

THE ADMINISTRATIVE RULES REVIEW COMMITTEE

1996 Annual Report

I. Introduction. This report covers the period beginning with the committee's February 1996 meeting through the January 1997 meeting. This period in essence covers those final rulemaking actions that were published in the calendar year 1996. Thus while certain actions of the committee may have occurred in January 1997, those actions related to 1996 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 1996 56 of these entities promulgated 392 filings—virtually unchanged from 1995, but still continuing a gradual decline in volume of rulemaking over the last decade. These filings often contain more than a single rule change, they actually represent some 1600 individual rule additions, amendments or repeals. Rulemaking activity for the last ten years is set out below:

YEAR	AGENCY	FILINGS	YEAR	AGENCY	FILINGS
1996	56	392	1991	66	511
1995	53	399	1990	56	498
1994	66	414	1989	60	463
1993	62	493	1988	86	621
1992	61	493	1987	60	503

In 1996 94 filings were put into effect using the “emergency” rulemaking provisions of the rulemaking process {Iowa Code sections 17A.4 & 17A.5}. Most of these filings were published as a notice of intended action at the same time. These emergency rulemaking filings account for 24% of the total filings; this is the worst percentage since 1991. However, *thirty* of these filings are identical “boilerplate” filings added to all licensing board rules, relating to license revocations for failure to provide child support and establishing peer review committees. If those filings are factored out, emergency rulemaking drops to a more reasonable 16%. The ten year history for emergency rulemaking is as follows:

YEAR	EMERGENCY FILINGS	FILINGS	YEAR	EMERGENCY FILINGS	FILINGS
1996	94 (24%)	392	1991	135 (26%)	511
1995	66 (16%)	399	1990	94 (19%)	498
1994	91 (22%)	414	1989	92 (20%)	463
1993	116 (23%)	493	1988	111 (18%)	621
1992	92 (19%)	493	1987	133 (26%)	503

To calculate the volume of rulemaking for 1996, 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 1996 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 1995. The second column represents the total “emergency” filings for that agency.

In 1996 only nine agencies promulgated over half of the total rulemaking and two-thirds of the “emergency” rulemaking; half of the agencies promulgated three rules or less.

1996 rulemaking by agency

Human Services Department	64	15
Professional Licensure Division	39	30
Natural Resources Commission	28	4
Public Health Department	21	1
Environmental Protection Comm.	19	4
Economic Development Department	17	7
Revenue and Finance Department	17	1
Insurance Division	14	1
Transportation Department	12	1
Labor Services Division	11	1
Storage Fund Tank Board	11	1
Education Department	10	3
Agriculture & Land Stewardship Department	9	0
Racing and Gaming Commission	8	2
Medical Examiners Board	8	1
Utilities Division	7	3
Educational Examiners Board	7	1
Ethics & Campaign Disclosure Bd	6	0
General Services Department	5	1
Public Safety Department	5	2
Secretary of State	5	0
Engineering Examining Board	4	0
College Aid Commission	4	0
Law Enforcement Academy	4	2
Personnel Department	4	4
Dental Examiners Board	4	0
Lottery Division	4	1
Agricultural Development Auth.	3	1
Attorney General	3	0
Real Estate Commission	3	0

Corrections Department	3	0
Inspections and Appeals Dept.	3	1
Credit Union Division	2	0
Architectural Examining Board	2	0
Industrial Services Division	2	1
Job Service Division	2	0
Pharmacy Examiners Board	2	0
Regents Board	2	1
Veterinary Medicine Board	2	0
Soil Conservation Division	1	0
Banking Division	1	0
Accountancy Examining Board	1	0
Landscape Architectural Board	1	0
Cultural Affairs Department	1	0
Historical Division	1	1
Library Division	1	0
Elder Affairs Department	1	0
Community Action Agencies	1	1
Status of Women Division	1	1
Management Department	1	1
Nursing Examiners Board	1	0
Records Commission	1	0
Telecommunications & Technology Commission	1	0
Treasurer of State	1	0
Veterans Affairs Commission	1	0
TOTALS	392	94

This annual number of 392 filings breaks down by month in the following chart. Note that during the legislative session rule making decreases only marginally; only the month of April shows a significant drop in the level of rule making. 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. 24 of the 94 emergency filings 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 nine filings per month.

	Jan	Feb	Mar	Apr	May	June	July	Aug	Sept	Oct	Nov	Dec	TOT
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 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 1996 the committee imposed only one formal objection, matching the number of objections imposed in 1995. 143 objections have been imposed since 1977, but in the last five years the frequency has dropped to less than five per year. Two session delays were imposed in 1996, up from one in 1995. 50 delays have been imposed since the power was created in 1977. Additionally, the committee imposed 14 general referrals (17 in 1995); five seventy day delays (7 in 1995); four economic impact statements (2 in 1995). The committee took 26 formal actions, down from 28 in 1995.

III. SUMMARY OF ISSUES BEFORE THE COMMITTEE

AGRICULTURE AND LAND STEWARDSHIP DEPARTMENT. Iowa Code Chapter 189A. Meat and poultry inspection. The committee first discussed Iowa's Meat Inspection Act and its' impact on a small Iowa grocery store that did not meet the current standards. Under the federal law retail establishments are allowed to sell no more than 25% of their product wholesale {i.e.: restaurants}; facilities which exceed this level must comply with much more stringent requirements. This federal provision has been made applicable to Iowa by section 189A.3(2) which binds the state to apply the same inspection standards that are applied by the federal government in interstate inspections. The committee took testimony from a number of individuals supporting the local grocery and from USDA officials attending from Washington. Committee members felt that the department should work the local facility and find a way to economically bring them into compliance. However, the committee concluded that it had no real jurisdiction in this matter since Iowa was *required* to follow federal regulations for meat processing. No action was taken.

IOWA DEPARTMENT OF ECONOMIC DEVELOPMENT. 261 IAC 5.13(2). Calculation of average county wage for jobs creation. Committee discussion centered around the phrase: "*This average will be the sum of the county averages divided by the number of counties in the region.*" It was noted this will lower the average regional wage because it does not take into account the relative size of the counties in calculating the average. However, it was noted that the legislature was aware of this provision at the time the legislation was enacted. For that reason the committee took no action on the rule, but committee members felt the legislature should review this definition to ensure it met with the legislative intent of the legislation. General referral.

ENVIRONMENTAL PROTECTION COMMISSION. 567 IAC 65.18(1). Manure management plans in smaller facilities. The committee took the unusual action of objecting to a rule based on the agencies *failure* to adopt an amendment to an existing provision. The proposal would have broadened the requirements for manure management plans. The subrule itself provides that certain animal feeding operations with a weight capacity over 200,000 pounds first occupied after September 22, 1995 must develop manure management plans even though these

facilities do not need construction permits. A proposed amendment would have extended this requirement to cover existing facilities which are expanded beyond the 200,000 floor. Following the public comment period the commission determined not to adopt this amendment. Committee members felt the amendment was necessary to correct the inherent unfairness of the existing rules, contending that new construction and the expansion of existing facilities should be treated similarly, since both types of facilities would pose similar problems concerning the disposal of the animal waste. Committee objection.

ENVIRONMENTAL PROTECTION COMMISSION. 567 IAC Ch. 117. Waste tire regulation. At the request of the legislative fiscal committee, the rules review committee examined existing provisions relating to waste tire storage sites. It was contended that the statutory fee of 85 cents per tire was unfair when applied to the *underground* storage of waste tires. It was generally agreed these tires posed virtually no environmental threat and the committee recommended that the legislature review the statutory fee and lower it for underground storage. General referral.

ENVIRONMENTAL PROTECTION COMMISSION. 567 IAC Ch. 134. In reviewing rules relating to groundwater professionals, it was discovered that Iowa Code section 455G.18 stated professionals could qualify only if they were members of certain national trade associations. Members felt that Iowa law should not mandate membership in a trade association as a condition to state licensure and requested that the legislature review this matter. General referral.

HUMAN SERVICES DEPARTMENT. 441 IAC 25.42. Disabilities management. The committee reviewed provisions implementing 1996 Iowa Acts Chapter 1183, section 27. That legislation require that counties maintain certain, specified information concerning persons receiving services through the mental health or developmental disabilities fund. Members felt this provision solved a dilemma faced by counties for decades: the requirement that counties fund mental health services, coupled with the inability to obtain any information on who was receiving service and the type of service received. The committee referred this provision for the general information of the body. General referral.

HUMAN SERVICES DEPARTMENT. 441 IAC Ch. 41, 75, 86, 153. Assistance to illegal aliens. Adopted in response to federal law, these rules provide that illegal aliens are ineligible for all federally funded welfare and public benefits. However, illegal aliens may receive emergency medical care, treatment for communicable diseases and local in-kind assistance, given at the local level which is not means tested. The committee members also felt that the legislature should be made aware of these changes and referred the matter to the legislature. General referral.

HUMAN SERVICES DEPARTMENT. 441 IAC 79.9. Medical services. Subrule 441 IAC 79.9(5), provides that inmates in a detention facility are not eligible for Medicaid Noting that medical care for these persons would be paid out of 100% state and local funds, committee members discovered this restriction applied to persons who were detained pending trial; there was some thought that persons not yet adjudicated should remain Medicaid-eligible. General referral.

HUMAN SERVICES DEPARTMENT. 441 IAC Chapter 175. Child abuse registry. The committee reviewed department policy concerning the re-opening of child abuse investigations. It was revealed that due to a change in the statute, some offenses no longer were placed on the registry, but there was no provision to allow persons currently on the registry to have their situations reviewed and expunged. General referral.

INSPECTIONS AND APPEALS. Medicare certification of in-home health care providers. In response to a public complaint the committee reviewed the Medicare certification procedures for home health care providers; these procedures are established by the federal Health Care

Financing Administration, but the certification process itself is administered by Iowa's Department of Inspections and Appeals. At issue was an oral change in policy that in essence required an applicant to provide ten client records for review before an onsite survey is performed and certification granted. The prior policy required only one record. That change was made effective immediately, with no prior notice to persons currently in the process of qualifying. Following discussions with representatives of Iowa's Citizens' Aide/Ombudsman, the Kansas City HCFA office did "grandfather" in those persons who were in the midst of preparations for review and survey. The committee members felt that the policy change was both arbitrary and unfair; but members acknowledged the fact this policy was federal, and thus beyond its' jurisdiction. The committee sent a letter of protest to Iowa's congressional delegation, requesting a reduction in the number of required contacts. No formal action.

INSURANCE DIVISION. 191 IAC Ch. 70, 81. Postdelivery benefits and care. In response to legislation the division enacted rules assuring newborn infants and their mothers a 48 hour hospital stay. The unsettled issue in this filing was whether the phrase "attending physician" as set out in House File 2369 excluded the use of a nurse midwife, which is a nursing specialty recognized by the Board of Nursing Examiners, to determine the hospital stay. The statutory language was plain on its face and committee members concluded the rules could not appropriately include midwives. General referral.

LABOR DIVISION. OSHA fire safety standards-general review. The committee reviewed the OSHA citations and penalties imposed as a result of the Terra Chemical fire in Sioux City. The problem was that individuals or entities which volunteer help during times of crisis may be open to OSHA citations and other liability, thus discouraging this "good Samaritan" spirit. Division representatives agreed that volunteers must not be discouraged from coming forward, and stated that the division would not issue citations to any employer for any rescue activity by its employees except when an employer had specifically designated an employee with responsibility to perform or assist in a rescue operation or when an employee has duties directly related to workplace processes or operations where the possibility of life-threatening accidents is foreseeable. No formal action.

MEDICAL BOARD OF EXAMINERS. 653 IAC Ch. 21. Supervision of physician assistants. The rules established standards to measure whether a physician was competent to supervise the practice of a physician's assistant. Representatives of the physician's assistants association were particularly concerned that the rules did not set out a hearing process prior to the revocation of the supervisory privilege. Concern was also expressed that the rules set out eligibility criteria instead of establishing *ineligibility* standards as required by statute. At the June meeting it was clear that significant controversy still surrounds this filing, and that no consensus had been reached concerning the supervision of physician assistants. Session delay and referral.

PUBLIC HEALTH DEPARTMENT. 191 IAC Ch. 89. Parental notification. In response to Senate File 13, the department implemented rules establishing a decision-making assistance program and providing additional detail concerning the statutory obligations relating to parental notification before a minor could obtain an abortion. Committee members noted that major portions of the legislation and the implementing rules are now under a temporary delay imposed by the federal courts. The members felt that the General Assembly as a whole should be aware of this action and know that further federal action might postpone this legislation even further. General referral.

RACING AND GAMING COMMISSION. 491 IAC IAC 10.6(2). Administration of Phenylbutazone to horses. The commission adopted this rule to correct an error in the statutory

language relating to the administration of drugs to race horses; that error sets the Phenylbutazone standard at two point two micrograms per millimeter of blood. A millimeter is a standard of length, not volume; it cannot be used to set a standard for bute, which is a liquid. The rule changes the standard to milliliter, which is the correct term for a liquid measure. Committee members felt they must clearly establish the principle that the plain language of a statute cannot be changed by an administrative rule. To do so, the members reasoned, would put the validity of an administrative rule on an equal footing with a statute. Thus it was felt that only legislative action can correct this statutory inconsistency. Session delay and referral.

REVENUE AND FINANCE DEPARTMENT. 701 IAC ch. 26,31,32,34. Use taxation of leased vehicles. 1996 Iowa Acts, Chapter 1125 provides that the use tax imposed on the use of a leased vehicle will be calculated on the value of that lease. At issue is the treatment taxes imposed on the vehicle. The department takes the position that the initial tax on the vehicle, paid by the lessor, is merely part of the lease price if passed along to the lessee, and as such is subject to use tax. Opponents contend this is a tax on a tax, and should not be used as part of the lease price, as long as that amount is separately stated in the agreement. The committee referred this issue back to the legislature for additional review. General referral.

TRANSPORTATION DEPARTMENT. 761 IAC Ch. 425. The Department of Transportation has established licensing standards for motor vehicle dealers, including regulations relating to the course and method of the dealers business, including such things as the size of the facility, the hours of operation, and the types of business that could be operated in conjunction with a licensed vehicle dealer. Committee members questioned whether it was appropriate to regulate the details of a business operation and referred the filing to the legislature for further review. General referral.

TRANSPORTATION DEPARTMENT. 761 IAC 119.4. Advertising sign charges. This filing is controversial because it implemented a 100% increase in the fees for so-called tourist signs; these small blue signs display the advertisers logo, or denote local attractions, and are the only forms of advertising allowed on Iowa's highways The department noted the fee is necessary because the fee has not changed in over a decade; and it is necessary for the sign control program to be self supporting. Committee members still expressed concern over such a dramatic increase in cost, and also raised question whether Iowa must follow federal restrictions for which the federal government is no longer willing to pay. General referral.