THE ADMINISTRATIVE RULES REVIEW COMMITTEE
1991

I. Introduction.

In 1991 66 administrative agencies promulgated 511 filings, representing over 2000 individual rule additions, amendments or repealers. This represents a two percent increase over the number of filings from 1990, as set out below:

In 1991 66 agencies promulgated 511 filings.
In 1990 56 agencies promulgated 498 filings.
In 1989 60 agencies promulgated 463 filings.
In 1988 86 agencies promulgated 621 filings.
In 1987 60 agencies promulgated 503 filings.
In 1986 57 agencies promulgated 476 filings.
In 1985 63 agencies promulgated 505 filings.
In 1984 55 agencies promulgated 415 filings.
In 1983 55 agencies promulgated 458 filings.

135 of these filings were placed into effect using the "emergency" provisions of chapter 17A, Iowa Code. Most of these were also placed under notice. This figure represents 26 per cent of the total volume of rule making and REVERSES a trend toward a reduced level of emergency rule making. To a large this increase can be attributed to the across-the -board budget cuts imposed in the Summer and Fall of 1991. The level of emergency rule making is set out below:

In 1991 135 "emergency rules represented 26% of the total.
In 1990 94 "emergency" rules represented 19% of the total.
In 1989 92 "emergency" rules represented 20% of the total.
In 1988 111 "emergency" rules represented 18% of the total.
In 1987 133 "emergency" rules represented 26% of the total.
In 1986 142 "emergency" rules represented 30% of the total.

To calculate the volume of rule-making for 1991, 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. For purposes of this analysis the term "agency" ignores the statutory groupings of divisions, boards, commissions, etc. Instead the listing below independently lists every rule-making unit, without regard to its location within a larger "umbrella" agency. The first column of numbers represents the total number of rule-making filings adopted in final form in 1991. The second column of numbers represent the number of "emergency" rules promulgated by the agency.

HUMAN SERVICES DEPARTMENT	94	38
NATURAL RESOURCES COMMISSION	35	4
REVENUE AND FINANCE Dept.	25	1
PROFESSIONAL LICENSURE Div.	24	1
COLLEGE AID COMMISSION	24	3
PHARMACY EXAMINERS BOARD	23	3
PUBLIC HEALTH DEPARTMENT	21	6
INSURANCE DIVISION	19	4
EDUCATION DEPARTMENT	19	5
ENVIRONMENTAL PROTECTION Com.	16	6
UTILITIES DIVISION	15	5
TRANSPORTATION DEPARTMENT	15	3
LABOR DIVISION	14	1
U.S.T. FUND BOARD	13	8
PUBLIC SAFETY DEPARTMENT	11	3
INSPECTIONS AND APPEALS Dept.	11	4
ATTORNEY GENERAL'S OFFICE	9	2
AGRICULTURE DEPARTMENT	9	4
RACING AND GAMING COMMISSION	7	3
PERSONNEL DEPARTMENT	7	1
ECONOMIC DEVELOPMENT Dept.	7	5
SOIL CONSERVATION DIVISION	6	1
DENTAL EXAMINERS BOARD	6	0
HISTORICAL DIVISION	5	1
SECRETARY OF STATE	4	4
NURSING BOARD	4	0
ELDER AFFAIRS DEPARTMENT	4	0

CULTURAL AFFAIRS DEPARTMENT	4	2
REAL ESTATE COMMISSION	3	0
LOTTERY DIVISION	3	2
JOB SERVICE DIVISION	3	0
INDUSTRIAL SERVICES DIVISION3	3	1
HEALTH DATA COMMISSION	3	0
CORRECTIONS DEPARTMENT	3	3
COMMUNITY ACTION AGENCIES	3	2
CIVIL RIGHTS COMMISSION	3	2
STATUS OF WOMEN DIVISION	2	0
LIBRARY DIVISION	2	0
LAW ENFORCEMENT ACADEMY	2	1
ARCHITECTURAL EXAMINING Bd.	2	0
ACCOUNTANCY EXAMINING BOARD	2	0
VETERINARY MEDICINE BOARD	1	1
VETERANS AFFAIRS DIVISION	1	1
TREASURER OF STATE	1	0
REGENTS BOARD	1	0
PUBLIC BROADCASTING DIVISION	1	1
PUBLIC DEFENSE DEPARTMENT	1	0
PREVENTION OF DISABILITIES Coun.	1	1
PERSONS WITH DISABILITIES	1	0
NATURAL RESOURCES Dept.	1	0
LIVESTOCK HEALTH ADVISORY Bd.	1	0

LANDSCAPE ARCHITECTURAL Bd.	1	0
IOWA FINANCE AUTHORITY	1	0
INTERNET	1	0
GENERAL SERVICES DEPARTMENT	1	1
EXECUTIVE COUNCIL	1	1
ENGINEERING AND SURVEYING Bd.	1	0
EMPLOYMENT APPEAL BOARD	1	0
EDUCATIONAL EXAMINERS BOARD	1	0
DISASTER SERVICES DIVISION	1	0
DEPARTMENT FOR THE BLIND	1	0
CRIMINAL AND JUVENILE JUSTICE	1	0
CREDIT UNION DIVISION	1	0
CITY FINANCE COMMITTEE	1	0
BANKING DIVISION	1	0
ARTS DIVISION	1	0
ALCOHOLIC BEVERAGES DIVISION	1	0

II. Formal Committee Actions

While the volume of rule-making is increasing, the volume of formal "objections" filed by the committee has remained relatively constant for three years. In 1991 the committee imposed seven objections, down from a decade high of eight objections imposed in 1989. A total of 130 objections have been imposed since 1977, but the trend has clearly been toward a decline in their frequency, as indicated below:

1977.....36	1984.....04	1991.....07
1978.....24	1985.....03	
1979.....13	1986.....05	
1980.....06	1987.....03	
1981.....08	1988.....02	
1982.....02	1989.....08	
1983.....03	1990.....06	

The volume of session delays for 1991 stands unchanged at four. A total of 38 delays have been imposed since the power was created in 1978.

III. Summary of Committee Actions

JANUARY

1. GENERAL REFERRAL: Operation of motor vehicles in navigable streams. {NATURAL RESOURCES COMMISSION}
2. ECONOMIC IMPACT STATEMENT: ARC 1530A, relating to WIC eligibility for farmers markets. {AGRICULTURE AND LAND STEWARDSHIP}
3. GENERAL REFERRAL: Application of pesticides toxic to bees. {AGRICULTURE AND LAND STEWARDSHIP}

FEBRUARY

4. SESSION DELAY: ARC 1593A, Relating to organ transplants. {DEPARTMENT OF HUMAN SERVICES}

MARCH

5. OBJECTION: ARC 1745A, 661 IAC 6.4(2)"d" relating to the inventory of impounded vehicles. {DEPARTMENT OF PUBLIC SAFETY}
6. SEVENTY DAY DELAY-ARC 1744A, relating to inventory procedures for impounded vehicles. {PUBLIC SAFETY DEPARTMENT}
7. GENERAL REFERRAL: ARC 1741A-Affordable Heating Program. {COMMUNITY ACTION AGENCIES}
8. GENERAL REFERRAL: ARC 1686A-ban on commercial catfishing in the Missouri River. {NATURAL RESOURCES DEPARTMENT}
9. GENERAL REFERRAL: Consumer Credit Code-Section 537.6203, assessment of fees. {DEPARTMENT OF JUSTICE}
10. ECONOMIC IMPACT STATEMENT: ARC 1682A, relating to vocational education programs. {DEPARTMENT OF EDUCATION}

11. GENERAL REFERRAL: ARC 1696A-Iowa work for college program. {COLLEGE STUDENT AID COMMISSION}

APRIL

12. GENERAL REFERRAL: ARC 1825A-Application of pesticides to waters. {ENVIRONMENTAL PROTECTION DIVISION}

13. OBJECTION: 491 IAC 4.27(99D), relating to alcohol limitations for track licensees and employees. {DIVISION OF RACING & GAMING}

MAY

14. GENERAL REFERRAL: ARC 1868A-Application of local option sales tax to excursion boats. {REVENUE DEPARTMENT}

JUNE

15. GENERAL REFERRAL: ARC 1967A, relating to the redemption of liquor coupons {ALCOHOLIC BEVERAGES}.

JULY

16. SESSION DELAY: ARC 2075A, relating to wildlife habitat funds {NATURAL RESOURCES}

17. SEVENTY DAY DELAY: ARC 2056A, relating to background checks for state employees {PERSONNEL DEPARTMENT}

18. OBJECTION: ARC 1808A & 2091A, relating to recipient copayments for Title XIX Medicaid Services {HUMAN SERVICES DEPARTMENT}

19. SESSION DELAY: ARC 2091A, relating to recipient copayments for Title XIX Medicaid Services {HUMAN SERVICES DEPARTMENT}

AUGUST

20. SEVENTY DAY DELAY RESCINDED, ARC 2149A {REAL ESTATE COMMISSION}

SEPTEMBER

21. SESSION DELAY: ARC 2275A, SUBRULE 5.3(3), relating to background checks for state employees {PERSONNEL DEPARTMENT}

22. SEVENTY DAY DELAY: ARC 2246A, RULE 10.16, relating to the administration of controlled substances {PHARMACY EXAMINERS}

23. GENERAL REFERRAL: ARC 2217A, relating to inventory searches of motor vehicles {PUBLIC SAFETY DEPARTMENT}

24. GENERAL REFERRAL: ARC 2220A, relating to certificate of need {PUBLIC HEALTH DEPARTMENT}

25. ECONOMIC IMPACT STATEMENT: ARC 2237A, relating to the reorganization of the department {HUMAN SERVICES DEPARTMENT}

26. OBJECTION: ARC 2215A, relating to export trade assistance for out-of-state corporations {ECONOMIC DEVELOPMENT CORPORATION}

OCTOBER

27. GENERAL REFERRAL: ARC 2283A, relating to costs for child support recovery {HUMAN SERVICES DEPARTMENT}
28. GENERAL REFERRAL: ARC 2360A, relating to vocational education requirements {EDUCATION DEPARTMENT}
29. ECONOMIC IMPACT STATEMENT: ARC 2325A, relating to the cleanup of underground storage tank sites {ENVIRONMENTAL PROTECTION COMMISSION}
30. OBJECTION: ARC 2353A, relating to the "emergency" filing of certain rules {UNDERGROUND STORAGE TANK BOARD}

NOVEMBER

31. OBJECTION: ARC 2448A, relating to continuing education {OPTOMETRY EXAMINERS BOARD}
32. GENERAL REFERRAL: RULE 9.14, relating to the qualifications for abstractors {IOWA FINANCE AUTHORITY}

DECEMBER

33. GENERAL REFERRAL: ARC 2540, relating to the air toxics fee imposed on emissions of airborne contaminants {ENVIRONMENTAL PROTECTION COMMISSION}
34. OBJECTION: ARC 2765A, relating to free hunting and fishing licenses {NATURAL RESOURCES DEPARTMENT}
35. GENERAL REFERRAL: ARC 2765A, relating to free hunting and fishing licenses {NATURAL RESOURCES DEPARTMENT}
36. GENERAL REFERRAL: ARC 2510A, relating to marijuana eradication {PUBLIC SAFETY DEPARTMENT}
37. SEVENTY DAY DELAY: ARC 2572A, relating to manicuring {BARBER LICENSING BOARD}

IV. Major Issues of 1991

AUDITOR

FILING FEES: AUDITS PERFORMED BY CPA'S, IAB Vol. XIV, #7, ARC 2390, ADOPTED. Iowa Code section 11.6, subsections 10 and 11 provide:

10. The auditor of state shall adopt rules in accordance with chapter 17A to establish and collect a filing fee for the filing of each report of examination conducted pursuant to subsections 1 through 3. The funds collected shall be maintained in a segregated account for use by the office of the auditor of state in performing audits conducted pursuant to subsection 4 and for work paper reviews conducted pursuant to subsection 5. Any funds collected by the auditor pursuant to subsection 4 shall be deposited in this account. Notwithstanding section 8.33, the funds in this account shall not revert at the end of any fiscal year.

11. Notwithstanding subsection 10, the filing fee collected for the filing of a report of examination shall not be collected if the audit was performed by the auditor of state.

In essence these provisions allow the auditor to establish a filing fee for financial examinations submitted by local governments, unless the auditor's office performs the audit. The auditor now completes rule making on a highly controversial rule which establishes a maximum fee of $1,000; the actual amount is only a percentage of this maximum, based on the size of the budget

of the local government. Iowa Code section 11.6(4) provides that the auditor may re-audit local budgets when there is probable cause to believe that review is necessary, and the cost of this second audit is paid out of the funds generated by the filing fee.

The proposed fees were vigorously opposed by local auditors and county officials, since the entire burden of this rule falls on governments which are attempting to save money by hiring private CPA's to perform the audit. To a great extent, this filing fee undoes the savings realized by utilizing private auditors. The auditor's office did take these concerns into account. The maximum fee has been reduced from $1,500 down to $1,000, thus lowering all of the fees; in addition, a sixth category has been added, thus lowering the fee still further for smaller communities. Representatives of the Auditor's office noted that the actual fee would be a maximum of $750 and agreed to undertake a new rule-making prior to any change in this fee.

INDUSTRIAL COMMISSIONER

CONTESTED CASE ALTERNATIVES, IAB Vol. XIII, #18, ARC 1759A, ADOPTED. In 1990 Senate File 2328 directed the division to establish a dispute resolution process to reduce the number of contested cases held in workers compensation matters. To meet this statutory requirement the commissioner now offers three alternatives to a contested case, designed to speed up the decision-making process and save time and money for all parties.

The first alternative is a dispute resolution process for handling workers compensation cases. This alternative is unique in that it is a negotiation process that precedes a contested case. It provides an opportunity for the parties to negotiate a settlement, thus avoiding the delay and expense of a contested case. The division has long been plagued with a serious case backlog, and hopes to encourage informal settlement of many cases to minimize any further growth in the backlog. These procedures are NOT an alternative to a contested case. They are intermediate steps designed to encourage compromises, as provided in section 17A.10. Informal settlement rules are fairly common but the commissioner has added a clever twist by allowing the parties to request an "advisory" opinion. This system is similar to a declaratory ruling. The parties are allowed to submit an "evaluation" of their case containing arguments and evidence, and an informal conference is scheduled to discuss the issues presented in the case. At the conclusion of this procedure the commissioner will issue an oral or written opinion. If a party to the action is dissatisfied with the proposal, that person must object to the opinion within twenty days of its issuance and demand a full contested case. If no objection is made the opinion will be deemed to be an acceptable settlement and an order will be issued to that effect.

A second alternative offered is binding arbitration. Under this system the parties agree to waive all contested case and judicial appeal rights, and submit the dispute to a deputy commissioner, with each party entitled to strike one name from the available pool of deputies. The process provides a highly abbreviated form of a contested case with evidence limited to 50 pages and no formal record being made of the arbitration. The procedure is available only if both parties agree, but it has the advantage of saving both time and money for both the parties and the commissioner. A third alternative is a summary trial. Only cases of lesser expense, such as temporary disability claims, are eligible for this alternative. It provides for a trial-type contested case hearing that is informal and limited to two and one half hours; evidence is limited to twenty-five pages. If a party objects to the decision of the deputy, a full contested case process will be initiated.

This rule making is significant in that it serves as a model for future development. Dispute resolution was pioneered by the Public Employees Relation Board well over a decade ago, with the result that that agency now handles more cases that ever, with fewer employees. Contested cases are expensive both in terms of time and money--most particularly for the state since the cost of the ALJ and the hearing itself is commonly carried by the state. For this reason it makes since to reduce the numbers of contested cases.

HUMAN SERVICES DEPARTMENT

MEDICAID TRANSPLANT POLICY, IAB Vol. XIII, #14, ARC 1593A. Previous rules provided payment for "non-experimental" transplants as defined by medicare policy. A federal court struck this rule on the grounds that the medicare provisions did not accurately categorize non-experimental transplants. The department now proposes to identify the specific transplants which are eligible under title XIX. The rule gets around the court decision by simply listing the procedures that the department currently funds; the court decision dealt with the definition of non-experimental, not the procedures themselves.

The controversy with this filing is that it does not include adult liver transplants, pancreas transplants and lung transplants, even though it will pay for the more costly heart transplant procedure. The department is largely concerned with the expense of adding these new procedures. The department currently pays around $500,000 per year for transplants. While heart procedures are now an accepted part of medical practice, liver and pancreas transplants remain experimental.

COPAYMENTS ON TITLE XIX SERVICES, IAB Vol. XIV, No. 8, ARC 2420A, ADOPTED. At its' July meeting the committee imposed an objection to DHS subrule 79.1(13), relating to copayments required of medicaid recipients. Since that subrule had been filed on an emergency basis in February, one of the effects of that objection was to terminate the subrule 180 days after the filing of the objection. In addition, the committee also imposed a session delay on the non-emergency filing, in effect stopping the collection of copayments early in January.

The rule-making process was complicated. In February the rule was placed in effect on an "emergency" basis, requiring recipient copayments on most medicaid services. This rule, and the "emergency" rule making, was specifically authorized by an Act of the General Assembly. However, that Act was in effect only until July 1st, 1991. At the same time the same rule was published as a notice of intended action, with that rule making being completed in July.

By that time, however, the initial Act authorizing the medicaid rules had expired. The department instead now relied on its general rule-making authority to support the filing. In the meantime the General Assembly enacted legislation authorizing specific, limited medicaid copayments, but that Act was vetoed by the Governor.

The issue, simply put, was whether the legislative intent expressed in a temporary statute precluded the agency from adopting a rule at variance with that intent. The committee was sharply divided on that issue, but ultimately a vote was taken to object to both the "emergency" and regular rule, and to delay the regular rule until the adjournment of 1992 session of the General Assembly. The opinion of the majority of the membership was that the legislative intent of the original, temporary legislation had the effect of limiting the grant of general rule-making power, and thus precluded extending the medicaid copayments beyond July 1st.

This issue is now pending in the General Assembly and in the Supreme Court. The legislature is considering a possible nullification of subrule 79.1(13) and legislation to permanently codify lawful copayments. The Supreme Court is considering the legality of the rule itself and will decide the question of whether temporary legislation precludes later rule making done under a general grant of authority. The "emergency " rule automatically terminated 180 days after the objection was filed (July 15, 1991) and the department now collects only those copayments which were in effect prior to the "emergency" rule.

RESTRUCTURING OF LOCAL OFFICES, IAB Vol. XIV, No. 3, ARC 2237A, NOTICE. In 1991 the Legislature enacted House File 479; section 129 of this Act required the Department of Human Services to eliminate seven of the eight district offices, excepting the Des Moines office, and with the counties and their state association to "...develop a transition plan for the office elimination and to equitably spread the associated costs." This rather brief piece of legislation triggered one of the most hard fought and bitter rule-making issues of 1991, and will not be completely settled until the end of the 1992 session.

The department proposal eliminated all eight district offices, but established five regional offices to provide administrative support for the local offices. Local offices were established in three categories: area, local and satellite offices. Each county was to have at least one type of office. An area office was headed by an area director and was open on a full-time basis. This office provided a wide range of services to clients and supervise and coordinate services in the cluster of counties comprising that area Local offices were headed by a supervisor, and were open on a full-time basis. The local offices provide income maintenance and social service programs. Satellite offices were to be open only on a limited time basis, and will provide the same services as local offices.

The rules were strongly opposed by the association of counties. First, because they were not consulted in the creation of the plan, which was at least implied by the enabling legislation. Second, the Act itself only dealt with the eight district offices, while the rules instituted an entire reorganization of the department. Third, because the reorganization would leave many smaller counties with only a part-time office. Lastly, since counties provided the space for DHS workers, many counties would be stuck with expensive leases when the number of workers was reduced. The Act was silent on the question of local offices, it dealt only with the elimination of district offices. The department's proposal did eliminate some county offices, replacing them with multi-county area or local offices. Each county retained an office, but in many cases that was be only a part-time satellite office.

The committee, especially mindful of the growing budget crisis, declined to take any action in opposition to this reorganization. Final adoption of the plan was delayed pending a court challenge based on the various contentions noted above. The Supreme Court ultimately decided the issue by supporting the department, except that it required the retention of the Des Moines district office. The rules were then adopted early in 1992.

NATURAL RESOURCES DEPARTMENT

HUNTING IN THE MINES OF SPAIN, XIII IAB 26, ARC 2079A, ADOPTED. The department has adopted a rule allowing limited hunting in the Mines of Spain recreation area near Dubuque. A portion of the area is designated a wildlife refuge, with hunting prohibited; another portion is designated as a recreation area, with hunting allowed in those areas. This designation sparked a controversy, with significant opposition to hunting in that area being expressed by the local

residents. Some ten years ago the department purchased 1200 acres of undeveloped land in Dubuque County. The land, known as the Mines of Spain area was purchased by the states for $2,500,000. $1,000,000 of that amount coming from state funds, mainly the open spaces account. The land became a state recreation area and pursuant to a covenant in the deed, it could not be used for hunting for ten years following its sale to the state. That period has now run and the department proposes to allow hunting in that area for 18 days per year.

This proposal was strongly opposed by Dubuque area residents. Their opposition came on three basic grounds; 1) they argued that the wishes of the original landowners should be honored; 2) they argued that hunting is unsafe due to the proximity of nearby landowners; and 3) they argued that hunters pose a threat to the archeological sites in the area.

The department vigorously rebutted these contentions, noting that area was purchased with tax revenues, for the use of all Iowans; in addition, hunting was already limited to only five per cent of the year (18 days). As to the specific arguments offered against the rule the department first noted that the wishes of the landowners were honored. The agreement was that no hunting occur on the property for ten years. That commitment has been honored. Second, other recreation areas are located near inhabited areas, without any firearm mishaps. To further reduce the chance of an accident, only a portion of the area is open to hunting. Lastly, there are archaeological sites in the area, but there is no reason to suspect that hunters pose a greater threat to those sites than either campers or hikers.

The committee considered all arguments and concluded that the rule was reasonable and within the authority of the department. One of the committee's primary concerns was control over state-owned lands. If the use of state-owned lands was determined by the local community in this instance, then a precedent would be set for similar actions in the future. Since a fair proportion of the department's rule making involved the use of parks and recreation areas, the committee did not want to start a policy of providing a local veto over park and recreational area use.

V. COMMITTEE POLICY ON CRITERIA USED IN GRANT PROGRAMS

For some time the committee was concerned over the use of "weighted" criteria in establishing eligibility for grants, awards or other types of benefits. Under this concept each eligibility criterion is assigned a specific weight; thus making some items more important than others. The problem is that only some agencies put these weighting factors into rules. Other agencies place the weights only in requests for proposals and some agencies give no notice at all that weights are being used.

The committee came to the conclusion that a weighting factor used to modify the importance of a particular criterion is subject to the rule-making process. This was based on two reasons. First, Iowa Code section 17A.2(7) defines a rule as "...each agency statement of general applicability that implements, interprets or prescribes law or policy...". The weight assigned to a criterion established a general policy, within the meaning of the statute, because it established the relative importance of the criterion itself. Such a determination clearly affects the rights of

the public and should be adopted as an administrative rule. Second, under both the United States and Iowa Constitutions, all persons are entitled to equal protection under the law. Placing weighting factors in rules would guarantee this protection by legally putting all applicants on notice that the factors exist. When the factors are not adopted as rules, those applicants who have knowledge of the weighting factors have an inherent and unfair advantage over those who do not.

Based on these considerations, on May 15, 1991 the administrative rules review committee adopted the following policy:

> *Criteria for awards or grants. Numerous state programs provide grants, loans or other types of awards. To ensure impartial evaluations for all applicants, the committee insists that the criteria for making the awards be set out in administrative rules in full detail. If an agency chooses to use a point system to award different weights to different criteria, that point system must also be set out as part of the rules.*