Chapter 16 Introduction to Rulemaking

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16.1 Definition of a Rule

The Administrative Procedure Act (APA) defines a rule in broad terms as every agency statement of general applicability and future effect adopted to implement or make specific the law enforced or administered by the agency or to govern its organization or procedure.[1] For a rule to be a valid rule, it must be properly and validly promulgated as defined by the law.[2] This is especially the case with legislative rules which, if not properly adopted they are not valid or legally enforceable.[3] In the case of interpretive rules, if they are not properly promulgated they may still be valid but will not carry the force of law and a court will have to decide how much deference they are due.[4]

That rules are statements of "general applicability" means that the nature of a rule is that it consists of a standard applicable to all.[5] Rules have thus been said to be analogous to enactments of the legislature.[6] They can be contrasted with contested cases, which, because they generally involve the application of rules or law to specific parties, have been said to be analogous to the adjudication process of a court.[7]

As one Minnesota court put it, "[I]t is obvious that the legislative scheme in so defining [the term 'rule'] was to include agency activities within the general definition of 'rule' and then to exclude such specific activity as it deemed beneficial to the concerns of efficient government and public participation."[8]

Excepted from this broad definition, and consequently from the requirements of formal rulemaking, are rules governing the internal management of an agency that do not directly affect the rights of or procedures available to the public.[9] Also excepted are several categories

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[1] Minn. Stat. § 14.02, subd. 4 (2021).

[2] *In re PERA Salary Determinations Affecting Retired and Active Employees of City of Duluth*, 820 N.W.2d 563 (Minn. Ct. App. 2012).

[3] *In re PERA Salary Determinations Affecting Retired and Active Employees of City of Duluth*, 820 N.W.2d 563 (Minn. Ct. App. 2012)

[4] *In re PERA Salary Determinations Affecting Retired and Active Employees of City of Duluth*, 820 N.W.2d 563 (Minn. Ct. App. 2012)

[5] *Minn. Chamber of Commerce v. Minn. Pollution Control Agency*, 469 N.W.2d 100, 105 (Minn. Ct. App. 1991) ("The development of site-specific criteria does not come within the definition of a rule because it is not an agency statement of general applicability and future effect); *see also Weber v. Hvass*, 626 N.W. 2d 426, 434 (Minn. Ct. App. 2001) (agreeing that a cost-of-confinement policy set by the Commissioner of Corrections "is clearly a rule, because it has general applicability over all inmates confined in [the Department of Correction's] facilities," but also noting the policy in question falls within a class of rules specifically exempted by the legislature from general rulemaking procedures).

[6] See 1 Kenneth Culp Davis & R.J. Pierce Administrative Law Treatise § 6.1 (5thd ed. 2001).

[7] *See id.* at 4; *see also* 1 F. Cooper, State Administrative Law 108 (1965).

[8] *McKee v. Likins*, 261 N.W.2d 566, 577 (Minn. 1977).

[9] Minn. Stat. § 14.03, subd. 3(a)(1) (2021); *see Minn. Med. Ass'n v. State*, 274 N.W.2d 84, 90 (Minn.

of rules pertaining to specific agencies or to specific programs as to which the legislature has chosen not to require formal rulemaking. Examples include rules of the commissioner of corrections governing inmates, opinions of the attorney general, occupational safety and health standards, and revenue notices and tax information bulletins of the commissioner of revenue.[10]

Suspensions, repeals, and amendments of existing rules are themselves defined to be rules by the APA[11] and can therefore be accomplished only by compliance with APA rulemaking procedures.

16.2 Types of Rulemaking Proceedings

There are four types of rulemaking proceedings: rulemaking without a hearing; rulemaking with a hearing; exempt rulemaking, that is rules adopted with legislative exemptions from the APA requirements; and expedited rulemaking, an abbreviated process that must be authorized by the legislature.[12]

Rulemaking without a hearing (sometimes called noncontroversial rulemaking) is discussed in chapter 20.[13] In rulemaking without a hearing, the agency, on notice to the public and after publication of the proposed rule and preparation of a statement of need and reasonableness supporting it, may adopt a rule without a hearing unless twenty-five members of the public request a hearing.

In rulemaking with a hearing, the agency gives notice, publishes the proposed rule, prepares a statement of need and reasonableness, and holds a more or less formal public

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1978) (noting that agency procedures and safeguards to ensure accuracy, completeness, and currency of agency data on individuals under the Data Practices Act pertain to internal agency management and "does not affect the public's right to information contained in the official record"); *Weber v. Hvass*, 626 N.W.2d 426, 433-34 (Minn. Ct. App. 2001) (affirming that a Department of Correction policy imposing a 10% surcharge on gifts to inmates was an internal management rule not subject to the APA).

[10] Minn. Stat. § 14.03, subd. 3(b)(1), (3), (5), (6) (2014). Other examples include certain highway weight limitation rules, the state education data element dictionary and annual data acquisition calendar, the occupational safety and health standards and uniform conveyancing forms adopted by the commissioner of commerce, standards adopted by the Electronic Real Estate Recording Commission, and interpretative guidelines developed by the commissioner of human services to the extent provided by chapter 245A. Minn. Stat. § 14.03, subd. 3(b)(2), (4), (5), (7)-(9) (2014); *see also In re Investigation into Intra-LATA Equal Access & Presubscription v. Minn. Pub. Utils. Comm'n*, 532 N.W. 2d. 583, 588-89 (Minn. Ct. App. 1995) (ruling that agency statements deemed not to be rules are exempted from the requirements of the APA's rulemaking requirements); *Stony Ridge & Carlos View Terrace Ass'n., Inc. v. Alexander*, 353 N.W. 2d. 700, 703 (Minn. Ct. App. 1984) (looking first to "to see if the policy falls within the general definition of a rule," and then "[i]f the policy may be defined as a rule, [determining] whether the policy falls within any listed exemptions to the definition of a rule.").

Excepted from the APA entirely are agencies in the legislative and judicial branches, the exercise of emergency powers in the department of military affairs, the statutory comprehensive health association, the tax court, and the regents of the University of Minnesota. Minn. Stat. §§ 12.31-.37, 14.03, subd. 1 (2014).

[11] Minn. Stat. § 14.02, subd. 4 (2014); *see Swenson v. State Dep't of Pub. Welfare*, 329 N.W.2d 320, 324 (Minn. 1983) (noting that amendment of an agency rule mandating individual public welfare services could be undertaken only through the use of formal rulemaking procedures).

[12] *See generally*: Minn. Stat. § 14.14 and 14.22 (2021).

[13] *See also:* Minn. Stat. §§ 14.22-14.28.

rulemaking hearing on the record.[14] Rulemaking with a hearing is discussed in chapter 21.

Exempt rules, discussed in chapter 21, is an expedited rulemaking method under which rules may be adopted without a hearing after publication of a notice of intent to adopt rules and expiration of a 30-day public comment period. No statement of need and reasonableness is required for exempt rules. Some exempt rules are limited in their effectiveness to two years.

Expedited rules are discussed at § 21.6. The process is essentially notice and comment rulemaking, without a hearing or a statement of need and reasonableness, but with a legal review by the office of administrative hearings. The legislature must specifically authorize the use of this process for a set of rules and it can also provide that a hearing will be held if 100 people request one.

16.3 Types of Rules

Three specific types of rules have been recognized as falling within the APA's broad definition of a rule—legislative rules, procedural rules, and interpretative rules.[15] The three types differ in their purpose. However, regardless of the rule type, all rules are subject to the rulemaking requirements of the APA.[16]

Legislative rules are those the purpose of which is to make substantive law pursuant to powers delegated to the agency by the legislature.[17] Legislative rules require specific statutory authority.[18]

The purpose of procedural rules is to set forth the nature and requirements of formal and

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[14] *See also:* Minn. Stat. §§ 14.13-14.19.

[15] Minn. Stat. § 14.38, subd. 1 (2021). The statute uses the term "substantive" rules and not "legislative" rules, although the case law uses the terms interchangeably with the same meaning. *See Cable Commc'ns Bd. v. Nor-West Cable Commc'ns P'ship*, 356 N.W.2d 658, 667 (Minn. 1984) ("This court has recognized three types of agency rules: legislative, interpretative, and procedural"); *Minnesota-Dakotas Retail Hardware Ass'n v. State*, 279 N.W.2d 360, 365 (Minn. 1979) ("Legislative rules . . . are enacted pursuant to delegated powers to make substantive law, and, in contrast to interpretative rules, have the force and effect of law."); *McKee v. Likins*, 261 N.W.2d 566, 577 (Minn. 1977) ("[T]hree definite types of rules came to be delineated by the commentators and later court decisions . . . procedural, legislative, or interpretative"). *See generally* Note, *Definition of "Rule" under the Minnesota Administrative Procedure Act,* 7 WM. MITCHELL L. REV. 665, 676–79 (1981).

[16] *Cable Commc'ns Bd.*, 356 N.W.2d at 667 ("Regardless of rule type, however, this court has held that all rules are subject to the rulemaking requirements of MAPA."); *White Bear Lake Care Ctr., Inc. v. Minn. Dep't of Pub. Welfare*, 319 N.W.2d 7, 9 (Minn. 1982) ("Rules must be adopted in accordance with specific notice and comment procedures established by statute . . . and the failure to comply with necessary procedures results in invalidity of the rule."); *Johnson Bros. Wholesale Liquor Co. v. Novak*, 295 N.W.2d 238, 242 (Minn. 1980) ("Interpretive rules fall within the statutory definition of 'rule.'"); *In re Assessment Issued to Leisure Hills Health Care Ctr.*, 518 N.W.2d 71, 74 (Minn. Ct. App. 1994) ("The Minnesota APA requires agencies to promulgate, as rules, all formal and informal procedures of an agency."); *Donovan Contracting of St. Cloud, Inc. v. Minn. Dep't of Transp.*, 469 N.W.2d 718, 722 (Minn. Ct. App. 1991) ("Interpretative rules must be adopted by following the procedures set forth in the Administrative Procedure Act.").

[17] *See e.g.: In re PERA Salary Determinations Affecting Retired and Active Employees of City of Duluth*, 820 N.W.2d 563 (Minn. Ct. App. 2012) and *Cable Commc'ns Bd.*, 356 N.W.2d at 667; *Minnesota-Dakotas Retail Hardware Ass'n*, 279 N.W.2d at 365 .

[18] *State v. Lloyd A. Fry Roofing Co.*, 310 Minn. 528, 534, 246 N.W.2d 696, 700 (1976).

informal procedures relative to the administration of official agency duties to the extent that they directly affect the rights of or procedures available to the public.[19] The most common procedural rules are those governing contested case practice before individual agencies.[20]

Interpretative rules are not defined in the APA.[21] Indeed, before their appearance in case law, they were never expressly mentioned in the APA. They have been described in case law as those rules the purpose of which is to make specific the law enforced or administered by the agency,[22] for example, by making more specific the acts that the agency will deem a violation of the law.[23] Interpretative rules must be adopted pursuant to the APA.[24]

16.3.1 Legal Effect of Types of Rules

Substantive, procedural and interpretative rules have the force and effect of laws if adopted pursuant to the APA.[25] If properly adopted, they should be afforded the same recognition as a statute.[26] Rules bind not just the public but also the agency itself. An agency is bound by the rules it has adopted and may not disregard them even though their adoption was discretionary with the agency.[27] The principle that an agency is bound by its own rules is not, however, hard-

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[19] Minn. Stat. § 14.06(a) (2021).

[20] *See, e.g.*, Minn. R. §§ 7829.0100-.3200 (2016) (rules of utility proceeding, practice, and procedure before public utilities commission).

[21] The federal APA expressly mentions interpretative rules and exempts them from the notice requirements, 5 U.S.C.A. § 553(b)(3)(A) (2021), and the publication and service requirements, 5 U.S.C.A. § 553(d)(2) (2021). The federal APA, however, similarly fails to expressly define *interpretative rule.*

[22] *Cable Commc'ns Bd.*, 356 N.W.2d at 667; *Minnesota-Dakotas Retail Hardware Ass'n*, 279 N.W.2d at 364; *In re Application of Q Petroleum*, 498 N.W.2d 772, 781 (Minn. Ct. App. 1993) (citing *City of Mapleton Cmty. Home, Inc., v. Minn. Dep't of Human Servs.*, 391 N.W.2d 798, 801 (Minn. 1986)); *Dullard v. Minn. Dep't of Human Servs.*, 529 N.W.2d 438, 445 (Minn. Ct. App. 1995) (finding department's interpretation an interpretative rule where the interpretation made federal and state medical assistance statutes more specific).

[23] *Cable Commc'ns Bd.*, 356 N.W.2d at 667; *Minnesota-Dakotas Retail Hardware Ass'n*, 279 N.W.2d at 364.

[24] *Johnson Bros. Wholesale Liquor Co. v. Novak*, 295 N.W.2d 238, 242-43 (Minn. 1980); *St. Otto's Home v. Dep't of Human Servs.*, 437 N.W.2d 35, 42 (Minn. 1989) ("All rules, including interpretative rules, must be adopted in accordance with the Minnesota Administrative Procedure Act."); *Dullard*, 529 N.W.2d at 445; *Builders Association of Twin Cities v. Board of Electricity*, 965 N.W.2d 350 (Minn. Ct. App.2021).

[25] Minn. Stat. § 14.38, subd. 1 (2021) (providing that every rule, whether known as substantive, procedural, or interpretive, has the force and effect of law five working days after publication of its notice of adoption in the State Register, unless a different day is specified by statute or rule); *Cable Commc'ns Bd.*, 356 N.W.2d at 667; *Minnesota-Dakotas Retail Hardware Ass'n*, 279 N.W.2d at 365; *Dullard v. Minn. Dep't of Human Servs.*, 529 N.W.2d 438, 445 (Minn. Ct. App. 1995); *Builders Association of Twin Cities v. Board of Electricity*, 965 N.W.2d 350 (Minn. Ct. App.2021).

[26] *See State v. Hopf*, 323 N.W.2d 746, 752 (Minn. 1982); *see also In re Rate Appeal of Benedictine Health Ctr.*, 728 N.W. 2d. 497, 507 (Minn. 2007) (reiterating that unpromulgated rules were not entitled to deference).

[27] *Springborg v. Wilson & Co.*, 245 Minn. 489, 493,73 N.W.2d 433, 435 (1955) (holding industrial commission bound to follow own rules of practice requiring hearing on employee petition for penalty against employer); *State ex rel. Indep. Sch. Dist. No. 6 v. Johnson*, 242 Minn. 539, 548, 65 N.W.2d 668, 673-74 (1954) (requiring state board of education to follow own rules requiring notice and warning before termination of state school aid); *see also Boedingheimer v. Lake Country Transp.*, 485 N.W.2d 917, 921 (Minn.

and-fast. The Minnesota Supreme Court has found that an agency has implicit power to impose reasonable standards to effectuate the purpose of the legislature even though to do so is inconsistent with rules of the agency.[28] Commentators have observed that underlying factors of justice, prejudice to parties, and policy implications of rigid adherence to rules explain the absence of a firm rule.[29]

16.3.2 Historical Overview of Interpretative Rules

While procedural and substantive rules have long had the effect of law, it has not always been clear that interpretative rules have had the force and effect of law.[30] There was no mention of interpretative rules in the APA before their first appearance in dicta in the opinion of the Minnesota Supreme Court in *McKee v. Likins*[31] in 1977. Thereafter, in *Minnesota-Dakotas Retail Hardware Association v. State*,[32] the Minnesota Supreme Court developed the concept of interpretative rules. There it was said that interpretative rules are mere statements of agency policy and do not have the effect of law.[33] Their weight and effect as applied to a particular fact situation were therefore to be judicially determined on a case-by-case basis.[34] In *Minnesota-Dakotas*, a rule originally adopted to be a legislative rule was found instead to be a legitimate interpretative rule. The court was precluded from finding the rule valid as a legislative rule having the effect of law because of insufficient statutory rulemaking authority.[35]

After the *Minnesota-Dakotas* decision, and in response to it, the legislature amended the APA to provide that all rules, whether legislative, procedural, or interpretative, have the force and effect of law.[36] Since the amendment of the APA and the *Minnesota-Dakotas* decision, the appellate courts have had other opportunities to discuss interpretative rules and their legal effect, as is discussed in section 16.4.

1992) ("[For department to] say initially that the fee schedule does not apply to hospitals and then to turn around and abruptly say that it does, would amount . . . to impermissible 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) (denying the board's application of a new unwritten definition of "emergency" where the board had previously promulgated a clear written definition of the same).

[28] *Koronis Manor Nursing Home v. Dep't of Pub. Welfare*, 311 Minn. 375, 379–80, 249 N.W.2d 448, 451 (1976) (denying nursing home accounting procedure option where allowance of option would have resulted in double reimbursement for welfare patients and thus would have conflicted with legislative purpose in establishing program).

[29] *See generally* 1 K. HICKMAN & R.J. PIERCE ADMINISTRATIVE LAW TREATISE § 6.5 (6th ed. 2020

[30] *See* Note, *Definition of "Rule" under the Minnesota Administrative Procedure Act, 7* WM. MITCHELL L. REV. 665, 678, 681 (1978).

[31] 261 N.W.2d 566, 577 (Minn. 1977).

[32] 279 N.W.2d 360 (Minn. 1979).

[33] *Id.* at 365.

[34] *Id.*

[35] *Id.*

[36] *See* Minn. Stat. § 14.38, subd. 1 (2021). Minnesota cases, such as *McKee*, 261 N.W.2d at 577, and *Minnesota-Dakotas Retail Hardware Ass'n*, 279 N.W.2d at 365, refer to interpretative rules rather than "interpretive" rules as does the statute. The terms are synonymous.

16.3.3 Retroactivity

No distinction has emerged in Minnesota among the three types of rules in terms of whether they can be retroactive. In a case dealing with substantive rules, the Minnesota Supreme Court observed that rules can be retroactive.[37] The court there applied the same standard to rules as is applied to statutes—no retroactive effect is presumed unless clearly and manifestly intended by the legislature.[38] Commentators have observed that the traditional general rule is that legislative rules are prospective in nature because they make law, and interpretative rules are retroactive by nature, since they clarify law that has existed all along.[39] Constitutional limitations, such as the prohibition against impairment of contract and the requirements of due process, may apply to restrict the retroactivity of a rule.[40]

16.4 Agency Policymaking as Improper or Illegal Rulemaking

State agencies make policy in a variety of ways. Agency administrators make policy on a daily basis as they make informal decisions. These decisions do not usually involve matters of great public concern, but they constitute the most common form of agency policymaking. As the following section of this chapter explains, agencies also make policy in the course of contested case proceedings, which is the adjudicatory function of the agency. The adoption of new policies through a trial-type hearing procedure is probably more common at the federal level than at the state level. However, the Minnesota Public Utilities Commission frequently adopts new public policy in the course of its ratemaking proceedings, which are conducted as contested cases.

The most procedurally well-defined method for making policy is rulemaking under the APA. The adoption of permanent rules under the APA requires an agency to complete a series of steps allowing for meaningful public input into the substance of the rule being adopted. Rulemaking under the APA, however, can take a substantial amount of time and can be expensive for the agency, at least where the rule is challenged. Consequently, state agencies sometimes seek other methods of disseminating their policy determinations. Agencies must, of course, distribute written information and interpretations to their employees and other agencies and to the public in order to perform their duties properly. Most of these written statements are merely explanations or instructions and are not controversial. However, the issuance of policy statements by state agencies has been described as improper or illegal rulemaking where the appellate courts have discerned a legislative intent to adopt the policy through the APA.[41]

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[37] *Mason v. Farmers Ins. Cos.*, 281 N.W.2d 344, 348 (Minn. 1979).*See generally* 1 K. HICKMAN & R.J. PIERCE, ADMINISTRATIVE LAW TREATISE § 6.6 (6th ed. 2020).

[38] *Mason*, 281 N.W.2d at 348.

[39] Asimov, *Public Participation in the Adoption of Interpretive Rules and Policy Statements,* 75 MICH. L. REV. 520, 569–72 (1977)*; see also* Note, *Definition of "Rule" under the Minnesota Administrative Procedure Act,* 7 WM. MITCHELL L. REV. 665, 682–83 (1981).

[40] *See Ashbourne Sch. v. Dep't of Educ.*, 43 Pa. Commw. 593, 403 A.2d 161, 165 (1979) ("Agencies may, of course, adopt retroactive regulations so long as they do not disturb vested rights, the impairment of contracts, or the principles relating to due process.").

[41] *Cable Commc'ns Bd. v. Nor-West Cable Commc'ns P'ship*, 356 N.W.2d 658, 667-68 (Minn. 1984). *See also: In re PERA Salary Determinations Affecting Retired and Active Employees of City of Duluth*, 820 N.W.2d 563 (Minn. Ct. App. 2012).

16.4.1 Guidelines, Bulletins, and Policy Statements

The administrative policymaking device that has sparked both judicial and legislative examination is the issuance of a written statement describing the agency's policy, outside and apart from rulemaking or adjudication. Such statements are often described as internal guidelines, bulletins, manuals, policy statements, directives, or instructions. The issuance of a policy statement by an agency without recourse to APA rulemaking allows the agency to retain more discretion than if it had adopted a rule for several reasons.[42] First, the agency is not required to obtain the public input guaranteed by the APA and thus has more latitude to adopt policies of its own choosing. Second, the agency retains greater procedural flexibility by being able to implement, withdraw, or modify its policy statement without an APA proceeding of any type. Third, the agency has greater discretion in whether or not to enforce its policy in every case. However, an agency issuing a policy statement or guideline must accept the less certain effect of such a device as opposed to a duly adopted rule. While rules have the effect of law, policy statements or guidelines do not. The question of whether policy statements are entitled to any deference in a contested case or on judicial review is considered below.

The proliferation of policy statements and guidelines by certain state agencies led to the 1975 revision of the APA, placing on agencies, for the first time, detailed procedural requirements for rulemaking.[43] The issuance of guidelines and policy statements by state agencies also has provoked critical examination by the courts regarding whether the statements constitute rules within the meaning of the APA. The Minnesota Supreme Court has characterized the issuance of written policy statements or interpretations of rules or statutes as "improper" or "illegal" rulemaking where the legislature intended the policy- making to be governed by the APA.[44] The inquiry is of greater significance in Minnesota than other jurisdictions because interpretative rules—those that make specific the law enforced by the agency—are required to be adopted through the APA, along with substantive and procedural rules.[45]

The beginning point for most judicial inquiries about the effect of policy statements is a consideration of whether the statement comes within the definition of a rule. As the first section of this chapter indicates, the definition of *rule* contained in the APA is very broad. It includes "every agency statement of general applicability and future effect . . . adopted to implement or make specific the law enforced or administered by that agency or to govern its organization or procedure."[46] Most policy statements or guidelines fall within this very inclusive definition. The

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[42] See: Mark M. Bell, *A Pragmatic Approach to Judicial Review of Informal Guidance Documents*, 2 FAULK L. Rev. 77 (2010) (generally discussing the way the courts views agency policy statements as law).

[43] Triplett & Nobles, *Rulemaking under Minnesota's Administrative Procedure Act: 1975 Amendments,* 43-6 HENNEPIN LAWYER 14 (July-August 1975).

[44] *Cable Commc'ns Bd.*, 356 N.W.2d at 667–68. Unadopted "rules" can only be challenged in a contested case proceeding, *not* in a preenforcement action under Minn. Stat. § 14.44. *Minnesota Ass'n of Homes for the Aging v. Dept. of Human Serv.*, 385 N.W.2d 65, 69 (Minn. Ct. App. 1986). *See also: In re PERA Salary Determinations Affecting Retired and Active Employees of City of Duluth*, 820 N.W.2d 563 (Minn. Ct. App. 2012).

[45] *See* Minn. Stat. § 14.38, subds. 1-3 (2021); *St. Otto's Home v. Dep't of Human Servs.*, 437 N.W.2d 35, 42 (Minn. 1989); *Minnesota-Dakotas Retail Hardware Ass'n v. State*, 279 N.W.2d 360, 364 (Minn. 1979); *Dullard v. Minn. Dep't of Human Servs.*, 529 N.W.2d 438, 445 (Minn. Ct. App. 1995).

[46] Minn. Stat. § 14.02, subd. 4 (2021). An application of the statute is illustrated by *Hanna Mining Co.*

definition does, however, contain an important exception for "rules concerning only the internal management of the agency or other agencies that do not directly affect the rights of or procedure available to the public."[47] The courts have found that some policy statements are simply guidelines for internal management of the agency and, as such, are statutorily excepted from the rulemaking procedure.[48] Internal guidelines are described by the courts as those statements that are "so remote from the public as to be exempt" from the rulemaking process.[49]

The Minnesota court of appeals found that an "internal guideline" of the commissioner of public safety that determined the length of a driver's license revocation was within the definition of a rule. Because it had not been adopted through the APA, the guideline could not have the force of law. The court of appeals determined, however, that this only deprived the revocation period in the guideline of "its conclusive presumption of reasonableness that a formal rule would provide." The court held that the specified revocation period was still presumptively valid but was open to greater scrutiny. The court remanded the case to the trial court for a determination of the appropriate length of the revocation.[50] In another driver's license case involving the department of public safety, the court of appeals decided that internal guidelines, although without the force of law, could be followed if the resulting agency action was not arbitrary or unreasonable.[51] In a similar approach, the Iowa Supreme Court has permitted an unadopted "rule" to be considered as a "relevant factor," but not as a valid rule with the force of law.[52]

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v. Minn. Pub. Utils. Comm'n, 375 N.W.2d 550, 553 (Minn. Ct. App. 1985). *See also Minn. Chamber of Commerce v. Minn. Pollution Control Agency*, 469 N.W.2d 100, 105 (Minn. Ct. App. 1991) ("The development of site-specific criteria does not come within the definition of a rule because it is not an agency statement of general applicability and future effect."). *But cf. In re Proposal by Lakedale Tel. Co. to Offer Three Additional Class Servs.*, 561 N.W. 2d 550, 555 (Minn. Ct. App. 1997) (concluding that MPUC's decision to require a $1 per activation fee, although based on policy concerns, was not a statement of general applicability and future effect and did not, therefore, require formal rulemaking procedures).

[47] Minn. Stat. § 14.03, subd. 3(a)(1) (2021).

[48] *E.g., In re Alleged Labor Law Violation of Chafoulias Mgmt. Co.*, 572 N.W.2d 326, 332 (Minn. Ct. App. 1997) (holding that contested case hearing is not a procedure affecting the rights of or procedures available to the general public but concerns only the parties to that action, and Relator was, therefore, not deprived of due process when the Department of Labor and Industry did not adopt rules regarding procedure for filing exceptions); *In re Assessment Issued to Leisure Hills Health Care Ctr.*, 518 N.W.2d 71, 74 (Minn. Ct. App. 1994) (holding that department is not required to promulgate its inspection procedures pursuant to the rulemaking requirement of the APA, because the department's inspection procedures involve only the internal management of the agency and neither directly affect the rights of the public or the procedures available to the public); *Stony Ridge & Carlos View Terrace Ass'n v. Alexander*, 353 N.W.2d 700, 703 (Minn. Ct. App. 1984). *But see Evenson v. Minn. Dep't of Human Servs.*, 489 N.W.2d 256, 261 (Minn. Ct. App. 1992) (holding that by requiring an individual to rent out her property, the commissioner has evidenced an intent to implement a policy that some people must rent their property to make it marketable for MSA purposes, and construing the commissioner's policy as an unadopted rule and therefore invalid); *In re Appeal of Jongquist*, 460 N.W.2d 915, 916 (Minn. Ct. App. 1990) (holding that Department of Jobs and Training, Division of Rehabilitative Services had no authority to require disabled persons to take out loans in absence of rule adopted pursuant to APA, because division procedures directly affected the rights of or procedures available to the public and did not come within any statutory exception).

[49] *Johnson Bros. Wholesale Liquor Co. v. Novak*, 295 N.W.2d 238, 242 (Minn. 1980).

[50] *Benson v. Comm'r of Pub. Safety*, 365 N.W.2d 799, 801 (Minn. Ct. App. 1984).

[51] *Schultz v. Comm'r of Pub. Safety*, 365 N.W.2d 304, 306-7 (Minn. Ct. App. 1985).

[52] *Young Plumbing & Heating Co. v. Iowa Natural Res. Council*, 276 N.W.2d 377, 383 (Iowa 1979).

16.4.2 Permissible Interpretation Versus Improper Adoption

As stated in the previous section, the starting point for most judicial inquiries about the effect of policy statements, or other agency interpretations, is whether the statement comes within the definition of a rule, "every agency statement of general applicability and future effect, adopted to implement or make specific the law enforced or administered by that agency or to govern its organization or procedure." Because interpretative rules "make specific" the law administered by agencies, they are subject to the rulemaking requirements of the APA, if not they are invalid and cannot be used as the basis for agency action.[53]

In applying this rule, the question or test considered by the Minnesota appellate courts in cases of alleged illegal rulemaking is whether the agency policy is a permissible interpretation of a rule or statute consistent with its plain meaning, or whether it constitutes the improper adoption of a new rule. The answer to this question requires a judgment by the court about how far the agency interpretation varies from the existing rule or statute.[54]

Generally the job of the courts is to give meaning to the effect or intent of the legislature, including when interpreting rules.[55] If an interpretation is consistent with the plain meaning of the rule or statute interpreted, the agency action is authorized by the statute itself, and the fact that no rule was adopted does not render the interpretation invalid, although it does not have the force and effect of law.[56] The interpretation is valid already based on the rule or statute. The

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[53] In re Salary Determinations Affecting Emps. of the City of Duluth, 820 N.W. 2d 563 (Minn. Ct. App. 2012).

[54] *Compare:* Aditya Bamzai, *Delegation and Interpretive Discretion: Gundy, Kisor, and the Formation and Future of Administrative Law*, 133 Harv. L. Rev. 164 (2019) for a good discussion of how much authority agencies have to interpret statutes and what deference under federal law courts should give.

[55] *State by Smart Growth Minneapolis v. City of Minneapolis*, 954 N.W.2d 584 (2021).

[56] *Flores v. Dep't of Jobs & Training*, 411 N.W.2d 499, 504 (Minn. 1987) (citing *Dumont v. Commissioner of Taxation*, 154 N.W.2d 196, 199 (Minn. 1967)) (holding unemployment compensation rule imposed additional requirements beyond those required by statute and was therefore inconsistent with the statute); *Cable Commc'ns Bd. v. Nor-West Cable Commc'ns P'ship*, 356 N.W.2d 658, 667 (Minn. 1984); *Sellner Mfg. Co. v. Comm'r of Taxation*, 202 N.W.2d 886, 888-89 (Minn. 1972); *see also Boedingheimer v. Lake Country Transp.*, 485 N.W.2d 917, 921 (Minn. 1992) (reversing a rule interpretation by the Department of Labor and Industry but holding that, if properly interpreted, the rule was valid as consistent with the governing statute); *City of Mapleton Cmty. Home, Inc., v. Minn. Dep't of Human Servs.*, 391 N.W.2d 798, 801 (Minn. 1986) (holding not all interpretations constitute interpretative rules – if the agency's interpretation corresponds with the plain meaning of the rule it construes, the agency is deemed not to have adopted a new rule); *Care Providers of Minn., Inc. v. Gomez*, 545 N.W.2d 45, 48 (Minn. Ct. App. 1996) (holding that department's internal use of assessment letters is means of effectuating its interpretation of existing law and does not involve the promulgation of a new rule); *Faribault Cnty. v. Minn. Dep't of Transp.*, 472 N.W.2d 166, 169 (Minn. Ct. App. 1991) (concluding that DOT's notice regarding state-aid funds constituted an announcement of a clear statutory requirement that the prevailing wage law be applied to state-aid funded projects contracted for by counties and cities and is not a rule); *City of Morton v. Minn. Pollution Control Agency*, 437 N.W.2d 741, 746-47 (Minn. Ct. App. 1989) (holding administrative agency exceeds its statutory authority when it promulgates a rule that is inconsistent with the agency's enabling legislation); *Good Neighbor Care Ctr. Inc. v. Minn. Dep't of Human Servs.*, 428 N.W.2d 397, 403-04 (Minn. Ct. App. 1988) (finding commissioner's interpretation of rules and statute was consistent with plain meaning and not an unpromulgated rule); *Nw. Bell Tel. Co. v. Minn. Pub. Utils. Comm'n*, 420 N.W.2d 646, 650 (Minn. Ct. App. 1988) (determining that MPUC interpretation of statutory terms "telephone service" and "public" was not adoption of new rule but mere

court will look to the plain words of the statute in making this determination. Conversely, if the interpretation is not within the plain meaning of the statute or rule, the agency action is not authorized by the statute itself and the fact that no rule was adopted renders the interpretation invalid.[57]

In considering whether an agency is merely interpreting a rule, the Minnesota Supreme Court also has held that where the rule is ambiguous and the interpretation advanced by the agency is a long-standing one, the agency is deemed to be interpreting its rule rather than adopting a new rule.[58] This holding is consistent with the custom of giving judicial deference to an agency's interpretation of its own rule where the rule is ambiguous and the interpretation is long-standing.[59] Conversely, if an interpretation has not been consistently applied in the past, a court

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interpretation); *Christian Nursing Ctr. v. Dep't of Human Servs.*, 419 N.W.2d 86, 91 (Minn. Ct. App. 1988) (holding that even though DHS interpretation of rule was not longstanding, it is consistent with the plain meaning of the rule and is not a new rule).

[57] *In the Matter of Minnesota Living Assistance, Inc.*, 934 N.W.2d 300 (2019); *St. Otto's Home v. Dep't of Human Servs.*, 437 N.W.2d 35, 43 (Minn. 1989) (holding commissioner's definitions inconsistent with the plain meaning of the rule); *White Bear Lake Care Ctr., Inc. v. Minn. Dep't of Pub. Welfare*, 319 N.W.2d 7, 8 (Minn. 1982); *In re Rate Appeal of Elim Homes, Inc. v. Minn. Dep't of Human Servs.*, 575 N.W.2d 845, 849 (Minn. Ct. App. 1998) (holding Commissioner of Health's interpretation of the nursing home rate statute was not an improper promulgation of a new rule, but was an interpretation and application of the plain language of the statute); *Dullard v. Minn. Dep't of Human Servs.*, 529 N.W.2d 438, 445 (Minn. Ct. App. 1995) (holding DHS interpretation of medical assistance benefits statute was inconsistent with statute and, because the interpretation was not adopted pursuant to the APA, it was not binding on the court); *Donovan Contracting of St. Cloud, Inc. v. Minn. Dep't of Transp.*, 469 N.W.2d 718, 722 (Minn. Ct. App. 1991) (determining that the illegal rule was not consistent with the plain meaning of the statute and concluding that the position of the department would not be viewed by a reasonable person as having a reasonable basis in fact or law); *In re Application of Crown CoCo, Inc.*, 458 N.W.2d 132, 137 (Minn. Ct. App. 1990) (finding Petrofund Board's action not consistent with the plain meaning of the act and, therefore, board's policy determination to make insured costs non-reimbursable an invalid rule which must be adopted properly through the APA); *Sa-Ag, Inc. v. Minn. Dep't of Transp.*, 447 N.W.2d 1, 5 (Minn. Ct. App. 1989) (holding agency interpretation of a statutory term in an "addendum" was unauthorized rulemaking where the statutory term was subject to more than one interpretation); *Ebenezer Society v. Minn. Dep't of Human Servs.*, 433 N.W.2d 436, 439 (Minn. Ct. App. 1988) (holding new standard introduced into Rule 50 was not consistent with plain meaning and rule was not ambiguous, therefore interpretation was invalid).

[58] *In the Matter of Minnesota Living Assistance, Inc.*, 934 N.W.2d 300 (2019); *White Bear Lake Care Ctr.*, 319 N.W.2d at 8; *see also In re Administrative Order Issued to Wright Cnty.*, 748 N.W. 2d 398 (Minn. Ct. App. 2010); *In re Deregulation of the Installation & Maint. of Inside Wiring*, 420 N.W.2d 650, 659 (Minn. Ct. App. 1988) (finding a PUC show-cause procedure used for ten years without challenge was mere statutory interpretation and not adoption of a new rule); *In re Application of Crown CoCo, Inc.*, 458 N.W.2d at 137 (finding Petrofund Board's action not consistent with the plain meaning of the act and, therefore, board's policy determination to make insured costs non-reimbursable an invalid rule which must be properly adopted through the APA); Note, *Definition of "Rule" under the Minnesota Administrative Procedure Act*, 7 WM. MITCHELL L. REV. 665, 681 (1981).

[59] St. Otto's Home, 437 N.W.2d at 40; *Resident v. Noot*, 305 N.W.2d 311, 312 (Minn. 1981); *In re Application of Q Petroleum*, 498 N.W.2d 772, 776 (Minn. Ct. App. 1993) (holding where rule was ambiguous, the agency's interpretation will be upheld because its requirement to submit a formal CAD letter or closure letter before its application would be considered is reasonable and consistent with plain meaning of rule); *Minnesota Transitions Charter School v. Commissioner of the Minnesota Department of Education*, 844 N.W.2d 223 (Minn. App. 2014); *In the Matter of Minnesota Living Assistance, Inc.*, 934 N.W.2d 300 (2019).

may cite this as an important factor and find it to be an invalid interpretative rule.[60] In general, state agency construction of state statutes through agency rules are presumed correct, often because of the agency's technical expertise.[61] The Minnesota courts have devised their own rules of deference to state agency construction of state statutes.[62] Under federal law, federal courts defer to agency construction of federal statutes when it is clear Congress intended to give the agency the authority to make rules.[63] The basic test for deference is articulated in *Chevron U.S.A. Inc.* v. *Natural Resources Defense Council, Inc.*[64] In cases where Minnesota courts are reviewing state agency construction of federal law in an area of agency expertise, the Minnesota courts appear to follow the *Chevron* deference rules.[65]

16.4.2(1) Consistency with Adopted Rule or Statute as a Factor

In a number of cases, the courts have found mere interpretation consistent with the plain meaning of the rule or statute when examining an agency policy. The Minnesota Supreme Court examined a department of public welfare (now the department of human services) policy bulletin that directed counties to consider a recipient's income tax refund as income available to meet needs. A consequence of this directive would be a reduction in the recipient's welfare grant. The court determined that the existing substantive federal law already was clear on this point and that the policy bulletin "constitutes merely a restatement of existing welfare policy and a directive concerning internal management requiring notification by county welfare agencies to welfare recipients of the existing policy with respect to income tax refunds."[66]

An allegation of improper rulemaking was also raised in litigation involving the St. Paul cable television franchise, where the Minnesota Supreme Court considered the cable communication board's interpretation of its rule requiring a contested case when an application for a cable franchise is "substantially contested." The board had employed a three-part test to

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[60] *Wenzel v. Meeker Cnty. Welfare Bd.*, 346 N.W.2d 680, 684 (Minn. Ct. App. 1984); *White Bear Lake Care Ctr.*, 319 N.W.2d at 9.

[61] *In re Review of 2005 Annual Automatic Adjustment of Charges for All Elec. and Gas Utilities*, 768 N.W.2d 112 (Minn.,2009); *In re Excess Surplus Status of Blue Cross & Blue Shield of Minn.*, 624 N.W.2d 264, 278 (Minn. 2001); *St. Otto's Home v. Minn. Dep't of Human Servs.*, 437 N.W.2d 35, 40 (Minn. 1989); *Reserve Mining Co. v. Herbst*, 256 N.W.2d 808, 824-25 (Minn. 1977).

[62] *In re Excess Surplus Status of BCBS Minn.*, 624 N.W.2d at 278 (Minn. 2001); *St. Otto's Home v. Minn. Dep't of Human Servs.*, 437 N.W.2d 35, 39-40 (Minn. 1989); *Reserve Mining Co. v. Herbst*, 256 N.W.2d 808, 24-25 (Minn. 1977).

[63] *United States v. Mead Corp.*, 533 U.S. 218, 229 (2001); *Chevron U.S.A. Inc. v. Natural Res. Def. Council, Inc.*, 467 U.S. 837, 865-66 (1984).

[64] 467 U.S. 837 (1984). *See also*: C.M. Kerwin and S.R. Furlong, Rulemaking: How Government Agencies Write Laws and Make Policy, 241-249 (2019) (discussing rules of judicial deference to administrative agency construction of statutes at the federal level).

[65] *See, e.g., In re Cities of Annandale & Maple Lake Permit Issuance for the Discharge of Treated Wastewater*, 731 N.W.2d 502, 513-14 (Minn. 2007) (applying *Chevron* deference where state agency "legally charged with the day-to-day enforcement and administration of [federal] regulation.").

[66] *Wacha v. Kandiyohi Cnty. Welfare Bd.*, 242 N.W.2d 837, 839 (Minn. 1976); *see also Faribault Cnty. v. Minn. Dep't of Transp.*, 472 N.W.2d 166, 169 (Minn. Ct. App. 1991) (holding DOT notice on availability of state-aid funds was not a rule when it was an announcement of a clear statutory requirement that the prevailing wage law be applied to state-aid funded projects contracted for by counties and cities).

determine if an application was substantially contested: first, whether the allegations were within the board's jurisdiction; second, whether each allegation was material to the disposition; and third, whether the board already had sufficient evidence to resolve each allegation. The court held that the board's interpretation was consistent with the plain meaning of the rule and did not constitute improper rulemaking.[67] Similarly, where the department of health interpreted a rule requiring "practical plumbing experience" to mean actual experience physically installing plumbing systems, the court simply found that the agency's interpretation of its rule was "consistent" with the rule and its authorizing statute.[68] In another department of public welfare case, the supreme court found that the agency's interpretation of its rule was "reasonable" in light of the statutory directive and the proper and efficient operation of the agency program. Even though the interpretation was different from the literal wording of the rule, the court examined the overall statutory scheme in finding that no illegal rulemaking had occurred.[69]

Similarly, the supreme court found that the DHS's interpretation of the "rate limitations" language reflected the plain meaning of the rule, as well as the plain meaning of the statute the rule was adopted to implement and was not improper rulemaking. In this case, no additional rulemaking was required to change the words of a rule into mathematical steps. The court held that the mathematical ratio used by the DHS to adjust property-related costs under temporary Rule 50 did not need to be adopted under the Minnesota Administrative Procedure Act to be valid.[70]

In *Application of Peoples Natural Gas Co.*,[71] the supreme court considered the effect of a policy statement issued by the Public Utilities Commission, which interpreted two statutes. The court, in finding that the MPUC correctly interpreted and applied the statutory provisions in this case, stated:

> That MPUC may have articulated its construction of a statute in a rule improperly promulgated does not render a correct interpretation incorrect. (citation omitted) While slavish adherence to a defective rule might well be troublesome, MPUC recognizes that, unlike a properly promulgated rule, its policy statement does not have the force and effect of law. The statement expressly noted that in each case the policy set out in the statement will merely provide the starting point for deliberation, "but the final decision will depend upon the facts of the case."[72]

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[67] Cable Commc'ns Bd. v. Nor-West Cable Commc'ns P'ship, 356 N.W.2d 658, 668 (Minn. 1984)*; see also Voettiner v. Comm'r of Educ.*, 376 N.W.2d 444, 451 (Minn. Ct. App. 1985).

[68] *Jones v. Minn. State Bd. of Health*, 301 Minn. 481, 483, 221 N.W.2d 132, 134 (1974).

[69] *Koronis Manor Nursing Home v. Dep't of Pub. Welfare*, 311 Minn. 375, 379, 249 N.W.2d 448, 451 (Minn. 1976).

[70] *City of Mapleton Cmty. Home, Inc., v. Minn. Dep't of Human Servs.*, 391 N.W.2d 798, 802 (Minn. 1986); *Care Providers of Minn., Inc. v. Gomez,* 545 N.W.2d 45, 48 (Minn. Ct. App. 1996) (holding DHS's use of assessment letters is merely a means of effectuating its interpretation of existing law and does not involve the promulgation of a new rule); *In re Ins. Agent License of Casey*, 540 N.W.2d 854, 859 (Minn. Ct. App. 1995), *rev'd on other grounds,* 543 N.W.2d 96 (Minn. 1996) (finding Commissioner of Commerce's interpretation of the rule was "overly narrow and rigid," but court deferred to it as applied to the facts of this case).

[71] 389 N.W.2d 903 (Minn. 1986).

[72] *Peoples Natural Gas Co.*, 389 N.W.2d 903, 906 (Minn. 1986).

The Minnesota Supreme Court clarified this language in the subsequent cases of *St. Otto's Home v. Minnesota Department of Human Services*, and *In re Application of Crown CoCo, Inc*.[73] In St. Otto's Home the court observed that *Peoples Natural Gas* should not be read to stand for the principle that if the agency's interpretation of a statute or rule is correct, it is irrelevant that the rule was improperly adopted.[74] In *St. Otto's Home*, the court stated that it normally invalidates an agency's action when the agency fails to follow proper rulemaking procedures. It proceeded to reverse a medical assistance rate decision of the human services department because the commissioner's interpretation of a rule constituted unpromulgated rulemaking at variance with the Administrative Procedure Act.[75] The court distinguished the two cases by stating that in *Peoples Natural Gas* the PUC issued its policy statement a year in advance and recognized that it did not have the effect of law while DHS's action was done without notice and had the effect of law because it created new mandatory requirements.[76]

16.4.2(2) Inconsistency with Adopted Rule or Statute as a Factor

Where the agency's policy is inconsistent with its adopted rule, the courts have often invalidated that policy or interpretation. The Minnesota Supreme Court invalidated a department of public welfare decision to reduce developmental achievement center services for mentally retarded persons from five days to three days per week. The rule in question required the services to be provided to all persons who needed them in accordance with an individual service plan. Although the plaintiffs clearly needed services five days a week, the department decided to reduce the services to three days a week because of fiscal restrictions. The court held that the reduction violated the rule and that any change in the implementation of the rule had to be channeled through the rulemaking process.[77] The court in another case also invalidated the department of public welfare's practice of computing Medicaid cost change implementation on a per diem basis where the department's rule specified that the patient day figure to be used was that of the prior fiscal year but did not mention taking into account current occupancy rates.[78] In another approach to a similar situation, the supreme court found that a department of public welfare rule "did not prohibit" a nursing home from receiving payments for nonmedical assistance covered items and services and that the agency policy to the contrary could not stand.[79] The supreme court has also

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[73] *St. Otto's Home v. Dep't of Human Servs.*, 437 N.W.2d 35 (Minn. 1989); *In re Application of Crown CoCo, Inc.*, 458 N.W.2d 132 (Minn. Ct. App. 1990) (stating that in *Peoples Natural Gas*, the agency's action fell within the case-by-case exception to the APA rulemaking requirements. In this case, the Petrofund Board's action did not come within the case-by-case exception to rulemaking).

[74] *St. Otto's Home*, 437 N.W.2d at 44; *see also Good Neighbor Care Ctr. Inc. v. Minn. Dep't of Human Servs.*, 428 N.W.2d 397, 402-03 (Minn. Ct. App. 1988) (stating if an interpretation is consistent with the plain meaning of the statute or rule, the agency's action is authorized by the statute itself, and the fact that no rule was adopted does not render that interpretation invalid, although it does not have the force and effect of law).

[75] *St. Otto's Home*, 437 N.W.2d at 43, 45.

[76] *Id*. at 44.

[77] *Swenson v. State Dep't of Pub. Welfare*, 329 N.W.2d 320, 324 (Minn. 1983).

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

[79] *Resident v. Noot*, 305 N.W.2d 311, 317 (Minn. 1981); *In re Application of Orr*, 396 N.W.2d 657, 663 (Minn. Ct. App. 1986) (holding agency cannot institute an absolute moratorium by consistently denying

found that a 1992 DHS Memorandum written to its rate-setting staff regarding the "not-to-exceed-claims-paid policy," as applied, did not reflect a proper interpretation of Rule 50's related organization rule and was inconsistent with DHS's "not-to-exceed-premiums policy." Accordingly, the court concluded that the Memorandum was an unpromulgated rule that was not entitled to deference.[80]

A determination of illegal rulemaking does not always weigh against an agency. The court of appeals stated that the interpretation of the nursing home welfare rate rule urged by the nursing home would constitute improper promulgation of a new rule if adopted by the department of public welfare.[81]

The Minnesota Supreme Court found that the commissioner of public safety's practice of requiring consent from the owner of a registered brand of intoxicating liquor before that brand could be imported by an out-of-state wholesaler was, in effect, a rule that interpreted the statute. The court observed that the policy could not be found to be a "directive" that merely interpreted a statute, since there was no existing law on the point. The court found that the practice was invalid and stated that the commissioner could not continue enforcing the policy without adopting it under the APA.[82] Similarly, the supreme court found that the Minnesota Public Utilities Commission had no authority to award an intervenor compensation based on a "statement of policy" it had issued in rate cases. Because the policy had not been adopted through the APA, it had no force of law.[83] The court of appeals has determined that the long-standing unwritten practice of the transportation regulation board and its predecessors requiring motor carriers to intervene as objectors rather than appearing as witnesses for another objector was an unadopted rule and was therefore not entitled to any deference. The court directed the board to consider the excluded testimony of witnesses who had withdrawn as objectors.[84]

Other state and federal courts have arrived at similar dispositions. In Michigan, a policy directive of the bureau of correctional facilities allowed a prisoner to transfer only one duffel bag and one footlocker to another prison. Because the policy was not adopted pursuant to the Michigan APA, the court found it to be "without legal authority" and allowed a prisoner to transfer extra briefcases of legal materials with him.[85] Some case law at the federal level also has assigned

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permits for activities allowed under its rule without first engaging in rulemaking procedures).

[80] *In re Rate Appeal of Benedictine Health Ctr.*, 728 N.W.2d 497, 507 (Minn. 2007).

[81] *Richview Nursing Home v. Minn. Dep't of Pub. Welfare*, 354 N.W.2d 445, 456 (Minn. Ct. App. 1984).

[82] *Johnson Bros. Wholesale Liquor Co. v. Novak*, 295 N.W.2d 238, 242-43 (Minn. 1980); *see also In re Application of Crown CoCo, Inc.*, 458 N.W.2d 132, 136 (Minn. Ct. App. 1990); *Sa-Ag, Inc. v. Minn. Dep't of Transp.*, 447 N.W.2d 1, 5 (Minn. Ct. App. 1989) (holding trial court properly enjoined enforcement of DOT "addendum" which interpreted statutory term); *Ebenezer Society v. Minn. Dep't of Human Servs.*, 433 N.W.2d 436, 439 (Minn. Ct. App. 1988) (finding standard not adopted as rule was invalid); *Good Neighbor Care Ctr. Inc. v. Minn. Dep't of Human Servs.*, 428 N.W.2d 397, 402 (Minn. Ct. App. 1988) (rules not adopted in accordance with rulemaking procedures are invalid and cannot be used as a basis for agency action - citing this treatise, § 16.4).

[83] *Senior Citizen Coal. v. Minn. Pub. Utils. Comm'n*, 355 N.W.2d 295, 303 (Minn. 1984).

[84] *N. Messenger, Inc. v. Airport Couriers, Inc.*, 359 N.W.2d 302, 304-05 (Minn. Ct. App. 1984).

[85] *Schinzel v. Marquette Prison Warden*, 123 Mich. App. 763, 765, 333 N.W.2d 348, 349 (1983); see also American Trust Adm'rs, Inc. v. Sebelius, 273 Kan. 694, 703-04, 44 P.3d 1253, 1260 (2002) (ruling agency bulletin withdrawing approval of stop loss insurance policy was an unadopted regulation and could not be enforced by the agency without rulemaking under the APA). *Contra Detroit Edison Co. v. Mich. Pub. Serv. Comm'n*, 680 N.W. 2d 512, 519-20 (Mich. 2004), *vacated in part on other grounds*, 695 N.W. 366 (Mich. 2005)

no weight to policy statements that have not been published in accordance with the federal APA.[86] The United States Supreme Court has determined that an interpretative rule in the bureau of Indian affairs manual was ineffective because it limited eligibility for general assistance benefits and had to be accomplished through a legislative rule.[87]

Professor Auerbach and Professor Davis have criticized judicial dispositions that result in no weight being given to agency policy statements. Professor Auerbach has urged that a general statement of policy by an agency should be entitled to weight on judicial review even though it would not be binding on the court.[88] Professor Davis states that many nonlegislative "rules" have an actual effect even though not adopted through formal APA rulemaking.[89] It is generally true that in the federal system, an agency can issue a policy statement that has no binding effect on a court but that may be accorded some weight. The District of Columbia Court of Appeals observed that a general statement of policy was neither a rule nor a precedent but "merely an announcement to the public of the policy which the agency hopes to implement in future rulemakings or adjudications." The court further stated that the policy was entitled to less deference than a rule or order but that the expertise and experience of the agency should not be ignored.[90] Additionally, Minnesota courts will give substantial deference to agency fact-finding.[91]

16.4.2(3) Need for Public Input and Similarity to Other Rule as Factors

Another element that commonly appears in appellate decisions invalidating agency policies is a determination by the court that the policy advanced demands full public input and participation before it is implemented. This principle was strongly set forth by the Minnesota Supreme Court in a 1975 case in which the department of health cited a policy or practice as grounds for denying a requested review of plans for a new nursing home. The department had a policy of not reviewing new nursing home construction plans unless other nursing facilities under the same ownership were free of deficiencies for six months and the metropolitan health board had reviewed the plans for need. While it noted that the department had a duty to use existing laws and regulations in carrying out its duties, the court stated:

> We feel compelled further to point out that any regulations of the Department of Health referred to by the department in any proceedings are subject to the Administrative Procedure Act, MINN. [STAT. §§] 15.01, to 15.41,

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(stating that some agency statements are exempt from the definition of rule or regulation and therefore not subject to same deference as would be a rule). In Minnesota, rules of the commissioner of corrections relating to internal management of institutions are exempted from APA rulemaking. Minn. Stat. § 14.03, subd. 3(b)(1) (2014).

[86] *Christensen v. Harris County*, 529 U.S. 576 (2000) (Interpretations such as those in opinion letters–like interpretations contained in policy statements, agency manuals, and enforcement guidelines, all of which lack the force of law–do not warrant *Chevron*-style deference."); *Hartnett v. Cleland*, 434 F. Supp. 18, 21-22 (D.S.C. 1977).

[87] *Morton v. Ruiz*, 415 U.S. 199, 231-32, 234-35 (1974).

[88] Auerbach, *Administrative Rulemaking in Minnesota*, 63 MINN. L. REV. 151, 160 (1979).

[89] 1 K. HICKMAN & R.J. PIERCE, ADMINISTRATIVE LAW TREATISE § 6.3 (6th ed. 2020).

[90] *Pacific Gas & Elec. Co. v. Fed. Power Comm'n*, 506 F.2d 33, 38-39 (D.C. Cir. 1974).

[91] *In re Proposal by Lakedale Tel. Co. to Offer Three Additional Class Servs.*, 561 N.W. 2d 550, 554 (Minn. Ct. App. 1997).

> and must be promulgated in accordance with that act. A person dealing with the department is entitled to proper notice of what regulations are being promulgated and are applicable to him. The purpose of the Administrative Procedure Act is to ensure that we have a government of law and not of men. Under that act, administrative officials are not permitted to act on mere whim, nor their own impulse, however well-intentioned they might be, but must follow due process in their official acts and in the promulgation of rules defining their operations.[92]

The theme of public participation was also involved in a case in which the Minnesota Supreme Court considered a policy bulletin that allowed reimbursement for abortions under the medical assistance program. The court found the policy to be invalid because it was within the definition of a rule and "involved a question of social and political policy so important to the public as a whole as to require that the rulemaking process of the APA be followed."[93] Similarly, the Minnesota court of appeals has described an aid to families with dependent children (AFDC) manual setting out welfare guidelines as an adoption of "far-reaching interpretative rules without allowing public input and debate through the procedures provided in the Administrative Procedure Act."[94] Underlying the supreme court's concern that public input is an important element of policymaking is the view that proper notice of new policies or changes in policy is an essential element of due process.[95]

Another factor of significance to the appellate courts in identifying illegal rulemaking is whether the policy asserted has, in fact, been adopted elsewhere in rule or statute. When the policy advanced by the agency appears in a similar rule administered by the agency, the supreme court has found this to be evidence that it was not intended to be included in the rule under

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[92] *Monk & Excelsior v. Minn. State Bd. of Health*, 302 Minn. 502, 509–10, 225 N.W.2d 821, 825 (1975).

[93] *McKee v. Likins*, 261 N.W.2d 566, 577-78 (Minn. 1977*); see also Swenson v. State Dep't of Pub. Welfare,* 329 N.W.2d 320, 324 (Minn. 1983) ("In questions of social and political importance such as the allocation of resources to the disabled, an opportunity for participation by all interested parties, as is required by Minn. Stat. § 14.14, subd. 1 (1982) is both necessary and desirable."); *Dullard v. Minn. Dep't of Human Servs.*, 529 N.W.2d 438, 445 (Minn. Ct. App. 1995) (stating it is inappropriate for agencies to adopt policy in a case-by-case method for issues involving broad social and political importance); *Evenson v. Minn. Dep't of Human Servs.*, 489 N.W.2d 256, 260-61 (Minn. Ct. App. 1992); *In re Appeal of Jongquist*, 460 N.W.2d 915, 916 (Minn. Ct. App. 1990); *In re Application of Crown CoCo, Inc.*, 458 N.W.2d 132, 138 (Minn. Ct. App. 1990*); In re Hibbing Taconite Co.*, 431 N.W.2d 885, 894 (Minn. Ct. App. 1988) (holding PCA announcement of broad policy whereby parent corporations are listed as co-permittees with subsidiary corporations was important question of social and political policy requiring rulemaking).

[94] *Wenzel v. Meeker Cnty. Welfare Bd.*, 346 N.W.2d 680, 684 (Minn. Ct. App. 1984). *But see Nat'l Min. Ass'n v. McCarthy*, 758 F.3d 243, 252 (D.C. Ct. App. 2014) (finding EPA's Final Guidance to be "meaningless" as a legal matter where the guidance "does not tell regulated parties what they must do or may not do in order to avoid liability [and] imposes no obligations or prohibitions on regulated entities"); *Mid Continent Nail Corporation v. United States*, No. 10-00247, slip op. 14-118, 2014 WL 4959025, at *5-6 (Ct. Int'l Trade 2014) (upholding Department of Commerce policy formulation "from 'pre-existing public sources'" where the public sources were publicly available at the time policy was formed, without notes-and-comments period required under federal APA).

[95] *Monk & Excelsior v. Minn. State Bd. of Health*, 302 Minn. 502, 509-10, 225 N.W.2d 821, 825 (1975); *see also Citizens Commc'n Ctr. v. FCC*, 447 F.2d 1201, 1212 n.33 (D.C. Cir. 1971).

consideration.[96] Similarly, where the policy asserted by the agency appears in a statute of another state but is absent in a similar statute in Minnesota, the appellate courts have found this to be an indication of an intent not to have such a policy enforced in Minnesota.[97] Another significant factor is whether or not the authorizing legislation directs the agency in a mandatory fashion to adopt rules. If the statute says the agency head must adopt rules to implement a program, then the establishment of elements of the program outside of rulemaking will not be permitted.[98]

16.4.3 Conclusion

A state agency advancing an important written policy outside of rulemaking or adjudication, or a private party advocating a particular interpretation of a rule or statute apart from its plain meaning, will face close judicial scrutiny if challenged. An agency must establish that its policy is merely an internal guideline or is consistent with existing law, or is a longstanding administrative interpretation, in order to prevail. Matters of obvious public concern and debate seem likely to be deemed rules requiring APA proceedings. Substantial reinterpretations of rules or statutes that result in implementation of a policy in conflict to some degree with the rule or statute will likely be prohibited. A finding of illegal rulemaking may result in no judicial deference being given to the policy and in a reversal of the agency decision. In some cases, however, the policy may nonetheless be considered as a factor, but without the force of law.

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.[99] 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.[100] In adjudicatory action by an agency, the agency normally

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[96] *White Bear Lake Care Center*, 319 N.W.2d at 9.

[97] *E.N. v. Special Sch. Dist. No. 1*, 603 N.W.2d 344 (Minn. Ct. App. 1999) (calling the application of the Rules of Civil Procedure by a hearing review officer in the administrative review of a special education decision *improper rulemaking*); *Wenzel*, 346 N.W.2d at 684.

[98] *Ins. Fed'n v. Hatch*, 370 N.W.2d 636, 639 (Minn. Ct. App. 1985).

[99] 1 K. HICKMAN & R.J. PIERCE, ADMINISTRATIVE LAW TREATISE § 6.1 (6th ed. 2020).

[100] 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).

applies existing law or policy to the facts of a particular case with an emphasis on the past.[101] 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.[102]

The absence of a stare decisis rule, which would require the agency to follow previous adjudicatory decisions, permits agencies to establish new policy easily.[103] 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.[104] 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 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,[105] 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

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[101] B. SCHWARTZ, ADMINISTRATIVE LAW § 4.17 (3d ed. 1991).

[102] *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 Envtl. Advocacy v. Metropo. Council,* 587 N.W.2d 838, 841-42 (Minn. 1999); David Schultz, *Quasijudicial and Quasilegislative Hearings in Minnesota Law*, 60 Bench & B. Minn. 15 (2003) (discussing differences between the two roles for administrative agencies).

[103] *See* § 12.2.

[104] Asimow, *When the Curtain Falls: Separation of Functions in the Federal Administrative Agency,* 81 COLUM. L. REV. 759 (1981).

[105] *SEC v. Chenery Corp.*, 332 U.S. 194 (1947); 1 K. HICKMAN & R.J. PIERCE, ADMINISTRATIVE LAW TREATISE § 6.8 (6th ed. 2020). *See also: Massachusetts v. EPA,* 549 U.S. 497 (2007) where the Court continued to give agencies broad discretion regarding what form to use to make rules.

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."[106] 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.*[107] 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.*),[108] 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 continue to permit agencies to choose formal rule making or ad hoc adjudication as alternative means to articulate rules.[109]

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.[110] 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.

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[106] *NLRB v. Majestic Weaving Co.*, 355 F.2d 854, 860 (2d Cir. 1966).

[107] 394 U.S. 759 (1969).

[108] 156 N.L.R.B. 1236 (1966).

[109] *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).

[110] *NLRB v. Bell Aerospace*, 416 U.S. 267 (1974).

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.[111] 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.[112] 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.[113] Under Minnesota case law, an agency may exercise its discretion when deciding which method is appropriate in a particular situation in formulating agency policy.[114] And a failure

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[111] *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).

[112] *Agency* also includes the capitol area architectural and planning board. Minn. Stat. § 14.02, subd. 2 (2021). 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).

[113] *Bunge Corp. v. Comm'r of Revenue*, 305 N.W.2d 779, 784-85 (Minn. 1981) (finding commissioner 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).

[114] *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

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.[115]

The discretion is not without limits, however.[116] 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.[117] According to the argument presented *in 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

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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).

[115] *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).

[116] *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).

[117] *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 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. HICKMAN & R.J. PIERCE, ADMINISTRATIVE LAW TREATISE, § 6.8 (6th ed. 2020)) (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).

> 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.[118]

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.[119]

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.[120]

16.6 Administrative Challenge to Improper Rulemaking

Prior to July 1, 2001, a challenge to an unadopted rule, outside of a contested case proceeding, had to be brought in court. As of that date, however, the APA was amended to provide an administrative process to challenge the enforcement of policies that should be adopted as rules.[121] Any person may file a petition with the office of administrative hearings seeking an order from an administrative law judge determining that an agency is enforcing or attempting to enforce a policy as though it were a duly adopted rule. The agency must respond to the petition within 10 days and oral argument may be ordered by the ALJ. The ALJ is authorized to issue an order directing the agency to cease enforcement of the unadopted rule and that order is published in the *State Register.* The costs of the proceeding are borne by the agency unless the ALJ rules in favor of the agency, in which case costs may be assessed against a petitioner under certain circumstances.

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[118] Minn. Stat. § 14.06(b) (2021).

[119] A. BONFIELD, STATE ADMINISTRATIVE RULEMAKING § 4.4 (Little, Brown & Co. 1986 & Supp. 1993).

[120] *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.

[121] Minn. Stat. § 14.381 (2014).