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ADMINISTRATIVE RULE MAKING IN WYOMING

This article will be directed towards the statutory rule making powers conferred on Wyoming administrative agencies and their various ramifications such as: notice, participation by interested parties, publication, deferred effectiveness, and filing practices. The comparable provisions, dealing with the above subject included in the Federal Administrative Procedure Act¹ (hereinafter referred to as the APA) and the Model State Administrative Procedure Act² (hereinafter referred to as the Model Act) will also be discussed.

Based on a questionnaire recently sent to Wyoming Administrative Agencies (approximately twenty-seven answering the questionnaire) the following practices were disclosed:

I. AGENCIES EXERCISING RULE MAKING POWER.

a. Five do not exercise rule making powers³ and of these the Liquor Commission has rule making power conferred by Wyo. Stat. § 12-39 (1953), but has not exercised it.

b. Twenty two exercise rule making powers⁴ although one of these agencies, the Wyoming State Park Commission, indicated that although they exercised their rule making authority (granted by Wyo. Stat. § 36-135 (1953)), they have no way of enforcing these rules.

II. AGENCIES GIVING NOTICE OF PROPOSED RULE MAKING.

a. Of the twenty two agencies exercising rule making authority,

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1. 60 Stat. 237 (1946), 5 U.S.C. §§ 1001-11 (1958).
 2. Handbook of the National Conference of Commissioners of Uniform State Laws 329-36 (1944).
 3. Aeronautics Commission, Wyo. Stat. §§ 33-14 to 33-16 (1957); Coal Mining Examining Board of Wyoming, Wyo. Stat. §§ 30-119 to 30-129 (1957); Wyoming Liquor Commission, Wyo. Stat. §§ 12-38 to 12-46 (1957); Board of Dental Examiners, Wyo. Stat. §§ 33-195 to 33-213 (1957); Blue-Sky Commissioner, Wyo. Stat. §§ 17-102 to 17-117 (1957).
 4. Real Estate Board, Wyo. Stat. § 33-345 (1957).
Board of Chiropractice Examiners, Wyo. Stat. § 33-137 (1957).
Board of Agriculture, Wyo. Stat. § 11-10 (1957).
Soil Conservation, Wyo. Stat. § 11-238 (1957).
Water Conservancy Districts, Board of Directors, Wyo. Stat. §§ 81-91 (k) and 41-126 (1957).
State Parks Commission, Wyo. Stat. § 36-134 (1957).
Board of Cosmetology, Wyo. Stat. §§ 33-173 and 33-176 (1957).
Game and Fish Commission, Wyo. Stat. § 23-15 (1957).
Predatory Animal Board, Wyo. Stat. § 11-104 (1957).
Employment Security Commission, Wyo. Stat. § 27-33 (1957).
State Military Board, Wyo. Stat. § 19-39 (1957).
Board of Pharmacy, Wyo. Stat. § 33-307 (1957).
State Board of Nursing, Wyo. Stat. § 33-281 (1957).
Livestock and Sanitary Board, Wyo. Stat. § 22-263 (1957).
State Board of Veterinary Examiners, Wyo. Stat. § 33-372 (1957).
Board of Architects, Wyo. Stat. § 33-27 (1957).
Board of Registration in Chiropody, Wyo. Stat. § 33-123 (1957).
Retirement Board, Wyo. Stat. § 9-301 (1957).
Collection Agency Board, Wyo. Stat. § 33-156 (1957).
Oil and Gas Commission, Wyo. Stat. § 30-219 (1957).
Public Service Commission, Wyo. Stat. § 37-30 (1957).
State Board of Control, Wyo. Stat. § 41-58 (1957).

six give notice of proposed rule making,⁵ although of these six, the Employment Security Commission and the Livestock and Sanitary Board indicated that they gave limited notice, and the Board of Cosmetology indicated that they gave informal notice.

b. Sixteen Wyoming Agencies indicated that they gave no general notice of proposed rule making.⁶

III. AGENCIES ALLOWING PARTICIPATION IN THE RULE MAKING PROCESS.

a. Twelve agencies indicated that they allowed participation in the rule making process by interested parties⁷ although nine of these agencies indicated that they allowed participation only to a limited class.⁸

b. Ten agencies indicated that they allowed no participation by interested persons in the rule making process.⁹

5. Board of Chiropractic Examiners.
Board of Agriculture
Board of Cosmetology.
Employment Security Commission.
Livestock and Sanitary Board.
Oil and Gas Commission.
6. Real Estate Board.
Soil Conservation.
Water Conservancy Districts, Board of Directors.
State Parks Commission.
Game and Fish Commission.
Predatory Animal Board.
State Military Board.
Board of Pharmacy.
State Board of Nursing.
State Board of Veterinary Examiners.
Board of Architects.
Board of Registration in Chiropody.
Retirement Board.
Collection Agency Board.
Public Service Commission.
State Board of Control (Water Rights).
7. Real Estate Board.
Board of Chiropractic Examiners.
Board of Agriculture
Game and Fish Commission.
Preditory Animal Board.
Employment Security Commission.
State Military Board.
State Board of Nursing.
Livestock and Sanitary Board.
State Board of Veterinary Examiners.
Board of Registration in Chiropody.
Oil and Gas Commission.
8. Real Estate Board.
Game and Fish Commission.
Predatory Animal Board.
Employment Security Commission.
State Military Board.
State Board of Nursing.
Livestock and Sanitary Board.
State Board of Veterinary Examiners.
Board of Registration in Chiropody.
9. Soil Conservation.
Water Conservancy Districts, Board of Directors.
State Parks Commission.
Board of Cosmetology.
Board of Pharmacy.
Board of Architects.

IV. AGENCIES PROVIDING FOR PUBLICATION OF RULES
ADOPTED BY THEM.

a. Of the twenty two agencies exercising rule making powers, twenty provide in one manner or another (i.e., pamphlet, mimeograph, or single copies) for publication of the rules adopted by them.¹⁰ Most of these rules are made available upon request.

b. Two agencies indicated that they did not publish rules.¹¹

V. AGENCIES PROVIDING A GRACE PERIOD BEFORE THEIR
RULES BECOME EFFECTIVE.

a. Twelve agencies provide for a grace period¹² although six of these indicated that it depended on the type of rule passed as to whether there was a grace period.¹³

b. Ten agencies indicated that they did not provide for a grace period.¹⁴

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- Retirement Board. Collection Agency Board.
Public Service Commission.
State Board of Control (Water Rights).
10. Real Estate Board.
Board of Chiropractic Examiners.
Board of Agriculture
Soil Conservation.
Water Conservancy Districts, Board of Directors.
Board of Cosmetology.
Game and Fish Commission.
Predatory Animal Board.
Employment Security Commission.
State Military Board.
Board of Pharmacy.
State Board of Nursing.
Livestock and Sanitary Board.
State Board of Veterinary Examiners.
Board of Architects.
Retirement Board.
Collection Agency Board.
Oil and Gas Commission.
Public Service Commission.
State Board of Control (Water Rights).
11. State Parks Commission.
Board of Registration in Chiropody.
12. Board of Chiropractic Examiners.
Board of Agriculture
Game and Fish Commission. Predatory Animal Board.
State Military Board. Employment Security Commission.
State Board of Nursing.
Livestock and Sanitary Board.
Board of Registration in Chiropody.
Retirement Board.
Collection Agency Board.
Public Service Commission.
13. Board of Agriculture.
State Military Board.
State Board of Nursing.
Livestock and Sanitary Board.
Retirement Board.
Collection Agency Board.
14. Real Estate Board.
Soil Conservation.
Water Conservancy Districts, Board of Directors.
State Parks Commission.
Board of Cosmetology.

VI. AGENCIES WHICH FILE THE RULES THEY HAVE PASSED.

a. Of the twenty two agencies exercising rule making powers, three of these file with the Secretary of State,¹⁵ one files with the Attorney General,¹⁶ and the Game and Fish Commission files a copy of their rules with each county clerk.¹⁷ Four agencies indicated that they keep a copy on file at their principal office.¹⁸

VII. AGENCIES WHICH HAVE ADOPTED RULES GOVERNING ITS PROCEDURE IN RULE MAKING.

a. Five agencies answered that they had adopted rules governing its procedure in rule making.¹⁹

Approximately twenty nine agencies did not answer the questionnaire. From an inquiry into the statutes creating these agencies, the following was found to exist:

I. AGENCIES AUTHORIZED TO EXERCISE RULE MAKING POWER.

a. Five do not possess rule making powers.²⁰

b. Twenty four agencies by statute have rule making power.²¹

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- Board of Pharmacy.
 - State Board of Veterinary Examiners.
 - Board of Architects.
 - Board of Registration in Chiropody.
 - State Board of Control (Water Rights).
 - 15. Board of Chiropractic Examiners.
 - Employment Security Commission.
 - Board of Architects.
 - 16. Real Estate Board.
 - 17. Wyo. Stat. § 23-18 (1957).
 - 18. Board of Agriculture.
 - Soil Conservation.
 - Water Conservancy Districts, Board of Directors.
 - State Parks Commission.
 - 19. Real Estate Board.
 - Board of Chiropractic Examiners.
 - Employment Security Commission.
 - State Military Board.
 - Board of Pharmacy.
 - 20. State Board of Medical Examiners.
 - Board of Examiners in Optometry.
 - Natural Resource Board.
 - Board of Charities and Reform.
 - State Board of Barber Examiners.
 - 21. State Board of Accountancy, Wyo. Stat. § 33-15 (1957).
 - Board of Land Commissioners, Wyo. Stat. § 36-17 (1957).
 - Inspector of Mines, Wyo. Stat. §§30-46 and 30-53 (1957).
 - Board of State Supplies, Wyo. Stat. § 9-374 (1957).
 - Board of Trustees, University of Wyoming, Wyo. Stat. § 21-353 (1957).
 - Board of Pardons, Wyo. Stat.
 - State Board of Embalming, Wyo. Stat. §§ 33-229, 33-230 and 33-239 (1957).
 - Board of Examining Engineers, Wyo. Stat. § 33-359 (1957).
 - Farm Loan Board, Wyo. Stat. § 11-611 (1957).
 - Agency for Surplus Property, Wyo. Stat. § 9-244 (1957).
 - Board of Public Utilities, Wyo. Stat. § 15-564 (1957).
 - Fire Department Civil Service Commission, Wyo. Stat. § 15-387 (1957).
 - Police Department Civil Service Commission, Wyo. Stat. § 15-410 (1957).
 - Zoning Commissions, Wyo. Stat. § 15-629 (1957).
 - Black Hills Joint Power Commission, Wyo. Stat. § 37-127 (1957).
 - Board of Directors Flood Control District, Wyo. Stat. § 41-120 (1957).
 - State Board of Equalization, Wyo. Stat. § 39-26 (1957).
 - State Director of Revenue, Wyo. Stat. § 39-36 (1957).

II. AGENCIES GIVING NOTICE OF PROPOSED RULE MAKING.

a. Of the twenty four agencies granted rule making power, only the Inspector of Mines²² and the State Director of Revenue²³ are required to give notice by statute.

III. AGENCIES ALLOWING PARTICIPATION IN THE RULE MAKING PROCESS.

a. Only the State Director of Revenue²⁴ and the Inspector of Mines²⁵ are required by statute to allow interested parties the opportunity to participate in the rule making process.

IV. AGENCIES PROVIDING FOR PUBLICATION OF RULES ADOPTED BY THEM.

a. The Board of Accountancy and the Board of Land Commissioners sent us a copy of their rules, although they did not answer our questionnaire. The statutes pertaining to the other agencies did not per se disclose any publication requirements. The Public Service Commission "may" from time to time publish.²⁶

V. AGENCIES PROVIDING FOR A GRACE PERIOD BEFORE THEIR RULES BECOME EFFECTIVE.

a. Only the Inspector of Mines has to provide for a grace period (15 days), although in case of emergency the grace period can be dispensed with.²⁷

VI. AGENCIES WHICH FILE THE RULES WHICH THEY HAVE PASSED.

a. A search through the statutes disclosed no affirmative requirement requiring the agencies to file rules adopted by them. The Board of Examining Engineers²⁸ has to submit biennially or as often as required a report to the Governor. Neither of these statutes affirmatively refer to rules and regulations, so that it is difficult to ascertain whether or not the report includes rules and regulations promulgated by the agencies.

The citations alluded to in the tabular presentation demonstrate the diversity of rule making procedures from one agency to another. Wyo. Stat. § 35-23 (1953) pertaining to the State Board of Health states that "such regulations so made shall . . . have the force and effect of law." The statutes creating many other rules and regulations shall have the "force

State Board of Health, Wyo. Stat. § 35-23 (1957).

Land Settlement Board, Wyo. Stat. § 36-55 (1957).

State Board of Education, Wyo. Stat. § 21-1 (1957).

State Commission of Prison Labor, Wyo. Stat. § 7-370 (1957).

Insurance Commissioner, Wyo. Stat. §§ 26-5 and 26-57 (1957).

Boxing Commissioner, Wyo. Stat. § 33-100 (1957).

22. Wyo. Stat. § 30-54 (1957).

23. Wyo. Stat. § 39-36 (1957).

24. Wyo. Stat. § 29-36 (1957), "public hearing."

25. Wyo. Stat. § 30-54 (1957), "opportunity to be heard."

26. Wyo. Stat. § 37-30 (1957) 1.

27. Wyo. Stat. § 30-56 (1957).

28. Wyo. Stat. § 33-359 (1957).

29. Wyo. Stat. § 36-56 (1957).

and effect of law," provide sanctions for violation of these rules and regulations.³⁰

It would seem that regulations such as these which have the force and effect of law and regulations which may influence judicial and administrative decisions should be conveniently available to all who may need to consult them. If our legal system is to presume knowledge of the law, there should at least be an opportunity to discern the law. In Wyoming we are not afforded an adequate opportunity to ascertain with certainty what the administrative law is.

The diversity in keeping records and the apparent inadequacy in the agency statutory framework results in uncertainty, confusion, and delay, creating a hardship to private parties. In *State Ex rel., Pape v. Hockett Et al.*,³¹ a Wyoming case construing the validity of a certificate issued by the State Superintendent of Public Instruction, the court said:

The matter is in a state of confusion. Relator introduced four different printed sets of rules, those in effect in 1924, 1929, 1933, 1937, and we cannot tell whether all or some portions of all were in force and effect since the rules make no statement in reference thereto. Counsel for relator appears to consider them all in force and cites from them indiscriminately.

The *Hockett* case illustrates the state of confusion which exists in failure to keep agency rules up to date in readily ascertainable form.

Because of the wide differences in the publication of administrative rules from one agency to another, and due to the lack of constitutional publication requirement, it would appear that the only practical means by which adequate notice can be insured is through the enactment of general legislation prescribing publication requirements for all agencies.

In 1951 the Wyoming Senate passed a bill (Senate File No. 22), which had already been passed by the House requiring "each agency of the State Government, as defined in the Act, to publish and disseminate its rules and regulations and to provide the Legislature with copies thereof for approval or disapproval, and requiring the Attorney General to render opinions on the constitutionality and validity of such rules." This bill was vetoed by the Governor on February 28, 1951. The reasons given for the veto were: (1) that requiring the Attorney General's opinion as to constitutionality would impose an undue burden upon the office of the Attorney General and would require additional assistance for that office;

30. E.g., State Board of Embalming, Wyo. Stat. § 33-229 (1957). ". . . who shall refuse or neglect to obey such rules and regulations when made, shall be guilty of a misdemeanor. . . ."

Collection Agency Board, Wyo. Stat. § 33-156 (1957). ". . . violation thereof shall be grounds of complaint for the revocation of the license. . . ."

State Board of Equalization, Wyo. Stat. § 39-26 (1957). ". . . institute or cause to be instituted any proceedings, either civil or criminal. . . ."

State Board of Education, Wyo. Stat. § 21-11 (1957). "For the purpose of enforcing the school laws the board may institute legal proceedings in the name of the State of Wyoming."

31. 156 P.2d 299, 302, 61 Wyo. 145 (1945).

(2) that the printing or mimeographing, the indexing, and publication of the rules would present a tremendous printing problem; (3) and that filing of certified copies of the rules with the Legislature would entail entirely too much work for both the State Departments having to file and for the Legislature as well. The Governor went to to say that these requirements would impose a burden as to manpower and as to additional funds for which no provisions had been made.

The bill was a step in the right direction but more than mere printing or mimeographing and publicizing in such a manner as to bring the existence of the rules to the attention of all persons affected thereby is needed. The basic objective of a good publication system is not only to make rules known and available to interested persons but to make them known and available prior to their taking effect. The Board of Cosmetology in answer to our questionnaire indicated that they gave "informal notice" when contemplating the exercise of their rule making powers. The extent of "informal notice" is not readily ascertainable. The pamphlet of their rules, which they sent in answer to our inquiry, had corrections in ink as to prices to be charged by schools teaching cosmetology.

The Wyoming Legislature in the 1961 Session repealed Sections 14-42, 14-43, 14-44, 14-45, and 14-46 of the Wyoming Statutes (1957) pertaining to Child-Caring Agencies. In their place the Legislature passed a new Section 14-46. The pertinent parts to our inquiry are: Section 14-46.4 (2) (a): "Such standards and regulations shall be reviewed and approved by the Wyoming Attorney General before they are adopted." See also Section 14-46.4 (3): "A public hearing shall be held prior to adoption of standards at which time recommendations from interested parties will be received and discussed. (a) Notification of the hearing for establishing standards and rules and regulations shall be given to all known child-caring agencies by direct mail and shall be published in a newspaper of general circulation in the state at least fifteen days prior thereto." This legislative enactment provides the remedy for the deficiency in Senate File No. 22 previously mentioned, i.e., notice prior to adoption of rules, but leaves out an important aspect of the Senate bill, namely the provision for publication of rules which are adopted.

In *Panama Refining Co. v. Ryan*³² a government lawyer had acknowledged before the Supreme Court that the parties had proceeded in the lower courts in ignorance of the technical, though inadvertent, revocation of the regulation upon which the case rested. The opposing counsel made the most of the situation by saying that the regulation governing the company could be found only "in the hip pocket of the Administrator." This case gave impetus to the enactment shortly thereafter of the Federal Register Act³³ which requires publication of all federal regulations "of general applicability and legal effect."

32. 293 U.S. 388 (1935).

33. 49 Stat. 500 (1935), 44 U.S.C.A. § 303.

Rule making is a vital part of the administrative process. In the absence of legislation prescribing publication requirements, Wyoming Agencies have a free hand in determining what is or is not to be published, or, indeed, whether rules are to be published at all. Rule changes, unlike law making by the state legislature, are not limited to any specific period but may and do occur at any time. An agency could penalize a party on the basis of a rule whose existence is unproclaimed and whose contents cannot be definitely ascertained.

The situation is even more apprehensive when we consider delegation of legislative power. Our legislature may and does delegates legislative rule making powers to our state administrative agencies. Cases construing the validity of Congressional delegation of power to Federal Administrative Agencies, assert that in order for a delegation of power to be valid there must be a "standard" which will guide the agency in its exercise of the delegated power. This judicial talk is largely theoretical since the vaguest of standards are upheld, and various delegations without standards have been upheld.³⁴

A sampling of standards imposed on Wyoming Agencies that are similar to those which have been held adequate on the Federal level of delegation assert that the particular agency may promulgate rules and regulations which are: "proper and necessary,"³⁵ "as it may deem necessary,"³⁶ "not inconsistent with the laws of the state of Wyoming,"³⁷ "as shall be prescribed by the board,"³⁸ "reasonable rule,"³⁹ "as shall in its judgment be necessary."⁴⁰

We should further note the apparent acceptance of broad standards in Wyoming. This is demonstrated by the case of *Gas Consumers v. Northern Utilities Co.*,⁴¹ in which natural gas consumers were challenging an order of the Public Service Commission increasing rates to be charged by the Northern Utilities Co. The consumers were arguing that no mention was made in the Opinion, Findings and Order of the Commission as to the formula employed to justify the granting of the rate increase. The Wyoming Supreme Court held that under the statutory standards of "just and reasonable"⁴² it is the result reached and not the method employed which is controlling. The court went on to say that the consumers did not show that the rate increase was erroneous or that the Commission reached a result which was not "just and reasonable."

34. Davis, Administrative Law Text 33, § 2.03 (1959).

35. Board of Registration in Chiropraxy, Wyo. Stat. § 33-137 (1957); Farm Loan Board, Wyo. Stat. § 11-611 (1957).

36. Board of Cosmetology, Wyo. Stat. § 33-176 (1957); Board of Examining Engineers, Wyo. Stat. § 33-359 (1957); Wyoming Liquor Commission, Wyo. Stat. § 12-39 (1957); Livestock and Sanitary Board, Wyo. Stat. § 11-263 (1957).

37. State Board of Embalming, Wyo. Stat. § 33-229 (1957).

38. Real Estate Board, Wyo. Stat. § 33-345 (1957).

39. Collection Agency Board, Wyo. Stat. § 33-156 (1957); Insurance Commissioner, Wyo. Stat. § 26-5 (1957).

40. State Board of Health, Wyo. Stat. § 35-10 (1957).

41. 247 P.2d 767, 70 Wyo. 225 (1952).

42. Wyo. Stat. § 37-20 (1959).

The law of State delegation differs substantially from the law of Federal delegation. State legislatures often delegate authority to petty officials without adequate safeguards. A noted writer in the field of administrative law⁴³ has suggested that what is needed is not standards but adequate safeguards, including a hearing upon adequate notice to interested persons of anticipated action, and judicial review of the action taken.

A recent Wyoming decision^{43a} is typical of this situation. The legislature delegated authority to the State Fire Marshall to adopt regulations, the violation of which constituted a misdemeanor. It appears to have been assumed that neither the statute nor regulations provided for a hearing in connection with the alleged violation. The Court relied on its inherent right to review the administrative action as basis for its dictum that this did not violate the due process. However, the Court overlooked the fact that such review presumably would be limited in scope^{43b} and hence not in itself a substitute for the protection afforded by a hearing.^{43c}

The inadequacy of proper safeguards has led some states to be strict on the requirement of standards. Some states have held that the legislature cannot delegate authority to adopt rules and regulations, the violation of which would be a criminal offense. The Colorado Supreme Court in the case of *Casey v. People*⁴⁴ held that only the legislature could declare an act to be a crime. The case involved a rule promulgated by Tri-County Health Department requiring a trailer court operator to obtain a permit from the Health Department before operating such a camp. The failure to do so would subject him to prosecution and punishment for a crime under a statute promulgated by the state legislature which made any violations of the rules and regulations of the Health Department a misdemeanor subject to a fine of \$1,000 or one years' imprisonment, or both penalties.⁴⁵ The Court held that the Legislature could not lawfully delegate its power of defining a crime to the District or County Health Departments. The rule promulgated by the Tri-county Health Department was held to be unconstitutional.

In considering delegation of rule making power by the Legislature, a distinction should be drawn between legislative and interpretative rules. In the clearest case of a legislative rule, a statute has conferred power upon the agency to issue the rule and the statute provides that the rule, if

43. Davis, *Administrative Law Text* 49, § 2.15 (1959).

43a. *Brinegar v. Clark*, 371 P.2d 62, 66 (Wyo. 1962).

43b. See Note, *Scope of Judicial Review*, *supra*.

43c. All parties and the Court in the *Brinegar* case seem to assume that the Fire Marshall had the power to determine violations. The statutory language seems merely somewhat inapt in one case that the regulations had the force of law. Assuming violations are misdemeanors as the statute provides (Wyo. Stat. § 35-432 (1957)), the actual fact of violation presumably would be determined by the courts in a jury trial as in the case of other crimes against the state. However, since the statute merely imposes a fine for violations (Wyo. Stat. § 35-443 (1957)), there is some possibility that such imposition may not be a crime for the purpose of determining whether a jury trial is required, but this apparently was not considered by the Court. Compare *State v. District Court of Sheridan County*, 283 P.2d 1023 (Wyo. 1955) and *Stusman c. City of Cheyenne*, 113 Pac. 322 (Wyo. 1911). See also, *United States v. Brimson*, 154 U.S. 447 (1894).

44. 336 P.2d 308, 139 Colo. 89 (1959).

45. Colo. Stat. 6612-14.

within the granted power, shall have the force of law. When a rule is legislative, the reviewing court has no authority to substitute judgment as to the content of the rule, for the legislative body has placed the power in the agency and not in the court.

On the other hand an interpretative rule may or may not have force of law, depending upon such factors as (a) whether the court agrees or disagrees with the rule, (b) the extent to which the subject matter is within special administrative competence and beyond general judicial competence, (c) whether the rule is a contemporaneous construction of the statute by those who are assigned the task of implementing and enforcing the statute, (d) whether the rule is one of long standing, and (e) whether the statute has been reenacted by legislators who know of the content of the rule.⁴⁶ An illustrative example of interpretative rules are the Treasury Regulations under the tax laws.

To determine whether a rule is legislative or interpretative we have to look to the legislative grant of power given to the agency. Interpretations by the agencies are looked upon by the courts for guidance in making their decisions, but are not binding on the courts . . . in other words the last word is given to the court.

The Wyoming Supreme Court has had occasion to hold that a State administrative agency was bound by its interpretative rule in the case of *Hercules Powder Co. v. State Board of Equalization*.⁴⁷ In that case the State Board of Equalization adopted a rule (rule 25) pursuant to their rule making power which provided, "if tangible personal property is purchased from a retailer in another state and shipped by the retailer directly to the customer in this state, the receipts from the sale of such property are not taxable under the Sales Tax Act but are subject to the Wyoming Use Tax Act of 1937." In this proceeding the Board contended that Hercules Powder Co. owed the state of Wyoming sales taxes amounting to \$2,348.64. The Powder Company contended that its liability should be based on the use taxes which are at a lower rate. They further alleged that they complied with the aforementioned rule 25 promulgated by the Board.

Rule 25 of the Board had been operative for more than 10 years. The Powder Company (an out of state corporation) relied on this rule and gave it a great deal of weight in its determination of sales. The Powder Company contended that it was unfair and unlawful for the Board to now attempt to establish a contrary policy by this proceeding without first clarifying its rule for the benefit of taxpayers. The court held that the Board was now bound by their rule; that the rule was published for the purpose of informing taxpayers and allowing them to plan accordingly and that if such a retroactive change were allowed the taxpayer would not know what to rely on.

46. These factors were taken from Davis, op. cit. supra, at p. 87.

47. 208 P.2d 1096, 66 Wyo. 268 (1949).

HOW CAN THE EXISTING SITUATION IN WYOMING BE IMPROVED?

The movement of requiring proper notice of administrative rules has led to the enactment of the APA and the Model Act. The procedures set down by these two enactments are a good attempt to state the essential principles of fair administrative procedure.

The Model Act seeks to accomplish this by providing for antecedent publicity before an agency engages in any exercise of its rule making powers. Section 3(a) provides that notice be mailed to all persons who have made timely request of the agency for advance notice of its rule making proceedings. The Model Act also suggests that some type of publication of this notice should be provided for. The medium of this publication is left to the discretion of the state adopting legislation similar to that of the Model Act. Section 3(a) further provides that the agency shall give at least 20 days notice of its intended action and shall afford all interested persons reasonable opportunity to submit data, views, or arguments, orally or in writing. Section 3(b) gives the agency an escape clause by providing, "If an agency finds that an imminent peril to the public health, safety or welfare require adoption of a rule upon less than 20 days notice, and states in writing its reasons for that finding, it may proceed without prior notice of hearing. . . ." A rule so adopted may be effective for 120 days with provisions for renewal if necessary.

Section 4(a) of the APA aims at securing prior publicity before rules are published by federal agencies. The federal law expressly requires that notice be given via the Federal Register. The lack of publication analogous to the Register in most states makes a similar direction in the Model Act impractical.

Section 8(a) and 3(a) (3) of the APA provides that every agency shall separately state and currently publish in the Federal Register substantive rules adopted by them.

Neither the procedure prescribed by Section 4 of the APA nor that imposed by Section 3 of the Model Act places undue burdens upon an agency's exercise of its rule making authority. The only mandatory requirement in either statute appears in the Model Act. Section 3 provides that the agency must grant an oral argument upon the request of 25 persons when the agency is contemplating the passage of substantive rules. Other than this requirement the form and extent of the participation by persons in rule making are entirely for the agency to determine. Thus, it is up to the agency to decide whether there shall be any public hearing procedures, and their nature, or whether those interested shall merely be given an address to which they can send any views in writing. Furthermore as previously mentioned, Section 3(b) of the Model Act gives the agency an escape clause—the hearing required when 25 persons petition can be dispensed with if an emergency exists.

As far as the federal field is concerned, there has been a system of publication of administrative rules in effect since the enactment of the

Federal Regitser Act of 1935, and the APA has consequently not had to deal with the basic problem. Sections 4 and 5 of the Model Act have in view the setting up of a similar system in the states. Section 4 provides for the filing forthwith in the office in the Secretary of State a certified copy of each rule adopted by it, including all rules existing on the effective date of this Act. Under Section 5, the Secretary of State is to compile, index, and publish all rules adopted by each agency and remaining in effect. Furthermore, compilations shall be supplemented or revised as often as necessary and at least once every two years. The Secretary of State shall also publish a monthly bulletin in which he shall set forth the text of all rules filed during the preceding month. Wisconsin⁴⁸ and Colorado⁴⁹ have adopted legislation similar to the Model Act and go a step further by providing that no rule is valid until a certified copy thereof has been so filed.

The basic objective of a good publication system is not only to make rules known and available to interested persons, but to make them known and available prior to their taking effect. Section 4 (b) of the Model Act provides that the rules adopted shall be effective 20 days after filing, except that if a statute provides for a later date then the later date is the effective date. This section also makes provision for an escape clause in case of emergency. In case of emergency the rule will become effective immediately upon filing. Section 4 (c) of the APA provides for effectiveness 30 days after publication but qualifies this by saying, "except as otherwise provided by the agency upon good cause found and published with the rule."

The remaining matter concerning rule making dealt with by Section 6 of the Model Act is that which provides that any interested person may petition an agency, requesting the promulgation, amendment, or repeal of any rule. Section 4 (b) of the APA provides that "Every agency shall accord any interested person the right to petition for the issuance, amendment, or repeal of a rule."

SUMMARY

Through the enactment of legislation similar to that of the Model Act it would appear that at least the minimum requirements for assuring adequate notice to the Wyoming public would be satisfied.

The new law would assure ample opportunity for interested persons to participate in the rule making process, would enable interested persons to always have the current rules on hand, and would result in greater uniformity in rule making procedures and in the form and numbering of rules. At the same time, the law provides sufficient flexibility, through emergency and other exceptions, to assure that the administrative agencies will not be stymied in performing their functions.

ALEX ABEYTA, JR.

48. Administrative Procedure and Review. Title XVIII, Wis. Stat., Vol. 2.

49. See § 3-16-2(10) Col. Rev. Stats (1953). Effective date of this article was May 1, 1959.