THE ADMINISTRATIVE RULES REVIEW COMMITTEE
1987

I. Introduction. In 1987 60 administrative agencies promulgated 503 filings,representing over 2000 individual rule additions, amendments or repealers. This continues a tendency over the last five years towards an uneven but steady increase in the volume of rule making, as set out below:

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.

133 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-six per cent of the total volume of rulemaking. It is a actual decline from the volume of emergency rulemaking in 1986 when 142 "emergency" rules were implemented, representing thirty percent of all rulemaking. While a four percent decrease appears inconsequential, it should be noted that agencies where not formally and actively discouraged until October of 1987. 1988 will be the first full year in which the results of the new policy may be fairly measured.

To calculate the volume of rule-making for 1987, 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 the number of "emergency" rules promulgated by the agency.

Human Services Dept.	94 (31)	Prof. Licensure Div	03 (01)
Natural Resources Dept.*	38 (05)	Treasurer	03 (01)
Transportation Dept.	30 (05)	Real Estate Comm.	03 (01)
Revenue Department	29 ----	Correction Dept.	02 ----
Economic Development	27 (16)	Iowa Finance Auth.	02 ----
Public Health Dept.	27 (05)	Personnel Department	02 ----
Labor Div.	24 (06)	Blind Division	02 ----
Envir. Protection Div.	17 (04)	Employment Services	02 ----
College Aid Comm.	16 (07)	Attorney General	02 ----
Agriculture Dept.	16 (05)	Management Dept.	02 ----
Insurance Dept.	15 (03)	Historical Division	02 (02)
Utilities Board	15 (02)	Soil Conservation Div.	02 (01)
Inspections & Appeals	12 ----	Elder Affairs	02 (01)
Pharmacy Board	12 (01)	Fair Board	02 (01)
Racing Comm.	10 (03)	Livestock Health Coun.	01 ----
Nursing Board	09 (03)	Veterinary Medicine Bd.	01 ----
Job Service Division	08 (02)	Sheep & Wool Promotion	01 ----
Secretary of State	07 (05)	Banking Dept.	01 ----
General Services Dept.	06 (03)	Campaign Finance Comm.	01 ----
Education Department	05 (02)	Deaf Services Division	01 ----
Dentistry Board	04 ----	Engineering Board	01 ----
Public Safety Dept.	04 ----	Architectural Board	01 ----
Iowa Lottery Div.	04 (03)	Savings & Loan Div	01 ----
Community Action Ag.	04 (03)	Railway Finance Auth.	01 ----
Industrial Division	04 (02)	Cultural Affairs Dept.	01 ----
Law Enforcement Acad.	04 (01)	Status of Women Comm.	01 ----
Alcoholic Beverages Div.	04 (01)	Public Defense	01 (01)
Energy Policy Division	03 ----	Credit Union Dept.	01 (01)
Regents Board	03 ---	Executive Council	01 (01)
Substance Abuse Division	03 (02)	* includes both the department and division	
Ag. Development Auth.	03 (02)		

II. Formal Committee Actions.

While the volume of rule-making is increasing, the volume of formal "objections" filed by the committee has dropped somewhat. In 1987 the committee imposed three objections, with one objection being strictly procedural in nature. Of the two substantive objections, both were overcome by revising the rule in line with the committee request.

1987 continued a long trend in a decline in the frequency of objections. In 1986 the committee imposed five objections, up from three objections in 1985. A total of 107 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	1986.....05
	1987.....03

The volume of session delays for 1987 increased to five, for a total of twenty-three since the power was created in 1978. In 1986 only two delays were imposed. Of these five delays, one was withdrawn by the committee and four went into effect when the

legislature declined to take any action. In one of these situations (Nursing education: see below) a compromise was reached making legislative action unnecessary.

III. Major rule-making issues of 1987

1. **EDUCATION DEPARTMENT**
Cooperative athletic competition between public and non-approved schools, X IAB 9, ARC 8054. The department proposed an amendment allowing non-approved private school students to participate in certain extracurricular activities in competition with approved schools. Non-approved schools are private schools that have not met all of the educational standards established by the department. The proposal was the result of long-term negotiation between representative of these schools and rather skeptical department staff. With the departure of Superintendent Benton, the board moved to terminate the proposal on the grounds that non-approved schools are ineligible for any other form of state support or participation, such as AEA services. The option to adopt or not adopt a rule is within the discretion of an agency, so the committee took no action and conducted no further reviews on the subject.

2. **EDUCATION DEPARTMENT**
Instructional standards in schools, ARC 7758, X IAB 2 (adopted in 1988). Easily the most controversial rules ever proposed, these standards dominated the summer and fall of 1987 and were the subject of three special committee meetings. All formal committee action involved the notice of intended action. The rules were not adopted until February 1988 and were immediately the subject of direct legislative review.

These rules were the result of 1985 legislation mandating that the department develop "new and improved" requirements for K-12 education. The statute sets out general guidelines for the department but the actual drafting of standards was left to an as hoc advisory group. A final version was published as a notice of intended action in July 1987. With minoor modifications that version was filed in its final form with publication on March 23, 1988.

In essence the standards raised the number of required credits for graduation from the current twenty-seven up to forty-one. The proposed standards set the curriculum for K-12 instruction, including the subjects to be offered at various levels and the amount of credits needed in various areas. A major subject of controversy was a requirement that public schools offer a prekindergarten for four-year-olds and an all-day kindergarten program. Other requirements increased the required number of course offerings in various academic subjects.

The delay in the adoption of the final text of the standards precluded formal legislative review until late February, 1988. In March the Senate passed a bill delaying implementation of the standards for one year, until July 1990. The House did not complete action on that bill, offering legislation of its own. In April the house unanimously adopted an amendment eliminating the standards mandating expanded Voc-ed, separate superintendents and principals, the specified number of school days and the length of kindergarten classes. In a compromise reached at the end of the legislative session. The statute itself was amended in Senate File 2278 to: 1) prevent implementation of an expanded requirement for vocational education; 2) allow principals to also serve as superintendents; 3)

create a waiver process allowing schools to demonstrate on a case-by-case basis that a particular standard would work an undue hardship.

3. **ENVIRONMENTAL PROTECTION COMMISSION**
Sulphur dioxide emissions, X IAB 6, ARC 7918. After almost ten years of debate and rulemaking, the division was compelled by the federal government to adopts rule reducing the acceptable level of SO2 emissions from eight pounds per million Btu, applicable only to sources greater than 500,000 Btu, down to five pounds, applicable to all sources. This reduction does not apply to the eight counties which border Illinois or to Black Hawk or Linn counties. These ten counties have been subject to a six pound limit for fifteen years and no additional restriction was imposed.

The primary source of SO2 is coal fired boilers, thus the rule will most seriously impact power generating facilities, and seriously threaten the marketing of Iowa coal. SO2 is a source of the so-called "acid rain"; the federal EPA has demanded for many years that Iowa reduce its emission levels and has itself already adopted the five pound limit. This results in dual enforcement where the federal government imposes a more stringent standard than does the state. For that reason it was no longer feasible to maintain an Iowa emission level different from the federal standard, and no formal opposition was raised to the reduction

4. **General Services Department**
Alcohol served in the historical museum, X IAB 6, ARC 7924. At the request of the historical division the department promulgated a rule allowing alcoholic beverages to be served at the historical museum. That facility, designed with meeting and auditorium space as well as display areas, could then be used to host receptions and other events, generating income for the facility. The rule was controversial because it departed from a long-standing tradition of not allowing alcoholic beverages on government property. Several committee members were also concerned that the state might potentially be liable for injuries resulting from alcohol abuse; other members opposed using state buildings in competition with other convention facilities. The committee initially delayed the proposal into the legislative session. It subsequently reversed that decision when the division assured the committee that liability problems did not exist, that the facility would be made equally available to all applicants and that numerous applications had already been made for use of the facility.

5. **Insurance Division**
Paid endorsements by media celebrities, X IAB 12, ARC 8166, The division has long regulated the practice of testimonials or endorsements of insurance products. The division proposed a restriction requiring all persons making TV or radio endorsements to be licensed to sell insurance. The implicit result of this proposal would have been to eliminate celebrity endorsements by imposing conditions which were virtually impossible for celebrities to meet. The committee opposed this rule on the grounds that an agency should not use a subterfuge to accomplish a regulatory goal. It was the committees opinion that if the division could show that a particular type of advertising was untruthful or misleading, then the advertising itself should be banned; but that it was unreasonable to impose licensing requirements on actors themselves. The division

subsequently terminated this rule making and is now investigating the possibility of nation-wide regulation of insurance advertising.

6. **DEPARTMENT OF MANAGEMENT**

Equal opportunity in state contracts, X IAB 12, ARC 8173, In 1986 the Legislature enacted provisions in Chapter 19B that required state agencies to promote equal opportunity in granting state contracts. Administration of this requirement was vested in the Department of Management (DOM). The problem with the statute was that it gave the department authority over state agencies to ensure affirmative action, but it was doubtful whether this authority extended to regulate private contractors (eg: affirmative action plans, periodic reporting, disqualification from contracting with the state).

Three portions of the rules imposed burdens on private contractors: 1) paragraph 4.5(2)"c" stated that every contractor doing more than $5,000 business with the state must file an affirmative action program with the DOM; 2) subrule 4.5(3) imposed reporting requirements and established an investigation process for alleged non-compliance; 3) subrule 4.7(2) established a series of sanctions, some of which apply directly to contractors. In addition to the problem of statutory authority, these three provisions did not appear in the original notice. Paragraph 4.5(2)"c" was in the notice, however the dollar limit was printed as $50,000, not $5,000 as adopted.

By general concensus between the department, the committee and the attorney generals office a session delay was imposed on these rules to give the legislature an opportunity to review those rules and determine whether the legislative intent of the statute was carried out. No legislative action occurred and the rules went into effect upon adjournment of the session.

7. **NURSING BOARD**

Increased academic requirements for nursing instructors, IX IAB 19, ARC 6822. Iowa Code section 153.5 empowers the board of nursing to establish education criteria for the approval of nursing programs. In exercising this approval power the board adopted standards increasing the education requirements for the staff of nursing schools. Paragraph 2.3(2) requires that within ten years the program head must have a masters degree. Rule 2.6(2) will also impose these same requirements for instructors in the institutions. Paragraph 2.3(1)"g" requires the institution itself to be accredited by one of several specified agencies.

The issue was whether it is reasonable to require current instructors in nursing schools to obtain a masters degree within ten years. Proponents of the requirement noted that nursing is the only profession where a college degree is not required of an instructor. Opponents cited the lack of availability of masters degree programs in Southern and Western Iowa and the financial burden it will place on existing faculty who are currently providing instruction in nursing programs.

The committee was particularly concerned with the impact these rules might have on community colleges, which largely specialized in "two-year" nursing programs and employed instructors that did not meet the new criteria. In addition, the committee was concerned about the burden placed on current instructors. The rules would have required them to attain a masters degree in ten years--at their own expense and on their own time. The committee delayed the rules into

the General Assembly. During that delay a compromise was developed, only newly hired employees would be subject to the higher standard, and schools had until 1993 to begin hiring masters degree educators. As a result of this proposal no action was taken on the delayed rules and they were allowed to go into effect.

8. SECRETARY OF STATE

Printing public measures on computerized ballots, X IAB 10, ARC 8092. Occasionally, a rule is used to correct a defect in a statute; this occurred when the Secretary of State promulgated regulations concerning the use of computer readable ballots. The portion of concern was paragraph 10.4(2)"i", which allows a summary of the text of a public measure to be printed on a paper ballot in lieu of the actual text when a computer readable ballot card is used instead of the traditional paper ballot. This provision conflicted with section 49.44, Iowa Code, which required that the summary had to be printed directly preceding the text of the measure on the ballot itself. This was a physical impossibility on the narrow, elongated computer ballots. While technically unlawful, the committee took the unusual step of not delaying the rule, noting that adherence to the statute would in effect made computer ballots unuseable for ratifying public measures. The committee referred the statute and rule to the General Assembly, which amended the statutory language to allow the use of summaries.

9. TRANSPORTATION DEPARTMENT

Bioptic lenses not eligible for drivers license, SELECTIVE REVIEW. In October and November the committee reviewed a DOT provision which prohibits wearers of telescopic lenses from driving motor vehicles. The basic issue is whether it is reasonable for the department to deny all wearers of bioptic lenses the opportunity to take the vision exam. Subrule 600.2(5) states "The department shall not license any person who must wear bioptic telescopic lenses to meet the visual acuity standard required for a license." These lenses are miniature telescopes attached to the eyeglass lenses and provide an expanded acuity of vision sufficient, in some cases to allow the wearer to pass the DOT vision tests. The subrule prohibits these people from being licensed. In testimony before the committee the department argued that the across-the-board ban is justified because bioptic lenses cause an impairment in the applicants visual field by leaving a blind spot in the field of vision. The department also noted that the rule had been specifically upheld in the Iowa Supreme Court. Gooch v. IDOT, 398 N.W.2d 845 (Iowa, 1987).

The committee also took testimony from a driver who wore bioptic lenses, who contended that any blind spot problems could be avoided by training the driver to constantly adjust his field of vision. He also contended that the rule was inherently unfair in that it did not allow an applicant to demonstrate that in his particular case the use of bioptic lenses did not present a safety hazard.

The committee agreed with this argument and recommended to the legislature that the licensing laws be amended to allow a case-by-case evaluation of bioptic lens users. The legislature took no action on this request.

10. TRANSPORTATION DEPARTMENT

Visual acuity standards, ARC 7626, IX IAB 19.

The development of new technology allowed the DOT to test drivers license applicants for field of vision as well as acuity on a

routine basis. The committee was uncertain whether these additional standards were needed to ensure driving safety, or whether they would place an undue hardship on license applicants. There did not appear to be hard evidence that field-of-vision testing is essential to promote safety, but was certain that the proposal would disqualify some drivers who currently are licensed. The issue was whether the hardship this testing would cause some drivers was justified by a measurable improvement in highway safety.

For this reason the committee imposed a session delay to allow the legislature to consider these standards before they go into effect. While the proposal was clearly not objectionable, it was thought appropriate to make the legislature as a whole aware of this new testing program and give it an opportunity to evaluate its merit. The legislature took no action on this rule, allowing it to go into effect at the conclusion of the session.

IV LEGISLATION AND RULES VETOES

Legislation. In 1987 the Iowa Administrative Procedures Act was amended to provide that persons wishing to request a contested case may do so by ordinary mail, and that the request is deemed made when postmarked. Prior to this legislation, agency rules generally stipulated that requests were deemed made when received by the agency. This issue was of concern both to the Citizens Aide/Ombudsman and the committee. The right to demand a contested case must be exercised within a specified time period and failure to exercise this right has long been deemed to waive the appeal process, including the right to seek judicial review. Prior to the legislative change, there was no evidence of filing until the agency received and stamped the filing. While the amendment does not solve the problem of lost mail, it does prevent problems with slow delivery or slow processing by the agency.

Rules veto. In 1987 the legislature enacted HJR 11, vetoing a rule promulgated by the Department of Employment Services (4.34(8)). In essence, this rule defined an employer "lockout" as a labor dispute which precludes an employee from receiving unemployment benefits. In 1988 the Iowa Supreme Court struck down the blanket lockout exclusion in Alexander v. Employment Appeal Board, 86-1555 (Iowa, 1988). The court mandated that the division consider various mitigating factors in determining whether a lockout should properly result in a denial of benefits. In June 1988, the department commenced rule-making procedures to re-promulgate a modified lockout rule.