Chapter 25. Legislative Review of Administrative Rules

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25.1 Introduction

The legislature oversees administrative rulemaking in two ways: (1) by controlling the initial delegation of rulemaking authority and (2) by reviewing (and sometimes rewriting) adopted rules.

Both houses of the legislature have internal rules governing legislative delegation of rulemaking authority to state agencies. House of Representatives Rule 4.13 and Senate Rule 4.5 require a bill to be referred to the governmental operations committee in the respective chamber if the bill delegates rulemaking authority to an agency or exempts an agency from the customary rulemaking procedures. Because of these legislative rules, bills containing rulemaking delegations or exemptions are re-referred from the committee with primary jurisdiction to the governmental operations committee. Often, the rulemaking delegation or exemption is the only reason that a bill is referred to the House or Senate governmental operations committees, so these committees give special attention to the rulemaking provisions of the bill.

The most common method for legislative review of adopted administrative rules is for the legislative committee with jurisdiction over the agency rules to hold a hearing. As a result of a hearing, a legislative committee may encourage an agency to amend or withdraw a proposed rule, or to amend or repeal an existing rule. Although the Legislative Coordinating Commission (LCC) has statutory authority over rulemaking, it seldom has used this authority.

Legislators also introduce bills that change the substance of rules, repeal rules, or require agencies to amend rules in a specified manner. In recent years, it has become more common for agencies to ask the legislature to repeal certain rules or to amend rules in specified ways. Sometimes, having prescribed some or all of the substance of a rule, the legislature will allow the agency to adopt the rule using an expedited or exempt rulemaking process.

The remainder of this chapter provides historical background on legislative oversight of state agency rules, and then describes current laws on this topic.

25.2 LCRAR History

Until July 1, 1996, the Legislative Commission to Review Administrative Rules (LCRAR) was the main legislative body with oversight of state agency rules. The LCRAR was a joint house and senate commission of the Minnesota Legislature created in 1974 to assist in legislative oversight of state agency rules and to investigate citizens' complaints about rules. The LCRAR was served by a full-time, nonpartisan staff person, and was assisted by other legislative staff.

In July of 1996, the LCRAR was abolished along with a number of other legislative commissions and the LCC was directed to take over the functions and duties of the LCRAR that it deemed necessary.[1] The LCC also is a joint house and senate commission. However, the LCC has a wide variety of duties, and does not focus on administrative rulemaking.

While in existence, the LCRAR was viewed as more cost effective than litigation and as acting in a timelier manner on a wide range of problems relating to administrative rules. The LCRAR was especially effective in resolving complaints where a negative impact was perceived but where there was no legal defect that would convince a court to act. For these disputes, mainly about public policy choices, the legislative arena was and still is the logical one in which to attempt resolution of the problem.

During the late 1960s and early 1970s, Minnesota state government, like the federal government, witnessed growth in the number, extent, and complexity of issues demanding attention. Unlike the U.S. Congress, however, the Minnesota Legislature is only in session part-time. Therefore, Minnesota legislators have less time than their federal counterparts in which to educate themselves on increasingly technical issues and to act through legislation.

The result has been the passage of a large number of laws that are more general than specific and that delegate legislative authority to administrative agencies. Delegation has obvious attractions for legislators. More problems can be addressed in a session if decisions are delegated to agencies. Laws identifying general problems and directing agencies to solve them have typically been easier to pass; the more specific a bill is made, the greater the likelihood of organized opposition, since the winners and losers are more clearly defined. Many of the decisions needed to implement the delegations of legislative authority are, therefore, made through administrative rules. While increased reliance on agency rulemaking solves one problem for legislators, it creates another: how does that same part-time, overworked legislature monitor rules adopted by agencies?

By the mid-1970s, state legislators were increasingly frustrated by their inability to check agencies' use of delegated authority. Many legislators believed agencies were sometimes acting without statutory authority, exceeding legislative intent, or, in cases where the agency opposed a program created by the legislature, failing to adopt the rules needed to implement the program.

Complaints from constituents about agency rules were another source of legislative frustration. Constituents frequently contacted legislators when they encountered an obstacle obstructing something they wanted to do, especially when that obstacle was “some bureaucrat.” Acting individually, legislators were not always successful in obtaining relief for their constituents. Constituents themselves felt even less able to influence agency actions.

The creation of a legislative body before which complaints could be aired and with power to affect agency rules addressed both the oversight function and constituent service needs of the legislature. Minnesota legislators discovered a model in Wisconsin and adopted a nearly identical version of Wisconsin law for the Minnesota Legislature in 1974. The Minnesota and Wisconsin rule review commissions were among the first in the nation to review agency rules.[2]

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[1] 1995 Minn. Laws ch. 248, art. 2, § 6, at 2422-23.

[2] Council of State Gov’ts, Book of the States 2021, tbl. 3.26 (2021), *available at*

The LCRAR was abolished in 1996 as part of a larger series of reforms. The LCC was authorized to assume some of the rule review authority formerly held by the LCRAR.

25.3 LCC and Policy Committee Authority

Statutory authority for legislative oversight of administrative rules still exists with the LCC. However, the LCC seldom has used this authority. The LCC is authorized to establish joint subcommittees or similar bicameral groups to assist the commission in carrying out its duties.[3] Unlike the LCRAR, which was established permanently in statute, joint subcommittees created by the LCC exist only for a legislative biennium, unless renewed by action of the LCC. The LCC consistently has granted authority for creation of a subcommittee to review administrative rules. However, the House and the Senate have not always appointed members, and the LCC generally has not been active in overseeing administrative rules.

Like the LCRAR, the LCC's enabling legislation[4] directs the commission to promote adequate and proper rules by state agencies and an understanding by the public of those rules. To that end, the commission is empowered to investigate complaints made regarding agency rules and to hold public hearings on those complaints if the commission believes the complaints to be "meritorious and worthy of attention." The commission is required to meet on a call signed by two of its members or any five members of the legislature.[5]

The LCC has two major statutory powers with respect to state agency rules. The first is the power to request an agency to hold a hearing pursuant to Minnesota Statutes section 3.843 on recommendations made by the commission to improve the agency's rules. This action must be taken by a majority vote for a motion that requests the agency to amend the rule complained of. The agency must publish notice[6] of a hearing on the commission's recommendations within sixty days after the receipt of the request unless a longer time period is specified by the commission in its request. The recommendations made by the commission pursuant to this section may be more or less specific, depending on the complaint and the degree of consensus reached by the interested parties and the commission members.

The second power is the power to object to rules.[7] Such an objection can occur when the commission considers the rule "to be beyond the procedural or substantive authority delegated to the agency."[8] The House of Representatives and Senate governmental operations committees have the same authority to object to rules. The objection is filed in the Office of the Secretary of State along with the reasons for the action. The Secretary of State then certifies the objection and sends a certified copy to the agency whose rules are in question and to the

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https://issuu.com/csg.publications/docs/bos_2021_issuu(identifying states that have a formal mechanism for legislative review of administrative rules).

[3] Minn. Stat. § 3.305, subd. 6 (2021).

[4] *Id*. §§ 3.841-.843.

[5] *Id.* § 3.305, subd. 8.

[6] *Id.* § 14.14, subd. 1.

[7] The LCC does not have the same power that the LCRAR had to temporarily suspend an agency rule. *See* 1997 Minn. Laws ch. 98, § 17, at 718 (repealing MINN. STAT. §§ 3.842, subd. 4, .844, .845 regarding the suspension of rules); *see also* subsection 25.4 (providing further discussion of the suspension of rules).

[8] Minn. Stat. § 3.842, subd. 4a (2021).

Revisor of Statutes. The commission or committee publishes the objection in the *State Register* and when the rule is published in the *State Register*, the rule will indicate the existence of the objection.

The responsible agency has 14 days after the filing of an objection to respond in writing to the objection. The commission or committee then has the power to modify or withdraw its objection. If any part of the objection remains, the burden is then on the agency to defend its position in any proceeding for judicial review or for enforcement of the rule to establish the validity of the rule. The commission or committee may petition for a declaratory judgment to determine the validity of a rule and may intervene in litigation arising from agency action.

The LCC and the House and Senate governmental operations committees also have authority over other rulemaking proceedings. When the chief administrative law judge (ALJ) determines an agency has failed to establish the need for and the reasonableness of a proposed rule, and the agency chooses not to accept the chief ALJ's recommendations for correcting the defects, the agency must submit the proposed rule to the LCC and to the governmental operations committees for advice and comment.[9] The commission and the committees have sixty days in which to render nonbinding advice and comment. In addition, if an agency fails to submit its notice of adoption, amendment or repeal of rules to the *State Register* within 180 days from the administrative law judge's report or the day that the comment period for the rule is over, the rule is automatically withdrawn. The agency is to report the failure to adopt the rules within the 180 days and the reason for the failure to the LCC.[10] The LCC also receives the annual report of agencies which lists the obsolete rules of the agency.[11]

Another means of legislative oversight over rules is that the authority of the standing committees of both the house *and* senate with jurisdiction over the subject matter of a proposed rule to advise an agency not to adopt the proposed rule.[12] Upon receiving this advice from both committees, the agency must delay adoption of the rule until after the end of the annual legislative session that begins after the vote of the committees. A committee vote must be by a majority of the committee and may occur at any time after publication of the rulemaking notice and prior to adoption of the rule. The notice of a committee's vote is published in the *State Register*. In 2018, this authority was exercised for the first time: in May of that year, both the House of Representatives Committee on Agriculture Policy and the Senate Agriculture, Rural Development, and Housing Policy Committee approved resolutions advising the Department of Agriculture that a proposed groundwater protection rule should not be adopted as proposed. The resolutions further prohibited the Department from final adoption of the rule until the adjournment of the legislative session that begin after adoption of the resolution. The effect of these two resolutions was to delay adoption of the rule until after the 2019 regular legislative session.[13]

Finally, section 3.842 allows the LCC to periodically review statutory exemptions to the rulemaking provision of chapter 14. In 1997, a rule exemption bill was passed as a result of a

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[9] *Id.* §§ 14.15, subd. 4, .26, subd. 3(c).
[10] *Id.* §§ 14.19, .26, subd. 1.
[11] *Id.* § 14.05, subd. 5.
[12] *Id.* § 14.126, subd. 1.
[13] 42 Minn. State Reg. 1544 (June 11, 2018).

study conducted by the LCC subcommittee on rules.[14] The subcommittee examined all the rulemaking exemptions there were currently in statute and decided whether those exemptions should continue, be terminated, or be modified. Their recommendations were passed into law in 1997.

25.4 Constitutionality of Suspension of Rules

Until the statutory authority of the LCRAR to suspend an administrative rule was repealed in 1997,[15] there was significant debate over the constitutionality of this authority. Much of that debate turned on the implications of the U.S. Supreme Court's holding in *Immigration & Naturalization Service v. Chadha,*[16] that the U.S. House of Representatives could not overturn a decision of the Immigration and Naturalization Service by vote of a committee.

In its opinion, the Court held that Congress could act only through the bill enactment procedure set forth in Article II of the U.S. Constitution. Thus, if Congress wishes to overturn an action of the executive branch, it can do so only if both houses pass a bill that is signed by the president.[17] Several state courts have made similar rulings with respect to state regulatory vetoes; some occurred before the *Chadha* decision,[18] others have occurred since.[19]

The statutory authority of the LCRAR to suspend an administrative rule was repealed in 1997.[20] Prior to that time, LCRAR staff opined that the suspension powers of the LCRAR were structured in a way that avoided the defects identified in *Chadha* and similar cases. First, the suspension was only temporary. The rule would become effective again if the legislature defeated the bill that the commission introduced to repeal the rule permanently.[21]

The requirement that permanent repeal of the rule take place through the bill enactment process assured that both houses of the legislature and the governor had input. Because a bill must be presented to the governor in order to become law, the LCRAR suspension process avoided another alleged defect identified in *Chadha*—that is, failure to provide for presentment of legislative action to the executive for approval or veto. The governor's office could influence the outcome of the commission's actions by letting it be

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[14] 1997 Minn. Laws ch. 187, at 1285-1340.

[15] *See* 1997 Minn. Laws ch. 98, § 17, at 718 (repealing Minn. Stat. §§ 3.842, subd. 4, .844, .845).

[16] 462 U.S. 919 (1983).

[17] *Id.* at 955-59.

[18] *See e.g., Alaska v. A.L.I.V.E. Voluntary*, 606 P.2d 769, 770 (Alaska 1980); *New Jersey v. Byrne*, 448 A.2d 438, 439 (N.J. 1981), *superseded by statute as stated in Kimmelman v. Burgio*, 497 A.2d 890, 892 (N.J. Super Ct. App. Div. 1985); *State ex rel. Barker v. Manchin*, 279 S.E.2d 622, 636 (W. Va. 1981).

[19] *State ex rel. Stephan v. Kansas House of Representatives*, 687 P.2d 622, 635-36 (Kan. 1984); *Legislative Research Comm'n v. Brown*, 664 S.W.2d 907, 913-14 (Ky. 1984); *Commc'ns Workers of Am., AFL-CIO v. New Jersey Civ. Serv. Comm'n*, 191 A.3d 643 (N.J. 2018)

[20] *See* 1997 Minn. Laws ch. 98, § 17, at 718 (repealing Minn. Stat. §§ 3.842, subd. 4, .844, .845).

[21] For full discussion of legislative vetoes in other states, see Arthur Earl Bonfield, *State Administrative Rulemaking*, § 8.3.2, at 497-507 (1986) and 1993 Supplement, at 189-96. The National Conference of State Legislatures also maintains a database of information on legislative veto laws and provisions allowing for other forms of legislative oversight of administrative rules across the country. Some of that information is available online, at https://www.ncsl.org/research/about-state-legislatures/separation-of-powers-legislative-oversight.aspx (last accessed March 13, 2022).

known during the suspension proceedings that a bill to repeal the rule would be vetoed. The commission would then need to determine if there was sufficient support in the legislature to override a veto. Thus, the usual checks and balances provided for by the Constitution were, in the staff's opinion, present in the LCRAR suspension process.[22]

In recent years, the U.S. Supreme Court has appeared more open to reviewing the balance of power between the legislative branch and administrative agencies with respect to federal rulemaking powers. It remains to be seen whether this interest will, over time, lead to substantive change to the constitutional authority of state legislatures to review administrative rules adopted by state agencies. Often, reporting on administrative law challenges focuses on the substance of the rule subject to review, and the procedural posture of the case is lost. Looking beyond the headlines, to determine whether and how the reviewing court approaches questions of legislative powers and procedures -- and whether that approach signals a broader evolution of the jurisprudence – is likely to be a continual requirement for practitioners working in this area.

[22]A contrary viewpoint on constitutionality can be found in Goldberg, *Comment on the Constitutionality of the LCRAR*, Ad. L. News 4 (June 1984); *see also Bonfield*, *supra* note 21, at 184-200 (discussing review by legislature and discussion of administrative rules review committees).