

THE ADMINISTRATIVE RULES REVIEW COMMITTEE  
1985

I. Introduction. In 1985 63 administrative agencies promulgated 505 filings, representing over 2000 individual rule additions, amendments or repealers. This represents a significant increase from the 415 filings promulgated in 1984 by 58 agencies; or the 458 filings promulgated in 1983 by 55 agencies. 150 of these filings were placed into effect using the "emergency" provisions of section 17A.4; with 49 occurring in the month of July. Virtually all of these were also placed under notice.

To calculate the volume of rule-making for 1985, filings are counted instead of individual rules. Each filing put into effect contained one or more individual rule promulgations; on the average each filing contains roughly four changes. The agencies which promulgated rules are listed below together with the number of filings put into effect. The number in parentheses represents 1984 filings.

Human Services Dept.	(53)	91	Banking Dept.	(01)	03
Revenue Department	(28)	49	Energy Policy Council	(04)	03
Health Dept.	(44)	40	Nursing Home Admin.	(05)	03
Conservation Comm.	(33)	39	Civil Rights Comm.	(03)	02
Transportation Dept.	(18)	25	Dentistry Board	(03)	02
Beer and Liquor Dept.	(06)	22	Fair Board	(03)	02
Commerce Comm.	(34)	18	Foster Care Bd.	(--)	02
Water, Air & Waste Dept.	(10)	18	Iowa Development Comm.	(--)	02
Agriculture Dept.	(12)	17	Iowa Finance Auth.	(--)	02
Insurance Dept.	(15)	11	Parole Board	(01)	02
Public Safety Dept.	(11)	10	Veterinary Medicine Bd.	(01)	02
Pharmacy Board	(08)	09	Architectural Bd.	(01)	01
Nursing Board	(06)	08	Arts Council	(05)	01
Secretary of State	(02)	08	Athletics Comm.	(01)	01
Industrial Comm.	(02)	07	Blind Comm.	(08)	01
Public Instruction Dept.	(04)	07	Campaign Finance Comm.	(02)	01
Racing Comm.	(04)	07	City Finance Committee	(02)	01
Real Estate Comm..	(04)	07	Executive Council	(--)	01
Soil Conservation Dept.	(07)	07	General Services Dept.	(02)	01
Job Service Dept.	(08)	06	Health Data Comm.	(03)	01
Merit Dept.	(06)	06	Housing Finance Auth.	(01)	01
OPP	(07)	06	Iowa Advance Fund. Auth.	(--)	01
College Aid Comm.	(08)	05	Iowa Family Farm Auth.	(01)	01
Credit Union Dept.	(01)	05	Livestock Health Coun.	(01)	01
Iowa Lottery Agency	(--)	05	PERB	(--)	01
Labor Dept.	(01)	05	Public Defense Dept	(--)	01
Correction Dept.	(11)	04	Refugee Service Center	(01)	01
Engineering Exam. Bd.	(--)	04	State Preserves Bd.	(--)	01
Law Enforcement Academ	(01)	04	Substance Abuse Dept.	(02)	01
Regents Board	(05)	04	Treasurer	(01)	01
aging Comm.	(02)	03	Voter Registration Comm.	(02)	01
Attorney General	(--)	03			

While the volume of rule-making is increasing, the ability of the committee and the various agencies to compromise their differences is increasing. This is reflected by the decreasing number of objections. In 1985 the committee imposed three objections, down from four objections in 1984. However, four forty-five day delays were imposed, while no delays were imposed in 1984. Fourteen of these delays have been imposed since 1978, when the power was enacted into law.

A total of 99 objections have been imposed since 1977, but the trend has clearly been toward a decline in their frequency, as indicated below:

1977.....36	1982.....02
1978.....24	1983.....03
1979.....13	1984.....04
1980.....06	1985.....03
1981.....08	

## II. Major rule-making issues of 1985

### 1. AGING COMMISSION

Nursing home ombudsman & care review committees, VII IAB 16, ARC 5252, NOTICE. The commission proposes rules to implement Code sections 249B.31 thru .35. These sections were enacted in 1983 to define the proper roles of the nursing home ombudsman and the care review committee established to review the care provided in each facility. Reading the state and federal provisions together clearly indicated that the ombudsman had been given sweeping powers to inspect nursing homes and to control the actions of care review committees. For example, 42 U.S.C. 3027a(12)B gives the ombudsman access to confidential patient files. This provision also appears in the Iowa statute, section 249B.33. Section 249B.35 places the control of local care review committees squarely under the ombudsman. Section f(2) of the Department of Health & Human Services manual also indicates that "local organizations" are to be subservient to the ombudsman. Section f(1) of that manual also places duties on the area aging agencies, which appear in the proposed rules. In short, the rules appeared to be sweeping in their application, but nevertheless appear to be solidly grounded in state and federal law

The committee had serious questions whether the proposal's extensive regulation of care review committees was reasonable. The committees are made up of unpaid volunteers who might balk at the new duties placed upon them by the detailed rules. To date these rules have not been adopted in final form.

### 2. LABOR DEPARTMENT

Asbestos regulation, VII IAB 21, ARC 5435, ADOPTED. Chapter 88b, 1985 Code required the licensing of any business which removes asbestos, and requires the individual employees to be certified by the department. The rules establish these procedures and additionally establish the actual asbestos control procedures which must be followed.

The issue presented by this rule was the decision by the

insurance industry not to cover the risks inherent in asbestos work. There are two basic risks. First, the possibility exists that asbestos particles may escape the work site and contaminate the building. This is an easily measured risk that largely involves the cost of clean-up after contamination. The second risk is the long-term health hazard for asbestos exposure. This risk involves the possibility of cancer, asbestosis or other ailments that may emerge years after exposure. It is this second risk that companies are unwilling to insure, due to the lack of predictability and the long-term nature of the risk.

The committee believed the legislature should seriously study the lack of insurance availability and the potential liability that contractees (many of them school districts) would be exposed to without long-term coverage. For that reason the committee requested that the rules be forwarded to the appropriate standing committee for legislative action. The committee also suggested that the Legislative Council discuss the possibility of appointing an interim committee to study the problem in detail and propose legislation for prompt action in the 1986 session. No legislative action was taken on this issue.

### 3. LAW ENFORCEMENT ACADEMY

Decertification procedures, VII IAB 21, ARC 5418, ADOPTED. In 1984 the committee rejected an academy proposal allowing it to rescind its certifications. It was the opinion of the committee that these certificates were in the nature of a diploma, not a license; and for that reason the committee stated they could not be revoked. In 1985 the academy was successful in obtaining legislation that changed the certificate into a form of a license, that can be revoked for "good cause". <80b.13(8) provides:

"8. Revoke a law enforcement officer's certification for the conviction of a felony. In addition the council may consider revocation proceedings when an employing agency recommends to the council that revocation would be appropriate with regard to a current or former employee.

A recommendation by an employing agency must be in writing and set forth the reasons why the action is being recommended, the findings of the employing agency concerning the matter, the action taken by the employing agency, and that the action by the agency is final. Final, as used in this section, includes all appeals through a grievance procedure available to the officer or civil service have been exhausted. The written recommendations shall be unavailable for inspection by anyone except personnel of the employing agency, the council and the affected law enforcement officer, or as ordered by a reviewing court."

The only mandatory revocation occurs when an officer has committed a felony; otherwise the commission has discretion to revoke on complaint by the employer. The discretionary grounds are aundry listed in rules 1.1 and 6.2. Discretionary revocation cannot occur unless the employer has actually terminated the officer or if the officer has been convicted of a crime involving moral turpitude.

### 4. PUBLIC INSTRUCTION DEPARTMENT

Restrictions on in-home education, VIII IAB 3, ARC 5773 & 4, NOTICE AND FILED EMERGENCY. In Johnson v. Charles City Community School

District, \_\_\_\_\_ N.W.2d \_\_\_\_\_. (Iowa 1985) the Iowa Supreme Court stated: "The state has a clear to set minimum educational standards for all its children and a corresponding responsibility to see that those standards are honored." This brief excerpt from a lengthy case makes the point that the department has a duty to promulgate rules regulating the course of instruction for both private and public school students. The department then emergency filed rules to set out these standards. The standard at issue was whether a parent could educate a child in their own home or whether it was the duty of a certified teacher to provide instruction. The rules adopted by the department clearly provided that only a certified teacher may provide instruction. The result was that in-home education provided by a parent would be made unlawful. The rule was firmly grounded in the statute, which provided " In lieu of [public school attendance], such child may attend upon equivalent instruction by a certified teacher elsewhere." [ss299.1] Reading this section together with the Johnson case indicates that the department has authority to set educational standards that require the exclusive use of a certified teacher.

The real issue was whether the department acted properly in developing and implementing these standards on an "emergency" basis. That filing was struck down in district court on the grounds that no clear emergency existed. The department has completed the "normal" rule-making procedure.

#### 5. DEPARTMENT OF PUBLIC SAFETY

Licensing of private detectives, VII IAB 26, ARC 5608, F.E. In 1984 the committee discovered several flaws in a recently enacted statute relating to the licensing of private detectives. Legislation was enacted at the committees request, to correct these flaws and the department proposes rules to implement the corrections. The bill (SF 456) limited disclosure requirements by corporations to those officials responsible for the operation of the company. The insurance requirements were also amended to ensure that licensees had adequate coverage to protect the public, while also ensuring that coverage was available to the licensees at a reasonable cost. This was accomplished by lowering the bonding requirements to \$5,000 for a security or detective agency (eliminating a sliding scale that required a maximum of \$50,000), while empowering the department to establish liability insurance requirements. The statute also requires the department to keep the names of a companies "operatives" confidential, because of the undercover nature of much of their work.

#### 6. RACING COMMISSION

Distribution of breakage in dog racing, selective review. In 1985 the Dubuque racing facility opened, and the committee conducted a review of the distribution of breakage under the system. Breakage is that amount of money left over after the amount of winnings is rounded off. It amounts to a few cents per bet, but over a entire season can accumulate up to several hundred thousand dollars.

Iowa pari-mutual law (<99D.12 & 22) contains a unique plan to use this breakage to increase the value of Iowa bred dogs. <99D.12 provides that the track shall retain the breakage and divide it into three slices. A portion is paid into supplement purses won by Iowa bred dogs, a second slice is paid annually to the breeder of the

winning Iowa whelped dog, and a third slice is put into a stake race for Iowa dogs.

The problem discovered by the committee was that only a few Iowa whelped dogs are eligible for the purse supplements. If all the breakage money is distributed, very large amounts of money would go to a few dog owners. The tracks solution to this problem is to retain most of the money until the 1986 season, when there will presumably be a larger field of dogs to share in the distribution.

The committee concern was whether the statutory scheme allowed a portion of the breakage to be retained and whether rule-making was required to establish a retention system. On the first question the committee determined that the statutory scheme simply did not envision that there would be a lack of Iowa dogs, and for that reason it was appropriate to establish a temporary program to allow retention of a portion of the breakage money until a larger field of eligible dogs was established.

The second was extremely difficult in that it involved a statutory scheme where money is collected, retained and distributed by a private party, which in turn is regulated by a government agency. The issue was whether an action taken by a private party, which is subject to the approval of a government agency, is an agency action requiring rule-making. Note that it is the track that is taking the action, involving money that is in its possession. Under <99D.7 the commission has the authority to accept or reject the track decision.

The issue to be resolved was whether government approval of a private action is the equivalent of agency action. The committee received testimony from representatives of the track, the commission, and from the racing community. It was the conclusion of the committee that rule-making was not needed because, 1) the actual plan was developed and administered by the track; 2) Commission approval and review was not sufficient action to require rule-making; and 3) the entire program was applicable only to one facility for a limited period of time.

**7. Water, Air & Waste Management**

Small treatment plant operators, VII IAB 15 (1-16-85). 1984 Acts Chapter 1099 empowered the department to issue water operator certificates without examination where 1) the water is untreated except for filtration, and 2) the system serves less than 250 persons. This statute was enacted to minimize the requirements for plant operators where the operation of the system involved little more than maintaining a pump.

In drafting rules to implement this section the department added additional requirements. 1) proof must be provided that the operator is competent; 2) proof must be provided that a certified operator cannot be hired; 3) proof must be provided that continuing education is either unnecessary or unavailable.

It was the opinion of the committee that some proof of competence was a reasonable requirement, but that the remainder of the rule guts the bill. The clear intent of the bill was to simplify the regulatory burden for those small operators who do little more than keep a pump operational, and send occasional water samples to the department for testing. For such a small operation the skills of a trained operator are unnecessary; without the exemption the small communities must pay for expertise they do not need.

The committee noted that the statute said nothing about regularly certified operators being unavailable or continuing education being unnecessary.

The committee referred the rule to the General Assembly, which promptly initialiate action to enact a rules veto to terminate it. That veto was approved by the House State Government Committee and the rule was promptly withdrawn by the agency.