Chapter 23. Review of Rules for Legality

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23.1 Introduction

All rules adopted pursuant to the Administrative Procedure Act (APA) are reviewed by an administrative law judge (ALJ) with the Office of Administrative Hearings (OAH). If the rule is adopted with a hearing, an ALJ is to make findings and conclusions about whether the agency has "fulfilled all relevant procedural requirements of law or rule."[1] If the rule is adopted without a hearing or through the expedited or exempt rulemaking process, the ALJ is to review the rule "as to its legality and its form to the extent the form relates to legality."[2] The OAH rules, found in Minnesota Rules, part 1400.2100 (2013), lists the "standards of review" or the various legal requirements that the ALJ considers in his or her review of rules.

An ALJ's review of the language of rules is limited. The scope of review is restricted to a review of the rule on its face, not as applied. The standard of review is similar to the court's review of a pre-enforcement challenge under Minnesota Statutes section 14.45 (2014). As stated by the court of appeals in *Minnesota Association of Homes for the Aging v. Department of Human Services*,[3] this standard of review is "'necessarily more restricted. Broad and far-reaching scrutiny of a rule or regulation, based upon hypothetical facts, is a premature exercise by the judiciary.'"[4]

This chapter will discuss the various legal requirements of rulemaking. Essentially, there are five sources of substantive rulemaking law: The Minnesota APA, located in Minnesota Statutes chapter 14; the applicable statutes or rules of the particular agency adopting the rule; the rules of the OAH; Minnesota appellate case law; and general principles of constitutional law.

Generally, the following issues arise in the review of rules for legality: (1) statutory authority, (2) procedural requirements, (3) unbridled discretion, (4) delegation, (5) retroactivity, (6) reasonableness, and (7) constitutional concerns, which include void for vagueness, overbroad classifications, equal protection concerns, and burdens on interstate commerce.

23.2 Statutory Authority

An agency may adopt, amend, suspend, or repeal a rule pursuant only to authority

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[1] Minn. Stat. § 14.50 (2022); *see id.* § 14.15, subd. 1.

[2] *Id.* § 14.26, subd. 3.

[3] 385 N.W.2d 65 (Minn. Ct. App. 1986).

[4] *Id*. at 67 (quoting *Minn.-Dakotas Retail Hardware Ass'n v. State*, 279 N.W.2d 360, 363 (Minn. 1979)); *see also Mammenga v. Dep't of Human Servs.*, 442 N.W.2d 786, 789 (Minn. 1989) ("The mere fact . . . that application of a rule may yield a harsh or undesirable result in a particular case does not make the rule invalid.").

delegated by law,[5] and a court shall declare a rule invalid if the rule exceeds statutory authority.[6] As stated by the courts: "It is a fundamental tenet of administrative law that the powers of an administrative agency can only be exercised in the manner prescribed by its legislative authorization";[7] and "The extent of jurisdiction or authority bestowed on an administrative agency is measured by the statute from which it derives its authority."[8] As stated in the often cited *McKee v. County of Ramsey*[9] case:

> An administrative agency's jurisdiction . . . is limited and is dependent entirely upon the statute under which it operates. "Jurisdiction of an administrative agency consists of the powers granted it by statute. Lack of statutory power betokens lack of jurisdiction. It is therefore well settled that a determination of an administrative agency is void and subject to collateral attack where it is made either without statutory power or in excess thereof."[10]

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[5] Minn. Stat. § 14.05, subd. 1 (2022); *Dullard v. Minn. Dep't of Human Servs.*, 529 N.W.2d 438, 445 (Minn. Ct. App. 1995).

[6] Minn. Stat. § 14.45 (2022); *e.g., State v. Hopf*, 323 N.W.2d 746, 752 (Minn. 1982); *Stasny by Stasny v. Minn. Dep't of Commerce*, 474 N.W.2d 195, 198-99 (Minn. Ct. App. 1991) (finding Department rule invalid as inconsistent with express language of statute); *Wangen v. Comm'r of Pub. Safety*, 437 N.W.2d 120, 124 (Minn. Ct. App. 1989) (holding rule invalid as inconsistent with the statute: "Rules that are inconsistent [with the statute] are ineffective and do not carry the force and effect of law."); *see also Rocco Altobelli v. Minn. Dep't of Commerce*, 524 N.W.2d 30, 37 (Minn. Ct. App. 1994) (finding Department of Commerce rule did not exceed the scope of the statute where chair leasing has been regulated for over 30 years and the legislature declined to ban chair leasing in 1992); *Minn. Chamber of Commerce v. Minn. Pollution Control Agency*, 469 N.W.2d 100, 103-04 (Minn. Ct. App. 1991) (finding the MPCA was within its statutory authority in adopting its water quality rules because the agency did not fail to consider social and economic factors as required by statute); *Norman v. Comm'r of Pub. Safety*, 404 N.W.2d 315, 318 (Minn. Ct. App. 1987) (finding limited driver's license rule did not exceed statutory authority, as rule was within a broad rulemaking mandate granted by statute).

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

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

[9] 310 Minn. 192, 245 N.W.2d 460 (1976).

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

Accordingly, a rule is invalid if it conflicts with a statute,[11] is inconsistent with the statutory authority pursuant to which it was adopted,[12] is contrary to the legislative intent,[13] limits the agency's appellate jurisdiction without statutory authorization,[14] or adopts a standard beyond the scope of the agency's authority, express or implied by the legislature.[15] On the

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

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

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

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

[15] *Francis v. Minn. Bd. of Barber Exam'rs*, 256 N.W.2d 521, 525 (Minn. 1977); *Drum v. Minn. Bd. of Water & Soil Res.*, 574 N.W.2d 71, 73 (Minn. Ct. App. 1998) (finding wetland rules valid as consistent with legislation, not in excess of the agency's statutory authority: "Generally, we invalidate an agency rule only if the rule was adopted in excess of the agency's statutory authority."); *In re Eigenheer*, 453 N.W.2d 349, 354 (Minn. Ct. App. 1990) ("An agency decision may be reversed if it is in excess of the statutory authority granted to the agency."); *Minn. Ass'n of Homes for the Aging v. Dep't of Human Servs.*, 385 N.W.2d 65, 68 (Minn. Ct. App. 1986) (finding rule, on its face, does not exceed statutory authority); *cf. In re Haslund*, 781 N.W.2d 349, 354 (Minn. 2010) ("We reverse an agency's decision when an appellant's substantial rights may have been prejudiced because the agency's decision exceeds the agency's statutory authority."); *In re Hubbard*, 778 N.W.2d 313, 321 (Minn. 2010) (finding despite the existence of a properly promulgated DNR rule, there was no express delegation of authority to the DNR to approve or deny local government variance decisions); *In re Qwest's Wholesale Serv. Quality Standards*, 702 N.W.2d 246, 259-61 (Minn. 2005) (finding fixed minimum performance standards adopted by the Public Utilities Commissioner (PUC) were within its authority as granted by the federal Telecommunications Act of 1996, but holding that PUC's requirement that Qwest pay a penalty if it failed to meet the standards was not authorized by the governing state statute because the APA limits fines established by rule to $700 per violation unless specific statutory

other hand, an agency's authority to regulate has been held to include the authority to restrict or prohibit,[16] and within the designated area of its regulation, the agency has implied power to formulate the necessary classifications and definitions.[17] But, as the supreme court restated in *Hirsch v. Bartlett-Lindsay Co.*,[18] "'a rule adopted in pursuit of legislative goals cannot subvert the primary purpose behind the legislation.'"[19]

23.2.1 Statutory Authority and Types of Rules

Although the question of whether statutory authority exists is always, basically, a question of legislative intent, the type of rule involved may determine whether the statutory authority is adequate. Commentators have long distinguished agency rulemaking by creating three general categories of rules: procedural; interpretative; and legislative, also called substantive.[20] Courts and commentators have used these categories to assist in determining whether sufficient statutory authority exists to support the rule.

Procedural rules are the description of the methods by which the agency will carry out

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authority exists); *In re Minn. Dep't of Commerce for Comm'n Action Against AT&T*, 759 N.W.2d 242, 250-51 (Minn. Ct. App. 2009) (concluding that the MPUC's penalty authority lapsed with the sunset of the underlying statute); *In re Investigation into the Comm'ns Jurisdiction over the City of Hutchinson's Intrastate Natural Gas Pipeline*, 707 N.W.2d 223, 226-28 (Minn. Ct. App. 2006) (noting that an agency enjoys only the authority granted to it by the legislature, which specifically exempted municipal utilities from regulation except as specifically provided otherwise; finding PUC did not have jurisdiction over the natural gas pipeline owned by the Hutchinson Utility Commission (HUC); concluding PUC did not have the authority to regulate the pipeline, even though statute allowed complaints about the HUC pipeline to be lodged with the PUC).

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

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

[18] 537 N.W.2d 480 (Minn. 1995).

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

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

its appointed functions. Generally, these rules have the force of law.[21] Interpretative rules interpret and apply the provisions of the statute under which the agency operates and, in Minnesota, have the force and effect of law.[22] Legislative rules have been defined as "the product of an exercise of delegated legislative power to make law through rules."[23] Legislative rules have the force of law.[24] The Minnesota Supreme Court adopted an analysis of rule by type in 1977; in some cases this framework provides a helpful overlay in discerning the adequacy of statutory authority.[25]

23.2.2 Legislative Rules

Although some early Minnesota cases suggest that rulemaking authority may be inferred from grants of enforcement authority to an agency,[26] other case law has required an express grant of legislative authority to adopt rules.[27] That express authority for rules is not to be found in the Minnesota APA. The APA expressly requires that agency rulemaking proceed only pursuant to substantive authority delegated by law.[28] However, the APA has not always imposed this limitation. Before the major revision of the APA in 1975,[29] agencies were given a generic grant of authority to adopt substantive rules, provided those rules did not exceed the statutory powers of the agencies.[30] Because of Minnesota's insistence on specific statutory delegation of rulemaking authority, Minnesota is distinguishable from the many jurisdictions where rulemaking authority is often considered implicit in the delegation of statutory duties to an agency.[31]

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

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[21] COOPER, *supra* note 20, at 174, 266-67. In Minnesota, procedural rules have specific statutory authorization if they meet requirements of MINN. STAT. § 14.06 (2022).

[22] Minn. Stat. § 14.38, subd. 1 (2022); COOPER, *supra* note 20, at 174.

[23] 1 KENNETH C. DAVIS, ADMINISTRATIVE LAW TREATISE § 6.3, at 233 (3d ed. 1994).

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

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

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

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

[28] Minn. Stat. § 14.05, subd. 1 (2022).

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

[30] Minn. Stat. § 15.0412 (1974).

[31] *See* COOPER, *supra* note 20, at 176.

allowed, "the authority for the rule expires."[32]

Authority for substantive rules, nonexistent in the APA, must therefore be found in the statutes specific to the agencies.[33] Once some authority to adopt a rule exists, the issue becomes one of legislative intent in determining how much authority has been delegated to the agency and on what subjects.

The case cited most often in which the court held that the legislature did not intend to authorize substantive rules involved the enforcement of air pollution control standards.[34] The Minnesota Pollution Control Agency sought to adopt rules setting forth procedures that would allow MPCA to issue orders requiring air polluters to conduct tests at their own expense. The grant of specific authority gave the agency significant rulemaking authority in the air pollution area but did not expressly mention a power to issue rules authorizing such orders.[35] However, the legislature had expressly authorized the agency to issue orders concerning water pollution.[36] From this latter provision, the court inferred that the legislature did not intend to authorize rules allowing orders concerning air pollution. According to the court, the pollution control agency "lacked statutory authority to issue an order, or a regulation authorizing an order."[37] In a much-quoted footnote, the court stated:

> If the PCA needs such authority to effectively carry out its function regarding air pollution, the proper place for it to seek such authority is the legislative body that created the agency and specified its powers. Courts cannot properly aid the agency by construing the statute to confer upon it implicit authority, when to do so would contravene the legislature's apparently deliberate failure to explicitly grant it such authority.[38]

A much earlier case, which involved the initial rules implementing the unemployment compensation law, held that general provisions directing the agency to adopt rules "for the administration of" the law did not amount to authority to enact substantive (legislative) rules at variance with the substantive portions of the act. The court found that "[t]o the extent that such rules attempt to change substantive and mandatory portions of a statute, they are a nullity. . . . [An administrative body] may adopt administrative rules, but in doing so can not change existing, or make new, law."[39] Conversely, a workers' compensation rule was held to be authorized by a general provision giving the agency power to "make rules and regulations governing the issuance of such policies."[40] The court found that the rule furthered the express legislative purpose, was valid and binding, and could be used by the agency to invalidate an attempt to cancel insurance coverage in violation of the rule.

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[32] Minn. Stat. § 14.125 (2022). It has been held however, that a failure to adopt rules within a specified time frame does not necessarily bar later agency action unless there is a specific indication that such a bar was intended. *Marshall Cnty. v. State,* 636 N.W.2d 570, 577 (Minn. Ct. App. 2001).

[33] Minn. Stat. § 14.05, subd. 1 (2022).

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

[35] Minn. Stat. § 116.07, subd. 4 (2022).

[36] *Id.* § 115.03, subd. 1(c).

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

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

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

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

An example of extensive legislative rulemaking delegation is illustrated in a rule adopted by the state board of pharmacy. By rule, the board added a drug to a statutory list of controlled substances.[41] On review of the rule, the court cited the mandatory compliance with the APA, together with other indications of legislative intent, in reversing the lower court and validating the rule. A similarly broad and general delegation of rulemaking authority involved a directive to the commissioner of health to adopt rules if it was determined that formaldehyde gases presented a significant health problem. A rule that banned housing sales if the gas levels exceeded the limits set by the rule was held valid after an examination of legislative intent, which noted the "power to regulate includes power to restrict or prohibit."[42]

23.2.3 Procedural Rules

The APA provides statutory authority for agencies to adopt rules setting forth "all formal and informal procedures related to the administration of official agency duties to the extent that those procedures directly affect the rights or procedures available to the public."[43] Even this grant of authority refers to "official agency duties" that must be derived from a specific statutory grant of authority.[44] However, as viewed by Minnesota courts, procedural rules—though derived from specific statutory authority—clearly are subordinate to the substantive law and cannot, in the absence of clear legislative intent, control the applicable substantive law.[45] Case law has suggested that the department of public safety's unadopted procedural rules, though lacking the force of law for failure to comply with the APA, are nonetheless entitled to "presumptive validity." However, in contrast, the lack of formally adopted procedural rules by the commissioner of veterans affairs invalidated the commissioner's attempt to discharge and transfer certain residents.[46]

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

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

[43] Minn. Stat. § 14.06 (2022). Note, however, that rules concerning only internal management of agency and that do not directly affect rights of, or procedures available to the public are excluded from the APA. *Id.* § 14.03, subd. 3(a)(1); *see In re Assessment Issued to Leisure Hills Health Care Ctr.*, 518 N.W.2d 71, 74 (Minn. Ct. App. 1994) (concluding Department of Health nursing home inspection procedures need not be adopted as rules under the APA because they do not directly affect the rights or procedures available to the public.); *see also* ch. 16 of this text (providing a general introduction to the rulemaking process).

[44] Minn. Stat. § 14.06 (2022).

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

[46] *L.K. v. Gregg*, 380 N.W.2d 145, 150 (Minn. Ct. App. 1986); see also In re Appeal of Jongquist, 460 N.W.2d 915, 917 (Minn. Ct. App. 1990) (concluding Department of Jobs and Training has no authority to require disabled persons to take out loans in absence of rules adopted pursuant to the APA); *Benson v. Comm'r of Pub. Safety*, 356 N.W.2d 799, 801 (Minn. Ct. App. 1984). *But see Schultz v. Comm'r of Pub. Safety*, 365 N.W.2d 304, 306 (Minn. Ct. App. 1985) (citing *Krakowski v. City of St. Cloud*, 257 Minn. 415, 101 N.W.2d 820 (1960)) (upholding enforcement of internal rule not promulgated through formal rulemaking: "Although internal

23.2.4 Interpretative Rules

It has been recognized by commentators[47] and suggested in dicta in a Minnesota case[48] that the power to promulgate interpretative rules need not be expressed but, rather, may be inferred from an agency's authority to enforce a law.

The Minnesota Supreme Court first expressly recognized interpretative rules in a case involving the APA before the extensive 1975 revisions.[49] According to the court, the department of public welfare's "policy bulletin" at issue was not valid nor entitled to the force of law unless adopted pursuant to the APA. In 1979, the court further elaborated on the distinctions it found between the types of rules it noted in the earlier case.[50] The court held that the rules of the consumer services section of the department of commerce, which lacked the requisite specific statutory authorization to be substantive rules given the force of law, were "interpretative rules."[51] As such, the court found that they lacked the force of law. The court discussed the adequacy of statutory authority for the rule based on the type of rule involved rather than through a direct analysis of the statutory mandate. Ironically, the judicially imposed classification of rule by type had no specific statutory authority in the APA. More troubling in this case was the court's application of the "interpretive rule" label and the conclusion that the rule, therefore, lacked the force of law. This conclusion ignored the clear language of the APA.[52]

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

> *Every rule, regardless of whether it might be known as a substantive, procedural, or interpretative rule,* which is approved by the attorney general and filed in the office of secretary of state as provided in section 15.0412 shall have the force and effect of law.[53]

This modification was effective retroactively to all properly promulgated rules other than those directly the subject of a supreme court opinion.[54]

Since the 1981 APA amendments, the courts have not repeated the precedent of finding

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rules do not have the force and effect of law, the action of an administrative agency cannot be reversed unless it is fraudulent, arbitrary, unreasonable, or outside its jurisdiction.").

[47] DAVIS, *supra* note 23, § 6.03 at 234 (discussing inherent power to issue interpretative rules).

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

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

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

[51] *Id.*

[52] Minn. Stat. § 15.0413 (Supp. 1975) (renumbered § 14.38) ("*Every* rule approved by the Attorney General and filed in the office of Secretary of State as provided by Section 15.0412 shall have the *force and effect* of law." (emphasis added)); *see id.* § 14.38, subd. 1 (2022) ("Every rule, regardless of whether it might be known as a substantive, procedural, or interpretive rule, which is filed in the Office of the Secretary of State as provided in sections 14.05 to 14.28 shall have the force and effect of law . . . ."); *see also* Note, *Definition of "Rule" under the Minnesota APA,* 7 WM. MITCHELL L. REV. 665, 681, 685 (1981).

[53] 1981 Minn. Laws, ch. 109, § 1, at 108 (emphasis added); *see* Minn. Stat. § 14.38, subd. 1 (2022).

[54] 1981 Minn. Laws, ch. 109, § 2, subd. 1a, at 108.

a properly promulgated agency rule nonetheless lacking the force of law; however, on a case-by-case basis, the courts have continued to allow agencies to enforce unpromulgated rules if they are found to be pursuant to the plain meaning of the statute or a longstanding interpretation of an ambiguous statute.[55]

23.3 Procedural Requirements

All rules must be adopted in accordance with specific notice and comment procedures established by statute, and failure to comply with the necessary procedures results in the invalidity of the rule.[56] The procedures with which the agency must comply are outlined in the

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

[56] Minn. Stat. § 14.45 (2022); *St. Otto's Home v. Dep't of Human Servs.*, 437 N.W.2d 35, 43 (Minn. 1989) (finding commissioner's definition of Medicare filing requirement constitutes a new rule that should have been adopted through the procedures of the Minnesota APA); *White Bear Lake Care Ctr. v. Minn. Dep't of Pub. Welfare*, 319 N.W.2d 7, 9 (Minn. 1982); *Ebenezer Soc'y v. Dep't of Human Servs.*, 433 N.W.2d 436, 439 (Minn. Ct. App. 1988) (finding introduction of a new standard without rulemaking process is invalid); *In re Hibbing Taconite Co.*, 431 N.W.2d 885, 895 (Minn. Ct. App. 1988) (finding agency erred in creating a new rule without following the statutory procedures); *In re NSP Red Wing Ash Disposal Facility*, 421 N.W.2d 398, 405 (Minn. Ct. App. 1988) (concluding agency did not engage in unpromulgated rulemaking in its interpretation of a rule); *In re Deregulation of the Installation & Maint. of Inside Wiring*, 420 N.W. 2d 650, 659 (Minn. Ct. App. 1988) (finding petitioner's argument that commission should have adopted rules not persuasive as commission was simply following procedures set forth in statute); *In re Orr*, 396 N.W.2d 657,

Minnesota APA[57] and the applicable rules of the OAH.[58] Among the statutory procedural requirements that the ALJ is required to review is "whether the record demonstrates a rational basis for the need for and reasonableness of the proposed rule." Minnesota Statutes section 14.26 (2022). In *Minnesota League of Credit Unions v. Minnesota Department of Commerce*,[59] the Minnesota Supreme Court held that the Department failed to comply with the procedural rule requiring that the statement of need and reasonableness (SONAR) contain a summary of all of the evidence and argument which is anticipated to be presented by the agency at the hearing justifying the need for and reasonableness of the proposed rules. The court found that while the SONAR was inadequate to support the rule, the Department's oral presentation at the hearing demonstrated the need for and reasonableness of the rule and did not surprise those objecting to the rule and therefore the defect was not prejudicial.

Cases involving the adequacy of the rulemaking record include *Mammenga v. Department of Human Services*[60] (concluding rulemaking record varies with the nature of the rule: "in some cases a substantial evidentiary record may be needed, as in *Manufactured Housing*,[61] while in other cases 'common knowledge' or 'common sense' will suffice"); *City of Morton v. Minnesota Pollution Control Agency*[62] (denying challenge of inadequate record due to an absent exhibit, since that exhibit was available as a handout throughout the hearing); *Minnesota Association of Homes for the Aging v. Department of Human Services*[63] (finding no procedural error because the agency did not discuss an amendment to the proposed rules in its SONAR).

Another procedural issue the ALJ reviews is *substantial difference*, whether the adopted rule is substantially different from the rule as proposed. Minnesota Statute sections 14.16 and 14.26 (2022). Cases involving substantial difference include *Minnesota League of Credit Unions v. Minnesota Department of Commerce*[64] (finding changes to the rule, which were suggested by the ALJ and adopted by the agency, not substantial changes since they only narrowed and clarified the rule); *City of Morton v. Pollution Control Agency*[65] (concluding agency's revision to the proposed rule did not constitute a substantial change); *Minnesota Association of Homes for the Aging v. Department of Human Services*[66] (concluding amendment offering an alternative to the original proposal is not a substantial change to the rule). Furthermore, individual state agency statutes or rules may set out procedures beyond those required by the APA or its

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633 (Minn. Ct. App. 1986) (concluding agency improperly adopted a moratorium without first engaging in rulemaking procedures); *Wenzel v. Meeker Cnty. Welfare Bd.*, 346 N.W.2d 680, 683 (Minn. Ct. App. 1984) (finding interpretive manual valid as a restatement of existing law but lacking legal authority of an interpretive rule, since manual was not promulgated according to APA).

[57] Minn. Stat. § 14.05, subd. 1 (2022).

[58] Minn. R. 1400.2000-.2410 (2022). These rules have the force of law. MINN. STAT. § 14.38, subd. 1 (2022).

[59] 486 N.W.2d 399, 405-406 (Minn. 1992).

[60] 442 N.W.2d 786, 791 (Minn. 1989).

[61] *Manufactured Hous. Inst. v. Pettersen*, 347 N.W.2d 238, 244 (Minn. 1984).

[62] 437 N.W.2d 741, 748 (Minn. Ct. App. 1989).

[63] 385 N.W.2d 65, 69 (Minn. Ct. App. 1986).

[64] 486 N.W.2d at 406. For an analysis of *substantial difference*, see § 22.3 of this text.

[65] 437 N.W.2d at 747.

[66] 385 N.W.2d at 69.

authorizing rules.[67]

The Minnesota APA does not contain any qualification that a rule that has "substantially complied" with the procedural requirements of the APA is a valid rule. In one case, the Minnesota Supreme Court refused to apply the "substantial compliance" doctrine, stating that even if the court were inclined to read the doctrine into the APA, through an application of the harmless error doctrine, this was not the appropriate case in which to do so.[68] In 1995, the legislature specifically added a "harmless error" provision to the APA.[69] The "harmless error" provision directs the ALJ to disregard a procedural error or defect if the ALJ finds that the error "did not deprive any person or entity of an opportunity to participate meaningfully in the rulemaking process; or that the agency has taken corrective action to cure the error or defect so that the failure did not deprive any person or entity of an opportunity to participate meaningfully in the rulemaking process."[70] With a "harmless error" ruling made by an ALJ, the agency no longer has to start the rulemaking process over due to a minor procedural error made in the rulemaking process.

23.4 Unbridled Discretion

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

Discretionary power may be delegated to administrative officers

> [i]f the law furnishes a reasonably clear policy or standard of action which controls and guides the administrative officers in ascertaining the operative facts to which the law applies, so that the law takes effect upon these facts by virtue of its own terms, and not according to the whim or caprice of the administrative officers.[71]

Accordingly, in a rule that grants discretionary authority to the administrative officer, the issue is whether the rule furnishes a "reasonably clear policy or standard of action." Thus, this discretion issue is closely related to the issue of vagueness[72] and to the definition of a rule, which requires specificity (a rule must "implement or make specific the law enforced or

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[67] *See, e.g.,* Minn. Stat. § 115.43, subd. 1 (2022); *Handle with Care v. Dep't of Human Servs.*, 406 N.W.2d 518, 523 (Minn. 1987) (finding, after examination of the legislative history, that a statutory requirement was not a precondition to the adoption of the rule).

[68] *Johnson Bros. Wholesale Liquor Co. v. Novak*, 295 N.W.2d 238, 241-42 (Minn. 1980).

[69] Minn. Stat. §§ 14.15, subd. 5, .26, subd. 3(d) (2022).

[70] *Id.* § 14.26, subd. 3(d).

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

[72] *See infra* § 23.8 (discussing the void for vagueness doctrine).

administered").[73] In addition, requiring more specific language to avoid excessive agency discretion assures that the rule will be applied in a consistent manner.[74] Another reason for not permitting unbounded discretion is that such a grant authorizes the agency to circumvent the APA. An unauthorized unspecific and ambiguous rule allows the administrative officer to create and apply qualification criteria without fulfilling the APA rulemaking procedures. Such ad hoc rulemaking power is invalid.[75]

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

Even if the language contains specific criteria, the criteria may be effectively nullified by the word *may*, as in the following example: "The Commissioner may grant a license if the applicant has fully paid the fee." Under this example, even if the applicant has fully paid the fee, the commissioner may still not grant the license. Thus, an applicant has no idea when or under what circumstances a license may be granted even though he or she has paid the fee.[76]

A rule granting discretionary power to administrative officers is permissible under certain circumstances. First, if the enabling statute expressly authorizes such agency discretion, then the rules adopted thereunder are not required to be more restrictive.[77] The second exception is prosecutorial discretionary power.[78] Finally, as discussed at the beginning of this section, a rule may grant discretionary power to administrative officers if the rule furnishes a reasonably clear policy or standard that controls and guides the administrator so that the rule takes effect by virtue of its terms, and not according to the whim and caprice of the administrative officer.[79] In determining the propriety of administrative discretion, the

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[73] Minn. Stat. § 14.02, subd. 4 (2022).

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

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

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

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

[78] 2 KENNETH C. DAVIS, ADMINISTRATIVE LAW TREATISE ch. 9 (3d ed. 1994 & Supp. 1997).

[79] *Anderson v. Comm'r of Hwys.*, 267 Minn. 308, 311-12 (1964); *Lee v. Delmont*, 228 Minn. 101, 113 (1949); *State v. Suter*, 346 N.W.2d 372, 373-74 (Minn. Ct. App. 1984) (holding the legislature's delegation of

determination must be made on a case-by-case basis, since what may be a "reasonably clear standard" in one industry may be a meaningless generality in another. Furthermore, it is not necessary that a rule contain explicit definitions of every term[80] or be more precise if, in the context of the regulatory scheme, it is not feasible.[81]

In *Askildson v. Commissioner of Public Safety*,[82] the court of appeals discussed permissible agency discretion:

> The legislature may delegate power to an administrative agency if the statute provides a reasonably clear policy to guide the administrative officers, so the law takes effect by its own terms, rather than according to the whim or caprice of the administrative officers. . . . [W]here it is impracticable to promulgate a definite comprehensive rule, as where application of a rule turns upon questions of qualifications of personal fitness, or where an act "relates to the administration of a police regulation which is necessary to protect the general health, welfare, and safety of the public," it is unnecessary to have a specific prescribed standard expressly stated in the legislation.[83]

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

Giving specific criteria to guide administrative officers' discretion may save a rule even if the criteria do not entirely restrain officer discretion. In *Coalition of Greater Minnesota Cities v. Minnesota Pollution Control Agency*,[84] the court of appeals considered a rule stating that if a discharger of phosphorous met certain criteria, the discharger "may" qualify for a partial exemption to discharge limits.[85] The petitioner argued that the rule granted unbridled discretion because even if a discharger met the criteria, the discharger could be denied a partial exemption.[86] The court rejected this argument, reasoning that "may" is permissive, and therefore, does not grant unbridled discretion.[87] The court also concluded that the complexity

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authority and the commissioner's promulgation of order complies with constitutional requirements: "[A] legislature must establish a 'reasonably clear policy or standard of action' to guide the agency's exercise of discretion."); *see also Hirsch*, 537 N.W.2d at 487 (stating Department of Labor and Industry rules should not adopt controlling regulations but rule should have flexible standards that allow for a certain amount of medical judgment by compensation judges and would provide guidance as to what treatment is compensable).

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

[81] *Can Mfrs. Inst. v. State*, 289 N.W.2d 416, 423 (Minn. 1979).

[82] 403 N.W.2d 674 (Minn. Ct. App. 1987).

[83] *Id.* at 677.

[84] 765 N.W.2d 159 (Minn. Ct. App. 2009).

[85] *Id.* at 164-65.

[86] *Id.* at 165.

[87] *Id.* at 166.

of the proceedings required reasonable officer discretion.[88] Moreover, the court stated that a discharger denied a partial exemption can challenge the MPCA's decision as an abuse of discretion.[89]

23.5 Delegation of Agency Powers

Generally, it is improper for an administrative agency to delegate its powers to another agency, person, or body without statutory authorization. Whether an agency has unlawfully delegated its powers depends on "whether adequate legislative or administrative safeguards exist to protect against the injustice that results from uncontrolled discretionary power."[90] In rulemaking, the delegation issue often arises in two contexts: when a rule adopts standards developed by another agency or body, or when a rule adopts or incorporates a statute or federal law that has been subsequently amended.

The Minnesota Supreme Court has upheld a rule that adopted standards developed by another body, stating it is not an improper delegation of authority for the supreme court to require applicants for admission to graduate from a law school accredited by the American Bar Association.[91] The court stated that it has neither the time nor the expertise to individually investigate the training and the programs of all law schools, and thus it does not offend the constitution for the court to decide to utilize instead standards developed by a nongovernmental body with expertise in the area of legal education. Nor is the board of psychology's adoption of foreign government recognition of schools improper when there is a "rational basis" for adopting that standard or verification.[92]

Adoption or incorporation of acts of Congress is permissible if the state program is auxiliary in nature to the federal legislation and seeks to achieve uniformity in the implementation of national programs and policies.[93] Even if the programs are not auxiliary to federal statutes, when there are "good reasons" to coordinate the federal and state eligibility requirements, and when it is the agency that will be making the ultimate determination directly affecting the applicant, the Minnesota Supreme Court has upheld the adoption of federal legislation in rules.[94]

The nondelegation issue arises in another way when a rule adopts or incorporates a statute or federal law that has been subsequently amended. In *Wallace v. Commissioner of*

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[88] *Id.* at 166-67.

[89] *Id.* at 167.

[90] *Hubbard Broad., Inc. v. Metro. Sports Facilities Comm'n*, 381 N.W.2d 842, 847 (Minn. 1986); *see Muehring v. Sch. Dist. No. 31*, 224 Minn. 432, 436-37, 28 N.W.2d 655, 658 (1947).

[91] *In re Hansen*, 275 N.W.2d 790, 796-97 (Minn. 1978). *But see Garces v. Dep't of Registration & Educ.*, 254 N.E.2d 622, 628-29 (Ill. App. Ct. 1969) (finding adoption of private organization's standards improper subdelegation of authority); *Costanzo v. N.J. Racing Comm'n*, 126 N.J. Super. 187, 192, 313 A.2d 618, 620 (1969) (concluding non-membership in the U.S. Trotting Association not valid grounds for refusal to issue or revocation of horse owner's license).

[92] *Draganosky v. Minn. Bd. of Psychology*, 367 N.W.2d 521, 525 (Minn. 1985).

[93] *Minn. Energy & Econ. Dev. Auth. v. Printy*, 351 N.W.2d 319, 351-52 (Minn. 1984); *Wallace v. Comm'r of Taxation*, 289 Minn. 220, 228 (1971).

[94] *Minn. Energy & Econ. Dev. Auth.*, 351 N.W.2d at 351-52.

Taxation,[95] the court held that a state tax law incorporating certain internal revenue code provisions incorporated these provisions as of the date the state law was enacted, and not as the provisions might be amended by Congress.[96] This case has been subsequently distinguished on a number of grounds. Several decisions have noted that this decision was based on statutory interpretation as well as on a specific constitutional provision.[97] In any event, the issue of subsequent amendments has been directly addressed by the Minnesota Legislature in Minnesota Statutes section 645.31: "When an act adopts the provisions of another law by reference it also adopts by reference any subsequent amendments of such other law, except where there is clear legislative intention to the contrary."[98]

23.6 Retroactivity

In principle, rules may be made retroactive if it is reasonable to do so.[99] The Minnesota Legislature has provided, however, that no law or rule is to be construed as retroactive unless clearly and manifestly so intended by the legislature.[100] The definition of a rule in the APA, furthermore, provides that the rule is to have "future effect."[101] But similar language in the federal APA has been construed as not precluding retroactive regulation.[102] In addition, the Minnesota APA also provides that a properly adopted rule, regardless of whether it is substantive, procedural, or interpretative, "has the force and effect of law retroactive to the date on which the rule became effective."[103]

23.7 Reasonableness

For a rule to be valid, it must be reasonable.[104] A rule is reasonable if rationally related to the end sought to be achieved by the act.[105] "The reasonableness of a rule is viewed toward the

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[95] 289 Minn. 220, 184 N.W.2d 588 (1971).

[96] *Id.* at 228, 184 N.W.2d at 593.

[97] *Minn. Energy & Econ. Dev. Auth.*, 351 N.W.2d at 351-52; *Minn. Recipients Alliance v. Noot*, 313 N.W.2d 584, 587 (Minn. 1981).

[98] Minn. Stat. § 645.001 (2022) provides that, unless specifically provided to the contrary by law or rule, the provisions of chapter 645 govern all rules becoming effective after June 30, 1981. In addition, Mason v. Farmers Ins. Cos., 281 N.W.2d 344, 348 (Minn. 1979) states that the standards in chapter 645 should apply also to rules.

[99] *Mason v. Farmers Ins. Cos.*, 281 N.W.2d 344, 348 (Minn. 1979).

[100] Minn. Stat. § 645.21 (2022); *Minn. League of Credit Unions v. Minn. Dep't of Commerce*, 486 N.W.2d 399, 405 (Minn. 1992) (stating law can ordinarily be applied only prospectively unless the legislature expressly declares or clearly and manifestly intends it to be applied retroactively).

[101] Minn. Stat. § 14.02, subd. 4 (2022).

[102] *Summit Nursing Home v. United States*, 572 F.2d 737, 742 (Ct. Cl. 1978).

[103] Minn. Stat. § 14.38, subd. 2 (2022).

[104] *Juster Bros. v. Christgau*, 214 Minn. 108, 118 (1943); *see also* § 22.2 of this text (discussing *reasonableness*).

[105] *Jacka v. Coca-Cola Bottling Co.*, 580 N.W.2d 27, 35 (Minn. 1998) (finding rules governing the extent of chiropractic treatment for lower back pain covered by workers' compensation were rationally related to the goal of regulatory health care in that they provide a yardstick to measure treatment); *Vang v. Comm'r of Pub. Safety*, 432 N.W.2d 203, 207-08 (Minn. Ct. App. 1988) (holding rule canceling certain driver's licenses

end sought to be achieved and not in light of its application to a particular party."[106] In *Mammenga v. Department of Human Services*,[107] the supreme court explained when a rule is unreasonable on its face, "The rule itself is unreasonable (and therefore invalid) when it fails to comport with substantive due process because it is not rationally related to the objective sought to be achieved."[108] The supreme court further stated:

> The mere fact, however, that application of a rule may yield a harsh or undesirable result in a particular case does not make the rule invalid. To say a rule is "invalid as applied" means that the rule is invalid if, as employed, it is unreasonable in a due process sense, *i.e.*, that the rule is not rationally related to the legislative ends sought to be achieved.[109]

The court held in *Mammenga* that the department's rule requiring attendance at school for six hours a week had a rational basis and therefore was valid.[110]

In *Good Neighbor Care Centers, Inc. v. Department of Human Services*,[111] the court stated that the "reasonableness of a promulgated rule is tested against the purpose of the statute it implements" and had the department actually promulgated its interpretation, the rule would be reasonable in light of the statutory purpose.[112]

23.8 Constitutional Issues

There are a number of constitutional concerns that are frequently presented in the review of rules. These include vagueness, due process, overbroad classifications, equal protection concerns, and burdens on interstate commerce.

The doctrine of void for vagueness has been applied to administrative rules. In *Minnesota League of Credit Unions v. Minnesota Department of Commerce*,[113] the Minnesota Supreme Court held in a pre-enforcement action that a Department of Commerce rule

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reasonable and rationally related to the end of removing inebriated drivers from the highways: "A rule is reasonable if it is rationally related to the end sought to be achieved."); *Christian Nursing Ctr. v. Dep't of Human Servs.*, 419 N.W.2d 86, 91 (Minn. Ct. App. 1988) (stating the test is whether rule bears rational relation to accomplishing a legitimate public purpose or to achieving the end sought by the act; holding department rule disallowing reimbursement for interest costs rationally related to the ends sought by the statute); *Norman v. Comm'r of Pub. Safety*, 404 N.W.2d 315, 318 (Minn. Ct. App. 1987) (finding rule providing supervised and graduated penalties has reasonable relation to purpose of the implied consent law); *Blocher Outdoor Adver. Co. v. Minn. Dep't of Transp.*, 347 N.W.2d 88, 91 (Minn. Ct. App. 1984).

[106] *Broen Mem'l Home v. Minn. Dep't of Human Servs.*, 364 N.W.2d 436, 440 (Minn. Ct. App. 1985).

[107] 442 N.W.2d 786 (Minn. 1989).

[108] *Id.* at 789.

[109] *Id.* at 789-90 (citations omitted).

[110] *Id.* at 790; *see also Minn. League of Credit Unions v. Minn. Dep't of Commerce*, 486 N.W.2d 399, 406 (Minn. 1992).

[111] 428 N.W.2d 397, 404 (Minn. Ct. App. 1988).

[112] *Id.*; *see Boedingheimer v. Lake Country Transp.*, 485 N.W.2d 917, 922 (Minn. 1992) (concluding Department of Labor and Industry provided a reasonable basis for excluding hospital services from the maximum fee schedule); *see also* § 24.10 of this text (discussing application of *reasonableness* standard in a pre-enforcement action brought before the court of appeals).

[113] 486 N.W.2d at 399.

prohibiting a credit union from soliciting individuals to join an affiliated group was a permissible regulation of commercial speech and was not vague since it gave fair warning to an individual of the conduct prohibited.[114] The doctrine has also been acknowledged in a case involving disciplinary investigation of lawyers by the Lawyers Professional Responsibility Board. However, attorney disciplinary proceedings have been said to be in sui generis and may not therefore be analogous to agency administrative proceedings. In one lawyer disciplinary case, the Minnesota Supreme Court declared that a rule, like a statute, is void for vagueness—

> if it fails to give a person of ordinary intelligence a reasonable opportunity to know what is prohibited or fails to provide sufficient standards for enforcement. . . . [D]ifficulty in construction is not in itself sufficient to set aside a rule, and the rule "should be upheld unless the terms are so uncertain and indefinite that after exhausting all rules of construction it is impossible to ascertain legislative intent." . . . Due process, however, does not require that a rule contain an explicit definition of every term. All that is necessary is that the rule prescribe general principles so that those subject to the rule are reasonably able to determine what conduct is appropriate.[115]

Federal courts have applied the void for vagueness doctrine to agency rules but have relaxed the standard from that applicable in the criminal cases from which the doctrine emerged. When a statute or rule is not concerned with criminal conduct or first amendment considerations, federal courts have stated that courts must be fairly lenient in evaluating a claim of vagueness.[116] As the court in *Exxon Corp. v. Busbee* stated, "[T]o constitute a deprivation of due process, [a rule] must be 'so vague and indefinite as really to be no rule or standard at all.' To paraphrase, uncertainty in this statute is not enough for it to be unconstitutionally vague, rather it must be substantially incomprehensible."[117]

An agency must also not violate procedural due process in the adoption of its rules. Procedural due process requirements guarantee notice and an opportunity to be heard.[118] In

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[114] *Id.* at 404-05; *see also Minn. Chamber of Commerce v. Minn. Pollution Control Agency*, 469 N.W.2d 100, 107 (Minn. Ct. App. 1991) (citing *In re Charges of Unprofessional Conduct Against N.P.*, 361 N.W.2d 386, 394 (Minn. 1985)) (finding Minnesota Pollution Control agency water quality rule not vague).

[115] *In re Charges of Unprofessional Conduct Against N.P.*, 361 N.W.2d 386, 394 (Minn. 1985) (citations omitted); *see also In re Knutson*, 405 N.W.2d 234, 238 (Minn. 1987) (addressing challenge to rules as overbroad and void for vagueness; holding that "necessarily broad standards of professional conduct are constitutionally permissible"); *Thompson v. City of Minneapolis*, 300 N.W.2d 763, 768 (Minn. 1980) (quoting *Colten v. Kentucky*, 407 U.S. 104, 110 (1972)) ("A rule is unconstitutionally vague if the words are 'not sufficiently specific to provide fair warning.'"); *State v. Enyeart*, 676 N.W.2d 311, 320-21 (Minn. Ct. App. 2004) (stating void-for-vagueness doctrine does not preclude the use of broad flexible standards that require the exercise of judgment or common sense); *Voettiner v. Comm'r of Educ.*, 376 N.W.2d 444, 449 (Minn. Ct. App. 1985) (finding contested rule not vague).

[116] *Exxon Corp. v. Busbee*, 644 F.2d 1030, 1033 (5th Cir. 1981).

[117] *Id.* (quoting *A.B. Small Co. v. Am. Sugar Refining Co.*, 267 U.S. 233, 239 (1925)).

[118] *Minn. Chamber of Commerce v. Minn. Pollution Control Agency*, 469 N.W.2d 100, 104 (Minn. Ct. App. 1991) (finding agency gave notice and afforded an opportunity to be heard); *see In re Proposal by Lakedale Telephone Co.*, 561 N.W.2d 550, 555 (Minn. Ct. App. 1997) (concluding telephone company not deprived of due process by Minnesota Public Utilities Commission's decision to adjudicate decision versus formal rulemaking process); *In re Alleged Labor Law Violation of Chafoulias Mgmt. Co.*, 572 N.W.2d 326, 332 (Minn.

Minnesota League of Credit Unions,[119] the supreme court held that late submissions to the rulemaking record should not have been made part of the record, however, the submission did not raise any new issues and therefore did not prejudice the objectors who had an adequate opportunity to be heard on the matter.

A rule is unconstitutionally overbroad if its terms prohibit conduct or speech that cannot be prohibited under the United States Constitution, even if some conduct that it reaches is in fact punishable.[120]

In a facial preenforcement constitutional challenge to a rule in *City of Morton v. Pollution Control Agency*,[121] the court of appeals held that it will defer to the agency's expertise in determining how best to allocate grant resources to achieve optimum results, and will not substitute its judgment for that of the agency.[122]

In *Norman v. Commissioner of Public Safety*,[123] Norman challenged a rule as unconstitutional on the grounds it was arbitrary and capricious because the rule inhibited or removed the Commissioner's exercise of discretion. The court of appeals held that the rule, in defining a standard for application for a second-time offender, is not an arbitrary or capricious restriction of the commissioner's discretion and, further, that the purpose behind the rule has a reasonable relation to the purpose of the implied consent law.[124]

In addition, a rule may not violate the constitutional right of equal protection. If no fundamental right or suspect class is involved, a classification in a rule is impermissible if it is not rationally related to a legitimate government objective.[125] A rule may not also improperly

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Ct. App. 1997) (finding commissioner's failure to promulgate rules on procedures for filing exceptions did not violate relator's right to due process).

[119] 486 N.W.2d 399, 407 (Minn. 1992).

[120] *Thompson v. City of Minneapolis*, 300 N.W.2d 763, 768 (Minn. 1980); *Minn. Racetrack Inc. v. Goldberg*, 403 N.W.2d 885, 890 (Minn. Ct. App. 1987) (holding, in First Amendment challenge to agency's election campaign rules, that rules did not violate employer's constitutional right to free speech).

[121] 437 N.W.2d 741 (Minn. Ct. App. 1989).

[122] *Id.* at 748; *accord In re Review of 2005 Annual Automatic Adjustment of Charges for All Elec. & Gas Utils.*, 768 N.W.2d 112, 118-19 (Minn. 2009); *In re Request for Issuance of SDS Gen. Permit*, 769 N.W.2d 312, 320-22 (Minn. Ct. App. 2009); *Coalition of Greater Minn. Cities v. Minn. Pollution Control Agency*, 765 N.W.2d 159, 168 (Minn. Ct. App. 2009); *see also In re Application of Q Petroleum*, 498 N.W.2d 772, 777 (Minn. Ct. App. 1993) (concluding Petroleum Board rule was ambiguous, but Board's construction was a reasonable one: "[W]hen agency's construction of its own regulation is at issue, this court gives considerable deference to agency interpretation."); *Minn. Chamber of Commerce*, 469 N.W.2d at 104 (giving deference to agency expertise in water quality rules which involved technical issues of public health and the environment).

[123] 404 N.W.2d 315, 318 (Minn. Ct. App. 1987).

[124] *Id.*; *see also In re Appeal of Jongquist*, 460 N.W.2d 915, 917 (Minn. Ct. App. 1990) (quoting *Monk & Excelsior, Inc. v. State Bd. of Health*, 302 Minn. 502, 509-10, 225 N.W.2d 821, 825 (1975)) ("'Under [the APA], administrative officials are not permitted to act on mere whim, nor their own impulse, . . . but must follow due process in their official acts and in the promulgation of rules defining their operations.'").

[125] *See State v. Hopf*, 323 N.W.2d 746 753 (Minn. 1982) ("We will uphold a legislative classification that is rationally related to a legitimate government objective."); *Peterson v. Dep't of Labor & Indus.*, 591 N.W.2d 76, 79 (Minn. Ct. App. 1999) (upholding rules limiting fees of qualified rehabilitation consultants in an equal protection challenge because, although the rules affected QRCs differently, the rate differences were established by QRCs themselves); *In re Lawful Gambling License of Thief River Falls Amateur Hockey Ass'n*, 515 N.W.2d 604, 606 (Minn. Ct. App. 1994) (concluding rule was rationally related to maintaining the integrity of lawful gambling because it ensures that the public can enter an establishment where there

regulate commercial speech. In *Minnesota League of Credit Unions*,[126] the supreme court affirmed a decision by the court of appeals that held that the Department of Commerce rule prohibiting a credit union from soliciting individuals to join an affiliated group was valid. The court determined that the rule was a permissible regulation of commercial speech.[127]

Finally, a rule may not be an unconstitutional burden on interstate commerce. "Where a regulation is evenhanded and promotes a legitimate state interest, reasonable burdens on interstate commerce will be tolerated."[128]

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is lawful gambling and be confident that no illegal gambling has been conducted on the premises); *Rocco Altobelli v. Minn. Dep't of Commerce*, 524 N.W.2d 30, 37-38 (Minn. Ct. App. 1994) (rejecting petitioners' equal protection argument because state's exemption of independent contractors from certain tax payments could be rationally justified by administrative convenience and expense); *In re Application of Crown CoCo, Inc.*, 458 N.W.2d 132, 138 (Minn. Ct. App. 1990) (finding Petrofund Board's classification on non-reimbursable costs of cleaning up gasoline leak rationally related to a legitimate government objective); *REM v. Dep't of Human Servs.*, 382 N.W.2d 539, 542 (Minn. Ct. App. 1986) (finding rational basis for DHS classification and rejecting equal protection claim).

[126] 486 N.W.2d 399, 407 (Minn. 1992).

[127] *Id.* at 402-04.

[128] *Manufactured Hous. Inst. v. Pettersen*, 347 N.W.2d 238, 246 (Minn. 1984).