. Dep't of Commerce, 474 N.W.2d 195, 198 (Minn. Ct. App. 1991); City of Morton v. Minn. Pollution Control Agency, 437 N.W.2d 741, 746 (Minn. Ct. App. 1989) ("An administrative agency exceeds its statutory authority when it promulgates a rule inconsistent with the agency's enabling legislation."); Vang v. Comm'r of Pub. Safety, 432 N.W.2d 203, 206-07 (Minn. Ct. App. 1988) (finding rule at issue well within the agency's sphere of authority).

[9] Can Mfrs. Inst. v. State, 289 N.W.2d 416, 425-26 (Minn. 1979) (finding no statutory authority to promulgate rules where legislative history indicated absence of explicit grant of rulemaking authority in governing statute was deliberate omission); *see* State v. Lloyd A. Fry Roofing Co., 310 Minn. 528, 534 n.6, 246 N.W.2d 696, 700 n.6 (1976) (similar facts and result); *see also* Buhs v. State Dep't of Pub. Welfare, 306 N.W.2d 127, 131 (Minn. 1981) (holding rule invalid as inconsistent with public policy, arbitrary, and unreasonable because it conflicted with the purpose of the federal program that it implemented); Hentges v. Bd. of Water & Soil Res. 638 N.W.2d 441, 445-46 (Minn. Ct. App. 2002) (finding board rule limiting federal exemption did not exceed statutory authority because it was consistent with legislative intent to achieve zero net loss in wetlands).

[10] Leisure Hills v. Levine, 366 N.W.2d 302, 304 (Minn. Ct. App. 1985).

[11] Francis v. Minn. Bd. of Barber Exam'rs, 256 N.W.2d 521, 525 (Minn. 1977); Drum v. Minn. Bd. of Water & Soil Res., 574 N.W.2d 71, 73 (Minn. Ct. App. 1998) (finding wetland rules valid as consistent with legislation, not in excess of the agency's statutory authority: "Generally, we invalidate an agency rule only if the rule was adopted in excess of the agency's statutory authority."); *In re* Eigenheer, 453 N.W.2d 349, 354 (Minn. Ct. App. 1990) ("An agency decision may be reversed if it is in excess of the statutory authority granted to the agency."); Minn. Ass'n of Homes for the Aging v. Dep't of Human Servs., 385 N.W.2d 65, 68 (Minn. Ct. App. 1986) (finding rule, on its face, does not exceed statutory authority); *cf. In re* Haslund, 781 N.W.2d 349, 354 (Minn. 2010) ("We reverse an agency's decision when an appellant's substantial rights may have been prejudiced because the agency's decision exceeds the agency's statutory authority."); *In re* Hubbard, 778 N.W.2d 313, 321 (Minn. 2010) (finding despite the existence of a properly promulgated DNR

©2015 William Mitchell College of Law. All Rights Reserved

include the authority to restrict or prohibit,[12] and within the designated area of its regulation, the agency has implied power to formulate the necessary classifications and definitions.[13] But, as the supreme court restated in *Hirsch v. Bartlett-Lindsay Co.*,[14] "'a rule adopted in pursuit of legislative goals cannot subvert the primary purpose behind the legislation.'"[15]

23.2.1 Statutory Authority and Types of Rules

Although the question of whether statutory authority exists is always, basically, a question of legislative intent, the type of rule involved may determine whether the statutory authority is adequate. Commentators have long distinguished agency rulemaking by creating three general categories of rules: procedural; interpretative; and legislative, also

rule, there was no express delegation of authority to the DNR to approve or deny local government variance decisions); *In re* Qwest's Wholesale Serv. Quality Standards, 702 N.W.2d 246, 259-61 (Minn. 2005) (finding fixed minimum performance standards adopted by the Public Utilities Commissioner (PUC) were within its authority as granted by the federal Telecommunications Act of 1996, but holding that PUC's requirement that Qwest pay a penalty if it failed to meet the standards was not authorized by the governing state statute because the APA limits fines established by rule to $700 per violation unless specific statutory authority exists); *In re* Minn. Dep't of Commerce for Comm'n Action Against AT&T, 759 N.W.2d 242, 250-51 (Minn. Ct. App. 2009) (concluding that the MPUC's penalty authority lapsed with the sunset of the underlying statute); *In re* Investigation into the Comm'ns Jurisdiction over the City of Hutchinson's Intrastate Natural Gas Pipeline, 707 N.W.2d 223, 226-28 (Minn. Ct. App. 2006) (noting that an agency enjoys only the authority granted to it by the legislature, which specifically exempted municipal utilities from regulation except as specifically provided otherwise; finding PUC did not have jurisdiction over the natural gas pipeline owned by the Hutchinson Utility Commission (HUC); concluding PUC did not have the authority to regulate the pipeline, even though statute allowed complaints about the HUC pipeline to be lodged with the PUC).

[12] Manufactured Hous. Inst. v. Pettersen, 347 N.W.2d 238, 242 (Minn. 1984); *Eigenheer*, 453 N.W.2d at 354 (finding statutory authority granted to DNR commissioner to protect state's public waters is broad enough to permit prohibition in the rule at issue).

[13] Mammenga v. Dep't of Human Servs., 442 N.W.2d 786, 792 (Minn. 1989) (finding commissioner had authority to interpret and limit by rule *secondary education program* to high school students and persons attending GED programs that require at least six hours of classroom instruction per week); State v. Hopf, 323 N.W.2d 746, 752 (Minn. 1982) (upholding provision banning advertising signs within 100 feet of schools and churches); *In re* Application of N. States Power Co. for Approval of Mercury Emissions Reduction Plan, 775 N.W.2d 652, 656-58 (Minn. Ct. App. 2009) (finding MPUC had jurisdiction to impose public health related requirements on municipal utilities customers); Christian Nursing Ctr. v. Dep't of Human Servs., 419 N.W.2d 86, 90 (Minn. Ct. App. 1988) (quoting *Hopf*, 323 N.W.2d at 752) (reiterating that agencies have "'implied power to formulate necessary classifications and definitions within the designated area of regulation'"); Norman v. Comm'r of Pub. Safety, 404 N.W.2d 315, 318 (Minn Ct. App. 1987) (finding rule well within the agency's broad statutory authority of rulemaking); Blocher Outdoor Adver. Co. v. Minn. Dep't of Transp., 347 N.W.2d 88, 91 (Minn. Ct. App. 1984); *see also* Jacka v. Coca-Cola Bottling Co., 580 N.W.2d 27, 34-35 (Minn. 1998) (concluding durational limitation on chiropractic treatment set by department of labor and industry was in harmony with statute, because rules were flexible enough to permit compensation judges to extend medical treatment beyond the durational limit where medically necessary).

[14] 537 N.W.2d 480 (Minn. 1995).

[15] *Id.* at 486 (quoting Weber v. City of Inver Grove Heights, 461 N.W.2d 918, 922 (Minn. 1990)).

©2015 William Mitchell College of Law. All Rights Reserved

called substantive.[16] Courts and commentators have used these categories to assist in determining whether sufficient statutory authority exists to support the rule.

Procedural rules are the description of the methods by which the agency will carry out its appointed functions. Generally, these rules have the force of law.[17] Interpretative rules interpret and apply the provisions of the statute under which the agency operates and, in Minnesota, have the force and effect of law.[18] Legislative rules have been defined as "the product of an exercise of delegated legislative power to make law through rules."[19] Legislative rules have the force of law.[20] The Minnesota Supreme Court adopted an analysis of rule by type in 1977; in some cases this framework provides a helpful overlay in discerning the adequacy of statutory authority.[21]

23.2.2 Legislative Rules

Although some early Minnesota cases suggest that rulemaking authority may be inferred from grants of enforcement authority to an agency,[22] other case law has required an express grant of legislative authority to adopt rules.[23] That express authority for rules is not to be found in the Minnesota APA. The APA expressly requires that agency rulemaking proceed only pursuant to substantive authority delegated by law.[24] However, the APA has not always imposed this limitation. Before the major revision of the APA in 1975,[25] agencies were given a generic grant of authority to adopt substantive rules, provided those rules did not exceed the statutory powers of the agencies.[26] Because of Minnesota's insistence on specific statutory delegation of rulemaking authority, Minnesota is distinguishable from the many jurisdictions where rulemaking authority is often considered implicit in the delegation of statutory duties to an agency.[27]

[16] *See* 1 FRANK E. COOPER, STATE ADMINISTRATIVE LAW 173-76 (1965); Note, *Definition of "Rule" under the Minnesota APA*, 7 WM. MITCHELL L. REV. 665, 676-83 (1981); *see also* McKee v. Likins, 261 N.W.2d 566, 577 n.11 (Minn. 1977); § 16.3 of this text (discussing procedural, interpretative, and legislative rules).

[17] COOPER, *supra* note 16, at 174, 266-67. In Minnesota, procedural rules have specific statutory authorization if they meet requirements of MINN. STAT. § 14.06 (2014).

[18] MINN. STAT. § 14.38, subd. 1 (2014); COOPER, *supra* note 16, at 174.

[19] 1 KENNETH C. DAVIS, ADMINISTRATIVE LAW TREATISE § 6.3, at 233 (3d ed. 1994).

[20] COOPER, *supra* note 16, at 264.

[21] *McKee*, 261 N.W.2d at 577-78. This analysis was further elaborated in *Minn.-Dakotas Retail Hardware Ass'n v. State*, 279 N.W.2d 360, 365 (Minn. 1979).

[22] *E.g.*, Welsand v. State R.R. & Warehouse Comm'n, 251 Minn. 504, 509, 88 N.W.2d 834, 838 (1958) ("In vesting regulatory power in an administrative agency, the legislature need not expressly delineate with particularity or exactness each and every phase of the power so conferred, but may . . . leave the exact scope of the rulemaking power to reasonable implication."); Lee v. Delmont, 228 Minn. 101, 114, 36 N.W.2d 530, 539 (1949) ("The discretionary power to ascertain operative facts normally carries with it the power to make rules and regulations pursuant to which power is exercised.").

[23] *See, e.g.,* State v. Lloyd A. Fry Roofing Co., 310 Minn. 528, 532-34, 246 N.W.2d 696, 699-700 (1976).

[24] MINN. STAT. § 14.05, subd. 1 (2014).

[25] *See* Triplett & Nobles, *Rulemaking under Minnesota's Administrative Procedure Act: 1975 Amendments*, 43–6 HENNEPIN LAWYER 14 (1975); Caral A. Auerbach, *Administrative Rulemaking in Minnesota,* 63 MINN. L. REV. 151, 164 (1979).

[26] MINN. STAT. § 15.0412 (1974).

[27] *See* COOPER, *supra* note 16, at 176.

©2015 William Mitchell College of Law. All Rights Reserved

The rigor the APA imposes on rulemakers to establish a statutory basis for the rulemaking is even extended to require prompt *use* of specific rulemaking authority. Sometimes referred to as a "use it or lose it" authority, agencies granted rulemaking power are required to use this authority within 18 months of the effective date of the law authorizing the rules. If the agency does not publish a notice of intent to adopt rules or a notice of hearing within the time allowed, "the authority for the rule expires."[28]

Authority for substantive rules, nonexistent in the APA, must therefore be found in the statutes specific to the agencies.[29] Once some authority to adopt a rule exists, the issue becomes one of legislative intent in determining how much authority has been delegated to the agency and on what subjects.

The case cited most often in which the court held that the legislature did not intend to authorize substantive rules involved the enforcement of air pollution control standards.[30] The Minnesota Pollution Control Agency sought to adopt rules setting forth procedures that would allow MPCA to issue orders requiring air polluters to conduct tests at their own expense. The grant of specific authority gave the agency significant rulemaking authority in the air pollution area but did not expressly mention a power to issue rules authorizing such orders.[31] However, the legislature had expressly authorized the agency to issue orders concerning water pollution.[32] From this latter provision, the court inferred that the legislature did not intend to authorize rules allowing orders concerning air pollution. According to the court, the pollution control agency "lacked statutory authority to issue an order, or a regulation authorizing an order."[33] In a much-quoted footnote, the court stated:

> If the PCA needs such authority to effectively carry out its function regarding air pollution, the proper place for it to seek such authority is the legislative body that created the agency and specified its powers. Courts cannot properly aid the agency by construing the statute to confer upon it implicit authority, when to do so would contravene the legislature's apparently deliberate failure to explicitly grant it such authority.[34]

A much earlier case, which involved the initial rules implementing the unemployment compensation law, held that general provisions directing the agency to adopt rules "for the administration of" the law did not amount to authority to enact substantive (legislative) rules at variance with the substantive portions of the act. The court found that "[t]o the extent that such rules attempt to change substantive and mandatory portions of a statute, they are a nullity. . . . [An administrative body] may adopt administrative rules, but in doing so can not change existing, or make new, law."[35] Conversely, a workers' compensation rule was held

[28] MINN. STAT. § 14.125 (2014). It has been held however, that a failure to adopt rules within a specified time frame does not necessarily bar later agency action unless there is a specific indication that such a bar was intended. Marshall Cnty. v. State, 636 N.W.2d 570, 577 (Minn. Ct. App. 2001).

[29] MINN. STAT. § 14.05, subd. 1 (2014).

[30] State v. Lloyd A. Fry Roofing Co., 310 Minn. 528, 533-34, 246 N.W.2d 696, 699-700 (1976).

[31] MINN. STAT. § 116.07, subd. 4 (2014).

[32] *Id.* § 115.03, subd. 1(c).

[33] *Lloyd A. Fry Roofing Co.*, 310 Minn. at 534, 246 N.W.2d at 700.

[34] *Id.* at 534 n.6, 246 N.W.2d at 700 n.6.

[35] Bielke v. Am. Crystal Sugar Co., 206 Minn. 308, 313-15, 288 N.W. 584, 586 (1939).

©2015 William Mitchell College of Law. All Rights Reserved

to be authorized by a general provision giving the agency power to "make rules and regulations governing the issuance of such policies."[36] The court found that the rule furthered the express legislative purpose, was valid and binding, and could be used by the agency to invalidate an attempt to cancel insurance coverage in violation of the rule.

An example of extensive legislative rulemaking delegation is illustrated in a rule adopted by the state board of pharmacy. By rule, the board added a drug to a statutory list of controlled substances.[37] On review of the rule, the court cited the mandatory compliance with the APA, together with other indications of legislative intent, in reversing the lower court and validating the rule. A similarly broad and general delegation of rulemaking authority involved a directive to the commissioner of health to adopt rules if it was determined that formaldehyde gases presented a significant health problem. A rule that banned housing sales if the gas levels exceeded the limits set by the rule was held valid after an examination of legislative intent, which noted the "power to regulate includes power to restrict or prohibit."[38]

23.2.3 Procedural Rules

The APA provides statutory authority for agencies to adopt rules setting forth "all formal and informal procedures related to the administration of official agency duties to the extent that those procedures directly affect the rights or procedures available to the public."[39] Even this grant of authority refers to "official agency duties" that must be derived from a specific statutory grant of authority.[40] However, as viewed by Minnesota courts, procedural rules—though derived from specific statutory authority—clearly are subordinate to the substantive law and cannot, in the absence of clear legislative intent, control the applicable substantive law.[41] Case law has suggested that the department of public safety's unadopted procedural rules, though lacking the force of law for failure to comply with the APA, are nonetheless entitled to "presumptive validity." However, in contrast, the lack of formally adopted procedural rules by the commissioner of veterans affairs invalidated the commissioner's attempt to discharge and transfer certain residents.[42]

[36] Hurley v. Chaffee, 231 Minn. 362, 366-68, 43 N.W.2d 281, 284 (1950).

[37] State v. King, 257 N.W.2d 693, 696 (Minn. 1977).

[38] Manufactured Hous. Inst. v. Pettersen, 347 N.W.2d 238, 242 (Minn. 1984). However, a board of barber examiners rule that was applied to deny license for failure to show "public necessity" was found void, because no "express or implied" authority was found in statute to justify imposition of this restriction. Francis v. Minn. Bd. of Barber Examiners, 256 N.W.2d 521, 525 (Minn. 1977). For an example of a "legislative rule" where the legislature delegated to the agency the authority to make substantive law, see Christian Nursing Ctr. v. Dep't of Human Servs., 419 N.W.2d 86, 90 (Minn. Ct. App. 1988).

[39] MINN. STAT. § 14.06 (2014). Note, however, that rules concerning only internal management of agency and that do not directly affect rights of, or procedures available to the public are excluded from the APA. *Id.* § 14.03, subd. 3(a)(1); *see In re* Assessment Issued to Leisure Hills Health Care Ctr., 518 N.W.2d 71, 74 (Minn. Ct. App. 1994) (concluding Department of Health nursing home inspection procedures need not be adopted as rules under the APA because they do not directly affect the rights or procedures available to the public.); *see also* ch. 16 of this text (providing a general introduction to the rulemaking process).

[40] MINN. STAT. § 14.06 (2014).

[41] Bielke v. Am. Crystal Sugar Co., 206 Minn. 308, 312, 288 N.W. 584, 586 (1939); *see also* Christgau v. Fine, 223 Minn. 452, 457-58, 27 N.W.2d 193, 196 (1947).

[42] L.K. v. Gregg, 380 N.W.2d 145, 150 (Minn. Ct. App. 1986); *see also In re* Appeal of Jongquist, 460

©2015 William Mitchell College of Law. All Rights Reserved

23.2.4 Interpretative Rules

It has been recognized by commentators[43] and suggested in dicta in a Minnesota case[44] that the power to promulgate interpretative rules need not be expressed but, rather, may be inferred from an agency's authority to enforce a law.

The Minnesota Supreme Court first expressly recognized interpretative rules in a case involving the APA before the extensive 1975 revisions.[45] According to the court, the department of public welfare's "policy bulletin" at issue was not valid nor entitled to the force of law unless adopted pursuant to the APA. In 1979, the court further elaborated on the distinctions it found between the types of rules it noted in the earlier case.[46] The court held that the rules of the consumer services section of the department of commerce, which lacked the requisite specific statutory authorization to be substantive rules given the force of law, were "interpretative rules."[47] As such, the court found that they lacked the force of law. The court discussed the adequacy of statutory authority for the rule based on the type of rule involved rather than through a direct analysis of the statutory mandate. Ironically, the judicially imposed classification of rule by type had no specific statutory authority in the APA. More troubling in this case was the court's application of the "interpretive rule" label and the conclusion that the rule, therefore, lacked the force of law. This conclusion ignored the clear language of the APA.[48]

Faced with a court interpretation of the APA that differed significantly from the clear language of the statute, the legislature passed an amendment that sought to reaffirm and clarify the APA. The 1981 legislature added the following italicized language to the APA:

> *Every rule, regardless of whether it might be known as a substantive, procedural, or interpretative rule,* which is approved by the attorney general

N.W.2d 915, 917 (Minn. Ct. App. 1990) (concluding Department of Jobs and Training has no authority to require disabled persons to take out loans in absence of rules adopted pursuant to the APA); Benson v. Comm'r of Pub. Safety, 356 N.W.2d 799, 801 (Minn. Ct. App. 1984). *But see* Schultz v. Comm'r of Pub. Safety, 365 N.W.2d 304, 306 (Minn. Ct. App. 1985) (citing Krakowski v. City of St. Cloud, 257 Minn. 415, 101 N.W.2d 820 (1960)) (upholding enforcement of internal rule not promulgated through formal rulemaking: "Although internal rules do not have the force and effect of law, the action of an administrative agency cannot be reversed unless it is fraudulent, arbitrary, unreasonable, or outside its jurisdiction.").

[43] DAVIS, *supra* note 19, § 6.03 at 234 (discussing inherent power to issue interpretative rules).

[44] Minn.-Dakotas Retail Hardware Ass'n v. State, 279 N.W.2d 360, 365 (1979) ("[T]he power to enforce necessarily encompasses power to announce in advance the circumstance when such power will be used.").

[45] McKee v. Likins, 261 N.W.2d 566, 577-78 (Minn. 1977); *see also* § 16.2 of this text (discussing types of rulemaking proceedings).

[46] *Minn.-Dakotas Retail Hardware Ass'n*, 279 N.W.2d at 365.

[47] *Id.*

[48] MINN. STAT. § 15.0413 (Supp. 1975) (renumbered § 14.38) ("*Every* rule approved by the Attorney General and filed in the office of Secretary of State as provided by Section 15.0412 shall have the *force and effect* of law." (emphasis added)); *see id.* § 14.38, subd. 1 (2014) ("Every rule, regardless of whether it might be known as a substantive, procedural, or interpretive rule, which is filed in the Office of the Secretary of State as provided in sections 14.05 to 14.28 shall have the force and effect of law."); *see also* Note, *Definition of "Rule" under the Minnesota APA*, 7 WM. MITCHELL L. REV. 665, 681, 685 (1981).

©2015 William Mitchell College of Law. All Rights Reserved

> and filed in the office of secretary of state as provided in section 15.0412 shall have the force and effect of law.[49]

This modification was effective retroactively to all properly promulgated rules other than those directly the subject of a supreme court opinion.[50]

Since the 1981 APA amendments, the courts have not repeated the precedent of finding a properly promulgated agency rule nonetheless lacking the force of law; however, on a case-by-case basis, the courts have continued to allow agencies to enforce unpromulgated rules if they are found to be pursuant to the plain meaning of the statute or a longstanding interpretation of an ambiguous statute.[51]

[49] 1981 MINN. LAWS, ch. 109, § 1, at 108 (emphasis added); *see* MINN. STAT. § 14.38, subd. 1 (2014).

[50] 1981 MINN. LAWS, ch. 109, § 2, subd. 1a, at 108.

[51] Cable Commc'ns Bd. v. Nor-West Cable Commc'ns P'ship, 356 N.W.2d 658, 661 (Minn. 1984); White Bear Lake Care Ctr. v. Minn. Dep't of Pub. Welfare, 319 N.W.2d 7, 9 (Minn. 1982); Schultz v. Comm'r of Pub. Safety 365 N.W.2d 304, 306-07 (Minn. Ct. App. 1985); Wenzel v. Meeker Cnty. Welfare Bd., 346 N.W.2d 680, 683 (Minn. Ct. App. 1984); *see In re* Rate Appeal of Benedictine Health Ctr., 728 N.W.2d 497, 506-07 (Minn. 2007) (finding DHS rate-setting memorandum did not reflect a proper interpretation of Rule 50's related organization rule; holding policy amounted to an unpromulgated rule); *see also* St. Otto's Home v. Dep't of Human Servs., 437 N.W.2d 35, 43-44 (Minn. 1989) (finding DHS interpretation of "common ownership" under existing agency rule was an "interpretive rule," invalidated by department's failure to follow the APA rulemaking process; distinguishing interpretative rule analysis from *In re* Peoples Natural Gas Co., 389 N.W.2d 903 (1986)); Mapleton Cmty. Home, Inc. v. Dep't of Human Servs., 391 N.W.2d 798, 801-802 (Minn. 1986) (finding agency rule interpretative, valid only if adopted under the APA; stating however, if agency interpretation corresponds with the plain meaning of the rule it construes, no new rule is deemed adopted); *In re* Peoples Natural Gas Co., 389 N.W.2d 903, 906 (Minn. 1986) (concluding MPUC's formulation of a policy statement of interim rates that did not purport to have the force and effect of law was an interpretative rule; finding that failure to follow the correct rulemaking procedure did not render the MPUC's correct interpretation incorrect); Minn. Transitions Charter Sch. v. Comm'r of Dep't of Educ., 844 N.W.2d 223, 233-34 (Minn. Ct. App. 2014) (finding change in a longstanding Department practice was not an unpromulgated rule as it was consistent with the plain meaning of the statute); *In re* PERA Salary Determinations of Emps. of City of Duluth, 820 N.W.2d 563, 570-74 (Minn. Ct. App. 2012) (finding, after thoroughly reviewing the Minnesota law, in one instance Public Employees Retirement Association failed to properly promulgate an interpretive rule and in another the interpretation was consistent with the plain meaning of the statute and promulgation was unnecessary); Ebenezer Soc'y v. Dep't of Human Servs., 433 N.W.2d 436, 441 (Minn. Ct. App. 1988) (holding creation of a new classification by agency interpretation was invalid unpromulgated rule, as agency's interpretation did not correspond to the plain meaning, nor was the rule ambiguous, and the agency's interpretation long-standing); Good Neighbor Care Ctrs., Inc. v. Dep't of Human Servs., 428 N.W.2d 397, 403 (Minn. Ct. App. 1988) (citing *Mapleton*, 391 N.W.2d at 801-02) (overturning ALJ's finding of an unpromulgated rule, finding DHS interpretation of a nursing home statute is consistent with statute, therefore no new rule need be adopted).

©2015 William Mitchell College of Law. All Rights Reserved