

## 24.9 GROUNDS—NONCONSTITUTIONAL CHALLENGES

The APA provides that a rule may be declared invalid if it exceeds the statutory power of the agency.<sup>1</sup> This claim requires a careful analysis of just what the legislative enactment, either expressly or impliedly, authorizes the agency to do by rule. In a case where the legislation authorized issuance of standards or guidelines for housing products containing formaldehyde, the aggrieved party argued that the agency exceeded its authority in going beyond mere regulation by instead banning use of the product if it contained a certain level of formaldehyde. The Minnesota Supreme Court held, however, that the express authority to regulate included, by necessary implication, the power to ban.<sup>2</sup> On the other hand, in another case, the court held that the enabling legislation did not confer authority on the agency to adopt legislative or substantive rules, but the court, nevertheless, allowed the rule as a valid exercise of the agency's statutory power to promulgate interpretative rules.<sup>3</sup>

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<sup>1</sup> MINN. STAT. § 14.45 (2014); *see also* §§ 23.2-.3. This is a common nonconstitutional challenge raised in court. *E.g.*, *In re* Application of Minn. Power for Auth. to Increase Rates for Elec. Serv., 838 N.W.2d 747, 753-54, 757 (Minn. 2013) (concluding plain language of statute supported Commission's consideration of economic conditions in determining timing and size of rate increase and Commission did not exceed statutory authority by considering factors outside those listed in statute); *Jacka v. Coca-Cola Bottling Co.*, 580 N.W.2d 27, 34 (Minn. 1998) (holding department of labor and industry did not exceed its statutory authority in adopting rules governing the extent of chiropractic treatment allowed for lower back pain, because the rules were flexible enough to permit compensation judges to extend medical treatment for as long as medically necessary); *Hirsch v. Bartlett-Lindsay Co.*, 537 N.W.2d 480, 487 (Minn. 1995) (finding Department of Labor and Industry emergency rules are inconsistent with statute and legislative authorization and therefore invalid); *In re* the Peace Officer License of Woollett, 540 N.W.2d 829, 831-32 (Minn. 1995) (finding Board's rule did not conflict with statute); *Handle with Care v. Dep't of Human Servs.*, 406 N.W.2d 518, 522-23 (Minn. 1987) (examining legislative history of statute as to preconditions for rulemaking); *GH Holdings, LLC v. Minn. Dep't of Commerce*, 840 N.W.2d 838, 843 (Minn. Ct. App. 2013) (concluding board exceeded its statutory authority by adopting rule limiting evidence in contested cases to previously submitted written record); *Hentges v. Bd. of Water & Soil Res.*, 638 N.W.2d 441, 445-46 (Minn. Ct. App. 2002) (concluding board rule limiting federal exemption did not exceed statutory authority because it was consistent with legislative intent to achieve no net loss of wetlands); *Drum v. Minn. Bd. of Water & Soil Res.*, 574 N.W.2d 71, 74-75 (Minn. Ct. App. 1998) (concluding the Board's interpretation was consistent with the legislative intent to achieve no net loss in wetlands and did not exceed its statutory authority); *Rocco Altobelli v. Dept. of Commerce*, 524 N.W.2d 30, 36 (Minn. Ct. App. 1994) (finding Department of Commerce rule did not exceed the scope of the statute since barber chair leasing has been regulated for over 30 years and the legislature declined to ban chair leasing in 1992); *Stasny by Stasny v. Minn. Dep't of Commerce*, 474 N.W.2d 195, 199 (Minn. Ct. App. 1991) (invalidating Department of Commerce rule as inconsistent with statutory authority pursuant to which it was promulgated); *Wangen v. Comm'r of Pub. Safety*, 437 N.W.2d 120, 124 (Minn. Ct. App. 1989) (invalidating rule absolutely barring consideration of appellant's license reinstatement because the rule exceeded statutory authority); *City of Morton v. Minn. Pollution Control Agency*, 437 N.W. 2d 741, 746 (Minn. Ct. App. 1989) (weighing claim that rule exceeds statutory authority); *Christian Nursing Ctr. v. Dep't of Human Servs.*, 419 N.W.2d 86, 90-91 (Minn. Ct. App. 1988) (same); *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 did not violate the clear language of the statute).

<sup>2</sup> *Manufactured Hous. Inst. v. Pettersen*, 347 N.W.2d 238, 242 (Minn. 1984) (citing *United States v. Darby*, 312 U.S. 100, 113 (1941)).

<sup>3</sup> *Minnesota-Dakotas Retail Hardware Ass'n v. State*, 279 N.W.2d 360, 364-65 (Minn. 1979); *see also* *State v. King*, 257 N.W.2d 693, 697 (Minn. 1977) (construing statute to grant board of pharmacy rulemaking

Finally, a rule may be declared invalid if it was adopted without compliance with statutory rulemaking procedures. The APA is explicit in the procedural requirements that must be followed, at least substantially, for valid rulemaking.<sup>4</sup> Under the federal APA, interpretative rules are exempt from the act's notice and comment procedures,<sup>5</sup> but this is not so under Minnesota's act.<sup>6</sup>

Whether there has been compliance with the statutory rulemaking requirements assumes, of course, that it is, indeed, a rule that is being challenged. Thus it may be necessary, in a preenforcement challenge, to first establish that the agency pronouncement is a rule. In one case, for example, the aggrieved party successfully established that a "policy bulletin" issued by the agency was a rule, and since the public notice and hearing requirements had not been complied with its issuing the bulletin, the agency's pronouncement was invalid.<sup>7</sup>

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power to designate certain controlled substances); *Francis v. Minn. Bd. of Barber Exam'rs*, 256 N.W.2d 521, 525 (Minn. 1977) (concluding board lacked authority to require by rule public necessity test for granting of barber license); *Guerrero v. Wagner*, 246 N.W.2d 838, 841 (Minn. 1976) (finding no authority to adopt rule delegating duty that statute assigns to someone else); *Mammenga v. Dep't of Human Servs.*, 442 N.W.2d 786, 792 (Minn. 1989) (deferring to agency's interpretation of statute in its rules).

<sup>4</sup> *Johnson Bros. Wholesale Liquor Co. v. Novak*, 295 N.W.2d 238, 241-42 (Minn. 1980) (finding practice of liquor control commissioner was invalid for lack of compliance with APA rule-making procedure; choosing not to adopt substantial compliance test); *see also* MINN. STAT. §§ 14.15, subd. 5, .26, subd. 3(d) (2014) (regarding a finding and treatment of "harmless error" for procedural defects); *Minn. League of Credit Unions v. Minn. Dep't of Commerce*, 486 N.W.2d 399, 407 (Minn. 1992) (finding rule changes not to be substantial since they only narrowed and clarified the rule); *Handle with Care*, 406 N.W.2d at 520 (finding joint commissioner's study and report required by statute not to be a precondition for rulemaking; the adopted rule was therefore valid); *In re Assessment Issued to Leisure Hills Health Care Ctr.*, 518 N.W.2d 71, 74 (Minn. Ct. App. 1994) ("We must declare an agency's action invalid . . . if the agency adopts policy without complying with statutory rulemaking requirements."); *Minn. Ass'n of Homes for the Aging*, 385 N.W.2d at 68-69 (finding no procedural error where modification of proposed rule from statement of need and reasonableness was not substantial, that such modification was permissible); Carl A. Auerbach, *Administrative Rulemaking*, 63 MINN. L. REV. 151, 215 (1979).

<sup>5</sup> 5 U.S.C. § 553(b)(A) (2012).

<sup>6</sup> MINN. STAT. §§ 14.02 (defining "rule" as "every agency statement of general applicability and future effect . . . adopted to implement or make specific the law enforced or administered by that agency"), .05, subd. 1 (2014) (requiring rules to be adopted under procedure of APA); *Minnesota-Dakotas Hardware*, 279 N.W.2d at 364 n.6; *see also* *McKee v. Likins*, 261 N.W.2d 566, 576 n.10, 577-78 (Minn. 1977) (comparing the Minnesota APA to its federal counterpart); *Ebenezer Soc'y v. Dep't of Human Servs.*, 433 N.W.2d 436, 441 (Minn. Ct. App. 1988) (finding adopted rule was really an interpretative rule and, as such, invalid as not adopted in accordance with rulemaking procedures); Note, *Definition of "Rule" under the Minnesota Administrative Procedure Act*, 7 WM. MITCHELL L. REV. 665, 683-87 (1981).

<sup>7</sup> *McKee*, 261 N.W.2d at 577-78; *see also* § 16.4.