The Administrative Rules Promulgation Process: A Primer

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Introduction

When the Legislature grants rulemaking authority to the executive agencies, it is delegating a quasi-legislative power. In spite of this, few legislators have had much opportunity to learn about the rules promulgation process. Since legislators are often contacted by constituents with questions about the promulgation of rules and since legislators are constantly asked to enact bills granting rulemaking authority to the agencies, this memorandum is intended to provide a brief overview of the rules promulgation and rules review process with an emphasis on those areas which are of special interest to the Legislature.

Background

Prior to the 1930's, few federal or state agencies were actively involved in the promulgation of rules and those that did promulgate rules usually followed no uniform procedure. The desire for some uniformity in the administrative rules process during the proliferation of regulatory agencies during this era prompted an examination of the process. A compromise piece of legislation, known as the Administrative Procedure Act (APA), was adopted by Congress in 1946. That same year, the National Conference of Commissioners on Uniform State Laws adopted a "Model State Administrative Procedures Act."

Although the states were slow to adopt the model, almost all now have some form of centralized procedure for administrative rules, and a majority are based on the model. The model was revised in 1961 and in 1981, each revision departing more from the federal APA.

South Dakota's administrative procedure act, although based on the 1961 model act, includes numerous additions, deletions, and variations. South Dakota adopted a comprehensive procedure for agencies to use to promulgate rules and for the review of agency decisions in 1966. The procedure, set out in chapter 1-26 of the South Dakota Codified Laws, has been frequently revised in subsequent years.

Role of the Legislative Research Council

Prior to 1986, the Code Counsel reviewed the rules for form and style, and the Attorney General's Office reviewed them for legality. In 1986, the Code Counsel became responsible for legal review as well as form and style. The Director of the Legislative Research Council (LRC) replaced the Code Counsel for that function by action of the 1989 Legislature. The Director delegated this authority back to the Code Counsel in 1999. SDCL 1-26-6.5 requires that the LRC review all the rules promulgated by the various agencies. The LRC must review each rule for form, style, and clarity, and review each rule for legality.

Initially, the LRC checks that all necessary forms have been filed and that the notice of hearing is complete. The notice must be filed with the LRC twenty days prior to the hearing. If the rules are not filed twenty days prior to the hearing, the rules will not be approved. The notice must contain a narrative description of the effect of the rules and the reasons for adopting the proposed rules. Each of the proposed rule changes must be covered in the notice. If any rule is not covered in the notice, it will not be approved.

When looking at an individual rule, the first thing that is checked is the authority. Each rule must have a citation for general authority and a citation for law implemented. The citation for general authority is the statute that grants rule-making power. Authority to promulgate rules may only be granted by means of statute. Without general authority there can be no rule.

An agency may only exercise those powers specified by statute. To avoid an unlawful delegation of power, the Legislature must adopt a clearly declared policy and provide understandable standards to guide the administrative action. Therefore, a statement such as "The department may promulgate rules to implement this chapter" is a grant of rule-making authority without standards and constitutes an unlawful delegation of legislative authority. Any statute that provides undefined discretion to an agency is an unlawful delegation of legislative authority.

It is especially important to be specific about fees. The statute must state the fees the agency intends to collect, otherwise the fees cannot be authorized. The statute should also state either the amount of the fee or a maximum amount for a fee. For licensing boards and commissions, if no fee is established in statute and no maximum fee is set, SDCL 1-26-6.9 states that the fee shall be reasonable:

> If a professional or occupational licensing board or commission is authorized in statute to establish fees by rule and no maximum fee limit is specified, the fees shall be reasonable and necessary to provide enough money to meet the budgetary needs of the licensing board or commission for such things as: per diem, travel expenses, office expense, salaries and benefits, utilities, supplies, testing, licensing, inspections, disciplinary actions, and legal fees. However, the total amount of increase in the fees imposed by a licensing board or commission may not exceed the previous year's budget by more than twenty percent.

When an agency proposes to increase a fee in a rule, the agency must provide a fund balance condition statement to justify the fee increase according to SDCL 1-26-4.8.

In addition to general authority, each rule must also have a citation for law implemented, the statutes that the rule is designed to carry out or administer. Sometimes the citation may be the same as general authority if that statute includes a policy statement. A rule cannot expand beyond the statute that it is implementing.

Sometimes an agency will implement a federal statute or regulation. This is particularly true of the Department of Social Services which has the authority to do so in SDCL 1-36-20. A rule that implements a federal statute or regulation must include a copy of that statute or regulation. It is also possible, but very rare, to cite an executive order or a court case as law implemented.

In addition to checking for proper authority, there are a number of other considerations. The LRC is responsible to check for any unlawful or unconstitutional delegations of authority. An agency cannot delegate authority to a private association. Further, an agency cannot delegate policy-making decisions, such as setting fees, to itself. SDCL 1-26-6.1 prohibits the restatement of a statute in a rule. There is an exception for definitions which may be copied exactly.

Some statutes are self-executing and rules are not needed, and may in some cases be contradictory. Rules that concern only the internal management of an agency and do not affect private rights are exempt from chapter 1-26. Such matters may often be addressed by executive orders or internal operating procedures and are outside the scope of rules promulgation.

After the LRC has examined the rules in light of all of these considerations, a letter is sent to the agency with a list of objections, if any. After the hearing, the rules are submitted to the LRC again and must be approved before they may be filed. The LRC checks to see that any changes made to the proposed rules are covered by the original notice of hearing. If not, those rules will not be approved. Also, any new provisions are checked for legality as the

original filing was checked. The LRC will also check to make sure any required changes were made. If everything is in order, the director of the LRC signs the final approval of the rules. Without the director's signature for legality and for form and style, the rules cannot be filed.

Procedure for Adopting Rules

The promulgation process is quite complicated. To begin the process, an agency must serve a copy of the rules, materials incorporated by reference, and an admission of service on the department secretary, bureau commissioner, or constitutional officer of the department to which it is attached. The agency then gets a written authorization from the appropriate officer to proceed. Upon receiving written approval and at least twenty days prior to the hearing, the agency must serve the LRC and the Bureau of Finance and Management with an admission of service, notice of hearing, fiscal note, impact statement on small business, proposed rules, and to the LRC only, any materials incorporated by reference. Also, at least twenty days prior to the hearing, the agency must publish the notice of hearing and send the notice to interested parties.

Once notice has been given, the agency must accept comments from the public and the LRC. To allow for input from the public, the agency must hold a hearing to "afford all interested persons reasonable opportunity to submit data, opinions, or arguments, either orally or in writing, or both, at a hearing held for that purpose." If a board or commission has the rule-making authority, a majority of the members of that board or commission must be present at the hearing. The comment period must be kept open for ten days following the hearing. However, if the agency adopting the rules is a board, commission, or other multi-member decision maker, the comment period is closed at the end of the hearing unless specifically continued to take additional comments.

After the comment period is complete, the adoption process may begin. The agency may make changes after consideration of the comments received by the public as long as those changes concern matters contemplated by the notice of hearing. The agency must also make any changes required by the LRC. The rules must be signed by the person or a majority of the board or commission with the authority to adopt them. The agency must then serve the minutes of the hearing, a complete record of written comments, and a corrected copy of the rules on the members of the Interim Rules Review Committee at least 5 days before presenting the rules to the Interim Rules Review Committee. The agency must file the corrected rules with the LRC and obtain signatures from the LRC approving the form and style, legality, and any incorporations by reference.

The agency must present the rules to the Interim Rules Review Committee. After the presentation and with the necessary signatures obtained, the agency may file with the Secretary of State: the original certificate; a copy of the rules; a copy of the signature sheet affirming that the rules that are filed are the rules as adopted; and that the agency has complied with the requirements of SDCL 1-26. This filing must occur within sixty-one days after the agency's rule-making process is deemed complete by the Interim Rules Review Committee. The rules are provisionally effective on the twentieth day after being filed with the Secretary of State, and finally effective on the first of July after the next legislative session.

Role of the Interim Rules Review Committee

The committee, which was authorized in 1972, is composed of six members: three members of the Senate appointed by the president pro tempore of the Senate, and three members of the House of Representatives appointed by the speaker of the House of Representatives. Members of the committee are appointed in odd-numbered years for two-year terms. The committee chooses a chair from its members. Each member has primary responsibility for the rules of certain agencies.

In reviewing the rules, the committee seeks to ensure that the spirit and intent of the legislation is carried out in

the rules. In addition, the committee makes sure that sufficient notice was given to the public and that complaints have been addressed.

The Interim Rules Review Committee may declare that the rule-making process is complete to the satisfaction of the committee, revert the rule to an earlier step in the rule adoption procedure pursuant to SDCL 1-26-4.7 to consider an amendment to the proposed rule, or move to suspend the proposed rule pursuant to SDCL 1-26-38.

A rule which is provisionally effective or is not yet effective may be suspended by the Interim Rules Review Committee prior to the first of July after the next legislative session. The procedure for suspension of provisional rules is set in SDCL 1-26-38. By a vote of a majority of the members, the committee may suspend any rule. To suspend a rule, the committee must adhere to the following procedure:

1) Give the agency which promulgated the rule at least two weeks' notice of a hearing on the proposed suspension;

2) Hold a hearing, which may be in conjunction with a regular committee meeting. At the hearing, the burden of proof that the rule is necessary and does not violate any constitutional or statutory provision or the legislative intent when authority to promulgate the rule was given, is on the agency;

3) File an appropriate resolution of such action with the Secretary of State.

The suspension is effective from the date of the filing. A suspended rule remains suspended until July first of the year following the year in which it became, or would have become, effective, and may not be enforced during that period.

The authority to suspend a rule is derived from a section added to the South Dakota Constitution in 1980, Article III, § 30, which provides:

> The Legislature may by law empower a committee comprised of members of both houses of the Legislature, acting during recesses or between sessions, to suspend rules and regulations promulgated by any administrative department or agency from going into effect until July 1 after the Legislature reconvenes.

There have been few instances over the years when the committee has used its authority to suspend a rule. It is more common for the committee to exercise its authority under SDCL 1-26-4.7 which permits the committee to require an agency to revert to any step in the adoption procedure or to hold additional public hearings. Typically, this may be done if the rules have been significantly and substantially altered from the original proposal and those changes were not a result of public testimony, or if the rules need to be substantially rewritten to achieve the intent of the agency. The statute provides nine circumstances for which the committee may require an agency to revert to any step in the adoption procedure.

Emergency Rules

There is a special abbreviated procedure for promulgating emergency rules. The agency must serve the head of the department, the LRC, and the Interim Rules Review Committee with the proposed rules, any materials incorporated by reference, a statement of necessity for the emergency procedure, and notice of intent to adopt emergency rules. The agency must publish a notice of intent to adopt emergency rules as it would a notice of hearing and send the notice to interested parties.

The LRC must review the statement of necessity for the emergency for sufficiency of the reasons. SDCL 1-26-5 requires that the agency provide a statement explaining "that the emergency procedure is necessary because of imminent peril to the public health, safety, or welfare, is necessary to prevent substantial unforeseen financial loss to state government, or is necessary because of the occurrence of an unforeseen event at a time when the adoption of a rule in response to such event by the emergency procedure is required to secure or protect the best interests of the state or its residents." If the statement does not meet that standard, the emergency cannot be approved.

In order to adopt emergency rules, the agency must make any changes required by the LRC, have the rules signed by the person or a majority of the body with authority to adopt them, file the rules with the LRC, obtain signatures for form and style and legality, and file any material concerning incorporations by reference. Three days after the publication of notice and if all signatures have been obtained, the agency may file the rules with the Secretary of State. No more than thirty days may elapse between the first service on the LRC and filing with the Secretary of State. The rules are provisionally effective immediately upon filing with the Secretary of State but are void ninety days later.

Summary

Whether emergency rules or rules adopted by the standard procedure, rules touch all of our lives. They provide the public a means to know what their government is requiring of them and of others for the public's protection or welfare. The process begins in the statutes that authorize the rules. The statutes serve to limit the rule-making authority. Legislators should view such grants of authority with care, making sure that the grants of authority are specific. Overly broad statutory grants of authority give the agency more discretion, and by doing so, may be unlawful grants of legislative power. While agencies must have flexibility in adopting rules, there must be limits placed in statute. A better understanding of the rules promulgation process should aid the continued success of the process.

This issue memorandum was written by Jacque Storm, Senior Legislative Attorney for the Legislative Research Council, in August 1996, and revised by Doug Decker, Code Counsel, in March 2009 and August 2018. It is designed to provide background information on the subject and is not a policy statement made by the Legislative Research Council.