

THE ADMINISTRATIVE RULES REVIEW COMMITTEE

1998 Annual Report

I. Introduction. This report covers the period beginning with the committee's February 1998 meeting through the January 1999 meeting. This period covers those final rulemaking actions that were published in the calendar year 1998. Thus while certain actions of the committee may have occurred in January 1999, those actions related to 1998 rules.

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 1998 53 of these entities promulgated 398 filings—an increase of about 6% over 1997. These figures are the highest rulemaking levels since 1995. Note that filings often contain more than a single rule change, they actually represent some 1400 individual rule additions, amendments or repeals. Rulemaking activity for the last ten years is set out below:

YEAR	AGENCY	FILINGS	YEAR	AGENCY	FILINGS
1997	53	398	1993	62	493
1997	50	375	1992	61	493
1996	56	392	1991	66	511
1995	53	399	1990	56	498
1994	66	414	1989	60	463

In 1998 61 filings were put into effect using the “emergency” rulemaking provisions of the rulemaking process {Iowa Code sections 17A.4 & 17A.5}. This was an increase of about 50% over the 39 emergencies in 1997. Most of these filings were published as a notice of intended action at the same time. These emergency rulemaking filings account for 15.5% of the total filings; an increase of about 4%. The ten year history for emergency rulemaking is as follows:

YEAR	EMERGENCY	FILINGS	YEAR	EMERGENCY	FILINGS
1998	53 (15%)	398	1993	116 (23%)	493
1997	39 (11%)	375	1992	92 (19%)	493
1996	94 (24%)	392	1991	135 (26%)	511
1995	66 (16%)	399	1990	94 (19%)	498
1994	91 (22%)	414	1989	92 (20%)	463

To calculate the volume of rulemaking for 1998, 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 1998 are listed below together with the number of emergency filings and the total number of filings made by each agency. 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. The first column of numbers represents the number of filings adopted in 1998. The second column represents the total “emergency” filings for that agency.

In 1998 ten agencies promulgated over 60% of the total rulemaking and over half of the “emergency” rulemaking; While the “bottom” half accounted for roughly 11% of the rulemaking total.

1998 rulemaking by agency

Human Services Department	74	19	Board of Regents	4	0
Public Health Department	36	5	Secretary of State	4	3
Natural Resources Commission	27	3	Corrections Department	3	1
Revenue and Finance Department	20	0	Historical Division	3	1
Education Department	18	2	Medical Examiners Board	3	0
Environmental Protection Division	16	3	Nursing Board of Examiners	3	0
Transportation Department	15	1	Accountancy Examiners Board	2	0
Pharmacy Examiners Board	14	0	Emergency Management Division	2	1
Engineering and Land Surveying Examiners Board	12	0	Substance Abuse Division	2	0
Professional Licensure Division	11	1	Treasurer of State	2	1
Workforce Development Division	11	1	Soil Conservation Division	1	0
Agriculture and Land Stewardship Department	9	3	Attorney General	1	0
Insurance Division	8	2	Real Estate Appraiser Examiners Board	1	0
Economic Development Department	8	0	Landscape Architectural Examiners Board	1	0
Racing and Gaming Commission	8	1	Real Estate Commission	1	0
Inspections and Appeals Department	7	1	Arts Division	1	0
Labor Services Division	7	0	Libraries and Information Services Division	1	0
Workers Compensation Division	7	3	Elder Affairs Department	1	0
Dental Examiners Board	6	1	Iowa Empowerment Board	1	0
Utilities Division	5	0	Criminal and Juvenile Justice Planning Division	1	0
Educational Examiners Board	5	0	Employment Appeal Board	1	0
Petroleum Underground Storage Tank Board	5	0	Livestock Health Advisory Council	1	0
Public Safety Department	5	1	Energy and Geological Resources Division	1	0
Architectural Examiners Board	4	0	Veterans Affairs Commission	1	0
College Student Aid Commission	4	2	Veterinary Medicine Board	1	0
Iowa Ethics and Campaign Disclosure Board	4	0	Wallace Technology Transfer Foundation	1	1
General Services Department	4	2	TOTALS	398	61
Personnel Department	4	2			

This annual number of 398 filings breaks down by month in the following chart. Two spikes occur during the year. One in July when rules are adopted in response to newly enacted legislation and a second towards the end of the year as agencies rush to clean up loose ends before the next legislative session begins. 23 of the 41 emergency filings {some 37% of the total} were published in July, in response to the need to implement legislation by the traditional July 1st effective date. Otherwise emergency rule making follows no other discernible patterns, varying in number from zero to six filings per month.

	Jan	Feb	Mar	Apr	May	June	July	Aug	Sept	Oct	Nov	Dec	TOT
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
1995	23	31	35	20	32	36	33	50	23	34	41	41	399

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 1998 the committee imposed only two formal objection, down from three objections in 1997. 148 objections have been imposed since 1977, but in the last five years the average has dropped to less than five per year. Five session delays were imposed in 1998, while none were imposed in 1997.

55 delays have been imposed since the power was created in 1978. Additionally, the committee imposed 10 general referrals (14 in 1997); 5 seventy day delays (3 in 1997); and one economic impact statement (none in 1997). The committee took 23 formal actions, up from the 20 in 1997. The individual actions are summarized below:

ADMINISTRATIVE RULES REVIEW COMMITTEE ACTIONS

February 1998 Through January 1999

ECONOMIC IMPACT STATEMENT (17A.4)

GENERAL SERVICES DEPARTMENT[401]

ARC 8271A, 401 IAC 5.21, fees for official publication, September 1998.

OBJECTION (17A.4(2) and 17A.4(4)"a")

DEPARTMENT OF HUMAN SERVICES[441]

ARC 7975A, 441 IAC 175.21, relating to the definition of the term "harm" in child abuse cases. July, 1998.

ARC 8097A, 441 IAC 169.4(1), relating to the availability of federal TANF funding in empowerment areas. July, 1998.

SESSION DELAY (17A.8(10))

ENVIRONMENTAL PROTECTION COMMISSION[567]

7760A, 567 IAC Ch. 50-52, agricultural drainage wells, February 1998.

NATURAL RESOURCES COMMISSION[571]

ARC 7935A, mussel regulations, May 1999.

RACING AND GAMING COMMISSION[491]

ARC 8231A, 491 IAC 1.6(4), ban on cash advance machines, September 1999.

ARC 8457A, items 3 and 6, criteria for the approval of slot machines, December 1999.

TRANSPORTATION DEPARTMENT[761]

ARC 8459A, item six, 761 IAC 600.13, relating to behind-the-wheel drivers certificates. December, 1998.

70-DAY DELAY (17A.4(5))

DENTAL EXAMINERS BOARD[650]

ARC 8014A, 650 IAC subrules 29.6(4) through (6), relating to the administration of nitrous oxide gas. June, 1998.

ENVIRONMENTAL PROTECTION COMMISSION[567]

ARC 7929A, 567 IAC 49.9(1)"a", relating to steel pipe. May, 1998.

DEPARTMENT OF HUMAN SERVICES[441]

ARC 7975A, 441 IAC Ch. 175, relating to the definition of child abuse, June 1998.

REVENUE AND FINANCE DEPARTMENT[701]

ARC 8058A, 701 IAC rule 26.45 relating to pest eradication, June, 1998.

TRANSPORTATION DEPARTMENT[761]

ARC 8459A, item Six, 761 IAC 600.13, relating to behind-the-wheel drivers certificates. December, 1998.

GENERAL REFERRAL TO SPEAKER OF THE HOUSE AND PRESIDENT OF THE SENATE (17A.8(7))

EDUCATION DEPARTMENT[281]

Sharing Information in student records, July, 1998.

ARC 8282A, 281 IAC 64.18, reallocation of funds, October 1998.

ETHICS AND CAMPAIGN DISCLOSURE[351]

ARC 8047A, 251 IAC Ch. 4, use of corporate property, June 1998.

ENVIRONMENTAL PROTECTION COMMISSION[567]

Property tax exemption, pollution control equipment, 567 IAC Ch. 11, June 1998.

ARC 7929A, 567 IAC 49.9(1)"a", relating to steel pipe. July, 1998.

ARC 8595A, 567 IAC 65.19, certification of manure applicators, January 1999.

HUMAN SERVICES DEPARTMENT[441]

ARC 8584A, 441 IAC Ch. 78, Medicaid payment for Viagra and similar drugs, January, 1999.

DEPARTMENT OF MANAGEMENT

forms relating to House File 727, local budget reporting, February, 1998.

PUBLIC HEALTH DEPARTMENT[641]

ARC 8204A, 641 IAC Ch. 111, renal disease payments, August, 1998.

REVENUE AND FINANCE DEPARTMENT[701]

House File 2513, sale of stock in a family business to descendants, November 1998.

III. SUMMARY OF ISSUES BEFORE THE COMMITTEE

ENVIRONMENTAL PROTECTION DIVISION

Property tax exemption for pollution control, 567 IAC Ch. 11. At issue was the growing use of a pollution control tax exemption by feedlots. Iowa statutes and rules make this property tax exemption widely available for most manure management equipment. Iowa Code section 427.1(19) creates a broad property tax exemption for pollution-control property, defined as "...*personal property or improvements to real property, or any portion thereof, used primarily to control or abate pollution of any air or water of this state or used primarily to enhance the quality of any air or water of this state...*" The Environmental Protection Commission has the responsibility of certifying the pollution control property. 567 IAC Chapter 11 sets out certain standards for the exemption; under these standards treatment facilities which neutralize or stabilize sewage, industrial waste or other waste, including the necessary pumping and transmitting facilities are eligible for the exemption. This exemption is now being extensively used by feedlots, accounting for as much as 95% of the certifications granted for wastewater property tax certifications. The EPC will certify any real property or fixed equipment that stores, transports or otherwise handles manure; the commission makes no effort to calculate the actual value of the equipment, leaving that determination for the local assessor. Once the assessment is certified by the division local assessors may assess the value of the property but they must grant the exception under Department of Revenue and Finance rules. Simply put, the question is whether it is appropriate to grant such a property tax exemption to large feeding operations. The committee voted to refer this exemption to the legislature for further review.

ETHICS AND CAMPAIGN FINANCE

Campaign use of corporate property, 6/3/98 IAB, ARC 8047A. This filing set out circumstances where corporate entities may make property, goods and services available to candidates and political committees, allowing "occasional, isolated, or incidental" use of corporate facilities for campaign purposes. The filing also sets out circumstances where campaigns can use corporate facilities, paying the fair market value for that use, thus allowing candidates and committees to enjoy the convenience of using the corporate facilities, while realizing no identifiable financial benefit from the corporation to the candidate or committee. The corporation must be reimbursed the full fair market value of the property, good or service used by the candidate.

Opponents noted that Iowa Code §56.15 specifically prohibited corporate contributions and that making a corporate facility available to a particular candidate or using corporate property constituted a prohibited contribution whether reimbursement was made or not. Supporters of the change contended the rule simply re-adopted an earlier interpretation of the term “contribution” which had been unnecessarily abandoned. The committee did vote a general referral in order to encourage legislative review of campaign finance.

DEPARTMENT OF NATURAL RESOURCES

Closing of season on washboard mussels, ARC 7935A, 4/8/98 IAB. This extremely controversial proposal to close the commercial harvest of washboard mussels was adopted in conjunction with the states of Minnesota, Wisconsin, Illinois and Missouri, which adopted a similar ban. A regulatory flexibility analysis of this proposal set an annual value of the harvest at \$56,000. The natural resources committee of the Iowa House held two hearings during the 1998 session and legislation to delay the rule and conduct additional studies was debated twice on the House floor; no legislative action was taken. Although committee members were mindful this issue had already been reviewed by the House of Representatives, they felt that the conflicting data received from the department and from the consultant for the shell exporters raised significant questions concerning the degree of threat to the washboard population. For that reason members felt that a session delay was appropriate to encourage further study on the Upper Mississippi this summer and to again have some level of legislative debate during the 1999 session. If no legislative action intervenes, this ban will become effective upon adjournment of the 1999 session of the General Assembly.

PERSONNEL DEPARTMENT

Deferred compensation for state employees, ARC 7940A, 4/8/98 IAB. After ten months of controversy, the issues surrounding the revision of Iowa’s deferred compensation program were resolved and an updated deferred compensation program was implemented. This rulemaking proceeding was truly unique in that it was Iowa’s first real use of negotiated rulemaking: a formal mediation process was begun utilizing a paid, professional mediator. This process lasted several months, with the result that 10 insurance companies were allowed to offer deferred compensation products.

PUBLIC HEALTH DEPARTMENT

Scope of practice review, 7/15/98 IAB, ARC 8202A. House File 710 was enacted in 1997; creating a pilot project which funds a scope of review process within the Department of Public Health; the goal of this pilot is to establish a mechanism for the investigation and resolution of the “turf fights” that periodically flare up between the licensed health-care professions. The project handles:

- Requests from practitioners seeking to become newly licensed health professionals or to establish their own licensure boards.
- Request from health professionals seeking to expand or narrow the scope of practice of a health profession.
- Unresolved administrative rulemaking disputes between licensure boards.

A scope of practice review committee must evaluate the above listed issues and make recommendations to the general assembly. With almost a full year since the first implementation of the program the department implements a number of changes. These amendments limit the

director's authority to direct the initiation of a scope of practice review, establish ex officio nonvoting members on review committees, and direct committees to encourage the involvement of outside interested parties in the review process. In essence they provide that the director will consult with members of the General Assembly and the rules committee before the director initiates a review.

RACING AND GAMING COMMISSION

Limitations on gambling. 6/17/98 IAB, ARC 8071A, NOTICE ONLY. The Racing and Gaming Commission proposed several excerpts from failed legislation as administrative rules. These excerpts would have: 1) prohibited the location of automatic teller machines on a gambling boat or within a racetrack enclosure; 2) limited the number of gambling licenses; and 3) frozen any expansion of slot machines. Proponents argued the merits of the proposal, noting that curbs were needed to stem the growth of problem gambling. Opponents argued against the process itself, contending the proposal was an unlawful attempt to enact failed legislation through the rule-making process.

Committee members were unanimous that the proposal itself was an impermissible attempt to re-draft legislation as an administrative rule. This conclusion was based on a traditional committee policy that the failure of the legislature to enact a particular provision demonstrated a legislative intent that such a provision should not be part of Iowa law. The commission responded by dropping this proposal in favor of several narrowly drafted alternatives.

Prohibition on credit terminals and freezing gambling licenses, ARC 8231A, 8/12/98. With serious objection to its first proposal, the commission selected a portion of that proposal for re-drafting and adoption. That portion 1) banned from gaming facilities machines which extend credit to the patrons and 2) froze the number of track casinos and gambling boats at current levels. This provision was offered as a compromise from the initial notice of intended action, which would have banned all automatic teller machines {ATMs} generally. This more limited ban had some measure of statutory support. Iowa Code §§99F.7 and 99F.9 prohibit a facility from extending credit or accepting a credit card. It was also noted that the commission had specific statutory authority to freeze the number of gambling licenses. After lengthy discussion the committee imposed a session delay on 491 IAC 1.6(4), relating to credit machines. This action postponed the effective date of the ban until the adjournment of the 1999 session of the General Assembly. The remaining two items, which freeze the number of casino and river boat licenses at current levels, went into effect as scheduled. The committee declined to either delay or object to this freeze.

Charitable contributions, 10/7/98 IAB, ARC 8388A. This provision requires that recipients of nonprofit distributions to explain how their receipt of this money would benefit residents of Iowa and also requires the qualified sponsoring organization to consider how it would benefit residents of Iowa. It requires the recipient of a donation to detail in writing how the use of the proceeds will benefit the residents of Iowa. The change was vigorously opposed by border communities that benefit from out-of-state casino patrons, contending that border cities have a community of interest with out-of-state neighbors that make it appropriate to share gambling proceeds. However, committee members felt that Iowans, who endure all of the problems of legalized gambling, should in turn reap the benefits of that activity. Members noted the rules did not preclude out-of-state donations, but instead merely encouraged consideration of Iowa-based charities.

Approval of requests for additional slot machines, 11/18/98 IAB, ARC 8457A. The commissions final effort to increase the level of regulation on the gaming industry was a set of

specific criteria to evaluate applications for increases in the number of slot machines, along with a requirement moving “ATM” machines away from gambling areas. Committee discussion centered around the question whether these criteria provided an impartial and uniform tool for evaluating applications for slot machine expansion. Members felt the legislature should review this particular criteria before they became effective. The requirement that “ATM” machines be moved from the gambling areas was allowed to go into effect.

REVENUE AND FINANCE DEPARTMENT

Capital gains treatment, House File 2513, Selective review. Iowa Code §422.7(21)“a” relates to exemptions from capital gains tax. As amended by House File 2513 it limits taxation in the sale of the family farm or family business to close relatives. The statute refers to the sale of tangible personal property or service of the business. The problem is that with incorporated businesses the business is traditionally “passed on” by selling the stock of the company to a family member; however, the stock of the company is the personal, intangible property of the holder, not property of the company. For that reason the exemption is not readily available when a family business or farm is incorporated---the stock is not tangible property of the business, thus the exemption does not apply. Committee members discussed whether this interpretation was fair. Some members felt the intent of the Act was to help keep a “small business” in the family, and to accomplish this goal it should include an incorporated small business. Other members contended that the decision to seek corporate status is a business decision based at least in part on tax considerations, and that having made that decision the corporation should not also be allowed the benefits accorded to unincorporated businesses. This issue was referred to the General Assembly with the request that it be clarified in statute.

DEPARTMENT OF TRANSPORTATION

Driver’s education, 11/18/98 IAB, ARC 8461A. As part of an omnibus filing relating to drivers license changes the department adopted qualification standards by for “behind-the-wheel” instructors: persons providing instruction for only that segment of drivers education consisting of actual on-street driving. The issue involved a conflict within House File 2528. Section two of the Act defines “laboratory” as including street or highway driving; that section goes on to state that *“To be qualified as a classroom or laboratory driver education instructor, a person shall have satisfied the educational requirements for a teaching license at the elementary or secondary level and hold a valid license to teach driver education in the public schools of this state.”* However, section two of the Act also stated: *“Street or highway driving instruction may be provided by a person qualified as a classroom driver education instructor or a person certified by the department of transportation. The department of transportation shall adopt rules pursuant to chapter 17A to provide for certification of persons qualified to provide street or highway driving instruction and for administering requested field tests.”* Thus two statutory provisions were completely contradictory.

Pursuant to this second provision, the Department of Transportation adopted standards for behind-the-wheel instructors far less rigorous than those imposed by the Department of Education. Certified drivers education teachers vigorously opposed this rule, contending it violates the statutory requirements set out in section two of the Act. Transportation representatives vigorously defended their program stating it is authorized by section two of the Act, by proving teaching assistants for handling only on-road instruction. The committee voted a

seventy day delay, followed later by a session delay, asking the legislature to clarify its intent by statute.

WORKFORCE DEVELOPMENT BOARD

Coordinating service provider, 7-15-98 IAB, ARC 8162A. The gradual re-working of the old Employment Services Department into the Workforce Development Department is now largely complete with this filing which divides Iowa into a number of regions roughly corresponding to community college areas. A coordinating service provider will be established in each region to manage the workforce development centers, design products and services, and oversee the performance of the workforce development system in that region.

The regional advisory board in each region initiates the formation of the coordinating service provider by convening a meeting of all workforce development service providers and other interested parties. Any interested public and private workforce development organization in the can be members of the coordinating service provider. The coordinating service provider is formed through a 28E agreement, in a format provided by the department. The 28E agreement must be approved by the regional advisory board and the state workforce development board before final execution. Each participating provider must:

- Be an Iowa corporation;
- Have sufficient funds to participate in the coordinating service provider and to satisfy potential liabilities arising from its participation in the agreement;
- Integrate products and services agreed to be offered through the region's workforce development system;
- Use and share customer information through the department's integrated customer service system;
- Accept financial responsibility and liability for its actions related to financial and audit matters, personal injury, property damage, performance outcomes, employment matters, and all other matters arising out of its respective performance in the agreement; and
- Actively participate in the management of the delivery of workforce development services.

The major responsibility for each provider is the workforce development center in each region. The centers provide a one-stop career center within each region, delivering an integrated network of information resources and workforce development services to job seekers, businesses, employees, students, schools and colleges, and the public at large. Each center must provide a broad range of employment services.