

THE ADMINISTRATIVE RULES REVIEW COMMITTEE

2000 Annual Report

I. INTRODUCTION. This report covers the period beginning with the committee’s February 2000 meeting through the January 2001 meeting, covering those final rulemaking actions that were published in the calendar year 2000..

Iowa state government consists of some 109 entities. There are 29 umbrella agencies, 60 divisions having some level of rulemaking autonomy, 19 independent agencies and one legislative agency. In 2000 52 of these entities promulgated 367 filings—a decrease of over 15% from 1999. This represents a return to more normal levels of rulemaking, following a 1999 spike caused by a revision to Iowa Code Chapter 17A

Note that filings often contain more than a single rule change, they actually represent some 1500 individual rule additions, amendments or repeals. Rulemaking activity for the last ten years is set out below:

YEAR	AGENCIES	FILINGS	YEAR	AGENCY	FILINGS
2000	52	367	1995	53	399
1999	81	506	1994	66	414
1998	53	398	1993	62	493
1997	50	375	1992	61	493
1996	56	392	1991	66	511

In 2000 75 filings were put into effect using the “emergency” rulemaking provisions of the rulemaking process {Iowa Code §§17A.4 & 17A.5}; A significant increase over the 55 emergencies in 1999. Most of these filings were published as a notice of intended action at the same time. These emergency rulemaking filings account for 20% of the total filings; doubling the 1999 percentage. The emergency filings are tabulated in appendix “B” The ten year history for emergency rulemaking is as follows:

YEAR	EMERGENCY	FILINGS	YEAR	EMERGENCY	FILINGS
2000	75(20%)	367	1995	66 (16%)	399
1999	55(10%)	506	1994	91(22%)	414
1998	61(15%)	398	1993	116(23%)	493
1997	39 (11%)	375	1992	92 (19%)	493
1996	94 (24%)	392	1991	135 (26%)	511

To calculate the volume of rulemaking for 2000, filed documents are counted instead of single rule changes. Note that a filing is *not* a notice of intended action; a filing is only the adoption in final form. If notices were included, the volume of rulemaking would virtually double. Each filing put into effect contains one or more individual rule changes; on the average each filing contains roughly four individual changes. The agencies which adopted rules in 2000 are set out in appendix A. For the purposes of this analysis the term “agency” ignores the statutory groupings of departments, divisions, boards, etc. Instead the chart independently lists every rule-making unit without regard to its location within a larger “umbrella” department. Capitalized agencies represent departments or independent entities while lower case agencies represent divisions, boards or other units of state government. Regardless of size each agency listed has rule-making authority and some level of autonomy; for that reason all are treated as state agencies regardless of formal designation or location within a larger umbrella agency. The 2000 total of 367 filings breaks down by month in the following chart:

	Jan	Feb	Mar	Apr	May	June	July	Aug	Sept	Oct	Nov	Dec	TOT
2000	19	29	22	28	22	34	23	38	34	56	45	17	367
1999	14	51	29	26	111	45	35	29	44	33	28	61	506
1998	13	32	18	34	32	28	58	31	39	30	35	48	398
1997	12	26	46	14	34	30	48	24	27	35	31	47	375
1996	34	31	31	18	23	31	52	34	32	44	30	32	392

II. OVERVIEW OF THE COMMITTEE ACTIONS

While the average number of filings has decreased over the last five years, the volume of formal actions taken by the committee has remained at a steady level for well over a decade. In 2000 the committee imposed only one formal objection, down from two in 1999. 151 objections have been imposed since 1977, but in the last five years the average has dropped to less than four per year. Two session delays were imposed tying the number for 1999. 59 delays have been imposed since the power was created in 1978. Additionally, the committee imposed six general referrals (seven in 1999); six seventy day delays (six in 1999); and one request for a regulatory analysis (none for 1999). The committee took sixteen formal actions, down from the seventeen in 1999. The individual actions are summarized below:

III. CALENDAR OF 2000 RULES REVIEW COMMITTEE ACTIONS

Feb 2000 through Jan 2001

February 2000 ARRC meeting

Regulatory analysis : 567 IAC 22.106, ARC 9536(3)A; Air quality-operating permit fee.

General referral: 567 IAC 65.16, ARC 9599A; Land application of manure.

General referral: 281 IAC 6.17; Appeal of local board of education decision.

General referral: IPERS coverage for mental health advocates.

March 2000 ARRC meeting

45-day delay: 282 IAC chapter 11, ARC 9669A, Disciplinary procedures for teachers.

70-day delay: 281 IAC 63.18(4), ARC 9640A, Programs for students in juvenile homes.

70-day delay: 871 IAC 2.4, ARC 9686A, Waivers.

70-day delay: 491 IAC 1.8, ARC 9648A, Waivers.

April 2000 ARRC meeting

70-day delay: 193E IAC 1.41, ARC 9739A, Real estate referral fees.

September 2000 ARRC meeting

General referral: 761 IAC 602.26, ARC 0025B, Student drivers licenses.

October 2000 ARRC meeting

Session delay: 571 IAC 76.1(2), ARC 0099B, garter and rattlesnakes as protected species.

Session delay: 701 IAC 107.16 and 108.4, ARC 0138B, fee for collection of local tax.

December 2000 ARRC meeting

General referral: 261 IAC 65.4(3), ARC 0268B, Brownsfield redevelopment fund.

January 2001 ARRC meeting

Objection: 567 IAC 65.16(3), ARC 0348B; Emergency filing.

General Referral: 567 IAC 65.16(3), ARC 0348B; Land application of manure.

70-day delay: 645 IAC Ch. 40, 43, 44, ARC 0367B. Chiropractic physician

IV. SUMMARY OF ISSUES BEFORE THE COMMITTEE

ALCOHOLIC BEVERAGES DIVISION-tied house restrictions, 11/01/00 IAB, ARC 0250B.

Iowa Code §123.45 states that no manufacturer or wholesaler can have a direct or indirect interest in a retail establishment. The Alcoholic Beverages Division implemented a rule allowing a manufacturer or wholesaler to have an ownership interest in a retail establishment provided that the interest is so remote that it does not violate the legislative intent of the tied-house law. The City of Des Moines requested this change as part of its efforts to recruit a “Gameworks” facility for a downtown development. Gameworks is a bar/entertainment facility partially {albeit remotely} owned by the distiller Seagrams.

This rule provides that the division will not construe an ownership interest to be in conflict with section 123.45 if that interest does not allow control of the retail establishment. It sets out a “laundry list” of criteria; if *all* are met the division will deem that the business arrangement does not violate the tied house restriction. In essence the criteria provide that a manufacturer can have only a passive minority-share in the retail business and cannot have any voice in the retail establishments operation or management.

Opponents of this rule disputed that the distiller Seagrams had only a passive interest in “gameworks”, contending that Seagrams had been very active in nationally promoting Gameworks projects. As a matter of statutory construction they contended the statute is plain on its face and allows no ownership interest by a manufacturer or wholesaler. They noted that Chapter 123 was a criminal statute that should be construed narrowly; and stated the only permissible revision can come only from a statutory change. Opponents also noted no nationwide several states had interpreted their own tied house statutes as allowing this exception, no other state had gone so far as to issue an administrative rule to reinterpret the statute. They warned this would set a dangerous precedent of allowing rulemaking as an alternative to legislating.

Representatives from the Alcoholic Beverages Division denied that the rule violates the statutory prohibition, contending that the rule simply interprets the meaning of the statutory phrase “no direct or indirect interest. They also felt that the licensing process would protect against any attempt to skirt the requirements and emphasized that the rule posed no threat to the three-tier system. Representatives from the City of Des Moines stated this change was essential to successfully recruit Gameworks to Des Moines.

A proposed objection to this rule failed on a tie vote {six votes are required for an objection}. Some members maintained that the statute was plain on its face and that the express language could not be modified by rule. Other members felt that the rule was a lawful interpretation of the statute.

DEPARTMENT OF CORRECTIONS, inmate labor, ARC 9919A & 9947A, 6/28/00 IAB.

Two Corrections Department rulemaking proceedings detailed the circumstances under which prison inmate labor can be used as an alternative to the employment of private labor. The rules provide a series of safeguards ensuring that inmate labor is not substituted for available private sector labor. They provide that disputes concerning the availability of private labor will be decided by Workforce Development and be binding on the Department of Corrections. Security concerns

are also addressed by provisions for informing local officials that prisoners would be working in their city or county.

The rules remain controversial, with opponents noting that employers using inmate labor enjoy a competitive advance over those using private labor, since no fringe benefits are provided; moreover, in many cases the wages paid to inmates are far less than those paid in private enterprise. It was also noted that the employment contracts could be established for a number of years and no provision exists to terminate the contract and the use of inmate labor if local labor conditions changed. Lastly, opponents alleged the department will promote its program as a means of competing with private industry in selected areas.

DEPARTMENT OF CORRECTIONS, Telephone rebates, 10/18/00 IAB, ARC 0199B.

All telephone calls by and to inmates are made operator assisted, collect; a portion of these receipts are rebated to the department. This is a security measure allowing the department to monitor inmate calls and guard against criminal activity. The amount of this fee is a perennial issue in rulemaking.

In revising the existing rules department representatives stated that revenue from telephone calls has greatly declined, as has the expense to inmate families, since the department contracted with the ICN to provide the service. Revenue to the department has declined to \$1.2 million from a 1999 level of \$2.4 million. In response to ARRC requests actual institutional source of the funds is identified and considered when evaluating requests for projects. Members remained concerned that these funds were being used for "brick and mortar" projects; they again emphasized the need to limit projects to those that actually benefit inmates.

DEPARTMENT OF CORRECTIONS, Ion scanners, ARC 0041A, 08/09/00 IAB.

Amid allegations of inaccurate readings and unskilled operation, the department implemented highly controversial rules relation to the use of ion scanning devices to detect illicit drugs on visitors. These devices were obtained through a federal grant and were installed in all corrections institutions in an attempt to halt drug smuggling in the institutions.

The controversies were ultimately resolved when staff rules training requirements were established to ensure the skill of machine operators. Also, in those cases where the accuracy of the test is in doubt, the warden is authorized to provide a non-contact visit. The length of exclusion for failing the scan is made progressive, where initially a failed test meant an automatic six month exclusion; the more times a visitor fails the test, the longer the exclusion.

HUMAN SERVICES DEPARTMENT, Child care facilities: complaints, 441 IAC 109.3, SELECTIVE REVIEW.

In response to a newspaper article detailing alleged violations found in central Iowa child care facilities owners of local child care facilities complained that the department improperly released unconfirmed information which was printed in the register story. They complained that many of the allegations came from disgruntled employees or parents; other allegations involved situations over which the facility had no control. The department disputed this contention, stating that all information came from the confirmed file. Department representatives stated the decision to deem a complaint to be substantiated was based on a "preponderance of the evidence standard." Discussion revealed that there were no criteria or written procedures to ensure that the department inspectors were uniform in their analyses and conclusions when applying the rules to actual situations. Committee members noted that new amendments to the rulemaking process

required agencies to establish substantive standards and procedural safeguards. These complaints are not the same thing as child abuse allegations and it is important to avoid a public perception that they are the same. It was also stated that a complaint file should contain the departments conclusions and an opportunity for the facility to respond.

MEDICAL EXAMINERS BOARD/PHARMACY EXAMINERS BOARD, Immunizations by pharmacists, ARC 0329B & 0301B, 11/29/00 IAB.

For a number of years pharmacists have been providing inoculations for influenza and pneumonia, with thousands of inoculations now given without problem. Both the Medical and Pharmacy Boards now complete rulemaking detailing the required arrangements between the prescribing physician and the pharmacist. The Medical Board joined in a collaborative effort with the Pharmacy Board. The two sets mirror one another. The rules require that a participating pharmacist complete a course of study on vaccine administration, operate under a written protocol from a physician and is generally supervised by that physician. It should be noted that supervision does not require the physician to be actually present; instead, the physician must be readily available through telecommunication. These rules were initially controversial because both the Medical and Osteopathic Medical Associations questioned the legality of the delegations. In response to those questions, committee members sought the advise of the Attorney General. A formal opinion was issued supporting the rules. In essence the opinion stated that the two boards have the authority to set the scope of the administration of prescription drugs by a pharmacist. The opinion cites Iowa Code §155A.4(2)"c" stating: *"This chapter does not prevent a practitioner from delegating the administration of a prescription drug to a nurse, intern or other qualified individual...under the practitioner's direction and supervision."* Board representatives advised the committee that some interested groups may seek legislative action to codify this practice.

REVENUE DEPARTMENT, Fee for the collection of local option sales taxes, 09/20/00 IAB, ARC 0138B.

2000 Acts, H.F. 2545 provided that the department may charge a fee to recover the direct costs of administration relating to the collection and distribution of certain local sales and services taxes imposed by local option. Direct costs include such things as taxpayer services, return processing, additional data entry, increased error processing, estimation, audits, and distribution of revenues. The fee is calculated based on the number of times the county occurs on the returns processed by the department during the fiscal year. Each occurrence represents the total taxable transactions for a county for the given tax period. The department estimated its statewide costs in administering the various taxes as roughly \$396,000 and adopted a rule apportioning this cost to the various localities which impose a tax; with the cost retroactively assessed to July 1st, 2000.

The rules were reviewed a total of four times. Department representatives noted this administrative overhead was minimal, imposing a 0.16 percent burden on \$254 million of taxes. Opponents contended this fee was unfair because local voters were promised that all of the taxes raised were to support local schools. Proponents of the fee noted that such a promise was never made by state officials and that the legislature had authorized the fee by law. Additional controversy arose when the Attorney General opined that the appropriations bill language provided ongoing authority to assess the fee in future fiscal years. Following extensive discussions

committee members felt that the legislature should reconsider the entire concept of imposing fees for the administration of a tax, and imposed a session delay on the implementation of the fee.

VISION IOWA BOARD. Organization and operation, 11/15/00 IAB, ARC 0270B.

The vision Iowa program was enacted by 2000 Iowa Acts Chapter 1174 to fund local projects creating a “major tourism facility”, costing at least \$20 million and providing economic development opportunities in tourism. Funding includes grants, loans, interim financing, interest subsidies, deferred payment loans, forgivable loans, loan guarantees, float loans, or other forms of assistance as approved by the board.

Although the rules met with general approval by committee members, some members expressed reservations about the criteria and their application. . Under these provisions up to 5 points could be awarded for facilities that were nonsmoking and for facilities that enhanced the fine arts. Board representatives stated the nonsmoking provisions were in line with Iowa’s general attempts to discourage smoking in public buildings; they also noted the fine arts language was added in response to the public comment and was more limited than the public request, which would have set aside one percent of the funding for the arts. Board representatives stated that the five possible points were not sufficient, by themselves, to guarantee funding. Committee members contended these criteria were not tied to those specified in the Act.

Members also expressed concern that the weighted criteria were only used for the initial screening of applications. Committee members felt the rules did not adequately establish that the point rating was not binding on the board itself. Board representatives noted that the board itself wanted to retain flexibility in reviewing applications and for that reason wished to review each application on a case-by-case basis. The weighted criteria would be used for initial selection to ensure that only qualified projects were presented to the board. The representatives also explained that while the criteria set out in rule did not bind the board, the criteria set out in the Act itself did control the boards discretion.. It was agreed that the rules would be clarified to emphasize that the weighted criteria were binding on the board itself.

WAIVERS-House File 2206:

The first waiver provision was proposed in March, 1996 as part of SF 2404; it received no legislative action. In 1999 this language was incorporated in Executive Order #11. Committee members expressed qualified support for some waivers as a general concept, but a number of issues were raised; these included:

- ⌘ Concerns that waivers could be used to shape major changes in policy, thus avoiding both the legislative and rulemaking processes;
- ⌘ Concerns that no mechanism was provided to review waivers or the rules involved in those waivers;
- ⌘ Concerns that the process would be largely unavailable to the average citizen who cannot afford legal counsel;
- ⌘ Concerns that it could result in inconsistent policy through inconsistent application;
- ⌘ Concerns that the waiver provisions were based on 1996 legislation that was not enacted by the legislature.

As a compromise, the ARRC sponsored legislation to codify waivers into the Administrative Procedures Act. That proposal appeared as House File 2206 and was enacted into law with a July 1, 2000 effective date. This legislation supplanted portions of Executive Order #11 and left the

procedural portions of that order intact. Under the statutory provisions an agency *may* choose to grant a waiver if:

- ⌘ The application of the rule to the petitioner would pose an **undue** hardship on the person for whom the waiver or variance is requested. [emphasis added]
- ⌘ The waiver or variance from the requirements of a rule in the specific case would not prejudice the substantial legal rights of any person.
- ⌘ The provisions of a rule subject to a petition for a waiver or variance are not specifically mandated by statute or another provision of law.
- ⌘ Substantially equal protection of public health, safety, and welfare will be afforded by a means other than that prescribed in the particular rule for which the waiver or variance is requested.

The Act specifically sets out that a statutory requirement cannot be waived by an agency (§1); moreover, this prohibition is also set out in the criteria themselves. This redundancy responds to legislative concern that waivers could be used to evade a statutory mandate. Lastly, the Act mandates that all waivers be indexed and made available for inspection to encourage consistency through public scrutiny, along with a requirement of periodic review by the ARRC. Rulemaking is now underway throughout state government to implement this requirement.

APPENDIX #1-SUMMARY OF RULEMAKING IN 2000

Agency name	Jan	Feb	Mar	Apr*	May	June	July	Aug	Sept	Oct	Nov*	Dec	Total
HUMAN SERVICES DEPARTMENT[441]	0	2	4	9	1	15	1	4	10	13	6	0	65
Natural Resource Commission[571]	1	0	4	1	3	3	0	2	4	0	3	1	22
REVENUE AND FINANCE DEPARTMENT[701]	3	1	0	1	0	0	3	2	3	5	4	0	22
EDUCATION DEPARTMENT[281]	0	1	2	1	0	0	0	7	0	1	3	0	15
Educational Examiners Board[282]	0	4	0	4	0	2	0	0	0	0	5	0	15
PUBLIC HEALTH DEPARTMENT[641]	0	1	0	2	1	0	5	0	0	3	1	1	14
Professional Licensure Division[645]	1	0	1	0	1	0	0	0	2	4	4	2	15
TRANSPORTATION DEPARTMENT[761]	1	1	0	2	4	0	2	3	0	0	0	0	13
Nursing Board[655]	0	0	0	1	0	2	0	0	0	4	2	0	9
AGRICULTURE AND LAND STEWARDSHIP DEPARTMENT[21]	1	2	0	0	1	0	1	0	3	0	0	1	9
CORRECTIONS DEPARTMENT[201]	0	0	0	0	0	2	0	1	3	3	0	0	9
Environmental Protection Commission[567]	1	0	0	0	0	1	0	1	0	3	1	2	9
Insurance Division[191]	2	1	0	1	1	1	0	0	1	0	2	0	9
Emergency Management Division[605]	1	0	0	0	1	0	0	4	0	1	0	1	8
Utilities Division[199]	0	1	0	2	2	0	1	0	0	2	0	0	8
ECONOMIC DEVELOPMENT DEPARTMENT [261]	0	1	0	0	3	0	2	2	3	2	5	2	20
INSPECTIONS AND APPEALS DEPARTMENT[481]	0	0	0	2	0	1	1	1	1	1	0	0	7
Labor Services Division[875]	2	3	0	0	0	0	0	1	0	1	0	0	7
Medical Examiners Board[653]	0	0	0	0	0	0	0	1	0	2	1	3	7
SECRETARY OF STATE[721]	1	1	0	0	0	3	0	0	0	2	0	0	7
Dental Examiners Board[650]	0	3	0	0	0	0	0	1	0	0	3	0	7
Pharmacy Examiners Board[657]	0	0	4	0	0	0	0	1	0	0	1	0	6
Racing and Gaming Commission[491]	0	2	0	0	0	0	0	1	1	2	0	0	6
ELDER AFFAIRS DEPARTMENT[321]	0	0	0	1	0	2	0	1	0	0	0	0	4
PERSONNEL DEPARTMENT[581]	0	0	1	0	0	0	2	0	0	1	0	0	4
PUBLIC SAFETY DEPARTMENT[661]	0	0	0	0	0	0	0	0	0	0	2	2	4
Workers' Compensation Division[876]	0	0	0	0	1	0	2	0	1	0	0	0	4
WORKFORCE DEVELOPMENT	0	0	1	0	0	0	0	3	0	0	0	0	4

DEPARTMENT[871]													
Banking Division[187]	0	0	0	0	0	0	0	1	0	0	1	1	3
GENERAL SERVICES DEPARTMENT[401]	1	0	1	1	0	0	0	0	0	0	0	0	3
PETROLEUM STORAGE TANK FUND BOARD [591]	0	1	0	0	1	0	1	0	0	0	0	0	3
Workforce Development Board [877]	0	1	0	0	2	0	0	0	0	0	0	0	3
Alcoholic Beverages Division[185]	1	0	0	0	0	0	0	0	0	1	0	0	2
College Student Aid Commission[283]	0	0	0	0	0	0	0	0	0	2	0	0	2
Community Action Agencies Division[427]	0	0	1	0	0	0	0	0	1	0	0	0	2
Iowa Finance Authority[265]	0	0	0	0	0	0	0	1	0	1	0	0	2
Parole Board[205]	0	0	0	0	0	1	0	0	0	1	0	0	2
Real Estate Commission[193E]	0	0	1	0	0	1	0	0	0	0	0	0	2
Architectural Examining Board[193B]	0	1	0	0	0	0	0	0	0	0	0	0	1
ATTORNEY GENERAL[61]	0	0	0	0	0	0	0	0	0	0	0	1	1
CIVIL RIGHTS COMMISSION[161]	0	0	1	0	0	0	0	0	0	0	0	0	1
Criminal and Juvenile Justice Planning Division[428]	0	0	0	0	0	0	1	0	0	0	0	0	1
Engineering and Land Surveying Examining Board[193C]	1	0	0	0	0	0	0	0	0	0	0	0	1
FAIR BOARD[371]	0	0	0	0	0	0	1	0	0	0	0	0	1
HUMAN RIGHTS DEPARTMENT[421]	0	0	0	0	0	0	0	0	0	1	0	0	1
Landscape Architectural Examining Board[193D]	0	0	1	0	0	0	0	0	0	0	0	0	1
Lottery Division[705]	1	0	0	0	0	0	0	0	0	0	0	0	1
Public Broadcasting Division[288]	0	0	0	0	0	0	0	0	1	0	0	0	1
Real Estate Appraiser Examining Board[193F]	0	0	0	0	0	0	0	0	0	0	1	0	1
Soil Conservation Division[27]	0	1	0	0	0	0	0	0	0	0	0	0	1
TREASURER OF STATE[781]	0	1	0	0	0	0	0	0	0	0	0	0	1
VOTER REGISTRATION COMMISSION[821]	1	0	0	0	0	0	0	0	0	0	0	0	1
TOTAL	19	29	22	28	22	34	23	38	34	56	45	17	367

APPENDIX #2-EMERGENCY RULEMAKING IN 2000

Agency name	Total
HUMAN SERVICES DEPARTMENT[441]	14
PUBLIC HEALTH DEPARTMENT[641]	08
Environmental Protection Commission[567]	05
Natural Resource Commission[571]	05
Emergency Management Division[605]	04
EDUCATION DEPARTMENT[281]	03
PERSONNEL DEPARTMENT[581]	03
Community Action Agencies Division[427]	02
CORRECTIONS DEPARTMENT[201]	02
Dental Examiners Board[650]	02

ECONOMIC DEVELOPMENT DEPARTMENT [261]	02
GENERAL SERVICES DEPARTMENT[401]	02
Insurance Division[191]	02
Labor Services Division[875]	02
Nursing Board[655]	02
SECRETARY OF STATE[721]	02
Workers' Compensation Division[876]	02
WORKFORCE DEVELOPMENT DEPARTMENT[871]	02
AGRICULTURE AND LAND STEWARDSHIP DEPARTMENT[21]	01

Criminal and Juvenile Justice Planning Division[428]	01
Educational Examiners Board[282]	01
ELDER AFFAIRS DEPARTMENT[321]	01
Parole Board[205]	01
Pharmacy Examiners Board[657]	01
PUBLIC SAFETY DEPARTMENT[661]	01
Real Estate Commission[193E]	01
REVENUE AND FINANCE DEPARTMENT[701]	01
TRANSPORTATION DEPARTMENT[761]	01
TREASURER	01
TOTAL	75