



Unpromulgated Rulemaking

The risk of going “off script” from your rule

Panelists

Administrative Law Judge Suzanne Todnem

Assistant Attorney General R.J. Detrick

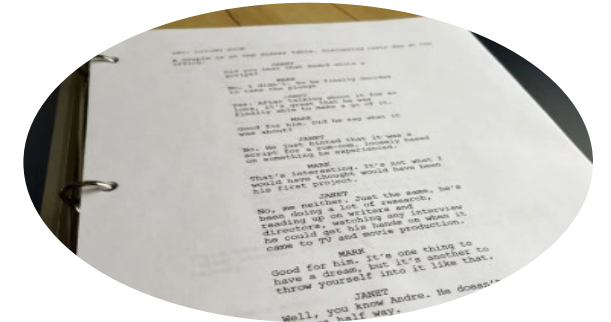
Court of Administrative Hearings Associate
General Counsel Sarah Mezera

Host

- Ann E. Cohen, Adjunct Prof. of
Administrative Law



Our script...

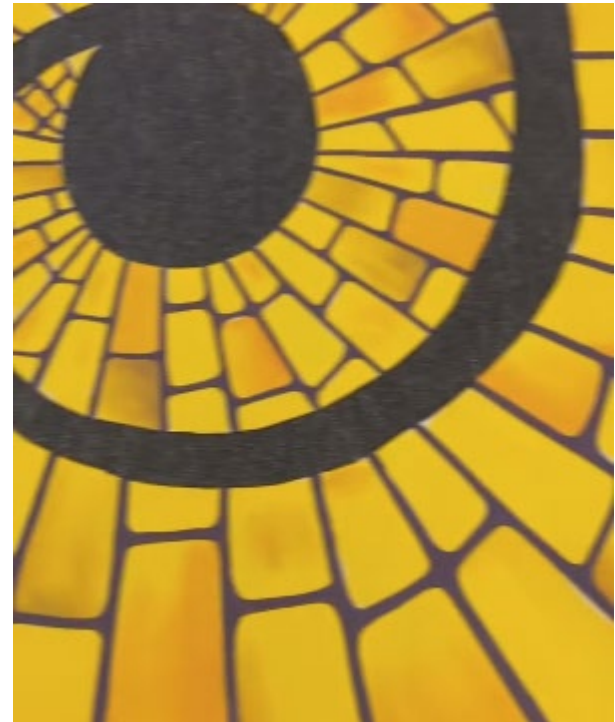


- Part 1: The basics
- Part 2: Unpromulgated rule challenges at CAH
- Part 3: Unpromulgated rule challenges in the courts
- Part 4: Questions for the panel from the audience
- Part 5: Lightning round! Let's all challenge ourselves to apply what we have learned....

Part 1: The Basics

The Basics

- Where does this issue come from?
- What's the problem?
- Who are the players?



What is a Rule?

Minn. Stat. § 14.02, subd. 4:

‘Rule’ means every agency statement of **general applicability** and **future effect**, including amendments, suspensions, and repeals of rules, adopted to **implement or make specific** the law enforced or administered by that **agency** or to govern its organization or procedure.

What is Not a Rule

Minn. Stat. sec. 14.03, subd. 3(a)(1):

rules concerning only the internal management of the agency or other agencies that do not directly affect the rights of or procedures available to the public....

[(2)-(4)] application forms, curriculum, data sharing policies.

Minn. Stat. sec. 14.03, subd. 3(b):

[exceptions particular to **various agencies**, including certain human services “interpretive guidelines.”]

Rules and Statutes: Agency Deference

- The state courts recognize, as exceptions to the formal rulemaking requirement, long-standing interpretations of ambiguous statutes and interpretations that follow from the “plain meaning” of clearly-worded statutes. *In re PERA Determinations Affecting Retired and Active Employees*, 820 N.W.2d 563, 570 (Minn. Ct. App. 2012).
- Rules are interpreted in the same manner as statutes. *In re Reissuance of an NPDES/SDS Permit to U.S. Steel Corp.*, 954 N.W.2d 572, 576 (Minn. 2021).
- If a rule is ambiguous, courts will defer to the agency’s reasonable interpretation of the rule. *St. Otto’s Home v. Minn. Dep’t of Human Servs.*, 437 N.W.2d 35, 40 (Minn. 1989).

What is an Unadopted or Unpromulgated Rule?

1. Something that meets the definition of a “rule” but that has not gone through the MAPA rulemaking process; and,
2. Something that is not subject to any of the statutory or judicial exemptions from rulemaking

What's the problem with an unadopted rule?

- If an agency tries to enforce it (rely on it) as a basis for an action, a court may reverse the agency's action because it didn't follow mandated MAPA rulemaking...
- or (even pre-enforcement) the agency's "unadopted rule" may be challenged at the Court of Administrative Hearings...
- and if the agency loses it may be forced to pay for the CAH's costs...



Part 2: Unpromulgated rule challenges at CAH



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HEARINGS

Unadopted Rule Challenge Process

14.381 UNADOPTED RULES. Subdivision 1. Petition.

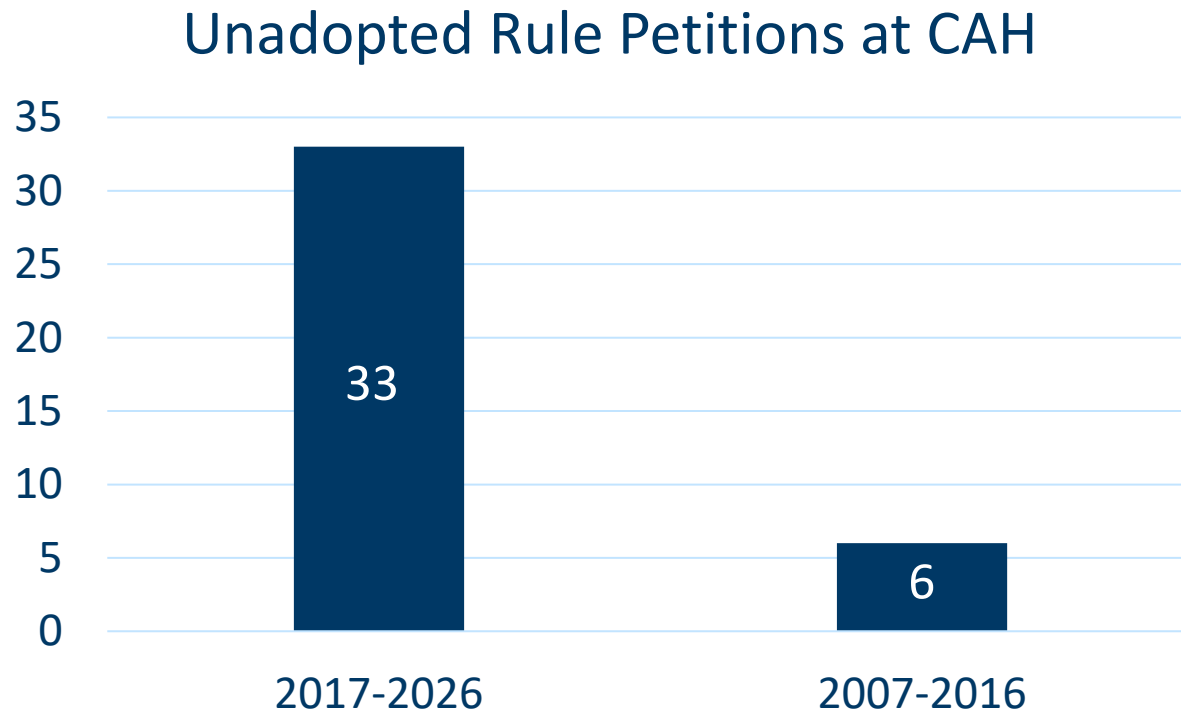
(a) A person may **petition** the [Court] of Administrative Hearings seeking an **order of an administrative law judge** determining that an **agency** is **enforcing** or attempting to enforce a **policy, guideline, bulletin, criterion, manual standard, or similar pronouncement as though it were a duly adopted rule...**

(b) An agency determination is **not** considered an unadopted rule when the agency enforces a law or rule **by applying the law or rule to specific facts on a case-by-case basis.**

Agency

Agency is defined as “any state officer, board, commission, bureau, division, department, or tribunal, other than a judicial branch court and the Tax Court, having a **statewide jurisdiction** and **authorized by law to make rules** or to adjudicate contested cases. "Agency" also means the Capitol Area Architectural and Planning Board.”

Unadopted Rule Petitions at CAH



Average cases per year:

- 2017 – 2026: 3.3 cases per year
- 2007-2016: 0.6 cases per year

Process at CAH

Minn. Stat. sec. 14:381:

- The petition must be supported by **affidavit** and must be **served** upon the agency.
- The agency shall respond in writing to the petition within **ten working** days.
- The administrative law judge may order **oral argument** on the petition, but only if necessary to a decision.
- **Subd. 3: Costs.** The agency is liable for all [CAH] costs associated with review of the petition. If the administrative law judge rules in favor of the agency, the agency may recover all or a portion of the costs from the petitioner... [Agency can ask for a bond “if it has reason to believe it will prevail”]

Part 3: Unpromulgated rule challenges in the courts



Appellate Court Review Process

Minn. Stat. sec. 14.381, subd. 2. Order.

The order of the administrative law judge **must direct the agency to cease enforcement of the unadopted rule** that is the subject of the petition.

The order must be **served** upon the parties and the **Legislative Coordinating Commission** by first class mail and must be **published** by the agency in the State Register.

The decision of the administrative law judge may be appealed under sections 14.44 and 14.45.

Minn. Stat. Sec. 14.44

14.44 DETERMINATION OF VALIDITY OF RULE.

The validity of any rule may be determined upon the **petition for a declaratory judgment** thereon.... when it appears that the rule, or its threatened application, interferes with or impairs, or **threatens** to interfere with or impair the legal rights or privileges of the petitioner.

The agency shall be made a party to the proceeding.....

Minn. Stat. Sec. 14.45

14.45 RULE DECLARED INVALID.

In proceedings under section 14.44, the court shall declare the rule invalid if it finds that it violates **constitutional provisions or exceeds the statutory authority of the agency or was adopted without compliance with statutory rulemaking procedures**. Any party to proceedings under section 14.44, including the agency, may appeal an adverse decision of the court of appeals to the supreme court as in other civil cases.



Part 4: Questions for the panel?

Part 5: Lightning round!

A wooden gavel is positioned diagonally, resting its head on a circular wooden block. A bright, jagged lightning bolt strikes the top of the gavel head, with smaller sparks or secondary bolts emanating from the point of impact. The entire scene is set against a solid dark blue background.

You be the Judge!

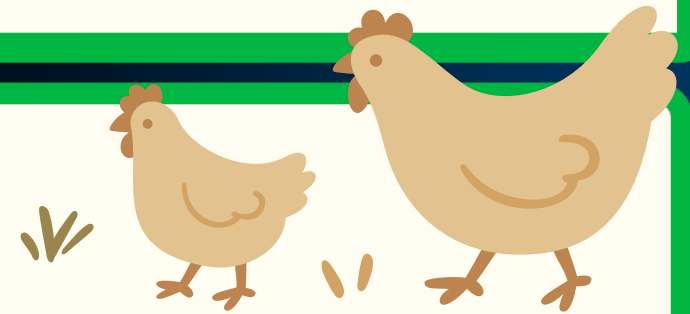
Scan to play:



Lightning Round 1:

A state agency adopts a rule that requires chicken housing to be located on a property's "backyard" but does not define "backyard." A lake property owner constructs a chicken coop on the property's street-facing side because the owner considers the lake to be the "front yard." The agency inspector cites the regulated party because the agency interprets a property's front yard to be street-facing and the "backyard" is the opposite side. The citation recipient files a petition at CAH arguing the agency is enforcing an unpromulgated rule.

You advise the agency that it will:



- (a) Win, because an agency is entitled to interpret a rule as applied to specific facts if the interpretation is longstanding.
- (b) Lose, because if the rule is vague, the agency interpretation constitutes an unadopted rule.

Submit

Lightning Round 2:

A state agency has adopted a rule that prohibits regulated parties from allowing vegetation on the regulated facility if it would provide “harborage for rodents.” The agency publishes a “guidance document” that states that vegetation violates this rule if it exceeds 8 inches in height. An agency inspector issues a citation for excessive vegetation and notes in the inspection report that the vegetation exceeded 8 inches. The citation recipient files a petition at CAH arguing that the agency is enforcing an unpromulgated rule.

You advise the agency that it will:



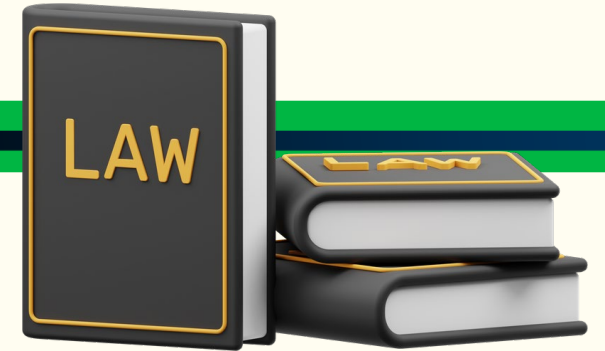
(a) Win, because although the guidance was mentioned, the agency was enforcing a properly adopted rule.

(b) Lose, because the 8-inch criteria is not in rule and was key to enforcement based on the record.

Submit

Lightning Round 3:

A state agency wants add conditions to permits that require permittees to comply with a state statute that is applicable to the permittees. The agency sends a letter to all the affected permittees alerting them that it intends to amend their permits to add a provision requiring compliance with the statute. After receiving the letter, a permittee files a petition claiming the agency is enforcing an unpromulgated rule.



You advise the agency that it will:

- (a) Win, because the agency is enforcing an applicable statute through permits.
- (b) Lose, because the agency needed to adopt a rule if it wants to enforce the statute through permits.

Submit

Lightning Round 4:

A state agency sends a letter to a regulated party indicating that, based on its interpretation of a statute, it will not be taking any action against that party for certain actions. Several months later, the agency sends a letter to the regulated party that announces that the statute will have a different interpretation going forward. At no point during this time does the agency issue a letter of warning, notice of violation, cancel a license, or take any other action against the regulated party.

If the party brings a petition under Minn. Stat. § 14.381 claiming the agency is enforcing an unadopted rule, will it win?



(a) Yes, because the statute is ambiguous and there is no plain meaning and the agency actions threaten enforcement.

(b) No, because the agency has not yet attempted to enforce its interpretation of an ambiguous statute.

Submit

Your Canva profile name won't be shared



Thanks for playing!