



REGULATION NATION: THE WISCONSIN PERSPECTIVE

WHAT IS A RULE?

Emily Kelchen

Over the years, as the state's responsibilities have become more complex, policy making power that used to belong solely to the legislature has been shared with state agencies to an ever-expanding degree. The legislature provides authority and oversight while the technical expertise of the agencies is relied upon to implement the legislature's policy goals. Although this power-sharing scheme is a cornerstone of modern governance, it is not without its peril.

Today, state agencies have significant power over Wisconsin citizens, landowners, and businesses.¹ Surveys of businesses consistently cite regulatory burdens as one of the

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¹ If an administrative rule is properly adopted and is within the power of the legislature to delegate, there is no material difference between it and a law. 63 Atty. Gen. 159.

main limitations on job growth.² Gov. Scott Walker recognized this when he took office, and enacted legislation aimed at reforming Wisconsin's rulemaking process.

2011 Wisconsin Act 21³ (Act 21) significantly altered the way Wisconsin's administrative agencies promulgate rules.⁴ In general, the new law forces agencies to take greater responsibility for their actions and be more transparent about the impact of proposed rules. Act 21 achieves these goals by requiring agencies to more vigorously support their policy choices, and through heightened

² Public Notice, National Poll on Government Regulations, <http://thepublicnotice.org/2011/09/11/memo-national-poll-on-government-regulations/>.

³ 2011 Wisconsin Act 21, <https://docs.legis.wisconsin.gov/2011/related/acts/21.pdf>.

⁴ Great Lakes Legal Foundation, Regulatory Reform Bill Sent to the Governor, <http://www.gllf-regwatch.org/blog/2011/05/19/regulatory-reform-bill-sent-governor>.

ISSUE IN BRIEF

- Understanding what constitutes a "rule" under Wisconsin's agency rulemaking process is important.
- If an agency policy choice falls within the definition of a rule, the agency must go through Chapter 227's rulemaking processes before implementing that policy.
- In light of the rigorous changes to the Chapter 227 rulemaking process, agency personnel may try to circumvent the statute's procedures by issuing "guidance" or "guidelines."
- Any agency rules masquerading as "guidelines" are invalid and unenforceable.

oversight of agency decisions by the governor and the public.

The statutory procedures found in Wis. Stat. Ch. 227 (Chapter 227) ensure the regulated community is afforded its basic right to due process - the right to adequate notice and a fair hearing prior to the imposition of regulatory mandates.

However, a state agency must follow Chapter 227's processes only if the policy it pursues falls within the definition of a "rule." As a result, agencies may attempt to sidestep the rulemaking requirements by portraying a rule or set of rules as mere "guidance," which generally does not go through the formal rulemaking process.

A state agency must follow Chapter 227's processes only if the policy it pursues falls within the definition of a "rule."

As discussed below, such attempts by state agencies to bypass the rulemaking process are unlawful. Moreover, any regulatory requirements arising from these policy pronouncements, including permit terms and conditions, are invalid and unenforceable.

Part I of this essay explores the legal definition of "rule" and why that definition is important. Part II discusses examples of agencies avoiding the rulemaking process. Part III

concludes with a discussion of avenues available to the public when an agency has attempted to act outside of the rulemaking process.

Definition of "Rule" and Its Legal Implications

As noted above, whether an agency action is included in the definition of a "rule" is essential to determining whether the agency must follow the process laid out by the legislature in Chapter 227.

Wisconsin law expressly provides that a state agency must promulgate as a rule "each statement of general policy and each interpretation of a statute which it specifically adopts to govern its enforcement or administration of that statute."⁵

Wisconsin statutes define a "rule" as a "regulation, standard, statement of policy or general order of general application which has the effect of law and which is 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."⁶

This expansive definition of "rule" has been refined over the years and exceptions have been added. A number of specific agency actions have been carved out of the definition of "rule."⁷ For example, one such

⁵ Wis. Stat. § 227.10(1).

⁶ Wis. Stat. § 227.01(13).

⁷ Wis. Stat. §§ 227.01(13)(a)-(zy).

exception provides that the statutory definition of "rule" does not include "any action or inaction of an agency, whether it would otherwise meet the definition under this subsection, which... [i]s a pamphlet or other explanatory material that is not intended or designed as interpretation of legislation enforced or administered by an agency, but which is merely informational in nature."⁸

Despite these statutory exceptions, most agency actions are included in the broad definition of "rule." Once an action is defined as a rule, the agency must follow the formal rulemaking process in Chapter 227 to develop and implement its policy choice.

Examples of Agencies Avoiding Rulemaking Procedures

Act 21's amendments to Chapter 227, such as the addition of gubernatorial review and the required economic impact report, have increased the workload of agencies and the time it takes to fully promulgate each rule. It is likely, therefore, that some agency personnel will attempt to avoid the rigorous requirements of the new formal process by issuing rules but describing them as informational or explanatory material.

Over the years, there have been numerous instances of state agencies attempting to circumvent the rulemaking process by redefining a rule as

⁸ Wis. Stat. § 227.01(13)(r).

“guidance” or mere “suggestions.” The courts have repeatedly rejected such attempts, as is their duty pursuant to Wis. Stat. § 227.40(4)(a).⁹

Real Estate License Denial Cannot be Based on Instruction Sheet

In *Frankenthal v. Wisconsin R. E. Brokers' Board*, a mimeographed sheet of instructions for renewal of real estate brokers' licenses was held to be a rule after the state real estate brokers' board refused to issue a broker's license to a partnership because one of the partners was not individually licensed as a broker despite having issued licenses under such circumstances in the past.¹⁰

The court explained: “When a party files an application for a license with an administrative agency and the latter points to some announced agency policy of general application as a reason for rejecting the application, such announced policy constitutes a rule, the validity of which the applicant is entitled to have tested in a declaratory action instituted pursuant to sec. 227.05, Stats.

However, if the application is rejected because of some ruling which is not applicable generally but is limited to the facts presented by applicant, then the situation is governed by the exception set forth in sec. 227.01 (4) and such a ruling does not constitute a ‘rule’ under ch. 227, Stats. The facts in the instant case clearly fall within the former category and not the latter.”¹¹

Cannot Regulate Plumbers with a Dear John Letter

A “To Whom It May Concern” letter, written by the State Board of Health and sent to all Wisconsin plumbers, retracting permission to use a particular type of fitting was held to be a rule in *Josam Mfg. Co. v. State Board of Health*.¹² The court found “[i]t was a statement of agency policy of general application despite the agency’s argument that it involved only one type of fitting.”¹³

A New Interpretation Requires a New Rule

In *Schoolway Transp. Co. v. Div. of Motor Vehicles*, an agency’s changed interpretation of a statute prompted by an opinion of the attorney general was held to be a rule.¹⁴

Sensible Zoning requires Formal Rulemaking

A floodplain zoning ordinance adopted by the Department of Natural Resources was held to be a rule in *Citizens for Sensible Zoning, Inc. v. DNR*, even though the ordinance impacted only those living in floodplains.¹⁵

Permit Limits Exceeding Standards in Rule Requires New Rulemaking

In *Wisconsin Electric Power Co. v. DNR*, chlorine limits imposed in pollution discharge permits that were more stringent than the limits set forth in the administrative rules were held to be rules despite any discretion the agency had because of its duty to uphold the state’s water quality standards.¹⁶

Parole Violation Memo Invalid – Rule Required

In *State ex rel. Clifton v. Young*, a memorandum announcing general policies and specific criteria governing all decisions on good time for mandatory release parole violations was a “rule” and should have been promulgated properly even though the agency had discretionary statutory authority to deny good time to mandatory release parole violators on a case-by-case basis.¹⁷

⁹ “In any proceeding pursuant to this section for judicial review of a rule, 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 promulgated without compliance with statutory rule-making procedures.” Wis. Stat. § 227.40(4)(a).

¹⁰ *Frankenthal v. Wisconsin R. E. Brokers' Board*, 3 Wis. 2d 249, 88 N.W.2d 352 (1958).

¹¹ *Id.* at 257.

¹² *Josam Mfg. Co. v. State Board of Health*, 26 Wis. 2d 587, 133 N.W.2d 301 (1965).

¹³ *Id.* at 595.

¹⁴ *Schoolway Transp. Co. v. Div. of Motor Vehicles*, 72 Wis. 2d 223, 240 N.W.2d 403 (1976).

¹⁵ *Citizens for Sensible Zoning, Inc. v. DNR*, 90 Wis. 2d 805, 280 N.W.2d 702 (1978).

¹⁶ *Wisconsin Electric Power Co. v. DNR*, 93 Wis. 2d 222, 287 N.W.2d 113 (1980).

¹⁷ *State ex rel. Clifton v. Young*, 133 Wis. 2d 193, 394 N.W.2d 769 (Ct. App. 1986).

Data Entry Instructions Pegged as Rules

Agency instructions to department personnel explaining how to enter data into a computer program were held to be rules in *Cholvin v. Wis. Dep't of Health & Family Servs.*¹⁸

These case summaries illustrate the court's decision-making process in cases where an agency action is challenged as improper rulemaking. The courts begin their analysis with

The action is of general application if that class is described in general terms and new members can be added to the class.

the statutory definition of "rule." The two elements of the definition most often addressed by the courts are "of general application" and "having the effect of law."¹⁹

The courts have held that "to be of general application, a rule need not apply to all persons within the state. Even though an action applies only to persons within a small class, the action is of general application if that class is described in general

¹⁸ *Cholvin v. Wis. Dep't of Health & Family Servs.*, 2008 WI App 127, 313 Wis. 2d 749, 758 N.W.2d 118.

¹⁹ See, e.g., *Frankenthal v. Wisconsin R. E. Brokers' Board*, 3 Wis. 2d 249, 88 N.W.2d 352 (1958), *Cholvin v. Wis. Dep't of Health & Family Servs.*, 2008 WI App 127.

terms and new members can be added to the class."²⁰ This broad understanding of "of general application" ensures all entities are treated equally.

The element "having the effect of law" is closely related to due process rights. "An agency regulation, standard, statement of policy or general order has been held to have the 'effect of law' where criminal or civil sanctions can result as a violation; where licensure can be denied; and where the interest of individuals in a class can be legally affected through enforcement of the agency action."²¹

The courts have also addressed the oft-relied on exception to the definition of "rule" for "pamphlet[s] or other explanatory material that is not intended or designed as interpretation of legislation enforced or administered by an agency, but which is merely informational in nature."²²

Only on rare occasions have the courts sided with an agency's

²⁰ *Cholvin* at ¶ 23 quoting *Citizens for Sensible Zoning, Inc. v. DNR*, 90 Wis. 2d 805, 280 N.W.2d 702 (1978). See also, *Wisconsin Elec. Power Co. v. DNR*, 93 Wis.2d 222, 287 N.W.2d 113 (1980).

²¹ *Cholvin* at ¶ 26. ("See generally, *Wisconsin Elec. Power Co. v. DNR*, 93 Wis.2d 222, 287 N.W.2d 113 (1980); *Schoolway Transp. Co., Inc. v. Division of Motor Vehicles*, 72 Wis.2d 223, 240 N.W.2d 403 (1976); and *Frankenthal v. Wisconsin Real Estate Brokers' Bd.*, 3 Wis.2d 249, 89 N.W.2d 825 (1958).")

²² Wis. Stat. § 227.01(13)(r)

classification of a challenged action.²³

Given the propensity of agencies to avoid the rulemaking process, it is reasonable to anticipate future attempts to pass off a rule as guidance. Thanks to the stronger oversight provisions added to Chapter 227 by Act 21, any such attempts will be more easily detected and challenged.

Active Oversight

Chapter 227's rulemaking process, as amended by Act 21, subjects agency decisions to oversight by the agency's governing body, other agencies, the governor's office, the legislature, the courts, and the public. This enhanced oversight is vital to ensure that agencies are properly promulgating rules.

One of Act 21's significant changes was adding gubernatorial oversight to the Chapter 227 rulemaking process.²⁴ Despite serving as the

²³ See e.g., *Homeward Bound Serv. V. Office of Ins.*, 2006 WI App 208, 296 Wis. 2d 481, 724 N.W.2d 380; *County of Dane v. Winsand*, 2004 WI App 86, ¶ 11, 271 Wis. 2d 786, 679 N.W.2d 885 ("Materials developed by an agency as a reference aid for its staff that are 'couched ... in terms of advice and guidelines rather than setting forth law-like pronouncements' are not a 'rule' within the meaning of Wis. Stat. § 227.01(13) because they are not intended to have the effect of law."); *Plumbing Apprenticeship Committee v. DILHR*, 172 Wis. 2d 299, 493 N.W.2d 744 (Ct. App. 1992) (Interpretation and application of a rule is not a rule.).

²⁴ See 2011 Wisconsin Act 21 ss. 1r creating Wis. Stat. § 227.10 (2m), 4 amending Wis. Stat. § 227.135 (2), 5

state's chief executive, prior to Act 21, the governor had no formal authority over the agency rulemaking process and related policy decisions.

Through Executive Order 50, Gov. Walker took advantage of this new authority over agency actions and created the Governor's Office of Regulatory Compliance to oversee actions both in and outside the formal rulemaking process.²⁵

Despite serving as the state's chief executive, prior to Act 21, the governor had no formal authority over the agency rulemaking process and related policy decisions.

In Executive Order 50, Gov. Walker declared that “[e]ach agency that develops any document interpreting, clarifying, or explaining statutes and rules that regulate individuals or entities or local governmental units, shall submit a copy to the Governor’s Office of Regulatory Compliance via

amending Wis. Stat. § 227.135 (3), 18 amending Wis. Stat. § 227.137 (4), 32 creating Wis. Stat. § 227.185, and 61 creating Wis. Stat. § 227.24 (1) (e) 1g.

²⁵ Exec. Order No. 50: Relating to Guidelines for the Promulgation of Administrative Rules. *available at* https://docs.legis.wisconsin.gov/code/executive_orders/2011_scott_walker/2011-50.pdf

[email] prior to its finalization by that agency.”²⁶

This means that all agency guidance is now subject to oversight by the Governor’s Office of Regulatory Compliance. If the Regulatory Compliance staff determine that the draft guidance is actually a rule, the office shall require the agency to follow the formal rulemaking process.

Members of the public, specifically those subject to regulation, also play an important oversight role outside of the rulemaking process. An individual or business can petition agencies directly, or petition a court to review agency action or inaction. The public can petition for rulemaking under Wis. Stat. § 227.12 if they meet certain criteria.²⁷ Judicial review of

²⁶ *Id.* at I.2.

²⁷ Wis. Stat. § 227.12(1) (“Unless the right to petition for a rule is restricted by statute to a designated group or unless the form of procedure for a petition is otherwise prescribed by statute, a municipality, an association which is representative of a farm, labor, business or professional group, or any 5 or more persons having an interest in a rule may petition an agency requesting it to promulgate a rule.”).

(3) Except as provided in sub. (4), within a reasonable period of time after the receipt of a petition under this section, an agency shall either deny the petition in writing or proceed with the requested rule making. If the agency denies the petition, it shall promptly notify the petitioner of the denial, including a brief statement of the reason for the denial. If the agency proceeds with the requested rule making, it shall

agency action or inaction is available when “the substantial interests of any person” are in play.²⁸

Conclusion

Understanding what constitutes a “rule” under Wisconsin’s agency rulemaking process is imperative. If an agency policy falls within the definition of a rule, the agency must closely follow Chapter 227’s rulemaking processes.

In light of Act 21’s changes to the Chapter 227 rulemaking process, agency personnel may try to circumvent the statute’s procedures by issuing “guidance” or “guidelines.” However, any agency rules masquerading as “guidelines” must go through the proper rulemaking process.

The Foundation is monitoring agency policies and when appropriate will take those actions necessary to ensure that all rules are properly promulgated.

The Great Lakes Legal Foundation is a tax exempt, nonprofit 501(c)(3) corporation whose mission is providing legal and policy expertise to advance economic growth and increase job opportunities in the upper Midwest.

This paper in its entirety can be found at <http://www.gllf-regwatch.org/rulemaking-in-wisconsin>

follow the procedures prescribed in this subchapter.

²⁸ Wis. Stat. § 227.52.