



Administrative Rules in Wisconsin

OVERVIEW

The Wisconsin Constitution delegates to the legislative branch the power to make laws and assigns to the executive branch the power to enforce and execute laws. Although the legislature is highly capable of adopting public policies and setting the agenda for the state, it does not always have the administrative expertise or resources to implement public policies. Also, the implementation and enforcement of the laws may require consideration of details and the adoption of procedures that cannot be foreseen when legislation is enacted. For these reasons the legislature has delegated to the executive branch the power to *promulgate*—to make known and put into effect—administrative rules.

Administrative rules have the effect of law and, as stated in the Wisconsin Statutes, are “issued by an agency to implement, interpret, or make specific legislation enforced or administered by the agency or to govern the organization or procedure of the agency.” State agencies are granted rule-making power to actualize the legislature’s public policy decisions. The administrative rules are compiled in the Wisconsin Administrative Code in 18 volumes and over 70 chapters, covering hundreds of topics ranging from the regulation of funeral directors to unemployment insurance to taxation to falconry.

AGENCY RULE MAKING AND SEPARATION OF POWERS

A main concern with granting agencies rule-making authority is that the granting or exercise of that authority may violate the separation of powers between branches of government, which is unconstitutional. Article IV, section 1, of the Wisconsin Constitution grants the lawmaking powers of state government to the legislature, stating, “The legislative power shall be vested in a senate and assembly.” The Wisconsin Supreme Court has said that an agency “may not substitute its own policy for that of the legislature.” The supreme court’s test for a permissible, thus constitutional, delegation of legislative power to an agency requires (1) that the legislative purpose of the statute be ascertainable; and (2) procedural safeguards to ensure that the agency complies with that purpose.

Agencies are part of the executive branch, yet they are accorded more latitude than the judiciary and the governor to exercise legislative powers because, as a creation of the legislature, they are subject to greater legislative control. An agency’s existence, plus its powers, duties, and scope of authority, are all subject to monitoring, change, or even elimination by the legisla-

ture. Moreover, the legislature can suspend administrative rules.

In *Martinez v. DILHR* (1992), the supreme court was faced with a challenge to section 227.26, Wis. Stats., which grants the Joint Committee for Review of Administrative Rules (JCRAR) authority to suspend administrative rules. The Department of Industry, Labor and Human Relations (DILHR) had implemented a rule that allowed a sub-minimum wage for temporary

The legislature’s delegation of power to agencies “to make rules and effectively administer a given policy is a necessary ingredient in an efficiently functioning government.”

—Wisconsin Supreme Court, *Gilbert v. Medical Examining Board* (1984)

workers, and JCRAR suspended the rule because it did not comply with legislative intent and caused undue hardship for migrant workers. DILHR told employers they could ignore JCRAR’s rule suspension and that it would not take action against employers paying the sub-minimum wage. A group of migrant workers sued DILHR. On appeal, the supreme court rejected DILHR’s claim and found that the suspension of administrative rules under section 227.26, Wis. Stats., was a proper exercise of legislative power and was constitutional.

AUTHORITY FOR CREATING ADMINISTRATIVE RULES

Several sources of authority in the Wisconsin Statutes permit agencies to create administrative rules. First, agencies may, under their own initiative, adopt rules to perform agency functions. If the agency has an established general policy or an interpretation of a statute that it employs in administering or enforcing the statute, that policy or interpretation must be set forth in an administrative rule. If an agency has discretion in deciding cases and it follows rulings in those cases as agency policy, it may do so in an administrative rule.

Second, certain statutes give specific authority to an agency to make rules to administer those statutes. For example, section 565.02 (4), Wis. Stats., states that the Wisconsin Department of Revenue may promulgate rules to operate, promote, and regulate the state lottery.

Third, a municipality or a group outside of state government—such as a farm, labor, business, or professional association, or any five or more persons having an interest in a rule—may petition to create administrative rules. A petition must contain a description of the proposed rule, a statement about why the petitioners are requesting this rule, and a statement about the agency's authority to make the proposed rule.

Finally, when necessary—that is, when life or property is in imminent peril—agencies may adopt temporary rules, called emergency rules, for a period of up to 150 days. For example, the statutes authorize the Department of Agriculture, Trade and Consumer Protection to promulgate emer-

gency rules for moving and selling cattle during a brucellosis outbreak.

PROCEDURE FOR CREATING ADMINISTRATIVE RULES

Upon drafting a new administrative rule, the agency submits it, along with an analysis of the rule's economic impact, to the Wisconsin Legislative Council. The Legislative Council reviews the proposed rule to ensure that there is adequate statutory authority, that the rule complies with stylistic and form conventions, and that it does not conflict with existing rules or with federal law. Following review by the Legislative Council, the agency usually holds a public hearing to solicit feedback on the rule.

After the public hearing, committees in the senate and the assembly review the final version of the agency's administrative rule. If the reviewing committee of either house objects to the rule, it refers the rule to JCRAR. If JCRAR disagrees with the reviewing committee's objection, the rule is approved; alternatively, JCRAR can request that the agency modify the rule. If JCRAR agrees with the reviewing committee's objection, it will introduce a bill in both the senate and assembly objecting to the rule and if either bill is enacted, the agency may not promulgate the rule. If there are complaints about an existing rule, JCRAR may hold a hearing on the rule; if evidence at the hearing supports the complaints, JCRAR may temporarily suspend the rule and then introduce a bill in both houses seeking permanent suspension.

ADMINISTRATIVE ACTIONS AND JUDICIAL REVIEW

Persons or entities believing that an administrative rule will interfere

with their legal rights may bring a lawsuit to declare the rule invalid. A person may challenge a rule if the state starts a legal proceeding to enforce the rule. Further, a party may obtain a contested case hearing with an agency if the party shows it has a substantial interest that will be injured by agency rule enforcement action or inaction. If the petitioning party disputes the hearing examiner's decision, that party may petition for judicial review in circuit court. The circuit court will render a decision based on the evidence introduced in the administrative hearing and, at its discretion, consider new evidence.

SUMMARY

The legislature's authority to delegate power to executive agencies to promulgate administrative rules is an essential part of Wisconsin state government. Agencies have the expertise to develop rules and procedures in specialized areas of government. However, to enable government to function effectively, the legislature can monitor and dictate the scope of the agencies' powers. Wisconsin's system of checks and balances allows legislative oversight and judicial review of administrative rules to ensure that agencies comply with the legislature's intent in delegating power to a particular agency.

Governing Wisconsin: "Administrative Rules"

Study Questions

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| 1 | When can the legislature suspend an agency's rules? | |
| 2 | What are the procedural safeguards that prevent rule making from becoming tyrannical? | |
| 3 | How does the judicial branch get involved in disputes about rule making? | |
| 4 | What are the four ways by which the rule-making process can begin? | |
| 5 | How does rule making by executive branch agencies improve state government? | |
| 6 | Does an executive branch agency violate the separation of powers doctrine when the agency makes rules? Why or why not? | |

Governing Wisconsin: "Administrative Rules"

Study Questions in the Cognitive Domain

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| 1 | When can the legislature suspend an agency's rules? | The legislature can suspend a rule before it becomes effective, if a legislative committee objects to the proposed rule. | Cognition |
| 2 | What are the procedural safeguards that prevent rule making from becoming tyrannical? | An agency must submit a proposed rule to the Legislative Council, and to committees of the legislature, before the rule becomes effective. Courts can stop application of the rule. | Comprehension |
| 3 | How does the judicial branch get involved in disputes about rule making? | The judicial branch gets involved either when an agency sues to enforce one of its rules or when a citizen sues to object to a rule. | Application |
| 4 | What are the four ways by which the rule-making process can begin? | (1) State agencies may issue rules that spell out how the agency will perform its functions. (2) A statute may authorize an agency to make rules to administer the statute. (3) Citizens may petition an agency to make a rule. (4) Agencies may issue emergency rules. | Analysis |
| 5 | How does rule making by executive branch agencies improve state government? | Executive branch agencies may have more expertise in the detailed or technical aspects of public policy making and the ability to do more thorough fact-finding, resulting in rules that will better carry out the legislature's public policy. | Synthesis |
| 6 | Does an executive branch agency violate the separation of powers doctrine when the agency makes rules? Why or why not? | Agency rule making might violate the separation of powers doctrine, but the supreme court has found that rule making is acceptable to make government more effective; both the legislature and the courts have the power to suspend a rule if it unduly limits legal rights. | Evaluation |