Chapter 24. Judicial Review of Rules

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24.1 Introduction

The validity of a rule may be challenged in court after the rule has been adopted but before it is enforced against a particular party in a contested case. This chapter deals with "preenforcement rule challenges" made under sections 14.44 and 14.45 of the Minnesota Administrative Procedure Act (APA). The validity of a rule may sometimes also be challenged later when it is sought to be enforced in a contested case. The last section of this chapter briefly discusses such a "collateral" attack on a rule.

24.2 Standing

Judicial review in a preenforcement challenge may be taken "when it appears that the rule, or its threatened application, interferes with or impairs, or threatens to interfere with or impair the legal rights or privileges of the petitioner."[1] Absent a discernible legislative intent to the contrary, standing for a challenge depends on a showing by the petitioner of "injury in fact."[2] Taxpayer status has been held sufficient to provide standing to challenge as invalid rulemaking a "policy bulletin" on medical assistance issued by the commissioner of public welfare.[3] In a case involving rulemaking under the Minnesota Occupational Safety and Health Act, the supreme court held that if a public interest organization was entitled as an interested person to participate in the rulemaking process, it also had standing and was entitled to seek

[1] Minn. Stat. § 14.44 (2014); *Rocco Altobelli v. Dep't of Commerce*, 524 N.W.2d 30, 34 (Minn. Ct. App. 1994) (finding petitioners lacked standing to challenge a rule which permits a cosmetologist to lease work space from a licensed salon as an independent contractor); *Minn. Educ. Ass'n v. Minn. State Bd. of Educ.*, 499 N.W.2d 846, 849 (Minn. Ct. App. 1993) (citing Minn. Stat. §§ 14.44-.45).

[2] *McKee v. Likins*, 261 N.W.2d 566, 570-71 (Minn. 1977); *see also Snyder's Drug Stores v. Minn. State Bd. of Pharmacy*, 301 Minn. 28, 32, 221 N.W.2d 162, 165 (1974); *Rocco Altobelli*, 524 N.W.2d at 35-36 (concluding petitioners have shown no connection between their injury and the purpose of the cosmetology statutes, which is to protect the health and safety of people in Minnesota); *In re Crown CoCo, Inc.*, 458 N.W.2d 132, 135-36 (Minn. Ct. App. 1990) (finding standing for petroleum service station owner to appeal a decision from Petroleum Tank Release Compensation Board where the service station showed it would suffer sufficient economic injury as a result of the decision). Minnesota does not always adhere to the same test for standing used in the federal courts. For example, under the federal test, taxpayer status is not sufficient to provide standing. *See, e.g., Sierra Club v. Morton*, 405 U.S. 727, 740 (1972) (affirming plaintiff must have "direct stake" in outcome); *Ass'n of Data Processing Serv. Orgs. v. Camp*, 397 U.S. 150, 153-54 (1970) (stating federal test requires, in addition to "injury in fact," showing that plaintiff is arguably within zone of interest sought to be protected by statute or constitutional provision involved).

[3] *McKee*, 261 N.W.2d at 570-71; *cf. Friends of Animals & Their Env't v. Nichols*, 350 N.W.2d 489, 491-92 (Minn. Ct. App. 1984) (affirming petitioner lacked standing in mandamus action to compel agency to adopt rules, since petitioner would not benefit from order compelling performance, as statute required).

judicial review of the rulemaking procedure.[4]

24.3 Petition for Declaratory Judgment

A preenforcement rule challenge under the APA is initiated by a "petition for a declaratory judgment … addressed to the Court of Appeals."[5] The legislature, by a 1984 amendment, directed that the petition be addressed to the court of appeals instead of, as before, to the district court.[6] In this context, the "petition for a declaratory judgment" should be considered in the nature of a writ, somewhat analogous to a petition for a writ of certiorari, whereby the agency's action is brought before the court of appeals for judicial review.[7]

Ordinarily, a preenforcement rule challenge presumes the existence of a rule. Instances may arise where a party claims that an agency pronouncement is a rule and is invalid because the agency, believing its pronouncement was not a rule, did not follow the statutory rulemaking procedures.[8] Consequently, there will be no rulemaking record. The Minnesota Court of Appeals has held that only formally adopted rules may be challenged by a petition for a declaratory judgment and that an unadopted rule should be challenged in a contested case enforcement action.[9] Mandamus relief, requested to compel an agency to promulgate rules, has been denied when the adoption of rules by the agency was discretionary and the commissioner of the agency had exercised his discretion not to adopt a rule.[10] The Minnesota Supreme Court has adopted rules setting out what the "petition for a declaratory judgment" for a preenforcement rule challenge must contain.[11] The petition is to describe the specific rule to be reviewed and the errors claimed by petitioner. Review of the validity of the administrative rule is on the record made in the agency rulemaking process.[12]

The APA does not prescribe any time limits for the bringing of a preenforcement rule challenge. The particular statute under which the agency has adopted its rule should be checked, however, to see if there are any time limits.[13] Neither is there any "exhaustion of

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[4] *Minn. Pub. Interest Research Grp. v. Minn. Dep't of Labor & Indus.*, 311 Minn. 65, 71, 249 N.W.2d 437, 440 (1976).

[5] Minn. Stat. § 14.44 (2014); Minn. R. Civ. App. P. 114.

[6] 1984 Minn. Laws ch. 640, § 26, at 1793; *see also* Minn. Stat. § 480A.06, subd. 4 (2014).

[7] *Manufactured Hous. Inst. v. Pettersen*, 347 N.W.2d 238, 247 (Minn. 1984) (quoting *Honn v. City of Coon Rapids*, 313 N.W.2d 409, 416 n.5 (Minn.1981)) (stating declaratory judgment action "has become, in many ways, 'an all-purpose writ.'"); *see also* Minn. Stat. § 480A.06, subd. 3 (2014) ("The Court of Appeals shall have jurisdiction to issue writs of certiorari to all agencies"); *cf.* Minn. Stat. § 14.63 (2014) (judicial review in contested cases is by certiorari).

[8] *See* ch. 16.

[9] *Minn. Ass'n of Homes for the Aging v. Dep't of Human Serv.*, 385 N.W.2d 65, 67-68 (Minn. Ct. App. 1986); *see also Minn. Educ. Ass'n v. Minn. State Bd. of Educ.*, 499 N.W.2d 846, 848-49 (Minn. Ct. App. 1993) (holding that a declaratory judgment petition was not the proper method to review a proposed interpretation of an adopted rule when the proposed interpretation is not part of the adopted rule). The legislature added another means of challenging an unadopted rule in 2001. *See* § 16.6 (discussing administrative challenge to improper rulemaking).

[10] *Friends of Animals & Their Env't v. Nichols*, 350 N.W.2d 489, 491 (Minn. Ct. App. 1984).

[11] Minn. R. Civ. App. P. 114.02, form 114.

[12] *Id.* 114.03, subd. 1.

[13] Some federal acts set time limits for judicial review of rulemaking. *See, e.g., Adamo Wrecking Co.*

remedies" requirement, as the statute expressly provides that a declaratory judgment may be rendered whether or not the petitioner has first requested the agency to pass on the validity of the rule, and whether or not the agency has commenced an enforcement action against the petitioner.[14] Since review became available in the court of appeals, there have been a number of cases where the validity of a rule has been challenged through declaratory judgment.[15]

24.4 Parties to a Preenforcement Challenge

The statute states that "[t]he agency shall be made a party to the proceeding."[16] The statute does not say who else may or should be party respondents. The Minnesota Rules of Civil Appellate Procedure state that persons, other than the petitioner, agency, and attorney

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v. United States, 434 U.S. 275, 278-79 (1978) (reviewing standards issued under Clean Air Act).

[14] Minn. Stat. § 14.44 (2014); Duncan Baird, *Remedies by Judicial Review of Agency Action in Minnesota*, 4 WM. MITCHELL L. REV. 277, 279-85 (1978) (dealing generally with ripeness, exhaustion, and primary jurisdiction). *But cf. Coalition of Greater Minn. Cities v. Pollution Control Agency*, 765 N.W.2d 159, 163-64 (Minn. Ct. App. 2009) ("There must be a showing that the rule is or is about to be applied to the petitioner's disadvantage. A mere possibility of an injury or mere interest in a problem does not render the petitioner aggrieved or adversely affected so that standing exists."(citation omitted)); *Minn. Educ. Ass'n v. Minn. State Bd. of Educ.*, 499 N.W.2d 846, 849 (Minn. Ct. App. 1993) (distinguishing between "threatened application" and "proposed interpretation" of a rule and denying standing where "Board's proposed interpretation of the word 'comparable' was not made part of the promulgated rule").

[15] *E.g., Ctr. for Biological Diversity v. Minn. Dep't of Natural Res.*, No. A12-1680, 2013 WL 2301951, at *2-3 (Minn. Ct. App. May 28, 2013) (citing Minn. Stat. §§ 14.44-.45) (denying statutory standing where petitioners failed to identify "any harm uniquely attributable to the challenged rules"); *Coalition of Greater Minn. Cities*, 765 N.W.2d at 163-64 (finding standing to contest "the effects that an overbroad application [or threatened application] of the [pollution control] rule would have on its municipalities"); *Rocco Altobelli v. Dept. of Commerce*, 524 N.W.2d 30, 34-35, 38 (Minn. Ct. App. 1994) (assessing petitioner's standing to invoke the court's original jurisdiction to determine validity of agency's rules under §§ 14.44-.45); *Minn. Educ. Ass'n*, 499 N.W.2d at 849 (denying standing where "Board's proposed interpretation of the word 'comparable' was not made part of the promulgated rule"); *Stasny by Stasny v. Minn. Dep't of Commerce*, 474 N.W.2d 195, 198 (Minn. Ct. App. 1991) (finding rule invalid where Commerce Department exceeded its statutory authority in adopting rule); *Minn. Chamber of Commerce v. Minn. Pollution Control Agency*, 469 N.W.2d 100, 102 (Minn. Ct. App. 1991) (finding original jurisdiction to determine validity of agency's rules, including amendments); *City of Morton v. Minn. Pollution Control Agency*, 437 N.W.2d 741, 745-46 (Minn. Ct. App. 1989) (discussing scope of review under §§ 14.44-.45 as to contested pollution control rules); *Christian Nursing Ctr. v. Dep't of Human Servs.*, 419 N.W.2d 86, 89-90 (Minn. Ct. App. 1988) (finding standing for declaratory judgment action challenging validity of rule consolidated with appeal from order in contested case); *Ellingson & Assoc. v. Keefe*, 410 N.W.2d 857, 861 (Minn. Ct. App. 1987) (finding original jurisdiction for pre-enforcement determination of the validity of rules governing comprehensive rehabilitation services); *Handle With Care v. Dep't of Human Servs.*, 406 N.W.2d 518, 519-20 (Minn. Ct. App. 1987) (weighing §§ 14.44-.45 pre-enforcement challenge to group family day care rules); *Minn. Ass'n of Homes for the Aging v. Dep't of Human Servs.*, 385 N.W.2d 65, 69 (Minn. Ct. App. 1986) (denying standing under §§ 14.44-.45 and allowing "Relator's claim that [the department's] practice is an unpromulgated rule [to] be made in a contested case hearing"); *cf. L.K. v. Gregg*, 380 N.W.2d 145,149 (Minn. Ct. App. 1986) (finding declaratory judgment action premature because no rule yet adopted).

[16] Minn. Stat. § 14.44 (2014); *cf. Neujahr v. Ramsey Cnty. Civil Serv. Comm'n*, 370 N.W.2d 446, 448 (Minn. Ct. App. 1985) (finding jurisdiction under 1985 amendment of Minn. Stat. § 480A.06, subd. 3, to hear direct appeals from "all agencies," including from the county commission).

general, may participate in the action with leave of the court of appeals.[17] The rules require that the petition be served upon the attorney general and the agency whose rule is being challenged.[18] Usually the commissioner who heads the agency is also named. In some instances, parties who had appeared in the agency rulemaking proceeding might be likely candidates for party respondents.

24.5 Perfecting the Appeal

The appeal must be perfected in accordance with the rules of the appellate courts.[19] The petition should be in the required format[20] and shall "briefly describe the specific rule to be reviewed and the errors claimed by petitioner."[21] A copy of the challenged rule must be attached to the petition.[22] The petition must be served on all parties and then filed with the clerk of appellate courts, along with proof of service, the requisite filing fees and bond, and an original and one copy of the statement of the case.[23] The briefing schedule proceeds under rules 114.04 and 131.01.

24.6 The Record for Judicial Review

The Minnesota Supreme Court has held that the record for judicial review in a preenforcement challenge is restricted to the record made before the administrative agency during the rulemaking proceedings.[24] Upon the filing of the petition with the court of appeals, the agency must produce the record, together with an itemized list of its contents, of the rulemaking proceeding within 30 days.[25] If considerable time has elapsed before the petition is filed, there may be a problem for the agency in assembling the record and preparing a

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[17] Minn. R. Civ. App. P. 114.05.

[18] *Id*. 114.01(c).

[19] *See* Minn. R. Civ. App. P. 114.01.

[20] *See id*. form 114.

[21] *Id*. 114.02.

[22] *Id*.

[23] *Id*. 114.01-.02.

[24] *Manufactured* Hous. Inst. v. Pettersen, 347 N.W.2d 238, 240-41 (Minn. 1984); *see also Minn. League of Credit Unions v. Minn. Dep't of Commerce*, 486 N.W.2d 399, 407 (Minn. 1992) (finding late submissions should not have been made part of the record, but since the memorandum did not raise any new issues there was no prejudice to the parties); *Mammenga v. Dep't of Human Servs.*, 442 N.W.2d 786, 791 (Minn. 1989) (the rulemaking record varies with the nature of the rule; here the record was adequate); *Rocco Altobelli v. Dept. of Commerce*, 524 N.W.2d 30, 36 (Minn. Ct. App. 1994) (holding review of rule's validity must be confined to "the record made in the agency proceeding"); *Minn. Educ. Ass'n v. Minn. State Bd. of Educ.*, 499 N.W.2d 846, 849 (Minn. Ct. App. 1993) (limiting court's review in a pre-enforcement action to the administrative record); *City of Morton v. Minn. Pollution Control Agency*, 437 N.W. 2d 741, 748 (Minn. Ct. App. 1989) (finding written handout available at public hearing was part of rulemaking record); *Minn. Ass'n of Homes for the Aging v. Dep't of Human Serv.*, 385 N.W.2d 65, 68-69 (Minn. Ct. App. 1986) (finding discussion noted in the post-hearing comment part of the rulemaking record). For a discussion of what is the record in rulemaking under the federal APA, see 1 KENNETH C. DAVIS, ADMINISTRATIVE LAW TREATISE ch. 7.4, at 309 (3d ed. 1994 & Supp. 1997).

[25] Minn. R. Civ. App. P. 114.03, subd. 2.

transcript of the agency proceedings. A resolution of this difficulty may require clarification by the legislature or by rules adopted by the appellate courts.

The content of the official rulemaking record is set out in the APA.[26] Generally, this record will include the various notices of the agency, the tape recording or transcript of the public hearing if one was held, the comments received, the documentary exhibits, the statement of need and reasonableness, and the order adopting the rule of the agency, as well as the rule itself. If the rule is being challenged on the grounds that the statutory procedures for its adoption were not followed, the record may need to be more complete than if the challenge is limited to another ground.

Ordinarily, the record may not be supplemented with new material on appeal. The APA provides that the official rulemaking record constitutes the exclusive record with respect to judicial review.[27] The Minnesota Supreme Court has noted, however, that "[c]onceivably, instances might arise where an irregularity might, in fairness, require supplementation or clarification of the rulemaking record."[28]

In appropriate cases the parties may stipulate to an abbreviated, more manageable record. There is an express statutory procedure for preparing the record in a contested case. Section 14.66 of the APA provides for stipulations for a shortened record and for sanctions for anyone who unreasonably refuses to cooperate and adds that "[t]he court may require or permit subsequent corrections or additions to the record when deemed desirable." But there is no longer a district court involved to resolve disputes about the record, and the court of appeals, as an appellate body, should not have to concern itself with resolving these disputes. The solution would be to remand to the district court for the county in which the agency has its principal office for resolution of any disputes about the making of the record or for the taking of evidence to supplement the record if an allegation of procedural irregularities is raised. While there is no express statutory authorization for this procedure, it is analogous to the procedure followed in a contested case for supplementing the record.[29]

24.7 Discovery Procedures

A rare instance may occur where the petitioner, seeking to establish procedural irregularities in the agency's rulemaking process, needs to develop evidence outside the record. The Minnesota Supreme Court has, in a contested case setting, authorized a very limited form of discovery.[30] Conceivably, a similar use of discovery might be applicable in a preenforcement

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[26] Minn. Stat. § 14.365 (2014); s*ee* Minn. R. Civ. App. P. 114.03, subd. 1.

[27] *Id.*

[28] *Manufactured Hous. Inst.*, 347 N.W.2d at 241 n.1.

[29] *See* Minn. Stat. § 14.68 (2014) (directing for contested cases, for alleged irregularities in procedure not shown in record, "the Court of Appeals may transfer the case to the district court").

[30] *In re Lecy*, 304 N.W.2d 894, 899-900 (Minn. 1981) (allowing for some discovery but expressing "deep concern over the inordinate length of time this matter has been in the court system . . . occasioned by an inappropriate application of the rule [allowing discovery]"); *Mampel v. Eastern Heights State Bank*, 254 N.W.2d 375, 378 (Minn. 1977) (permitting limited discovery "of the mental processes by which an administrative decision is made," including inquiry into procedural matters and agency adherence to statutory rulemaking requirements); *see also United States v. Morgan*, 313 U.S. 409, 421-22 (1941) (finding

challenge proceeding, although this is unclear. At least in a contested case, it appears that limited written interrogatories may be directed to agency officials, but agency officials cannot be deposed orally, nor may their mental processes be explored.[31]

24.8 Grounds for Judicial Review—Constitutional Violations

The statute states three grounds on which the court of appeals may declare a rule invalid: (1) the rule violates constitutional provisions; (2) the rule exceeds the statutory authority of the agency; or (3) the rule was adopted without compliance with statutory rulemaking procedures.[32] This section will deal with constitutional violations.

The usual constitutional challenges are that the rule is an unconstitutional delegation of legislative power to an administrative agency, that the rule violates the commerce clause of the federal constitution, that the rule violates the equal protection clauses of the federal and state constitutions, and that the rule violates the due process clauses of both constitutions. The same claims of constitutional invalidity that may be asserted against a statute may be asserted against a rule.[33]

The unlawful delegation of powers clause,[34] although frequently raised, has not had much success in the courts. The Minnesota Supreme Court has been willing, in view of the increasing complexity of matters subject to regulation, to find a permissible delegation of rulemaking power to the agencies under very general policy directives from the legislature.[35] A rule may also be challenged if it delegates the agency's authority to another private or public body.[36]

Whether a rule places an unreasonable burden on interstate commerce requires an inquiry into the evenhandedness of the rule's impact on the parties affected and the legitimacy of the state interest sought to be promoted.[37] In *Minnesota League of Credit Unions v.*

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inappropriate the extensive discovery and questioning of the Secretary of Agriculture in dispute over validity of the Secretary's order).

[31] *Lecy*, 304 N.W.2d at 900 (setting forth precise questions that may be submitted to agency official in written interrogatory form).

[32] Minn. Stat. § 14.45 (2014); *Minn. Educ. Ass'n v. Minn. State Bd. of Educ.*, 499 N.W.2d 846, 848 (Minn. Ct. App. 1993). *See generally* 2 F. COOPER, STATE ADMINISTRATIVE LAW 782-96 (1965). Questions of legality in the adoption of rules are discussed in chapter 23.

[33] *See, e.g., In re Charges of Unprof'l Conduct Against N.P.*, 361 N.W.2d 386, 394 (Minn. 1985) (applying constitutional analysis to validity of a rule, "like a statute"); *Thompson v. City of Minneapolis*, 300 N.W.2d 763, 768 (Minn. 1980) (applying constitutional analysis to rule under which employee was disciplined).

[34] Minn. Const. art. III, § 1.

[35] *E.g., Manufactured Hous. Inst. v. Pettersen*, 347 N.W.2d 238, 242-43 (Minn. 1984); *Anderson v. Comm'r of Hwys.*, 267 Minn. 308, 311-12, 126 N.W.2d 778, 780-81 (1964); *Lee v. Delmont*, 228 Minn. 101, 114, 36 N.W.2d 530, 539 (1949); *see also* § 23.5.

[36] *Wallace v. Comm'r of Taxation*, 289 Minn. 220, 226, 184 N.W.2d 588, 591-92 (Minn. 1971); *see also* § 23.5. *But cf. In re Hansen*, 275 N.W.2d 790, 796-97 (Minn. 1978) (finding court deference to ABA education standards in denying admission to bar applicant was not a delegation of authority, rather the utilization of legal education industry standards).

[37] *Kassel v. Consolidated Freightways Corp.*, 450 U.S. 662, 670-71 (1981) (weighing with "sensitive consideration" burden to interstate commerce against state's interest in maintaining truck-length

Minnesota Department of Commerce[38] the Minnesota Supreme Court held that a rule prohibiting a credit union from soliciting individuals to join an affiliated group was valid. The supreme court determined that the rule was a permissible regulation of commercial speech and was not vague since it gave fair warning to an individual of the conduct prohibited.

A common constitutional challenge is that the rule purports to classify affected parties without a rational basis for the classification, thereby raising an equal protection claim.[39] An even more common challenge is that the rule violates due process in that it is arbitrary and capricious[40] or vague or overbroad.[41] To survive a substantive due process challenge, the rule

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limitations); *Minn. v. Clover Leaf Creamery Co.*, 449 U.S. 456, 470-71 (1981) (finding state's environmental protection statute "evenhanded" and "not 'clearly excessive' in light of the substantial state interest in promoting conservation of energy and other natural resources"); *see also Manufactured Hous. Inst.*, 347 N.W.2d at 246 (finding state environmental regulation arbitrary, capricious, and violative of substantive due process where the court found "no reasoned determination" supporting the selected emissions level).

[38] 486 N.W.2d 399 (Minn. 1992).

[39] *E.g., Draganosky v. Minn. Bd. of Psychology*, 367 N.W.2d 521, 524-25 (Minn. 1985) (contesting distinction between accredited and non-accredited schools for licensing purposes); *State v. Hopf*, 323 N.W.2d 746, 753 (Minn. 1982) (contesting on-premise/off-premise distinction for advertising devices); *Welsand v. State R.R. & Warehouse Comm'n*, 251 Minn. 504, 509-10, 88 N.W.2d 834, 838-39 (1958) (contesting classification as a contract carrier for motor vehicle licensing); *Rocco Altobelli v. Dept. of Commerce*, 524 N.W.2d 30, 37-38 (Minn. Ct. App. 1994) (rejecting equal protection argument advanced by petitioner's because the state's exemption of independent contractors from certain tax payments could be rationally justified by administrative convenience and expense); *In re Crown CoCo, Inc.*, 458 N.W.2d 132, 138-39 (Minn. Ct. App. 1990) (contesting board's distinction between previously insured and non-insured claimants in reimbursing eligible costs); *REM, Inc. v. Dep't of Human Servs.*, 382 N.W.2d 539, 542 (Minn. Ct. App. 1986) (contesting distinction between new care facilities for disabled persons and older facilities, for determining entitlement to occupancy incentives linked to per diem reimbursement rates).

[40] *E.g., Williamson v. Lee Optical*, 348 U.S. 483 (1955) (weighing rationality of regulation for the sale of eyeglass frames and finding the regulation constitutional); *Manufactured Hous. Inst.*, 347 N.W.2d at 243 (finding the rationality of a pollution control rule "appears to be lacking"); *Contos v. Herbst*, 278 N.W.2d 732, 741 (Minn. 1979) ("Where an economic regulation is involved, due process requires that legislative enactments not be arbitrary or capricious."); *Juster Bros. v. Christgau*, 214 Minn. 108, 118-20, 7 N.W.2d 501, 507-08 (1943) (finding the case "an excellent illustration of the arbitrariness and oppressiveness which invalidates any administrative rule or proceeding"); *Peterson v. Dep't of Labor & Indus.*, 591 N.W.2d 76, 79 (Minn. Ct. App. 1999) (finding decision to fix fees of qualified rehabilitation consultants (QCRs) not arbitrary, although the rules affected QRCs differently, because the rate differences were established by the 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) (citing *Mammenga v. Dep't of Human Servs.*, 442 N.W.2d 786, 789, 790 (Minn. 1989)) (stating, "An administrative rule violates substantive due process if it is not rationally related to the objective sought to be achieved as enunciated by the legislature," but finding the rule in question rationally related to maintaining integrity of lawful gambling); *Minn. Chamber of Commerce v. Minn. Pollution Control Agency*, 469 N.W.2d 100, 103 (Minn. Ct. App. 1991) (applying "arbitrary and capricious" test to agency's rulemaking proceedings); *In re Eigenheer*, 453 N.W.2d 349, 354 (Minn. Ct. App. 1990) (finding Department of Natural Resources commissioner's findings regarding the application of wetland rules "neither arbitrary nor capricious" but supported by substantial evidence); *In re Appeal of Jongquist*, 460 N.W.2d 915, 917 (Minn. Ct. App. 1990) (striking down agency's case-by-case decision process regarding allocation of certain resources to the disabled where agency had not promulgated any rule or broad policy to govern the case-by-case decision process).

[41] *E.g., Arnett v. Kennedy*, 416 U.S. 134, 159-60 (1974) (finding employment clause allowing dismissal for "such cause as will promote the efficiency of the service" not vague or overbroad where

need only bear some rational relation to the accomplishment of a legitimate public interest.[42] A rule may also be challenged on the basis of procedural due process that guaranties notice and an opportunity to be heard.[43] A rule may also be challenged constitutionally on the grounds that it takes property without just compensation.[44]

In *Mammenga v. Department of Human Services*,[45] the supreme court clarified the important distinction between constitutional unreasonableness and administrative unreasonableness.[46] A rule is constitutionally unreasonable if, on its face or as revealed by the record, it violates substantive due process by not being rationally related to the statutory objective sought to be achieved. An administrative decision, on the other hand, may be unreasonable, i.e., arbitrary and capricious, in its resolution of a particular dispute, but this kind of unreasonableness does not implicate the constitution or make the rule itself invalid. The phrase "unreasonable" as applied has caused confusion. It simply refers to those instances where the record shows that the rule itself lacks a rational constitutional basis. Illustrative of this confusion is *Christian Nursing Center v. Department of Human Services*.[47] Other examples of a constitutional challenge include *Vang v. Commissioner of Public Safety*[48] and *Good Neighbor Care Centers v. Department of Human Services*.[49]

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agency followed "longstanding principles of employee-employer relationships" in interpreting the language and provided counsel for employees seeking advice or interpretation of the rule); *Minn. League of Credit Unions v. Minn. Dep't of Commerce*, 486 N.W.2d 399, 406 (Minn. 1992) (upholding lower court's ruling that the term "solicit" in department's rule regulating credit unions was not unconstitutionally vague); *Thompson v. City of Minneapolis*, 300 N.W.2d 763, 768 (Minn. 1980) (finding the phrase "wantonly offensive" in public employment standard "not so uncertain in meaning as to deprive appellant of fair warning of the conduct or speech which is subject to disciplinary action"); *Minn. Chamber of Commerce*, 469 N.W.2d at 106-07 (finding Minnesota Pollution Control Agency rule regarding nonpoint dischargers was not unconstitutionally vague).

[42] *Manufactured Hous. Inst.*, 347 N.W.2d at 243; *Minn. Chamber of Commerce*, 469 N.W.2d at 104-05.

[43] *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 Minnesota Public Utilities Commission not in violation of procedural due process because contested decision requiring telephone tracing activation fee did not require formal rulemaking under the APA); *In re Alleged Labor Law Violation of Chafoulias Mgmt. Co.*, 572 N.W.2d 326, 332-33 (Minn. Ct. App. 1997) (finding commissioner's failure to promulgate procedural rules did not violate relator's right to due process where relator's claim rejected on substantive, not procedural grounds).

[44] *E.g., DeCook v. Rochester Int'l Airport Joint Zoning Bd.*, 796 N.W.2d 299, 308-08 (Minn. 2011) (finding land use regulations near airport constituted compensable regulatory taking); *McShane v. City of Faribault*, 292 N.W.2d 253, 258-59 (Minn. 1980) (same); *In re Mapleton Cmty. Home*, 373 N.W.2d 815, 820 (Minn. Ct. App. 1985) (rejecting nursing home's argument that contested rule could cut property-related payments to below property cost rates and was, therefore, confiscatory).

[45] 442 N.W.2d 786 (Minn. 1989).

[46] *Id.* at 789-90; *see also 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).

[47] 419 N.W.2d 86 (Minn. Ct. App. 1988).

[48] 432 N.W.2d 203 (Minn. Ct. App. 1988).

[49] 428 N.W.2d 397 (Minn. Ct. App. 1988).

24.9 Grounds—Nonconstitutional Challenges

The APA provides that a rule may be declared invalid if it exceeds the statutory power of the agency.[50] This claim requires a careful analysis of just what the legislative enactment, either expressly or impliedly, authorizes the agency to do by rule. In a case where the legislation authorized issuance of standards or guidelines for housing products containing formaldehyde, the aggrieved party argued that the agency exceeded its authority in going beyond mere regulation by instead banning use of the product if it contained a certain level of formaldehyde. The Minnesota Supreme Court held, however, that the express authority to regulate included, by necessary implication, the power to ban.[51] On the other hand, in another case, the court held that the enabling legislation did not confer authority on the agency to adopt legislative or substantive rules, but the court, nevertheless, allowed the rule as a valid exercise of the agency's statutory power to promulgate interpretative rules.[52]

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[50] Minn. Stat. § 14.45 (2014); *see also* §§ 23.2-.3. This is a common nonconstitutional challenge raised in court. *E.g., In re Application of Minn. Power for Auth. to Increase Rates for Elec. Serv.*, 838 N.W.2d 747, 753-54, 757 (Minn. 2013) (concluding plain language of statute supported Commission's consideration of economic conditions in determining timing and size of rate increase and Commission did not exceed statutory authority by considering factors outside those listed in statute); *Jacka v. Coca-Cola Bottling Co.*, 580 N.W.2d 27, 34 (Minn. 1998) (holding department of labor and industry did not exceed its statutory authority in adopting rules governing the extent of chiropractic treatment allowed for lower back pain, because the rules were flexible enough to permit compensation judges to extend medical treatment for as long as medically necessary); *Hirsch v. Bartlett-Lindsay Co.*, 537 N.W.2d 480, 487 (Minn. 1995) (finding Department of Labor and Industry emergency rules are inconsistent with statute and legislative authorization and therefore invalid); *In re the Peace Officer License of Woollett*, 540 N.W.2d 829, 831-32 (Minn. 1995) (finding Board's rule did not conflict with statute); *Handle with Care v. Dep't of Human Servs.*, 406 N.W.2d 518, 522-23 (Minn. 1987) (examining legislative history of statute as to preconditions for rulemaking); *GH Holdings, LLC v. Minn. Dep't of Commerce*, 840 N.W.2d 838, 843 (Minn. Ct. App. 2013) (concluding board exceeded its statutory authority by adopting rule limiting evidence in contested cases to previously submitted written record); *Hentges v. Bd. of Water & Soil Res.*, 638 N.W.2d 441, 445-46 (Minn. Ct. App. 2002) (concluding board rule limiting federal exemption did not exceed statutory authority because it was consistent with legislative intent to achieve no net loss of wetlands); *Drum v. Minn. Bd. of Water & Soil Res.*, 574 N.W.2d 71, 74-75 (Minn. Ct. App. 1998) (concluding the Board's interpretation was consistent with the legislative intent to achieve no net loss in wetlands and did not exceed its statutory authority); *Rocco Altobelli v. Dept. of Commerce*, 524 N.W.2d 30, 36 (Minn. Ct. App. 1994) (finding Department of Commerce rule did not exceed the scope of the statute since barber chair leasing has been regulated for over 30 years and the legislature declined to ban chair leasing in 1992); *Stasny by Stasny v. Minn. Dep't of Commerce*, 474 N.W.2d 195, 199 (Minn. Ct. App. 1991) (invalidating Department of Commerce rule as inconsistent with statutory authority pursuant to which it was promulgated); *Wangen v. Comm'r of Pub. Safety*, 437 N.W.2d 120, 124 (Minn. Ct. App. 1989) (invalidating rule absolutely barring consideration of appellant's license reinstatement because the rule exceeded statutory authority); *City of Morton v. Minn. Pollution Control Agency*, 437 N.W. 2d 741, 746 (Minn. Ct. App. 1989) (weighing claim that rule exceeds statutory authority); *Christian Nursing Ctr. v. Dep't of Human Servs.*, 419 N.W.2d 86, 90-91 (Minn. Ct. App. 1988) (same); *Minn. Ass'n of Homes for the Aging v. Dep't of Human Servs.*, 385 N.W.2d 65, 68 (Minn. Ct. App. 1986) (finding rule did not violate the clear language of the statute).

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

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

Finally, a rule may be declared invalid if it was adopted without compliance with statutory rulemaking procedures. The APA is explicit in the procedural requirements that must be followed, at least substantially, for valid rulemaking.[53] Under the federal APA, interpretative rules are exempt from the act's notice and comment procedures,[54] but this is not so under Minnesota's act.[55]

Whether there has been compliance with the statutory rulemaking requirements assumes, of course, that it is, indeed, a rule that is being challenged. Thus it may be necessary, in a preenforcement challenge, to first establish that the agency pronouncement is a rule. In one case, for example, the aggrieved party successfully established that a "policy bulletin" issued by the agency was a rule, and since the public notice and hearing requirements had not been complied with its issuing the bulletin, the agency's pronouncement was invalid.[56]

24.10 Standard of Review

In a preenforcement rule challenge, the court of appeals determines if, on the record, the agency acted reasonably or arbitrarily and capriciously, and if it acted in accordance with the constitution and the law.[57] The court is not required, as in a contested case, to use the

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

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

[54] 5 U.S.C. § 553(b)(A) (2012).

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

[56] *McKee*, 261 N.W.2d at 577-78; *see also* § 16.4.

[57] *Manufactured Hous. Inst. v. Pettersen*, 347 N.W.2d 238, 241-44 (Minn. 1984); *Minn. Chamber of Commerce v. Minn. Pollution Control Agency*, 469 N.W.2d 100, 102-03 (Minn. Ct. App. 1991).

"substantial evidence" standard.[58] In other words, the standard of review is more restrictive in judicial review of a preenforcement rule challenge.[59] A preenforcement challenge tends to consider the rule in an abstract or hypothetical setting, and it would be premature for the courts to apply a more searching or stricter standard of review at this stage based on hypothetical facts.[60]

Under the arbitrary and capricious standard, the court makes a "searching and careful" inquiry of the record to determine if the agency action has a rational basis.[61] Deference is to be shown to agency expertise, but the agency must explain on what evidence it is relying and how that evidence connects rationally to the rule involved.[62] Requiring the agency to explain itself ensures that the agency action is not a result of "impermissible whim, improper influence, or misplaced zeal."[63]

At times, the subject matter to be regulated may involve an area where the technical or scientific knowledge is incomplete or the available data imperfect, and yet regulation is needed. In such instances, a rule adopted on the basis of incomplete or tentative information will still be

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[58] *Manufactured Hous. Inst.*, 347 N.W.2d at 244.

[59] *Minnesota-Dakotas Retail Hardware Ass'n v. State*, 279 N.W.2d 363 (Minn. 1979); *see also Rocco Altobelli v. Dept. of Commerce*, 524 N.W.2d 30, 36 (Minn. Ct. App. 1994) (in declaratory judgment petitions, this court has a limited scope of review); *Minn. Educ. Ass'n v. Minn. State Bd. of Educ.*, 499 N.W.2d 846, 849 (Minn. Ct. App. 1993) (in a pre-enforcement challenge, the standard of review is necessarily more restricted); *Minn. Chamber of Commerce*, 469 N.W.2d at 102-103 ("In a pre-enforcement action the reasonableness of the rule as applied cannot be considered, but the reasonableness of the application may be considered in a contested-case hearing").

[60] *Minnesota-Dakotas Hardware*, 279 N.W.2d at 363*; see also Minn. Chamber of Commerce*, 469 N.W.2d at 107 ("This court should not engage hypothetical applications in a pre-enforcement challenge.").

[61] *Manufactured Hous. Inst.*, 347 N.W.2d at 244; *see Bowman Transp., Inc. v. Arkansas-Best Freight Sys.*, 419 U.S. 281, 285 (1974); *Citizens to Preserve Overton Park v. Volpe*, 401 U.S. 402, 416 (1971); *see also In re Lawful Gambling License of Thief River Falls Amateur Hockey Ass'n*, 515 N.W.2d 604 (Minn. Ct. App. 1994) ("An administrative rule violates substantial due process if it is not rationally related to the objective sought to be achieved as set forth by legislature."); *Minn. Chamber of Commerce*, 469 N.W.2d at 103 (applying "a 'searching and careful' inquiry of the record to ensure that the agency action has a rational basis").

[62] *Manufactured Hous. Inst.*, 347 N.W.2d at 244*; see also Boedingheimer v. Lake Country Transp.*, 485 N.W.2d 917, 922 (Minn. 1992) (noting the court ordinarily defers to agency expertise where complex matters are involved); *Drum v. Minn. Bd. of Water & Soil Res.*, 574 N.W.2d 71, 73 (Minn. Ct. App. 1998) (noting that court should defer to agency's expertise and special knowledge); *In re Insurance Agent License of Casey*, 540 N.W.2d 854, 859 (Minn. Ct. App. 1995) *rev. in part on other grounds*, 543 N.W.2d 96 (Minn. 1996) (finding commissioner's rule interpretation "overly narrow and rigid" but deferring to that interpretation as applied to the facts of this case); *In re Lawful Gambling License of Thief River Falls Amateur Ass'n*, 515 N.W.2d at 606 (noting that minimal judicial scrutiny is correct standard of review for contested case: "It is not for the courts to question the political wisdom of a regulation."); *Minnesota Chamber of Commerce*, 469 N.W.2d at 103-4 (giving deference to the agency where case "involves technical issues of public health and the environment"); *In re Crown CoCo, Inc.*, 458 N.W.2d 132, 136 (Minn. Ct. App. 1990) ("Although an agency's decision is entitled to some deference . . . when an agency's authority to act is called into question, . . . we need not defer to agency expertise."); *City of Morton v. Minnesota Pollution Control Agency*, 437 N.W.2d 741, 748 (Minn. Ct. App. 1989) ("The court will defer to the agency's expertise in determining how best to allocate grant resources to achieve best pollution control results, and will not substitute its judgment for that of the agency in pre-enforcement or facial challenge.").

[63] *Manufactured Hous. Inst.*, 347 N.W.2d at 244 n.4 (quoting *Reserve Mining Co. v. Herbst*, 256 N.W.2d 808, 825 (Minn. 1977).

upheld as valid, provided the agency explains itself adequately and acts reasonably.[64]

Decisions of administrative agencies enjoy a presumption of correctness.[65] Mindful of the constitutional prohibition against the delegation to the judiciary of duties that are essentially administrative in character, the court must exercise restraint in reviewing agency action so as not to substitute its own judgment for that of the agency.[66]

The APA states that the reviewing court may, if grounds exist, declare a rule invalid.[67] The reviewing court also may, if it finds the rulemaking process defective, remand to the agency for further proceedings.[68]

In determining the validity of a rule, the court may first have to interpret or construe the language of the rule. The rules of statutory construction are applicable to all rules becoming effective after June 30, 1981.[69] Although the reviewing court defers to the practical construction that an agency gives its rules or a statute, even long-standing administrative procedures may not be binding if erroneous or contrary to law.[70] And courts need not defer to the agency when the language of the rule or the standard delineated is clear and capable of being understood.[71] In construing a rule, courts must be careful of the separation of powers doctrine that prohibits delegation of nonjudicial functions to the court. A declaration of invalidity of agency action does not transfer the agency's legislative power to the court.[72]

The validity of a rule may be challenged in either a preenforcement challenge proceeding or in a contested case. In either instance, as explained in *Mammenga v. Department of Human Services*,[73] the constitutional rational basis challenge may be made. In a contested case, however, the agency's decision may also be challenged as being arbitrary or capricious, i.e., based on whim or devoid of articulated reasons.[74] Consequently, as *Mammenga* points out,

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[64] *Id.* at 244 (quoting *Ethyl Corp. v. EPA*, 541 F.2d 1, 28 (D.C. Cir. 1976)); *see also Amoco Oil Co. v. EPA*, 501 F.2d 722, 739-41 (D.C. Cir. 1974) (demanding "reasons and explanations, but not 'findings'" where regulations turn on choice of policy, assessment of risk, or frontiers of scientific knowledge).

[65] *Crookston Cattle Co. v. Minn. Dep't of Natural Res.*, 300 N.W.2d 769, 777 (Minn. 1981); *Reserve Mining Co. v. Herbst*, 256 N.W.2d 808, 824 (Minn. 1977); *In re Eigenheer*, 453 N.W.2d 349, 352 (Minn. Ct. App. 1990).

[66] *Reserve Mining Co.*, 256 N.W.2d at 824-25.

[67] Minn. Stat. § 14.45 (2014).

[68] *Manufactured Hous. Inst.*, 347 N.W.2d at 246; *see also* Duncan H. Baird, *Remedies by Judicial Review of Agency Action in Minnesota,* 4 WM. MITCHELL L. REV. 277, 304-7 (1978).

[69] Minn. Stat. § 645.001 (2014).

[70] *Twin Ports Convalescent, Inc. v. Minn. State Bd. of Health*, 257 N.W.2d 343, 348 (Minn. 1977); *Ingebritson v. Tjernlund Mfg. Co.*, 289 Minn. 232, 237, 183 N.W.2d 552, 554-55 (1971); *see also Mammenga v. Dep't of Human Servs.*, 442 N.W.2d 786, 791 (Minn. 1989) (finding commissioner's interpretation of statutory phrase "completing a secondary education program" to exclude GED courses was reasonable); *Good Neighbor Ctrs., Inc. v. Dep't of Human Servs.*, 428 N.W.2d 397, 401 (Minn. Ct. App. 1988) (stating court does not defer to agency on questions of law).

[71] *Citizens Advocating Responsible Dev. v. Kandiyohi Cnty. Bd. of Comm'rs*, 713 N.W.2d 817, 827 (Minn. 2006); *Resident v. Noot*, 305 N.W.2d 311, 312 (Minn. 1981); *In re Application of Q Petroleum*, 498 N.W.2d 772, 777 (Minn. Ct. App. 1993) ("If the regulation is not ambiguous, no deference is given to the agency interpretation and the court may substitute its own judgment."); *Wenzel v. Meeker Cnty. Welfare Bd.*, 346 N.W.2d 680, 684 (Minn. Ct. App. 1984).

[72] *Minn. Distillers v. Novak*, 265 N.W.2d 420, 422 (1978).

[73] 442 N.W.2d 786, 789 (Minn. 1989).

[74] *In re Investigation Into Intra-LATA Equal Access & Presubscription v. Minn. Pollution Control Agency*,

in discussing the "unreasonableness" of agency action, it is important to remember that the kind of unreasonableness that will invalidate a rule (lack of rational basis) is different from the kind of unreasonableness that renders an agency decision arbitrary or capricious.

24.11 Review by the Minnesota Supreme Court

The statute provides that "[a]ny party to proceedings under section 14.44, including the agency, may appeal an adverse decision of the Court of Appeals to the Supreme Court as in other civil cases."[75] Only someone who was a party to the preenforcement challenge proceeding before the court of appeals is entitled to seek further appellate review, since the statute speaks of an "appeal . . . as in other civil cases." Although the statute could be read to provide or appeal as a matter of right to the supreme court, the appellate rules provide that "[r]eview of any decision of the Court of Appeals is discretionary with the Supreme Court."[76] or that the aggrieved party has only a right to petition the supreme court for further review. Presumably a petition for further review is intended.

The supreme court will make its own independent review of the agency's record without particular deference to the decision of the court of appeals.[77]

24.12 Collateral Attack on Rules

Sections 14.44 and 14.45 of the APA are specifically designed to provide a direct judicial attack on the validity of an administrative rule, and this procedure may be used before any action by the agency to enforce the rule. So far, this chapter has dealt chiefly with this direct, preenforcement proceeding for judicial review. It is established in Minnesota, however, that the validity of a rule may also be attacked collaterally in an enforcement or contested case proceeding.[78] Consequently a rule challenge can arise in a variety of legal settings.

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532 N.W.2d 583, 588 (Minn. Ct. App. 1995) ("We will defer to agency's expertise in fact finding, and will affirm the agency's decision if it is lawful and reasonable."); *In re Assessment Issued to Leisure Hills Health Care Ctr.*, 518 N.W.2d 71, 75 (Minn. Ct. App. 1994) (finding Department of Health's failure to follow federal regulations, in the absence of an established state inspection process, did not constitute arbitrary and capricious action).

[75] Minn. Stat. § 14.45 (2014); *Minn. League of Credit Unions v. Minn. Dep't of Commerce*, 486 N.W.2d 399 (Minn. 1992); *In re Assessment Issued to Leisure Hills Health Care Ctr.*, 518 N.W.2d 71, 74 (Minn. Ct. App. 1994) (granting petition for further review of decision of court of appeals and stayed the appeal panel's order pending a decision).

[76] Minn. R. Civ. App. P. 117, subd. 2.

[77] *See* Samuel L. Hanson, *The Court of Appeals and Judicial Review of Agency Action,* 10 WM. MITCHELL L. REV. 645, 660-61 (1984); *cf. Reserve Mining Co. v. Herbst*, 256 N.W.2d 808, 824 (Minn. 1977).

[78] *E.g., Boedingheimer v. Lake Country Transp.*, 485 N.W.2d 917, 921 (Minn. 1992); *State v. Lloyd A. Fry Roofing Co.*, 310 Minn. 528, 531, 246 N.W.2d 696, 698 (1976*); see also In re Peace Officer License of Woolett*, 540 N.W.2d 829, 831-32 (Minn. 1995*); State ex rel. Spurck v. Civil Service Bd.*, 226 Minn. 253, 259, 32 N.W.2d 583, 586 (1948); *Martin v. Wolfson*, 218 Minn. 557, 565, 16 N.W.2d 884, 889 (1944); *Drum v. Minn. Bd. of Water & Soil Res.*, 574 N.W.2d 71, 75 (Minn. Ct. App. 1998); *In re Insurance Agent License of Casey*, 540 N.W.2d 854, 859 (Minn. Ct. App. 1995) *rev. on other grounds*, 543 N.W.2d 96 (Minn. 1996); *In re Lawful Gambling License of Thief River Falls Amateur Hockey Ass'n*, 515 N.W.2d 604, 606-07 (Minn. Ct. App. 1994); *In re Eigenheer*, 453

A rule may be collaterally attacked in judicial review of a contested case decision brought pursuant to sections 14.63 through 14.69 of the APA. Thus, an employee who was disciplined under a rule of a city's civil service commission sought judicial review of the contested case decision, alleging that the rule was unconstitutional both on its face and as applied to him.[79] In the judicial review of a decision of the commissioner of public welfare fixing a nursing home's rate, the nursing home established that the rate was not computed under a permissible interpretation of the agency rule but that the rate was improperly based on factors that should have been adopted in a new rule.[80]

An agency may have authority to enforce its rules by seeking an injunction, and in such an enforcement proceeding, the defendant may, as a defense, collaterally attack the rule as being invalid.[81] In a personal injury tort action brought in state court based on a defendant's violation of an interpretative rule of the federal Consumer Product Safety Commission, the Minnesota Supreme Court ruled on the validity and authoritative effect of the federal agency's rule.[82]

In a direct preenforcement challenge, the record for judicial review is the record made by the agency during the rulemaking proceedings,[83] and in a contested case, the record is that made before the agency in the contested matter.[84] When a rule's validity is attacked collaterally in a contested case proceeding or some other kind of enforcement proceeding, the parties will need to consider carefully the contents of the record so as to afford a proper evidentiary basis for the grounds to be asserted for the rule's invalidity. In a preenforcement challenge, the court will be concerned only with the validity of the rule on its face.[85] In a collateral attack setting, however, the court may also be asked to strike down the rule as applied to the

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N.W.2d 349, 353-54 (Minn. Ct. App. 1990); *In re Crown CoCo, Inc.*, 458 N.W.2d 132, 136 (Minn. Ct. App. 1990); *In re Appeal of Jongquist*, 460 N.W.2d 915, 916-17 (Minn. Ct. App. 1990). *But see Adamo Wrecking Co. v. United States*, 434 U.S. 275, 285 (1978) (concluding federal courts in criminal prosecution may inquire whether agency complied with appropriate procedures when promulgating a rule under which defendant is charged, but may not in a criminal case "pursue any of the other familiar inquiries which arise in the course of an administrative review proceeding"). The legislature added another means of challenging an unadopted rule in 2001. *See* § 16.6.

[79] *Thompson v. City of Minneapolis*, 300 N.W.2d 763, 763 (Minn. 1980); *cf. Wangen V. Comm'r of Pub. Safety*, 437 N.W.2d 120, 124 (Minn. Ct. App. 1989) (invalidating rule depriving driver of reinstatement hearing after second DUI as in excess of statutory authority); *Vang v. Comm'r of Pub. Safety*, 432 N.W.2d 203, 207-208 (Minn. Ct. App. 1988) (unsuccessfully challenging driver's license reinstatement decision); *Norman v. Comm'r of Pub. Safety*, 404 N.W.2d 315, 318 (Minn. Ct. App. 1987) (same).

[80] *White Bear Lake Care Ctr. v. Minn. Dep't of Pub. Welfare*, 319 N.W.2d 7, 7-9 (Minn. 1982); *see also Wenzel v. Meeker Cnty. Welfare Bd.*, 346 N.W.2d 680, 684 (Minn. Ct. App. 1984) (finding commissioner erred by relying upon invalid interpretive rule for determining welfare assistance).

[81] *E.g.*, *Fry Roofing Co.*, 310 Minn. at 532-33, 246 N.W.2d at 699.

[82] *Swanson v. Emerson Elec. Co.*, 374 N.W.2d 690, 701-02 (Minn. 1985).

[83] *See* § 24.6.

[84] Minn. Stat. § 14.66 (2014) (requiring "the entire record of proceeding under review"); *Mammenga v. Dep't of Human Servs.*, 442 N.W.2d 786, 791 (Minn. 1989) (finding portions of rulemaking record made part of record in contested case proceeding); *Drum v. Minn. Bd. of Water & Soil Res.*, 574 N.W.2d 71, 73 (Minn. Ct. App. 1998) (stating on first judicial review, court should independently examine the agency's record without deferring to its legal conclusions).

[85] *See* § 24.10.

challenging party.[86]

[86] *See, e.g., Broen Mem'l Home v. Minn. Dep't of Human Servs.*, 364 N.W.2d 436, 440 (Minn. Ct. App. 1985) (weighing reasonableness of challenged rule as applied to plaintiff); *Mammenga*, 442 N.W.2d at 789-90 (clarifying misunderstanding surrounding phrase "invalid as applied," and affirming the approach taken in *Broen Mem'l Home*, 364 N.W.2d at 440).