

THE ADMINISTRATIVE RULES REVIEW COMMITTEE
1989

I. Introduction.

In 1989 60 administrative agencies promulgated 463 filings, representing over 1800 individual rule additions, amendments or repealers. This is a significant decrease in the number of filings from 1988, and is the lowest since 1984, as set out below:

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.

92 of these filings were placed into effect using the "emergency" provisions of chapter 17, Iowa Code. Most of these were also placed under notice. This figure represents twenty per cent of the total volume of rulemaking. It is a slight increase from the eighteen per cent figure for 1988, but is still well below the volume of emergency rulemaking in 1987 when 133 "emergency" filings were implemented, representing twenty-six percent of the total or 1986 when 142 "emergency" rules were implemented, representing thirty percent of all rulemaking. Since October of 1987 agencies have been actively discouraged from adopting emergency rules.

The decline in the number of filings and the number of agencies promulgating rules can largely be attributed to an abnormal "spike" in 1988. In that year a "uniform" set of rules was developed for the Iowa Open Records Law, Iowa Code Chapter 22. Every agency adopted that uniform rule, thus distorting the level of rule-making to some degree.

To calculate the volume of rule-making for 1989, 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 second column of numbers represent the number of "emergency" rules promulgated by the agency.

HUMAN SERVICES DEPT.	64	14	CREDIT UNION DIVISION	03
REVENUE DEPARTMENT	31	02	NURSING BOARD	03
NATURAL RESOURCES DIV.	28	04	DENTAL BOARD	03
EDUCATION DEPARTMENT	25	07	PETROLEUM BOARD	03 01
PROF. LICENSURE DIV.	22	02	PUBLIC DEFENSE DEPT.	03 02
ECONOMIC DEVELOPMENT	21	06	ELDER AFFAIRS DEPT	02
TRANSPORTATION DEPT.	20	04	MANAGEMENT DEPARTMENT	02 01
PUBLIC HEALTH DEPT.	20	06	AGRICULTURAL DEVELOP.	02
LABOR SERVICES DIVISION	19	02	PUBLIC EMPLOYMENT BOARD	02
UTILITIES DIVISION	18	01	ENGINEERING BOARD	02
INSPECTIONS & APPEALS	15	02	REAL ESTATE BOARD	02
AGRICULTURE DEPT	13	04	ARCHITECTURAL BOARD	02
SECRETARY OF STATE	13	04	GENERAL SERVICES DEPT.	02
ENVIRONMENTAL PROTECT.	11	02	SOIL CONSERVATION	02
PUBLIC SAFETY DEPT	11	06	HISTORICAL DIVISION	02 01
CORRECTIONS DEPARTMENT	09	02	HIGH TECHNOLOGY	02
RACING & GAMING	08	03	TREASURER	02
COLLEGE AID COMM.	07		VETERINARY BOARD	02
LOTTERY DIVISION	07	02	APPEAL BOARD	01
INSURANCE DIVISION	06	01	ENERGY & GEOLOGICAL	01
PHARMACY BOARD	05	03	PUBLIC BROADCASTING	01
ATTORNEY GENERAL	05	03	ACCOUNTANCY BOARD	01
MEDICAL BOARD	05		BEEF INDUSTRY COUNCIL	01
PERSONNEL DEPT.	05	02	CAMPAIGN FINANCE DEPT.	01
INDUSTRIAL SERVICES DIV	04	02	SHEEP & WOOL BOARD	01
JOB SERVICE DIVISION	04		LIVESTOCK HEALTH ADVIS.	01
REGENTS BOARD	04		IOWA FINANCE AUTHORITY	01
HEALTH DATA COMM.	04	01	PAROLE BOARD	01
COMMUNITY ACTION AG.	03	01	CULTURAL AFFAIRS	01
LAW ENFORCEMENT ACADEMY	03	01	VOTER REGISTRATION COMM	01

II. Formal Committee Actions.

While the volume of rule-making is decreasing, the volume of formal "objections" filed by the committee has risen fourfold. In 1989 the committee imposed eight objections, with one objection being strictly a reimposition of a 1979 action that was voided by an editorial revision.

1989 has reversed a long trend in a decline in the use of objections, with the highest number being voted since 1981. In 1988 the committee voted two objections. In 1987 the committee imposed three objections, down from five imposed in 1986. A total of 117 objections have been imposed since 1977, but the trend has clearly been toward a decline in their frequency, as indicated below:

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

The volume of session delays for 1989 declined below 1988 level with only two being imposed, down from four in 1988. A total of thirty delays have been imposed since the power was created in 1978. In 1987 five delays were imposed.

III. Summary of Committee Actions

- 1) OBJECTION-261 IAC subrule 23.6(3), relating to community development block grant funds {DEPARTMENT OF ECONOMIC DEVELOPMENT}
- 2) SESSION DELAY-ARC 186A, relating to advertising practice by hearing aid dealers {HEARING AID EXAMINERS}
- 3) GENERAL REFERRAL-ARC 8A, relating competition with private enterprise by Regent's Institutions {BOARD OF REGENTS}
- 4) GENERAL REFERRAL-The Family Support Subsidy Program {HUMAN SERVICES}
- 5) OBJECTION-ARC 82A, relating to the salaries of nursing home employees {HUMAN SERVICES}
- 6) OBJECTION-761 IAC 119.4, related to tourist-oriented highway signs {DEPARTMENT OF TRANSPORTATION}
- 7) GENERAL REFERRAL-ARC 42A, relating to the regulation of above ground storage tanks {STATE FIRE MARSHAL}
- 8) GENERAL REFERRAL-ARC 54A, relating to the regulation of pre-need burial plans {ATTORNEY GENERAL}
- 9) OBJECTION-ARC 39A, item 12, relating to the rescission of 441 IAC 55 {HUMAN SERVICES}
- 10) GENERAL REFERRAL-cutback for hemodialysis services {PUBLIC HEALTH}
- 11) GENERAL REFERRAL-Area Aging Agencies-competition with private enterprise ELDER AFFAIRS}
- 12) GENERAL REFERRAL-Use of "mortgage surveys" {ENGINEERING BOARD}
- 13) GENERAL REFERRAL-Safety standards for school vehicles {EDUCATION}
- 14) SESSION DELAY-ARC 9611, relating to physician's assistants {MEDICAL EXAMINERS}
- 15) OBJECTION-491 IAC 10.4(14)"a", relating to alcohol consumption by officials, employees and owners at racing tracks {RACING & GAMING}
- 16) GENERAL REFERRAL-ARC 9657 and 9659, relating to rules promulgated by the Department of Economic Development {ECONOMIC DEVELOPMENT}
- 17) GENERAL REFERRAL-ARC 9691, relating to conditions for admission into a care facility {HUMAN SERVICES}
- 18) OBJECTION-ARC 9570, relating to case management {HUMAN SERVICES}
- 19) OBJECTION- ARC 349A, relating to funding for animal disease research {LIVESTOCK ADVISORY}
- 21) GENERAL REFERRAL-21 IAC 45.47, relating to the reporting of pesticide sales {AGRICULTURE}
- 22) GENERAL REFERRAL: 401 IAC 80.1(1) relating to claiming homestead exemptions {REVENUE DEPARTMENT}

- 23) GENERAL REFERRAL: anaerobic lagoon regulation and slurry storage basins {ENVIRONMENTAL PROTECTION}
- 24) GENERAL REFERRAL: ARC 145A, relating to public rest room facilities {PUBLIC HEALTH}
- 25) GENERAL REFERRAL: Council on Governments-feasibility study for a C.O.G. in central Iowa {ECONOMIC DEVELOPMENT}
- 26) GENERAL REFERRAL-House File 506, relating to the registration of charities {NO AGENCY-STATUTORY ISSUE}
- 27) OBJECTION-645 IAC 62.3, relating to continuing education {COSMETOLOGY BOARD}

IV. Major rule-making issues of 1989

1. ELDER AFFAIRS DEPARTMENT

Competition with private enterprise. In an issue involving Iowa Code Chapter 23A, the committee reviewed rules promulgated by the Department of Elder Affairs which related to competition with private enterprise. The issue presented in this filing involved a specific fact situation in which an Area Aging Agency (AAA) is publishing a free newspaper in direct competition with a local private paper. The situation was brought to the committee's attention by the Citizen's Aid Office.

A small publishing company in Dubuque publishes a monthly tabloid entitled "Over 49 News and Views", in the Cedar Rapids area. It is made available, without charge, at various shopping areas. Subsequently, The Heritage Area Agency on Aging, a department of the Kirkwood Community College, expanded its "Involvement" newsletter to a similar multi-page tabloid format, which is direct mailed without charge to senior citizens in a seven county area. To help defray the cost of this enhanced publication the AAA solicits advertising from the same businesses that advertise in "News and Views".

The entry of an AAA into the newspaper business is not unlawful. Iowa's unfair competition law, Iowa Code Chapter 23A, restricts the ability of government entities to engage in commercial enterprise; but applies to only units of state agencies and political subdivisions of the state. Area aging agencies are clearly NOT political subdivisions. That designation has been rather strictly limited to counties, cities, school districts and other entities that are governed by an elected board or commission. AAA's also appear not to be units of state government. Generally units are considered to be actual subdivisions of state agencies. AAA's are not created or directly controlled by a state agency. For this reason it appeared that Iowa Code Chapter 23A did not restrict the rights of AAA's to compete with private enterprise. Even though the AAA newsletter was not unlawful competition with private enterprise the committee was concerned that the spirit, if not the letter of the anti-competition law was violated. The combined resources of an area aging agency and a community college, using government facilities and resources are being successfully used to enter a market previously held by a private business. REFERRED TO THE GENERAL ASSEMBLY.

2. EMPLOYMENT SERVICES DEPARTMENT

Increased minimum wage. In a deceptively simple piece of legislation, House File 17 gradually will increase Iowa's minimum wage above the federal level. The simplicity was achieved by adopting the federal definitions for employer and employee. This

action now spawns thirty pages of regulations. These detailed rules are largely taken verbatim from the code of federal regulations and establish the detail needed to define the terms "employer" and "employee". Many types of employees are exempted from the Act, and from the Federal Minimum Wage. Primary among these groups are "white collar" workers. The rules define this class as "executive" or administrative employees, who receive a salary instead of a per hour wage. A similar exemption is provided for salespeople who traditionally receives commissions instead of a per hour wage. In all cases the rules specify a minimum weekly income that the exempt class must receive in order to qualify for the exemption.

While the legislation was controversial, the rules promulgated by the labor division were not. This filing largely provided "fill-in" details taken from federal regulations. These federal regulations had been in place for some time and were generally acceptable to the business community. NO COMMITTEE ACTION.

3. ENGINEERING AND LAND SURVEYING BOARD

Mortgage surveys. The committee called up for selective review a long-standing rule of the engineering board, it established standards for the preparation of land surveys. The issue was the application of these standards to the so-called "mortgage survey". Iowa lenders frequently sell mortgages on the secondary market. The buyers, large banks and other financial institutions, generally want some assurance that the property is in fact as described in the mortgage. This assurance is provided by a "mortgage survey" in which a registered surveyor inspects the property and provides the lender with a certificate that attests that the property is as described. This documentation is significantly less costly than a true survey, but it is essentially useless for any purpose other than selling a mortgage on the secondary market. The committee review was triggered by a board interpretation of the rule that opined that mortgage surveys were subject to the standards set out in the rule. That interpretation was a statement of general applicability and implemented policy, thus the interpretation itself met the definition of an administrative rule. The committee was concerned that the cost of a survey would be significantly higher than the cost of a mortgage survey and provide no particular value to most homeowners, who need a survey only to obtain their mortgage. The committee felt that the board's interpretation was unnecessary, but did not conclude that it was unlawful. For that reason the committee referred both the rule and the interpretation to the General Assembly for legislative action. REFERRED TO THE GENERAL ASSEMBLY.

4. BOARD OF HEARING AID DEALERS EXAMINERS

Hearing aid examinations. The committee examined a proposal adopted by the board of hearing aid examiners, striking language which requires all advertisements for hearing tests to contain a disclaimer which states that the tests are "for the purpose of fitting, selection, adaptation and sale of hearing aids." This requirement has currently been in effect for several years. The initial problem prompting this rule was the public confusion between the roles of hearing aid dealers, audiologists and physicians. The requirement ensured that the public was informed of the limited scope of the hearing aid dealer test. Hearing aid dealers complained that much of their printed advertising was prepared on a national basis and that the added language made it difficult to use these

promotional materials.

This change is vehemently opposed by audiologists who note that hearing aid dealers are not empowered to test for acuity or for the detection of the causes of hearing loss. They maintain that the disclaimer is needed to adequately inform hearing aid customers of the limited nature of this test. The committee was concerned about eliminating this long-standing disclaimer, but could not conclude that its' elimination was unlawful; since the statute did not mandate any such language. SESSION DELAY IMPOSED AND REFERRED TO THE 1990 SESSION OF THE GENERAL ASSEMBLY.

5. HUMAN SERVICES

Admission to care facilities. In 1987 the Congress enacted the Omnibus Budget Reconciliation Act of 1987. One provision of the Act requires that all persons seeking admission to a nursing care facility be screened to determine whether mental illness or retardation is present. The federal law makes no distinction between private-pay and medicaid-pay applicants. That requirement was binding on those states wishing to use medicaid funds for nursing home care. To comply with that mandate the Iowa Department of Human Services proposed a rule requiring that all admissions into care facilities be approved by the Iowa Foundation for Medical Care. The committee opposed this proposal noting that the department had no authority to regulate admissions of private-pay patients into a care facility, and that the proposal was contrary to Iowa Code section 135C.3 which provided for admission into a care facility upon written order of a physician.

The committee referred this issue to the 1989 session of the General Assembly. Since failure to submit to the federal mandate would result in the loss of federal funds, the legislature amended chapter 249A to require screening of all admissions into care facilities. REFERRED TO GENERAL ASSEMBLY-STATUTE AMENDED TO AUTHORIZE RULE.

6. MANAGEMENT DEPARTMENT

Targeted small business. In 1989 the United States Supreme Court struck down a Virginia law that "set aside" thirty percent of government contracting for targeted minorities. The court opined that a specific, numerical set aside violated equal protection of the laws. Based on that decision the Iowa legislature enacted Senate File 517, which empowered the department to make any changes needed to bring the program into compliance with the court decision. The department has eliminated the two percent set aside and now requires agencies to "encourage" minority participation in the contracting process. This encouragement includes such things as targeted invitations to eligible vendors, identification of purchasing areas currently void of minority participation and the establishment of informal targets for participation. NO COMMITTEE ACTION.

7. NATURAL RESOURCES DEPARTMENT

Out-of-state hunting licenses. The Administrative Rules Review Committee met with representatives of the Department of Natural Resources, concerning the implementation of House File 88; that Act relates to the issuance of deer and turkey licenses to out-of-state residents. The Department maintained that the language of sections two and three preclude issuing out-of-state licenses in 1989, because the Act required a "biological balance" of 110% be attained

before a license could be issued. The department maintained that language rendered it impossible to issue out-of-state licenses because it would be impossible to attain a biological balance of 110%. Apparently the term biological balance was misused in the statute; it is a technical term that means the number of wildlife is equal to the available food source. In a farm state such as Iowa, it is unlikely that balance will ever be reached.

The committee was of the opinion that the provisions for a 1989 out-of-state license were independent of the 110% language. It was the committee's opinion that sections two and three created a specific number of out-of-state licenses for 1989, and for subsequent years established a procedure (albeit flawed) to determine the appropriate number of licenses to be issued. The committee conceded that the biological balance language might be impossible to implement but believed that flaw only impacted license procedures after 1989. The department contended that the entire paragraph had to be read together and that the biological balance language applied to the entire paragraph, including the 1989 season. The issue was clarified by an opinion of the Attorney General stating that the provisions were severable and that out-of-state licenses could be issued in 1989. NO ACTION BY THE COMMITTEE.

8. PROFESSIONAL LICENSURE

Physician assistant. Senate File 2169 was enacted in 1988, creating a full licensing process for physician assistants. Prior to that time "PA's" were not licensed. Regulation was provided by the Medical Board which regulated the supervising physicians, with informal advice from a physician assistant committee. Under the new statutory scheme the medical board retains jurisdiction over the supervising physician, but the newly established PA board will now establish the educational and practice requirements for a PA license. The rule-making power of the new board was curiously restricted in that section 21 of the Act established a joint committee, made up of members of both the PA and medical board to review and approve all rules proposed by the PA board.

The Act required both boards to promulgate rules. The PA board needed the normal rules of organization and operation; the Medical board needed rules relating to the amount of supervision required of the physician. Both boards actively opposed each other's rules. The PA board was concerned over what it felt were overly stringent supervision requirements. The Medical board believed that the PA rules went beyond the scope of the professions' authority in listing the duties that a PA could perform. The committee declined to decide the merits of these allegations. Instead, the committee threatened a session delay on both sets of rules if the professions could not reach acceptable compromises. Both boards then met in a series of meetings in the Summer of 1989 and reached solutions that made further committee action unnecessary. NO COMMITTEE ACTION.

9. PUBLIC HEALTH DEPARTMENT

Cutbacks in hemodialysis funding. In July of 1989 the Public Health Department emergency adopted a series of rule changes to reduce the level of funding for hemodialysis services. This action was necessitated by House File 775, which reduced funding by \$150,000 and mandated that the department establish a rule to reduce services.

To meet the legislative mandate the department reduces the level

of payment from 100% to 80% and reduces the eligibility level from 300% of the poverty level to 200%. The changes would impact 71 people. This program is not a traditional poverty program. It is designed to allow lower income Iowans to receive the care they desperately need without draining their family resources down to the poverty level. The cutbacks would force these people ultimately into Title XIX due to the high cost of dialysis. After several month of discussion the department restored the current level of funding after receiving legislative assurance that additional money would be appropriated in the 1990 session. REFERRED TO THE GENERAL ASSEMBLY.

10. PUBLIC SAFETY DEPARTMENT

Aboveground storage tanks. Rules adopted by the state fire marshall would greatly increase the number of storage tanks subject to inspection and licensure. House File 447, enacted in 1989, in part created a registration program for aboveground storage tanks similar to that created for underground tanks. Much of the statutory language was simply taken from the underground tank program. Aboveground tanks are currently under the jurisdiction of the Fire Marshal, and so this new registration was placed in that same office.

The legislation significantly expanded the type of tanks under the Marshal's jurisdiction. Traditionally the Fire Marshal inspected only tanks containing flammable materials. Section 3(4) in effect expanded the inspections to cover between one and two thousand hazardous substances. Additionally, the Act excludes only tanks of 1,100 gallons or less, this implies that all larger tanks are included in the registration program, even if they are mounted on trucks. The result is that virtually all above ground tanks must now be registered with the Fire Marshal's office. This provision will especially impact farm suppliers who store and transport large amounts of fertilizers and chemicals.

Registration must take place by May 1, 1990. The Fire Marshal was aware of these concerns and agreed to postpone any enforcement action until that date. The committee felt that the expanded coverage was not intentional and decided to refer the rules to the General Assembly for further study. GENERAL REFERRAL TO THE GENERAL ASSEMBLY.

11. RACING AND GAMING COMMISSION

Riverboat gambling. Senate File 524 is a licensing act providing for casino style gambling on excursion boats. The license must be held by a non-profit corporation. That corporation may, in turn, enter into a management contract with a boat operator. Both the license and the selection of the boat operator are subject to the approval and regulation of the commission. The rules were largely non-controversial, but some concern existed over the degree to which the division would keep information submitted by the applicants confidential. These concerns were eliminated when the proposal was amended to make all application information public. NO COMMITTEE ACTION.

12. REVENUE DEPARTMENT

Sales tax on airplane purchases. In 1989 the committee heard testimony from an individual who was assessed a late payment penalty for failure to timely pay sales tax on an aircraft purchase. The Department of transportation had an obligation to inform him that

the tax was owed at the time the aircraft was registered, but the department failed to due so. The liability was discovered by the Department of Revenue, which assessed the penalty.

The DOT erred when it registered the aircraft without demanding documentation that the tax on that aircraft had been paid. Both Iowa statutes and the departments own rules require that proof as part of the registration process. The ultimate result of that error was that the purchaser was assessed a late penalty for failure to timely remit the tax.

All parties agreed that the individual was not at fault for the late payment of the tax; however, the Department of Revenue had no authority to waive the penalty for good faith mistakes, even when the mistake was not on the part of the taxpayer. Section 422.58 states that "[t]he penalty imposed under this subsection is not subject to waiver."

The committee believed that the statute in this case was at fault. The committee believed that the best solution was first for the individual to file a claim against the state. Secondly, the committee decided to refer the issue to the legislature with the recommendation that a less restrictive waiver provision be added to the Code. GENERAL REFERRAL TO THE LEGISLATURE.

13. REGENTS BOARD

Competition with private enterprise. Chapter 23A of the Code was enacted in 1989; it established a general principle that state government is not to compete with private enterprise. Section 23A.2(2) provides the board of regents with the power to partially exempt itself from the Act. The exemption is not automatic; the board by rule may exempt itself from the prohibition in nine specific areas as set out in the Act. Under this concept, using the notice and public participation provisions of section 17A.4, members of the affected public would have the opportunity to comment on whatever exemptions the board chose to propose.

The committee heard testimony from several Iowa audiologists who complained that the University of Iowa was unfairly marketing hearing aids in competition with private dealers. Both the Audiology Department and the College of medicine fit hearing aids. While they assist patients in obtaining hearing aids, Regents officials maintain that the University of Iowa does not sell hearing aids. While the university does fit those hearing aids, officials maintain that services provided to patients at the hospital and clinic are exempt from the Act. The services cost between \$150 and \$200 per aid. The audiology clinic fits about 150 hearing aids per year.

The issues presented by this controversy were rule-related, but were particularly unsuited to committee resolution. The real issue is the extent to which the Board of Regents have made a good faith attempt to comply with the Act and the actual extent and nature of the business enterprises run by the various institutions. For this reason the committee chose to take no adverse action to the rule itself; instead, it referred the rule to the General Assembly to determine whether Chapter 23A requires further modification to specify limitations on public competition. REFERRED TO GENERAL ASSEMBLY.