

**Rules Reform Task Force (RRTF)
December 1, 2000, Meeting Minutes**

Members Present:

Katie DeBoer, Citizen Member
John Knapp, Esq., Winthrop & Weinstine, P.A.
Laura Offerdahl, Governor's Office
Dave Orren, Minnesota Department of Health (MDH)

Senator Don Betzold
Representative Marty Seifert
Senator Dan Stevens

Member Absent:

Representative Gene Pelowski

Also Present:

Adrienne Buske, Legislative Assistant to Rep. Seifert Wendy Willson Legge, MDH

Call to Order. Representative Seifert, RRTF Vice Chair, called the meeting to order at 10:38 a.m. Representative Seifert noted that Representative Pelowski would not be able to attend. All others were present within a few minutes of the start of the meeting.

Approval of 11/10/00 Minutes. Representative Seifert made a motion to approve minutes as written. Seconded by Mr. Knapp. Motion passed unanimously.

Presentation on Legislative Oversight of Agency Rules (Legislative Rule Review in Colorado). George McCormick from Senate Counsel & Research distributed a handout prepared by Tammy Shefelbine, Senate Counsel & Research Law Clerk. Mr. McCormick stated that the memo was a summary of answers to questions raised at the last RRTF meeting. Mr. McCormick also said:

- In Colorado, there is no agency like the Office of Administrative Hearings to determine the reasonableness of and statutory authority for rules. All issues are resolved with the agency. The first outside review of an agency's rules is the legislative review.
- Colorado does not allow rules to lapse very often.

Discussion following Legislative Oversight Presentation.

- Ms. DeBoer asked whether Colorado's procedure would be redundant with the administrative law judge procedure we have in Minnesota. Mr. McCormick said that that depended on the role of the legislative oversight group. If the legislative oversight group were to repeat the Office of Administrative Hearings determination of whether need and reasonableness had or had not been established, and whether there was statutory authority, then the legislative oversight group would be redundant. On the other hand, legislative review could include other factors, such as whether there were better ways of achieving the rule's purpose. If the Legislature wanted to be more involved in the rulemaking process, the legislative oversight group could not hurt.

- Mr. Orren commented that the legislative oversight group would be redundant. Although there is value in having a legislative committee look at rules, agencies would not want to perform all the rulemaking tasks if the legislature could just pass on the rule. Instead, the agencies would proceed through legislation. This would result in a loss of public participation, and would subject these laws to the tumult of the legislative session. This would not be good for the kind of detail needed in rules.
- Ms. DeBoer asked if there is a way to increase legislative participation without being redundant. Mr. McCormick said that he doesn't know. He agrees with Mr. Orren's observations, and noted another drawback to having a legislative oversight group do the same thing as the Office of Administrative Hearings: members of the public may decide that they will find friendlier ears in the Legislature than the agency, and decide not to deal with the agency but rather wait and go to the Legislative committee.
- Representative Seifert commented that, at the next meeting, we will make concrete recommendations for changes.
- Mr. Orren posed a question for both of the Legislators present: should each rule that has been adopted be referred to a policy committee, not for approval or disapproval, but for the committee to review the policy? Senator Betzold commented that that would depend on the committee. The Environment/Natural Resources committee is interested in DNR promulgated rules and would look at them. However, the DHS and Health rules would inundate their policy committee; the committee wouldn't care about the rules, until there is an issue like the nursing home bedrails issue.
- Representative Seifert asked Mr. Orren if all members of the policy committee get copies of the rules when they come out? Mr. Orren said that the agency is required to notify chairs of the committee and legislative authors of rulemaking authority when we give our 30 days notice. Our rulemaking manual recommends that we also give notice to the ranking minority member on the committee. Mr. Orren thinks that usually not all committee members are notified.
- Mr. Knapp commented that, whether or not we recommend the Colorado system, legislative involvement in rules will be ongoing. Mr. Knapp was concerned that, although we have a good procedure in place for the Revisor's bill, we don't have anything in place for reviewing the repeal of rules by the Legislature. Mr. Knapp asked McCormick if he has thought about what process we should consider that would ensure the appropriate level of review before repeal of rules. Mr. McCormick said that there should be something; the procedure with the Revisor's bill is good model.
- Mr. McCormick expressed concerned that, late in session, there may be many bills on the agenda and lists of rules to be repealed. The Legislature then has to rely on the person preparing bill to say that the bill does not repeal any rules that you would want to keep. There have been cases of the inadvertent, mistaken repeal of rules. Several years ago, a Board of Education rule establishing a procedure for certification of school nurses was repealed, even though the law requiring certification was not repealed. Mr. McCormick suggested that a joint rule of the Senate and House could ensure that policy committees would consider legislative repeal of rules and that rule repeals would not be added first in a conference committee.
- Mr. Knapp asked Mr. McCormick to bring to the next meeting proposed statutory language to ensure that those mistakes do not happen in future. Mr. McCormick

agreed. Mr. Knapp suggested that he consult with Mr. (Mark) Shepard and Mr. (Paul) Marinac.

- Senator Betzold suggested that, if the agency says a rule is not controversial and the Legislature believes the agency, then Senate and House counsel would not need to go through every line of the rule. Senator Betzold asked where is the point in the system we're trying to hone into to ensure that problems don't happen? Senator Betzold said that he would go to the source. Mr. Knapp agreed that it was fair to go to the source, perhaps in the nature of the agency bill. He commented that a better process is needed.
- Mr. Orren suggested that the expedited process be available to agencies for noncontroversial rules. That way, regulated parties would have chance to see the proposed rule, but if 25 letters were not received, the agency would not prepare a statement of need and reasonableness. Mr. Orren said that he will distribute this proposal to the committee before the next meeting.

Presentation of Recommendations for Legislative Review of Rules. Mr. Orren distributed two handouts (memoranda dated November 29 and 30, 2000) and made a presentation regarding recommendations for legislative review of rules.

Legislative Review of State Agency Rules and Related Laws and Programs: Mr. Orren summarized the first handout (dated November 29, 2000). The highlights are described below.

1. Under Minnesota Statutes section 14.3691, the agency would prepare a report listing any rules the agency recommends for repeal, describing the rationale for rules to keep, and suggesting any changes in rules. This report would generally consist of one or two paragraphs per chapter of rules. Representative Seifert asked how many chapters there are of MDH rules. Mr. Orren said that he guessed about 50, give or take 20. After the agency prepares this report, legislative committees would ID and prioritize rules and select for review only one set of rules per agency. This would be an in-depth review, such as the review of the nursing home bedrail rule. Mr. Orren noted that Care Providers of Minnesota has expressed a concern about selecting only one set of rules, because some industries, like nursing homes, are subject to rules from several agencies, both state and federal. Mr. Orren agreed that the legislative committee could select one area (such as nursing homes), instead of one chapter, and focus on what is important in that subject area.
2. The legislative committee would look at the big picture. The committee would hold hearings and consider recommendations. During the bedrail issue, Senator Stevens contacted federal agencies about federal rules affecting nursing home bedrails. Senator Don Samuelson and Representative Fran Bradley even went to Washington to talk to federal officials about bedrails. Senator Stevens expanded this issue to include the survey process used in nursing homes and also the issue of who could assist in feeding nursing home patients. Senator Stevens commented that you don't want the issue to be so specific as bedrails, because it makes sense to broaden the issue across agencies. There are lots of issues that cross agencies. Representative Seifert commented that it looks like there would be flexibility for the issue to cross agency jurisdiction, and Mr. Orren agreed.

3. The time spent for an agency to prepare the report would range from about 10 hours to 100 hours or more, and the legislator and legislative staff time to identify and prioritize rules would range from 10 to 20 hours.
4. The requirement that the agency estimate the effect of possible rule repeal on the state budget and any loss of benefits to the citizens was included in the law when the Legislature was considering repealing all rules. An agency cannot make this estimate if the agency is not recommending repeal.

Discussion Following Presentation on Legislative Review of State Agency Rules and Related Laws and Programs:

- Representative Seifert said that the recommendations look very good. The chair of the legislative committee could take the review of a set of rules or an issue area and re-refer it to a subcommittee. The subcommittee could dig into it, and full committee meetings would not be needed until the chair said so. Senator Stevens commented that this is exactly the model used by the Senate Health and Family Security Committee. The Committee chair appointed a subcommittee which brought in staff from agencies, and brought the advisory committee together with all of the stakeholders. The benefit of this system is that all of the people are sitting at the same table. With facilitation, they can come together on many issues ; they can find common ground and can disagree without being disagreeable. Representative Seifert asked how many were on the subcommittee, and Senator Stevens replied five or six.
- Representative Seifert asked if the committee wants to recommend that this be put in the final report for recommendation, or hold it over until next meeting? Senator Stevens agreed that the memo is very well written, and stated that it should be strongly considered and dealt with at the next meeting.
- Senator Stevens said that he would encourage the task force to recommend a process for dealing with federal rules. Although we can't make a direct impact, we need a process for identifying federal rules that are causing problems in Minnesota. We would submit to our federal delegation and the federal agency our identification of the federal rule, why the rule is causing a problem, and our recommended changes. Representative Seifert said that that sounds like good recommendation, and that the committee would hold the recommendation until the next meeting. We'll also consider the governor's authority to veto rules and whether to make a recommendation about that. We'll hold the November 29th memo over until the next meeting; anyone who wants changes should get those ready for the next meeting.
- Representative Seifert said to put in the memo that the task force says that, because the sunsets on rules were removed in the conference committee for ML2000, chapter 469, clause (4) requiring agencies to estimate the effect of possible rule repeal is not relevant.

Rulemaking Notice to the Legislature: Mr. Orren summarized his second handout (dated November 30, 2000). He stated that Minnesota Statutes, section 14.116, is a good statute by and large, but there are problems with notifying the legislative authors because some statutes are old and have been amended many times. Performing the research to find the authors or supporting authors who are still legislators requires ten or more hours of agency work. When Representative Munger was still in the Legislature, the research had

to go back to 1955. Each piece of big legislation requires a big effort by the agency. Mr. Orren's proposed statutory change, which is in the memo, would require notice to be sent to the chairs of the legislative policy and budget committees with jurisdiction over the subject matter of the proposed rule, and would require the agency to make reasonable efforts to notify sitting legislators who were chief authors of the law or companion bill if the legislation became effective during the previous two years. Mr. Orren would also add that notice be sent to the ranking minority members of the relevant legislative policy and budget committees. The proposed notice would still give very good notice to the Legislature and reduce some of the burden on agencies.

Discussion Following Presentation on Rulemaking Notice to the Legislature:

- Senator Betzold commented that he had previously proposed a bill that would do this. Representative Seifert said that he was one of the people who opposed the bill because only the committee chairs would have received notice of changes in the rules. Representative Seifert said that the notice proposed by Mr. Orren looks good, especially since the House now allows 25 or 30 co-authors on a bill. Mr. Orren's recommendation makes a good faith effort to give notice.
- Senator Stevens said that Mr. Orren's proposed language is a reasonable compromise that eliminates lots of unnecessary time by agency staff. With the addition of giving notice to ranking minority members, Senator Stevens thinks that the proposal is a good idea for a task force recommendation.
- Senator Betzold said to put this in the mix of things to discuss for the final report.
- Mr. Orren said that he would take both the November 29th and 30th memos, revise them to include what has been discussed today, and include the revised memos in the materials for the next meeting.

Current Alternatives to Rulemaking Used by Various State Agencies.

Testimony by the Minnesota Pollution Control Agency (MPCA): Ann Foss from the MPCA gave testimony regarding administrative penalty orders (APOs) and distributed two handouts: an MPCA fact sheet regarding the use of APOs and a copy of the MPCA's APO statute, including the most recent amendments. The highlights are discussed below:

- In 1987 the MPCA was given APO authority in the area of waste violations. This authority was broadened in 1991.
- The statute required the agency to develop a plan for the implementation of the APO authority. The agency published the plan for comment. The plan was then approved by the agency's board. The plan included an introduction, overview of authority, discussion of the process to use in issuing an APO, the administrative appeals process, and the role of the Attorney General. The plan did not include any matrix of potential violations with proposed penalties, and did not include all criteria to be used to determine if the violation was serious enough to require a nonforgivable penalty.
- The decision process is not based on the decision of one individual. The agency started using a forum process to make decisions about penalties and other enforcement. The forum consists of the investigator, senior enforcement staff, the enforcement supervisor, and a member of the Attorney General's Office. The investigator recommends enforcement action and the group must reach consensus.

Discussion Following Testimony by MPCA:

- Representative Seifert asked what means a party has of contesting an APO if the party receives an APO and disagrees with the agency's conclusion. Ms. Foss said that the person can request an administrative hearing in front of an administrative law judge (ALJ) or can request that the agency go to district court. Typically the agency goes to the ALJ. Also, the agency has the person come in and discuss the matter. Many times they waive the appeal after this discussion. Senator Stevens said that Ms. Foss did a good job of presenting. The advantage of APOs is that you do have an expedited administrative process available. The key to the APO process is that compliance is the real goal, and you're not charging anyone with criminal activities. Senator Stevens doesn't often laud the MPCA, but this is one area where they've done an excellent job. He thinks that APOs are well-suited for certain things, and should be looked at as an alternative for use in other agencies.
- Representative Seifert asked what if the party goes to court, hires an attorney, and the judge decides the MPCA went too far because there was no violation of law. Who would pay for the court fees? Ms. Foss stated that she was not sure. She only recalls one instance where the agency was asked to reimburse for attorney fees, so this is not automatic. When Representative Seifert asked if a judge could order this, Ms. Foss said that was what happened in the one case she recalls.
- Ms. Deboer asked if APOs are enforcement mechanisms for existing rules? Ms. Foss said yes, and that she's also confused about why this is an alternative to rulemaking. She thinks it is because the process for implementing APOs is an alternative. Mr. Orren said that this is a part of "ways to make regulation work better," not an alternative to rulemaking. This is a way to provide flexibility in enforcement.
- Mr. Knapp said that he agrees APOs are appropriate and other agencies should use them, but his criticism is that it's a black box process. The method for calculating the penalty is not known, and once the penalty comes out, it's take it or leave it. Mr. Knapp asked if any document exists that describes how the agency calculates the penalty. Ms. Foss said that the regulated party is not invited to forum, but that during the informal process the agency spells out how it calculated the penalty. The MPCA uses a penalty matrix and walks through the method with the parties, if they have questions.
- Senator Stevens said that another advantage of the APO is that it can be forgivable, nonforgivable, or a combination. If it is a first offense, the penalty is usually forgivable; if the party takes corrective action in 30 days, the penalty will be forgiven. It's not a perfect system, but it's an enhancement to enforcement (not an alternative to rulemaking). Ms. Foss said that Senator Stevens had made a good point. The MPCA typically reserves a nonforgivable penalty for serious or repeat violations.

Testimony from the Department of Revenue (DOR):

Linda Geier, an attorney for DOR, gave a presentation on revenue notices as an alternative to rulemaking, and distributed two handouts: an informational sheet on revenue notices and a highlighted copy of the revenue notice statute (MS270.0604). Highlights of the presentation are listed below:

- DOR started publishing revenue notices in 1991, as a result of the taxpayer bill of rights. The Society of CPAs and the Minnesota Bar Association had gone to the Legislature and wanted something similar to IRS revenue rulings. At the direction of the Legislature, the DOR studied the issue.
- The Legislature wanted the DOR to use broad-based pronouncements, and they wanted the DOR to be bound by these statements. People were getting different answers to questions depending on whom they called. They wanted quick answers, and they wanted to be able to rely on the statement made.
- The DOR then came up with the revenue notice. A revenue notice is a statement of policy that provides an interpretation of existing law. The legal effect of the revenue notice is that it is binding on the DOR but not on the taxpayer. The DOR has generally found that the revenue notices are followed. They have no precedential value, and do not have the force and effect of law. A person can go to the tax court and contest a revenue notice.

Discussion Following Testimony from the DOR:

- Representative Seifert asked if a judge found that the revenue notice was not the judge's interpretation, would another revenue notice be sent out? Ms. Geier said that the revenue notice would immediately become null. The DOR usually revokes it, and publishes notice in the State Register.
- Representative Seifert commented that other agencies could use this method. This could remove inconsistencies in enforcement, and result in consistency across the state. It would be very helpful. Why was it just the DOR? Ms. Geier said that the DOR has an exception from the Administrative Procedure Act for revenue notices. When the DOR requested an exception, that was a pretty serious request, and the Legislature looked at it very carefully before granting that exception. Practitioners came forward and said that they needed information more quickly; rules would take too much time.
- Ms. Geier said that the DOR averages 25 to 30 revenue notices per year. The DOR is happy with this process. Senator Stevens asked what the public response is. Ms. Geier said that the feedback has been very positive. They have had revenue notices for a number of years. There are people on a mailing list who receive a revenue notice as soon as it is published. The revenue notices are also on the DOR web site.
- Mr. Orren stated that revenue notices were not allowed in the past because the Legislature was very careful about extending flexibility to agencies. Mr. Orren said he thinks the Government Operations committees should hold hearings on this method to determine whether it would be reasonable to extend this authority to other agencies and what restrictions should apply. Mr. Orren asked if there was any federal law on this subject. Mr. Knapp said that he didn't know.
- Representative Seifert suggested that the task force consider including revenue notices as part of the groups' recommendations.
- Senator Stevens said that the group should consider something like an interpretive policy notice that would be specific to certain rules. It could be used with more controversial, substantial rule changes, along with some sort of notification of those rule changes. If we do something in this area, we should include notification of ranking minority members (see subdivision 4 on issuance and notice to legislators).

- Ms Geier said that the handout of the statute is section 279.0604. The highlighted portion was added in 1995. The DOR's experience is that staff of the committees look at it and might have comments; it's been very helpful, and has allowed the DOR to fix the bugs in the revenue notice before it is published.

Testimony from the Department of Agriculture : Carol Milligan, the Department of Agriculture rules coordinator, and Jerry Spetzman, also from the Department of Agriculture, testified about Best Management Practices (BMPs). Ms. Milligan said that BMPs provide technical assistance in the area of chemical use, which can be very confusing. The agency develops information to give to farmers on what the agency thinks is the best use of chemicals. Mr. Spetzman said that BMPs are by definition voluntary. If the agency wants one to be mandatory, the agency needs to make it into a rule.

Discussion Following Testimony from the Department of Agriculture:

- Mr. Orren said that the Department of Agriculture gets a huge percent of compliance (over 90%) with BMPs. The use of BMPs is not something that would work if the agency is dealing with vulnerable populations and needs to protect everyone, but BMPs are wonderful where 95 percent compliance is good enough.
- Senator Stevens said that he wants an executive summary of how to do BMPs. The agency probably gets good compliance because it involves people up front. Representative Seifert asked Ms. Milligan for a brief summary before the next meeting.
- Senator Stevens said that he has small booklet with two documents, the Declaration of Independence and the United States Constitution. For 150 years we operated on common sense and common law. As we add more and more language to our statutes and more rules, we limit the ability of regulators to make decisions. When it's a hard and fast rule, regulators have no authority to ignore rules. Senator Stevens used the example of the Department of Human Services which uses descriptive guidelines on the regulation of day care. These guidelines explain the rules in plain language. We need to get people out of the mode that you have to have a hard and fast rule in a book to achieve compliance. Representative Seifert agreed.

Determine Assignments for Next Meeting; Schedule Next Meeting

- Representative Seifert stated that, at the next meeting, the task force will hear any last public input and the committee will assemble recommendations. A copy must be printed and voted on by December 15th.
- Ms. Offerdahl said that it would be helpful if we could get the recommendations posted on the website ASAP. Ms. Buske said that she could put them on the website. Mr. Orren could send or fax his memos to Ms. Buske.
- Representative Seifert said that the agenda for the next meeting would repeat items one through three on the current agenda, and then go right to the recommendations for the task force report. There will be no approval of the final report until the January meeting. However, Representative Seifert asked if members would be comfortable approving pieces, item by item? The members concurred.

- Representative Seifert asked about holding the next meeting on December 14th. Senator Stevens said that there is a 95% chance that he won't be at that meeting, but he is comfortable with the task force going ahead. The date was acceptable to the other members. Representative Seifert said that we will plan to hold meeting at 9:30 a.m. on December 14th, in room 400N of the State Office Building. At least five members are needed for a quorum. If at least five members cannot attend, we'll reschedule. Members should get their suggestions to Ms. Buske by one or two days before the meeting.

Review Stakeholder Input

Presentation by George A. Beck, Administrative Law Judge

Judge Beck distributed two handouts and gave a presentation regarding rulemaking notice. The two handouts were a letter from Judge Beck to Representative Pelowski dated November 15, 2000, and a copy of a bill introduced in 1999 with proposed statutory amendments to chapter 14. Highlights of Judge Beck's presentation are listed below:

- The Office of Administrative Hearings (OAH) is responsible for the legal review of rules and for conducting controversial rulemaking hearings.
- OAH has four suggestions regarding notice: (1) requiring agencies to publish rules and all supporting materials on the web; (2) requiring an agency to explain in the Statement of Need and Reasonableness if an advisory committee was not appointed; (3) authorizing the Governor's office to maintain a state rulemaking docket, which the OAH would like to see published in community newspapers; and (4) requiring agencies to include on their web site and in their notices of intent to adopt rules information about how to be put on the agency rulemaking list.
- OAH's comments are aimed at making more affected people aware that a rulemaking proceeding is pending.

Discussion Following Presentation by Judge Beck

- Senator Betzold said that Senator Metzen was reluctant to proceed with the bill until he got the green light that people were on board with it. Judge Beck said that the only feedback they had received was from Mr. Orren, and his comments could be incorporated in the bill. Mr. Orren agreed.
- Mr. Knapp commented that the committee has heard some discussion of agencies adopting policies by non-rulemaking processes. Mr. Knapp asked Judge Beck if he is aware of any process that involves administrative law judges (ALJs) where an agency adopts a policy that has the effect of a rule, but does so through non-rulemaking processes. Is there a role for ALJs to determine if the agency has authority, without rulemaking? Judge Beck said that there could be a role for ALJs in a contested case hearing. There is a process in California where someone can challenge a policy and obtain an ALJ ruling before the policy becomes a rule. Senator Stevens said that we should look at and research options other than a full contested case hearing, by either party requesting an opinion from an ALJ with some sort of expedited hearing. Mr. Knapp said that, for the next meeting, he will look at California law and see if it is something we can adopt in Minnesota.

- Senator Stevens commented that every county in Minnesota must have a legal newspaper for publication of legal notices of the county. Besides requiring a listing in the State Register, agencies could be required to publish a brief readers digest description in county legal newspapers (87 county papers). Judge Beck said that this was the ideal solution, but that, even if this publication was not mandated, a lot of publications would pick up the information if it was easily available.
- Representative Seifert asked Judge Beck if there were any rules he thinks should not have gone forward. Judge Beck said that the OAH review is a legal review; the OAH does not get into the policymaking area. If there is a strong policy objection to a rule, that's a place for the legislature to step in. There should be a process for the policy review of a rule.
- Representative Seifert said that we don't have that in place. The Governor's veto helps. What mechanism is there to stop a bad rule? Ms. Deboer asked if Representative Seifert was looking for something more immediate than the Legislature's authority to repeal any rule or change the law. Representative Seifert said that the problem is that you're empowering the minority to stop things. For example, with the Profile of Learning, a certain senator refused to say there was a problem with the rule, and as a minority of one blocked anything that happened. How can we get a group to say there's a problem with a rule? How can we stop it? Mr. Orren says that he doesn't have an answer. There is a Governor's veto. If there was lots of legislative concern with a Department of Health rule, we would almost always withdraw it. Also, if the Legislature knows that it's an area like the Profile of Learning, the Legislature could say to the agency, "you draft the rule and you bring it back to the Legislature for final approval." Representative Seifert said that we might put that in the task force report; he was going to suggest it for the feedlot rule.
- Senator Stevens said that in Colorado a rule would sunset after a year unless the legislature took action to extend it. Rules would become law for one year, and would be extended by legislative authority. It is a gray area whether this is constitutional or not. Judge Beck said that it can be structured in a constitutional manner; it depends on what authority is at the end of the legislative review process. His experience is that agencies are very cooperative. The Legislature doesn't need a strong veto authority. Representative Seifert said that he will visit with Mr. Sheperd and Mr. McCormick and put something together. We need a rarely used but very needed mechanism to stop the rules that cause problems.
- Senator Stevens asked Judge Beck for his opinion of the Governor's veto authority. Judge Beck said that he has a personal opinion, but not an agency opinion. Judge Beck said the problem is that it's creating a delay in the rulemaking process. It's a problem having that review prior to rule adoption. We're trying to expedite rulemaking, but the Governor's review is adding delay. The Governor's control over the agency head is sufficient and should be relied on. Having the Governor's review for every rule is overkill. Senator Stevens said that Judge Beck's personal opinion is then to let the Governor's veto authority sunset.

Presentation by Patti Cullen, Vice President, Care Providers of Minnesota

Ms. Cullen distributed a memo and made a presentation. Highlights of the presentation are listed below:

- The last page of the memo she distributed concerns things that are not rules but are implemented anyway. Her industry is subject to a variety of mechanisms that institute changes without rules, such as bulletins. Most of these changes are outside interpretive changes. She cautions us to add something on the entities being impacted, especially changes that cost providers money. For example, MDH very appropriately uses bulletins. Usually it's Care Providers asking for a bulletin, such as on the use of haldol and how they're going to be surveyed. On the other hand, the agency that pays Care Providers will add a change and suggest that it is part of their per diem, so the agency won't pay for it. There is no mechanism for Care Providers to address this problem.

Discussion Following Presentation by Ms. Cullen

- Representative Seifert asked Ms. Cullen, for the next meeting, to give concrete examples of interpretations that cost money or caused problems where Care Providers was not jeopardizing life or health.
- Senator Stevens said that Care Provider's only alternative now (to address a problem with an interpretation) is to go through a contested case hearing. Senator Stevens asked Ms. Cullen if she would agree that we should have a different option rather than going right to a contested case hearing. Ms. Cullen said she had had success in the past in going to the LCRAR and having them stop it. She agrees that going to a contested case process would not be done, and an alternative would be very much appreciated. The ALJ has been good about identifying issues, but then the agency says, we'll do it anyway. Our process now is to write to the commissioner and copy legislators who we hope will also write to the commissioner. If there will be a financial impact, maybe a process should be added so that there would be a separate notice, maybe to the chairs of the appropriate funding committees.
- Mr. Knapp said that agencies must justify state rules that exceed federal rule. He is concerned about the wholesale repeal of rules, but wondered what Ms. Cullen thought about requiring the agency to identify rules that exceed federal requirements. Ms. Cullen thought that was a great idea. She would add to that rules and their interpretations.

Public Testimony

Testimony by Wallace Rogers, Senior Associate, Jefferson Center

Mr. Rogers distributed a handout and gave testimony. Highlights of his testimony are listed below:

- Mr. Rogers has in the past been a mayor and county administrator, and therefore on the front line regarding rules to enforce at the local government level. He suggests a process that involves ordinary rank and file citizens who are affected, and involves them at the front end of the rulemaking process. He suggests using a Feedback Panel. This takes 8 to 12 people who look like a snapshot of the group of citizens who might be affected by the rule. This group has an opportunity to affect the rule.
- Mr. Rogers believes a procedure like giving testimony to our task force is more comfortable than sitting as a mayor and reacting to a rule. Because nothing in writing

has come down from the task force, Mr. Rogers feels that his comments will be taken into account.

- A Feedback Panel might also address some of the other problems, such as a bad rule. Maybe if there was a Feedback Panel, a bad rule wouldn't get to the point where it's even written. If people are not involved until the back end, they must react in a more negative way to try and stop the process. The idea is to get people to talk about it at beginning and get their input before something is written.
- The memo Mr. Rogers distributed is what they've forwarded to the Governor's office. It addresses the public perception that something is missing in the process. A Feedback Panel does not prolong the process. The panel will meet for 1 or 2 days. The first half of the meeting would be to bring them up to speed on what's behind proposed rule from the points of view of the special interest groups and the agency. During the second half of the meeting, they would deliberate and come up with some suggestions and reaction. It is a very nonpartisan process.

Discussion Following Mr. Rogers' Testimony

- Senator Stevens said that some of the agencies have done similar things, but he doesn't know what they are doing in the area of rulemaking.
- Mr. Orren said that this idea fits within concept that agencies are trying to give early notice. With respect to whether the agencies first prepares a draft or not, we need to approach this by training for the agencies. Sometimes it wouldn't work to not have a draft because, if the agency is amending a rule, they already have an idea of how to amend it. Not giving people that draft would be dishonest. But if we don't have any agency proposal of how to solve the problem, we could use this Feedback Panel.
- Senator Stevens said that where the legislature mandates that the agency shall draft rules to implement a statute, it would be very beneficial to obtain input before drafting rules. Representative Seifert said that he can also see the benefits. This is a concept that we should have been using for a long time.

Testimony by Chuck Williams, Vice President for Internal and External Affairs, EVTAC Mining

Mr. Williams is also a former Commissioner of the PCA. Highlights of his testimony are listed below:

- The rulemaking system has become fairly complicated. Mr. Williams is concerned as he watches agencies struggle with issues. For example, the agency is finally moving to the rulemaking process with respect to the mercury policy draft.
- There isn't enough funding for this rulemaking process to be carried out. The Legislature has to think about how to give incentives to agencies.
- Agencies tell Mr. Williams that he has to decide if he wants his permits issued or if he wants rulemaking. The agency has a big backlog in issuing permits.
- The task force needs to talk about increasing the number of signatures that can trigger a hearing. Twenty-five signatures is a pretty low bar to step over. The task force should consider raising the bar; the world is so complicated and it's so costly to hold a hearing.

Discussion Following Mr. Williams' Testimony

- Senator Stevens said that, in our task force report, we need to make clear that policy statements or interpretations are not binding on the regulated industry until there is a formal rulemaking process. Also, some agencies are not doing a good job of prioritizing their mission. The head of the PCA and PCA staff were at global warming conference in the Netherlands We have to have priorities; we have to issue permits and protect the environment in Minnesota before we go around and try to cure all the ills of the world. Sometimes these policy statements are ways that the bureaucracy holds its finger down on the regulated parties without having the blessing of the legislators.

Adjournment

The meeting adjourned at approximately 12:05 p.m.

Handouts:

- 1) Meeting agenda
- 2) Draft minutes from the 11/10/2000 RRTF meeting.
- 3) “Legislative Oversight of Agency Rules - Follow-Up Questions to 11/03/00 Meeting,” memo dated 11/28/00 by Tammy Shefelbine, Senate Counsel & Research Law Clerk.
- 4) “Suggestions for Task Force Recommendations on Legislative Review of State Agency Rules and Related Laws and Programs,” memo dated 11/29/00 by Dave Orren, RRTF Member and Rules Coordinator for MDH.
- 5) “Suggestion for Task Force Recommendations on Rulemaking Notice to the Legislature,” memo dated 11/30/00 by Dave Orren.
- 6) “Administrative Penalty Orders: Compliance is the Goal,” Fact Sheet dated June 1996 by MPCA.
- 7) Minnesota Statutes, Section 116.072 (2000) (entitled “Administrative penalties”).
- 8) “Information Sheet - Revenue Notices,” dated 12/1/00.
- 9) Minnesota Statutes, sections 270.0603 through 270.0604 (1998) (section 270.0604 is entitled “Revenue Notices”).
- 10) Letter dated 11/15/00 from George A. Beck, Administrative Law Judge, to Rep. Gene Pelowski, Jr., Chair, RRTF.
- 11) S.F. No. 994, as introduced: 81st Legislative Session (1999-2000).
- 12) “Comments on rules review process,” memo dated 11/28/00 by Patti Cullen, Vice President, Care Providers of Minnesota.
- 13) “Subject: Concept Paper – Proposal to Expand Citizen Participation Opportunities in the State of Minnesota’s Administrative Rule Making Process,” by the Jefferson Center.

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