23.4 UNBRIDLED DISCRETION

The unbridled discretion doctrine is a doctrine closely related to other legal concepts, including delegation of authority and the constitutional prohibition against laws that are vague. The doctrine has been recognized as a separate concept because of its recurrence in administrative rules. This section will first discuss the source of this doctrine, then demonstrate by examples why such a rule delegating unbridled discretion is impermissible, and finally discuss the circumstances under which agency discretion is permissible.

Discretionary power may be delegated to administrative officers

> [i]f the law furnishes a reasonably clear policy or standard of action which controls and guides the administrative officers in ascertaining the operative facts to which the law applies, so that the law takes effect upon these facts by virtue of its own terms, and not according to the whim or caprice of the administrative officers.[1]

Accordingly, in a rule that grants discretionary authority to the administrative officer, the issue is whether the rule furnishes a "reasonably clear policy or standard of action." Thus, this discretion issue is closely related to the issue of vagueness[2] and to the definition of a rule, which requires specificity (a rule must "implement or make specific the law enforced or administered").[3] In addition, requiring more specific language to avoid excessive agency discretion assures that the rule will be applied in a consistent manner.[4] Another reason for not permitting unbounded discretion is that such a grant authorizes the agency to circumvent the APA. An unauthorized unspecific and ambiguous rule allows the administrative officer to create and apply qualification criteria without fulfilling the APA rulemaking procedures. Such ad hoc rulemaking power is invalid.[5]

In discussing the unbridled discretion concept, it is useful to demonstrate the problem with examples. In a typical statutory grant, the legislature instructs the agency as follows: "The Commissioner shall adopt rules to set standards for qualification and methods of calculation." Under the legislative grant, the agency has considerable discretion in establishing the standards of qualifications or selecting the specific method of calculation. However, under this statute, the agency would not have the authority to adopt the following rule: "The Commissioner may grant a license if the applicant meets appropriate financial qualifications." Under this example, the agency has set forth no specific standards whatsoever in regard to what constitutes "appropriate financial qualifications." By failing to make specific discernible standards, the agency has not given applicants any information about or guide to how they may qualify for a license. Thus, this rule fails to give adequate notice to interested persons.

1 Lee v. Delmont, 228 Minn. 101, 113, 36 N.W.2d 530, 538 (1949); *see also In re* Appeal of Jongquist, 460 N.W.2d 915, 917 (Minn. Ct. App. 1990) ("Under the [APA], administrative officials are not permitted to act on mere whim, nor their own impulse, however well-intentional they might be.").

2 *See infra* § 23.8 (discussing the void for vagueness doctrine).

3 MINN. STAT. § 14.02, subd. 4 (2014).

4 Blocher Outdoor Adver. Co. v. Minn. Dep't of Transp., 347 N.W.2d 88, 91 (Minn. Ct. App. 1984).

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

Even if the language contains specific criteria, the criteria may be effectively nullified by the word *may*, as in the following example: "The Commissioner may grant a license if the applicant has fully paid the fee." Under this example, even if the applicant has fully paid the fee, the commissioner may still not grant the license. Thus, an applicant has no idea when or under what circumstances a license may be granted even though he or she has paid the fee.[6]

A rule granting discretionary power to administrative officers is permissible under certain circumstances. First, if the enabling statute expressly authorizes such agency discretion, then the rules adopted thereunder are not required to be more restrictive.[7] The second exception is prosecutorial discretionary power.[8] Finally, as discussed at the beginning of this section, a rule may grant discretionary power to administrative officers if the rule furnishes a reasonably clear policy or standard that controls and guides the administrator so that the rule takes effect by virtue of its terms, and not according to the whim and caprice of the administrative officer.[9] In determining the propriety of administrative discretion, the determination must be made on a case-by-case basis, since what may be a "reasonably clear standard" in one industry may be a meaningless generality in another. Furthermore, it is not necessary that a rule contain explicit definitions of every term[10] or be more precise if, in the context of the regulatory scheme, it is not feasible.[11]

In *Askildson v. Commissioner of Public Safety*,[12] the court of appeals discussed permissible agency discretion:

> The legislature may delegate power to an administrative agency if the statute provides a reasonably clear policy to guide the administrative officers, so the law takes effect by its own terms, rather than according to the whim or caprice of the administrative officers. . . . [W]here it is impracticable to promulgate a definite comprehensive rule, as where

6 Note that in *Coalition of Greater Minnesota Cities v. Minnesota Pollution Control Agency*, the court of appeals cited this section of this treatise in considering the validity of a rule that established criteria for issuing partial exemptions from discharge limits. 765 N.W.2d 159, 164-65 (Minn. Ct. App. 2009). Even if the discharger met the standards for an exception, the rule stated that the officer "may" grant a partial exemption. *Id.* at 165. The court upheld the rule, noting that, given the complexity of the proceedings, reasonable officer discretion was necessary. *Id.* at 166-67.

7 Hirsch v. Bartley-Lindsay Co., 537 N.W.2d 480, 487 (Minn. 1995) (finding Department of Labor and Industry emergency rules unduly infringed on discretionary power of workers compensation judges to make decisions regarding limits on medical care); *see supra* § 23.2 (discussing statutory authority).

8 2 KENNETH C. DAVIS, ADMINISTRATIVE LAW TREATISE ch. 9 (3d ed. 1994 & Supp. 1997).

9 Anderson v. Comm'r of Hwys., 267 Minn. 308, 311-12, 126 N.W.2d 778, 780-81 (1964); Lee v. Delmont, 228 Minn. 101, 113, 36 N.W.2d 530, 538 (1949); State v. Suter, 346 N.W.2d 372, 373-74 (Minn. Ct. App. 1984) (holding the legislature's delegation of authority and the commissioner's promulgation of order complies with constitutional requirements: "[A] legislature must establish a 'reasonably clear policy or standard of action' to guide the agency's exercise of discretion."); *see also Hirsch*, 537 N.W.2d at 487 (stating Department of Labor and Industry rules should not adopt controlling regulations but rule should have flexible standards that allow for a certain amount of medical judgment by compensation judges and would provide guidance as to what treatment is compensable).

10 *In re* Charges of Unprofessional Conduct Against N.P., 361 N.W.2d 386, 394 (Minn. 1985).

11 Can Mfrs. Inst. v. State, 289 N.W.2d 416, 423 (Minn. 1979).

12 403 N.W.2d 674 (Minn. Ct. App. 1987).

> application of a rule turns upon questions of qualifications of personal fitness, or where an act "relates to the administration of a police regulation which is necessary to protect the general health, welfare, and safety of the public," it is unnecessary to have a specific prescribed standard expressly stated in the legislation.[13]

Accordingly, in a rule that sets forth specific discernible standards to control and guide the administrative officer, the administrative officer may have considerable discretion in deciding whether a particular applicant has satisfied the standard. More important, such standards allow both the applicant and the reviewing court to understand the rules of the game and, consequently, provide a basis for determining whether the administrative officer acted in an arbitrary or unequal manner.

Giving specific criteria to guide administrative officers' discretion may save a rule even if the criteria do not entirely restrain officer discretion. In *Coalition of Greater Minnesota Cities v. Minnesota Pollution Control Agency*,[14] the court of appeals considered a rule stating that if a discharger of phosphorous met certain criteria, the discharger "may" qualify for a partial exemption to discharge limits.[15] The petitioner argued that the rule granted unbridled discretion because even if a discharger met the criteria, the discharger could be denied a partial exemption.[16] The court rejected this argument, reasoning that "may" is permissive, and therefore, does not grant unbridled discretion.[17] The court also concluded that the complexity of the proceedings required reasonable officer discretion.[18] Moreover, the court stated that a discharger denied a partial exemption can challenge the MPCA's decision as an abuse of discretion.[19]

13 *Id.* at 677.
14 765 N.W. 2d 159 (Minn. Ct. App. 2009).
15 *Id.* at 164-65.
16 *Id.* at 165.
17 *Id.* at 166.
18 *Id.* at 166-67.
19 *Id.* at 167.