LEGISLATIVE COMMISSION TO REVIEW ADMINISTRATIVE RULES

1979-1980 BIENNIAL REPORT

LCRAR

Legislative Commission to
Review Administrative Rules

Rep. Wayne A. Simoneau
Chairman

Sen. Timothy J. Penny
Vice-Chairman

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Secretary of the Senate

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Executive Director

December 30, 1980

Members of the Legislature:

The 1979-1980 Report of the Legislative Commission to Review Administrative Rules is hereby submitted as required by Minnesota Statutes, Section 3.965, Subd. 2.

The Legislative Commission to Review Administrative Rules(LCRAR) was created by the Minnesota Legislature in 1974(M.S. 3.965) as a bi-partisan, joint commission to "promote adequate and proper rules by state agencies and an understanding upon the part of the public respecting them."

The Legislature has delegated to state agencies the authority to adopt rules in order to carry out specific legislation and these rules have the force and effect of law. The body of law included in the Minnesota Code of Agency Rules now greatly exceeds the amount of law contained in Minnesota Statutes. The LCRAR is given oversight over the agencies to ensure that they are not exceeding their delegated authority in the rulemaking process. To carry out this function the LCRAR can investigate complaints, hold public hearings, request agencies to go to rules hearings, and, if the circumstances warrant, suspend a rule. The suspension of a rule must be ratified by the Legislature and signed by the Governor.

The LCRAR welcomes your interest and hopes that it can serve each of you by acting as the Legislature's "watchdog" over state agencies to ensure that rules promulgated by them do not exceed statutory authority or violate legislative intent. Ideally, the LCRAR's activities should not only serve to check possible abuses of rulemaking authority; they should also encourage productivity and accountability in state government, which is the goal of every legislator.

The report which follows describes the procedures used and actions taken on complaints regarding rules which were brought before the LCRAR in the period from January, 1979 to December, 1980.

Sincerely,

Wayne Simoneau

Representative Wayne Simoneau
Chairman, LCRAR

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MEMBERS OF THE LCRAR, 1979-1980

Representative Wayne Simoneau, Chairman

Representative Paul McCarron

Representative Thomas R. Berkelman

Representative Dave O. Fjoslien

Representative Bill Peterson

Senator Tim Penny, Vice-Chairman

Senator Jerome Gunderson

Senator Bill Luther

Senator Wayne Olhoft

Senator Delores J. Knaak

STAFF OF THE LCRAR

Staff:*	1979	1980
	Marshall R. Whitlock Executive Secretary	Susan P. Robertson Executive Director
	Lorraine Hartman Secretary	Lorraine Hartman Secretary
	Janet Rahm Staff Attorney (assigned part time to LCRAR by the Revisor of Statutes)	Terri Lauterbach Staff Attorney (assigned part time to LCRAR by the Revisor of Statutes)
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*The Commission has, on occasion, been able to utilize the services of other legislative staff agencies during the review of rules, thus giving the Commission the expertise of persons familiar with the operation of particular state agencies.

TABLE OF CONTENTS

I. EXECUTIVE SUMMARY

The Legislature established the LCRAR in 1974 to "promote adequate and proper rules by agencies and an understanding upon the part of the public respecting them." In order to carry out this statutory charge, the LCRAR has established the following objectives:

1. To act on behalf of the Legislature as a watchdog over state agencies to ensure that rules promulgated by them do not exceed statutory authority or violate legislative intent.

2. To investigate citizen and legislative complaints which claim that certain rules are unreasonable or improper.

3. To maintain liaison with state agencies in order to promote the adoption of adequate and proper rules and to foster the public's understanding of them.

In an effort to meet these objectives, the LCRAR conducted 71 rule reviews involving 25 state agencies and boards in the period January, 1979, to November, 1980. This was an increase of 65% over the preceding two years. Two of these reviews were particularly extensive, involving health care regulations and the state's hazardous waste rules. Public testimony was taken on all rules on which the LCRAR took action. In addition to formal review of rules, staff responded to approximately 500 informal inquiries, which is an increase of more than 100% over the preceding two years.

During this period, the LCRAR exercised its authority to suspend rules for the first time, doing so with three rules.

Again, for the first time, the Commission requested agencies to conduct rules hearings to revise outdated rules or promulgate new ones. The Department of Health has concluded hearings on the rules cited by the LCRAR, as has the Department of Public Welfare. The Department of Public Safety is in the process of developing new drivers' license rules to replace internal policies which had been adopted outside the rulemaking process. Significant amounts of staff time were spent with agency personnel and citizen groups working out solutions to rule problems before the LCRAR.

The LCRAR also referred numerous policy questions to the full Legislature and five of its recommendations were enacted into law.

In addition to a dramatic increase in workload and activity, the responsibilities of the LCRAR were also increased. The Legislature expanded the LCRAR's jurisdiction to include seven additional agencies. As a result, most rules of virtually all state agencies and departments are now subject to possible review by the LCRAR. Another statutory change resulted in involving the LCRAR directly in the rulemaking process by

allowing agencies to appeal a decision of the Chief Hearing Examiner regarding the need and reasonableness of a rule to the LCRAR. If the Chief Hearing Examiner finds that an agency has not sufficiently demonstrated the need and reasonableness of a rule, the agency must either correct the defects or submit the rule to the LCRAR for an advisory opinion, which must be rendered within 30 days.

Finally, the LCRAR has recommended a number of changes in the LCRAR statute and in the Administrative Procedure Act (Chapter 15) in order to streamline and clarify the rulemaking process in Minnesota's state government.

II. HISTORY AND CURRENT PROCEDURES

Over the past 50 years there has been continual growth of government at all levels in response to the need to solve problems which could not be solved by individual initiative and private action. As legislatures passed laws to deal with specific problems, they found it necessary to delegate authority for implementing those laws to executive agencies. The rules adopted by executive agencies in most states have the force and effect of law; thus, any serious efforts at finding ways to improve government must take into account some means of reviewing this whole body of administrative agency law.

Concerns have been raised nationwide about the number and extent of state agency rules by legislators and citizens alike. In theory, rules merely complement the law. But legislators frequently discover agencies circumventing legislative intent or exceeding statutory authority. Cases have even been found where bills defeated in a legislative session later appear in state agency rules. Citizens complain that they often are overburdened and harassed by a plethora of duplicative or even contradictory rules.

The Minnesota Legislature responded to these concerns in 1974 by establishing the Legislative Commission to Review Administrative Rules(LCRAR), a bipartisan commission composed of five senators and five representatives. (See Appendix I) The Commission is charged with promoting "adequate and proper rules by agencies and an understanding upon the part of the public respecting them." In order to carry out its responsibility, the Commission may hold hearings to investigate complaints with respect to rules. If it finds a complaint to be meritorious it can suspend any rule by an affirmative vote of at least six members, provided the Commission has first obtained an advisory recommendation on suspension from the appropriate standing committees of the House and Senate. No suspension can take effect until after the recommendation is received, or 60 days after referral.

If any rule is suspended, the Commission must place a bill before the next year's session of the legislature to permanently repeal the suspended rule. If the bill is defeated, or fails of enactment in that year's session, the rule goes back into effect and the Commission may not suspend it again. If the bill becomes law, the rule is repealed and may not be enacted again unless a law specifically authorizes the adoption of that rule.

Suspension of a rule is perhaps the most dramatic step which the LCRAR can take. In practice, however, a more important tool to be used in legislative oversight is the Commission's authority to request any department issuing rules to hold a public hearing. The Commission may make this request pursuant to its charge to "promote adequate and proper rules." When a department is so requested to hold a hearing, it must give notice as provided by the Administrative Procedure Act(APA)Minnesota Statutes, Section 15.0412,

Subdivision 4) and the hearing is to be conducted in accordance with the provisions of Minnesota Statutes, Section 15.0412. This means that rules must be proposed, with an accompanying statement of reasonableness and need, and that an impartial hearing examiner will conduct the hearing. The hearing is to be held not more than 60 days after the department receives the request.

The Commission has used this authority to get agencies to review existing rules which seem to be no longer reasonable or necessary. It has also requested agencies to hold hearings when the agencies have issued policy bulletins which seem to meet the definition of "rule" under the APA(an agency statement of general applicability and future effect) but which have not been adopted in accordance with the provisions of the APA. The APA was intended to assure the public of the right to participate in administrative rulemaking; the LCRAR has exercised its authority to guarantee this right.

The LCRAR was given additional authority and responsibility last year. An amendment to the APA involves the LCRAR directly in the rulemaking process by allowing agencies to appeal a decision of the Chief Hearing Examiner regarding the need and reasonableness of a rule to the LCRAR. If the Chief Hearing Examiner finds that an agency has not sufficiently demonstrated the need and reasonableness of a rule, the agency must either correct the defects or submit the rule to the LCRAR for an advisory opinion, which must be rendered within 30 days. (See Appendix II)

The LCRAR can directly serve legislators by assisting them when they have concerns or complaints regarding an agency's rules (or lack of rules). Legislators may also want to forward constituents' rule complaints to the LCRAR. In addition to bringing formal complaints, legislators can request LCRAR staff to monitor rulemaking proceedings which are of particular interest to them. Private citizens or groups can also bring complaints before the LCRAR.

A person wishing to register a complaint against an agency's rules should first contact the Commission's Executive Director. The complaint should clearly identify the rule in question and the reason why the person believes the rule should be reviewed by the Commission. The complaint should also be accompanied by whatever documentation is available pertaining to the complaint and the rule.

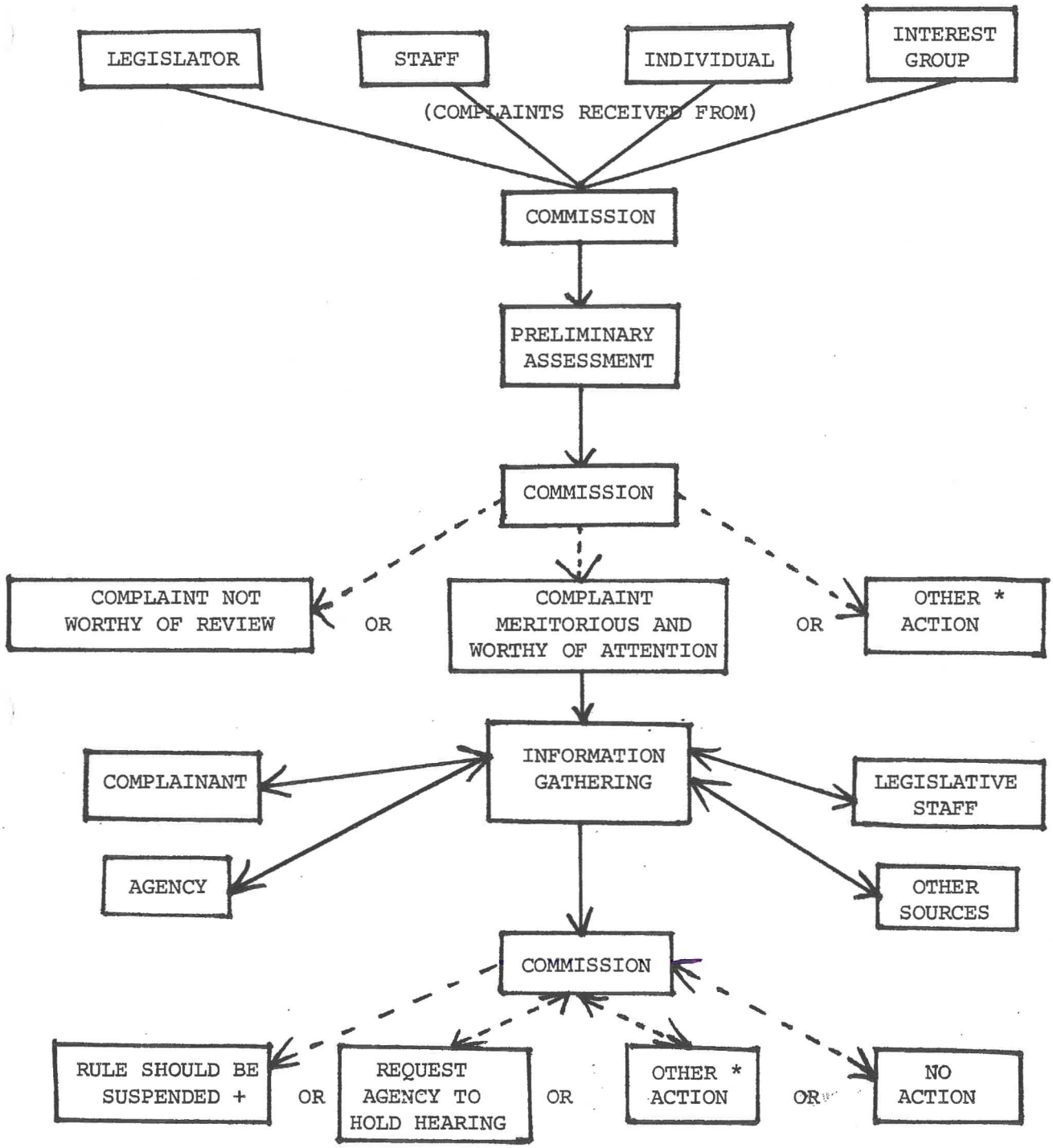
According to the statute, the Commission has discretion in dealing with complaints. It can determine that a complaint is "meritorious and worthy of attention" (Minnesota Statutes, Section 3.965, Subdivision 2), or it may decide that the issue is not critical and that the Commission should not deal with it. For the Commission to determine that an issue is sufficiently meritorious, the Commission staff engages in a preliminary assessment of the complaint. Staff gathers relevant data on the rule, identifies the major questions and issues pertaining to the complaint, contacts the agency to indicate that a complaint has been received, and generally begins the process of reviewing the rule for any problem areas.

Once sufficient information has been collected, the Commission then determines whether the rule necessitates a full-scale review by the LCRAR. If that determination is made, then staff begins the process of contacting concerned groups, agency personnel, and those legislators who have had an association or interest with a particular issue or rule.

The process through which the Commission reviews rules is outlined in Section III. It traces the Commission's procedure from the receipt of a complaint to potential action by the Commission to resolve a rule-related problem.

Section IV outlines the steps involved in the suspension of a rule.

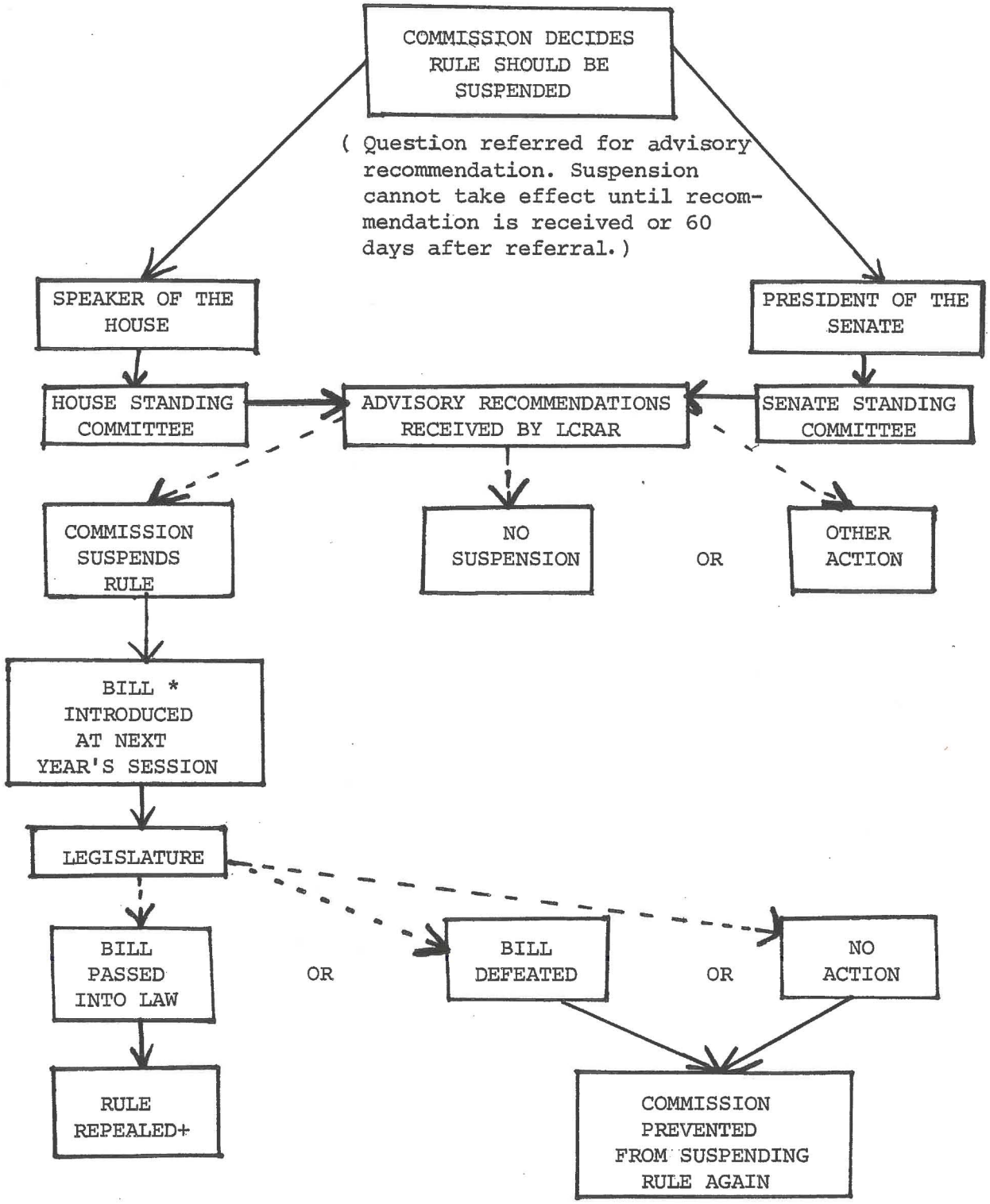
III. LCRAR RULE REVIEW PROCESS



* Other action includes referral to other legislative bodies, informal negotiation with agency to resolve problems, and tabling the discussion until some future date.

\+ The process through which rules are suspended are discussed on page 7(see also Minn. Stat. § 3.965, Subds. 2, 3 and 4)

IV. THE PROCESS OF SUSPENDING A RULE: LCRAR



*This bill provides for the repeal of the rule suspended by the LCRAR

+Once a rule is repealed in this manner, the agency cannot enact a rule with the same or similar language unless a law specifically authorizes the adoption of that rule.

V. NUMBER OF MEETINGS AND COMPLAINTS HEARD BY LCRAR

During 1979 and 1980, the LCRAR met 24 times (14 meetings during 1979 and 10 during 1980).

There were 71 formal complaints during the two-year period involving the 25 agencies listed below. The number after each agency indicates the number of formal complaints reviewed concerning rules of the particular agency.

Administration	-	1	Housing Finance Agency	-	1
Agriculture	-	2	Pharmacy Board	-	1
Board of Architectural Engineering	-	1	Pollution Control Agency	-	8
Board of Education	-	2	Public Safety	-	3
Board of Electricity	-	2	Revenue	-	1
Board of Nursing	-	1	State Planning Agency	-	1
Corrections	-	3	Transportation	-	5
Commerce	-	5			
Crime Control Planning Board	-	1			
Department of Natural Resources	-	3			
Department of Public Welfare	-	9			
Economic Security	-	1			
Education	-	4			
Education, Vocational Technical Division	-	1			
Employee Relations	-	1			
Energy	-	2			
Ethical Practices Board	-	1			
Fire Marshal	-	3			
Health Department	-	9			

Many of these complaints were resolved through negotiation between the agency and the person or group who brought the complaint with staff of the LCRAR acting in the position as intermediary. In several instances the complainant felt that information provided by the agency and the LCRAR demonstrated that the rule was necessary and reasonable. Thus, no further action was necessary. In other instances, the agency itself was willing and able to take action to resolve the problem(e.g. grant a variance; amend or repeal the rule). But in a number of cases, the only solution seemed to lie with definitive action on the part of the full LCRAR. Those instances will be described briefly in the pages which follow.

1. Solid Waste Rules of the Pollution Control Agency(PCA)

The complaint brought before the LCRAR contended that PCA had violated legislative intent when it proposed its solid waste rules, in particular SW 11. The law provided that PCA could set different standards for sparsely populated areas of the state, but PCA chose not to do this. A number of legislators from the northern part of the state complained that it would be impossible for small communities in that region to comply with the rules. The LCRAR found that the proposed rule did violate legislative intent and directed the PCA to report back to it with a plan on how to resolve the problem. The PCA chose to amend SW 11 and new hearings were held. On April 28, 1980, an amended SW 11(published in the Minnesota Code of Agency Rules as 6MCAR 4.6011) was adopted by the PCA. The amended rule grants exemptions for sparsely populated areas from certain sanitary landfill operating standards.

2. Department of Transportation Rule Which Required Parallel Parking on All State-aid Roads

Several legislators requested the LCRAR to suspend the rule pertaining to enforcement of parallel parking on any approved state-aid road project(Minnesota Department of Transportation(DOT) Rule 14MCAR 1.5032 I, 1 a(5)). A number of small communities felt that angle parking should be permitted on state-aid streets which were wider than the minimum standard. The community of Lonsdale testified that its main street was 85 feet wide and that angle parking would not impede traffic flow nor would it present significant safety problems.

Two hearings were held on this issue and on August 27, 1979, the LCRAR suspended the rule. In the 1980 session, a bill was passed to ratify this suspension (H.F. 1666, Chapter 370, Laws of 1980).

As a result of this case, legislation was passed which directed DOT to adopt a rule which would permit variances from state-aid standards under certain circumstances. Staff of the LCRAR worked with staff of DOT to draft this rule, as well as a new rule which permits angle parking under certain circumstances. These rules were adopted by DOT on June 10, 1980.

3. Department of Revenue Rule Providing for Collection of Sales Tax on Packaging Materials Used in Custom Meat Processing

This rule was reviewed by the LCRAR in the summer of 1978 at the request of the Minnesota Association of Meat Processors(MAMP). MAMP contended that

the Department of Revenue had exceeded its statutory authority and violated legislative intent when it provided, through rule, for a sales or use tax on the wrapping paper used by custom meat processors. Their contention was based on their interpretation of Minnesota Statutes 297A.25, Subd. 1(h) which exempts from the sales tax the "processing of agricultural products, whether vegetable or animal...." (emphasis added). MAMP contended that that particular section of the law exempts packaging materials used in processing meat. In addition, MAMP claimed that 297A.25 made specific mention of only two classes of users of materials in the "manufacturing, processing (etc) of agricultural products" who were not exempt from the payment of sales or use tax, i.e. "restaurants and consumers." Therefore, according to Mr. Howard Nelson, the chairman of MAMP's legislative committee, meat processors are exempt since they are not in either classification.

On the other hand, the Department of Revenue asserted that the exemption in the statute specifically applies to the sale or use of personal property. Since custom meat processors are not producing and selling an item of tangible personal property, (they do not claim to be selling wrapping material) they are basically selling a service. Persons who sell services are consumers of tangible personal property used in rendering such services and are liable for sales or use taxes on such tangible personal property. The Department of Revenue maintained that this is the principle followed in all states having a sales and use tax law and the Department has adopted rules which are in accord with the general application of the law.

Two hearings were held on this issue in 1978. The final staff report was presented to the LCRAR on September 26, 1978. It recommended that no action be taken on the complaint.

After considerable debate, the Commission rejected a motion to suspend, but passed a motion which found that the rule violated legislative intent. A summary of the Commission's actions was transmitted to the Tax Committees, in the expectation that the issue would be finally resolved by the Legislature itself.

During the 1979 session the Department of Revenue did not attempt to collect the tax, pending possible action by the Legislature. When no action had been taken by late in the 1980 session, the Department indicated its intention to MAMP to resume collection of the tax.

As a result, Mr. Howard Nelson requested the LCRAR to take up the matter once more since members of MAMP were again being forced to pay a tax which they believed violated legislative intent.

Another LCRAR hearing was held on July 18, 1980, with testimony taken from representatives of the Department of Revenue and from Mr. Nelson. Essentially, the same points were raised at this hearing as in the 1978 hearings.

Counsel to the LCRAR pointed out to the Commission that the statute itself did not exempt wrapping paper for custom meat processing from the tax. Therefore, even if the LCRAR were to suspend the rule, the Department of Revenue could still claim the authority to collect the tax.

After vigorous discussion, the Commission voted to once again send the issue to the House and Senate Tax Committees along with a letter expressing the strong feelings of the LCRAR that the issue should be reviewed and resolved.

4. Regulation of Nursing Homes - Rules of Department of Health, Department of Public Welfare, Board of Pharmacy and State Fire Marshal

In the summer of 1979 a number of complaints were consolidated when the LCRAR moved to undertake an in-depth review of all regulations pertaining to nursing homes. Six public meetings throughout the state were held, at which testimony was taken from providers, consumers and staff from state agencies. Two separate meetings were devoted to Commission review and action on the final staff report. The Commission found that on the whole, state regulations were not duplicative nor unnecessarily burdensome. However, it did find that the reasonableness of a number of rules could be questioned, based largely on new scientific developments and procedures in the delivery of nursing care. As a result, on January 29, 1980, the LCRAR requested the Department of Health to hold a hearing on the following rules:

1. MHD 46(1) Use of Oxygen
2. MHD 47(a) Annual Tuberculosis Testing for Employees
3. MHD 49(c)(1) Patient Admission Tuberculosis Testing
4. MHD 55(u)(1) Machine Washing of Dishes
5. MHD 54(a)(5) Laundry Temperature
6. MHD 53(f) Destruction of Unused Drugs
7. MHD 50(e)(1) Minimum of 2 hours of nursing personnel per patient per 24 hours
8. MHD 48(a)(4) Preservation of patient records
9. MHD 48(8) Patient accounts
10. Variances
11. MHD 64(a)(1)(aa) - 5% of rooms designated for single occupancy

The Department of Health held a hearing on these rules on April 1, 1980.

The LCRAR found that two rules were unreasonable and actually were detrimental to the overall well-being of patients in some instances. Therefore, after receiving affirmative advisory recommendations from the House Health and Welfare Committee and the Senate Health, Welfare and Corrections Committee, on March 5, 1980, the Commission voted to suspend the following two rules:

MHD 52(a)(1) - the portion of the rule which unconditionally prohibited the use of double beds in nursing homes and boarding care homes.

MHD 64(a)(3)(ffl) - which unconditionally prohibited the use of locks on patient doors in nursing homes.

The Department of Health subsequently adopted a new rule to allow the use of double beds under certain circumstances; nursing homes and boarding care homes are required to develop a written policy regarding the use of double beds.

The Department of Health also adopted a new rule regarding locks on patient doors. It reads as follows: "The nursing home shall develop a written policy regarding the use of locks on patient bedroom doors. The policy shall address whether or not doors can be locked while the patient is in the room. Any locks installed on patient bedroom

doors shall be so arranged that they can be locked only from the corridor side. All such locks shall permit exit from the room by a simple operation without the use of a key. All locks shall be openable with a master key which is located at each nursing station."

The LCRAR found in its review of nursing home rules that many of them are mandated under federal regualtions. One such regulation was found to be particularly burdensome. This rule requires that a patient be seen "by his attending physician at least once every 30 days for the first 90 days following admission"and at intervals not to exceed 60 days thereafter.

The LCRAR sent resolutions requesting a relaxation of the rule to the Minnesota Congressional delegation, the President, the Department of Health, Education and Welfare(now Health and Human Services), and to the National Conference of State Legislatures, asking for their support in getting the rule revised.

Finally, the Commission recommended the following issues to the legislative policy committees for their review and action:

1. The development of a pre-admission screening program. The committees were requested to consider what such a program should include and who should be responsible for implementing it.

2. Staffing problems in nursing homes; i.e. how can the problem of a nursing shortage be addressed.

3. Reporting of abuse of vulnerable adults.

4. Regulation of hospitals by the Joint Commission on Accreditation of Hospitals.

5. Annual audits of nursing homes.

The Legislature acted on two of these issues: A law was passed to establish a pre-admission screening program and a law was passed to provide for the reporting of abuse of vulnerable adults.

5. Fire Marshal Rule Regarding Room Use and Placement for Elementary Students

The Hutchinson school board requested the LCRAR to suspend Minnesota Rule Fire Mar 31, Mn Uniform Fire Code Sec. 1.216. This rule states that"rooms used for kindergarten and first grade pupils shall not be located above or below the floor of exit discharge. Rooms used for 2nd grade pupils shall not be located more than one story above the floor of exit discharge."

The Hutchinson school district claimed that this rule was unnecessary in their case because of the extensive fire precautions which the school had taken and it was unreasonable because it would deny the use of the gym, media room and lunchroom to primary students.

While the rule was under review by the LCRAR, the State Fire Marshal agreed not to enforce the rule against the Hutchinson school district. Two hearings were held on the matter, at which testimony was taken from fire marshals throughout the state who opposed suspension of the rule, and from the city of Hutchinson, who favored suspension. A nationally recognized fire code consultant said that the rule could be relaxed in Hutchinson's case, but that he could not support suspending it for all schools.

The Commission voted to sustain the rule. Subsequent to this, the State Fire Marshal and the Hutchinson school board were able to work out a time frame and plan of action for compliance with the rule.

6. Department of Public Safety - Lack of Rules for Issuance and Cancellation of Drivers' Licenses

In January, 1979, two legislators who were also members of the LCRAR requested the Commission to review the policies followed by the Department of Public Safety in regard to licensing of individuals subject to paroxysmal disturbances of consciousness. At that time, the Department had no rules to address situations where persons subject to loss of consciousness (such as epileptics and diabetics) applied for a driver's license. It did, however, have a policy. The complainants felt that since this policy was being applied to all persons similarly affected, now and in the future, it was an agency statement of general applicability and future effect. Therefore, under the definition of "rule" in the Minnesota Administrative Procedure Act (Minnesota Statutes, Section 15.0411, Subd. 3), this policy should have been adopted as a rule under the rulemaking provisions of the APA.

The policy had been adopted on the recommendation of a volunteer Medical Review Board. When the complaint was filed, the substance of the policy itself was not at question. But the complainants felt strongly that a policy which does directly affect the rights of or procedure available to the public, should be adopted in accordance with the prescribed rulemaking process. This would enable citizens to participate in the adoption of rules which directly affect them and it would promote an understanding on the part of the public as to which rules they are called upon to obey.

Therefore, on March 5, 1979, the LCRAR passed the following motion:

"The LCRAR requests the Department of Public Safety to hold a hearing with respect to proposed rules to administer those provisions of Minnesota Statutes, Chapter 171, which are related to the granting, denying, restricting, suspending, revoking or cancelling of drivers' licenses for persons with physical or mental disabilities or diseases when the Department's decision is related to the disability or disease. The proposed rules should include the criteria the Department will use to determine a person's eligibility or ineligibility for a license pursuant to Minnesota Statutes, Section 171.04, clauses (8) and (9). The requested hearing may be held in conjunction with a hearing on other rules which the Department is proposing, provided the hearing is held within 60 days of receipt of this request."

The Department subsequently developed rules. However, Commission members and staff objected to the lack of specificity in the rules and to the fact that the Commissioner of Public Safety was given extremely broad discretion in the implementation of the rules. In spite of these objections, the Department chose not to revise the draft rules, but to proceed to a hearing with them. The hearing was held in May, 1980. The hearing examiner objected to the rules for many of the same reasons as had LCRAR staff and members. As a result, the Department withdrew the rules and proceeded to solicit public opinion on new rules. A recent draft of the rules indicates that the rights of the public are given greater protection and organizations representing affected groups have given their approval to the draft rules. The Department expects to go to hearing with the new rules early in 1981.

7. Department of Public Welfare Rules for Services to the Mentally Retarded

In May, 1980, the LCRAR requested the Department of Public Welfare to hold hearings on three separate rules related to services for the mentally retarded. This action was taken after several public hearings and a four month review of rules pertaining to services for the mentally retarded. In one case, Rule 34, the agency was requested to revise the rule to eliminate those parts of the rule which duplicated the Department of Health's Supervised Living Facilities regulations. (The Department had proposed a rule in 1974 which would have done this and then, supposedly, "lost" the rule after it had gone to hearing.)

In other action, DPW was requested to revise Rule 185 to include criteria and procedures for need determination within the rule itself as well as to clarify what services were mandated by the rule and who was responsible for their delivery following passage of the Community Social Services Act. In this case, DPW had issued binding requirements through the issuance of a policy bulletin which had not been adopted in compliance with the Administrative Procedure Act.

In a third action, DPW was requested to bring to hearing a rule(Rule 18) setting standards for semi-independent living facilities for the mentally retarded. DPW had been working with provider and advocate groups for six years on this rule, but until it was promulgated there could be no public dollars spent to reimburse such programs.

Hearings on Rule 18 and 34 were held in October, 1980, and Rule 185 was heard in November, 1980. The Department has adopted revised Rule 185; the rule was amended to conform with the LCRAR request. The Department expects to adopt revised Rules 18 and 34 early in 1981.

8. Pollution Control Agency Hazardous Waste Rules

During 1979 and 1980 the LCRAR received several requests to review the state Pollution Control Agency's hazardous waste rules. One of the complaints was brought before the LCRAR by Mr. Peter Popovich on July 5, 1979. That complaint claimed that the rules were invalid because they had been improperly

adopted over the objections of the Chief Hearing Examiner. (The Chief Hearing Examiner disapproved them because he held the agency had made substantial changes in the rules from the time they were proposed in the State Register. The Pollution Control Agency (PCA) adopted the rules anyway and the Attorney General approved them.) The issue of the validity of the rules was brought before the Minnesota Supreme Court on October 29, 1979, as part of an appeal by the City of Shakopee in a case related to hazardous wastes. The LCRAR then determined not to take up a review of the rules while the issue of their adoption was pending before the Court.

On June 5, 1980, the Supreme Court ruled that the subject matter of the suit was rendered moot by Laws of Minnesota, 1980, Chapter 564 (the Waste Management Act), and the judgment was vacated and the matter dismissed. Thus, the Court never ruled on whether or not the rules were valid, primarily because one of the main items at issue in the suit was the definition of hazardous waste found in the rules and the new law itself defined solid and hazardous waste.

Shortly after the Court's ruling, the Minnesota Association of Commerce and Industry (MACI) requested the LCRAR to review the rules from two standpoints. One was to address the validity of the rules in terms of the manner in which they were adopted. The other was to address the reasonableness of the rules in light of the adoption of less stringent rules by the federal Environmental Protection Agency. Representative Jim Pehler also requested the Commission to review the reasonableness of the state rules.

At a meeting held on June 16, 1980, the Commission voted to undertake an in-depth review of the rules based only on questions of reasonableness, not on the validity of their adoption. A hearing on the rules was subsequently held on August 19, 1980. Testimony was received from the director and staff of the Minnesota Pollution Control Agency, the director of environmental affairs for MACI, the chairman of the Minnesota Waste Management Board, staff from the Region V office of the U.S. Environmental Protection Agency (EPA), the executive vice president of the Automotive Service Councils, the chief hazardous waste officer for Hennepin County, the office manager of the Minnesota Newspaper Association, and the manager of the Division of Environmental Health of Ramsey County. Staff from the legislative Science and Technology Research Office attended as resource persons.

In the testimony presented by Mr. Ted Shields, representing MACI, a formal request was made for the LCRAR to suspend the state hazardous waste rules and let the federal program for regulating hazardous waste be the operative one in Minnesota. MACI did not dispute the need to properly manage hazardous waste, but they felt it could be done in an adequate and less costly way under the federal program.

The final staff report was presented to the Waste Management Commission on November 12, 1980, and to the LCRAR on November 19, 1980. The staff report found that the particular scheme of regulation embodied in the state PCA rules appears to be very close to the federal EPA scheme. Both the state rules and

the federal regulations establish comprehensive "cradle-to-grave" watchdog systems which require extensive reporting about the nature and amount of wastes produced by generators, strict limits on where the wastes can be disposed, and very exact procedures for their transportation to highly regulated storage sites. In comparison to the federal regulatory scheme, then, staff found that the state rules did not appear to be unreasonably comprehensive insofar as they addressed all stages of the handling of hazardous wastes. Both systems regulate all stages of handling.

However, some very real differences between the state and federal programs were found to exist. These differences related to the listing of nonhazardous waste on the state disclosure form, the testing procedure required by PCA even when the generator admits his wastes are hazardous, and PCA's more restrictive definitions of flammability and corrosivity.

The LCRAR took the following actions to address these differences, as well as other concerns raised in the hearings:

(a) The Commission requested additional information from PCA relative to the requirement that all nonhazardous waste be listed on the disclosure form. If the need and reasonableness of this requirement could not be demonstrated, PCA was to be requested to remove this provision through use of the noncontroversial procedure for adoption of a rule or in concjunction with the regular rulemaking hearings which were mandated under the Waste Management Act of 1980.

(b) The Commission requested PCA to amend MCAR 4.9002 E.2. to clarify PCA's intent in regard to testing of components in Lists 1 and 2. Specifically, the rule was to be amended so that redundant testing was not required when a generator could demonstrate that he knew what the hazardous constituents of the waste were and that the waste would be handled in compliance with the hazardous waste rules. PCA was requested to amend the rule through use of the noncontroversial procedure for adoption of a rule or in conjunction with rulemaking hearings mandated under the Waste Management Act of 1980.

(c) The Commission requested additional information from PCA relative to the definition of corrosive materials. Specifically, it asked the Agency to demonstrate the need and reasonableness of maintaining the definition of a corrosive material as one as having a pH of greater than 12 or less than 3, rather than the federal standard of 12.5 and 2.

(d) The Commission requested additional information from PCA relative to the definition of a flammable waste. Specifically, the Agency was requested to demonstrate the need and reasonableness of maintaining the definition of a flammable waste as a material that has a flashpoint below 200°F., rather than below 140°F. as federal rules require.

(e) The Commission requested PCA to review its rules so that information required on the manifest document would correspond to that required by EPA. The Agency was directed to make this rule change through use of the noncontroversial procedure for adoption of a rule as provided in Section 7, Subd. 4h, Chapter 61, Laws of 1980. If seven or more persons objected to changing the rule without a hearing, the Agency was to notify the LCRAR which could

then request PCA to hold a rulemaking hearing in accordance with the provisions of Minnesota Statutes, Section 15.0412, Subdivisions 4 to 4g, within 60 days.

(f) The Commission urged PCA to continue its technical assistance and public education program to assist generators. The Commission requested that generators be helped to understand how both federal and state laws and regulations applied to them and how they could comply. The Commission recommended that seminars be held in outstate locations and, whenever practical, on-site assistance be given. PCA was encouraged to enlist the aid of organizations representing business and industry in disseminating information to generators. The information to be disseminated was to include a listing of available firms which test and analyze wastes.

(g) The Commission urged PCA to continue to seek interim and final authorization from EPA to manage the hazardous waste program in Minnesota.

(h) Finally, the Commission requested PCA to report back to the LCRAR in January, 1981, regarding its implementation of the LCRAR's recommendations and its progress toward receiving federal authorization.

9. Department of Corrections Rules for Jail Standards

Late in the 1980 legislative session, the issue of state standards for county and regional jails came up in the House of Representatives. Several representatives had been contacted by county commissioners who claimed that the counties were not able financially to adhere to the state standards for county and regional jails. The matter was first discussed in the House Health, Welfare and Corrections Division of Appropriations. The question raised by some members was that either jail standards needed to be relaxed or more money had to be appropriated to counties to upgrade jails. However, before the Committee took any action, the issue was raised on the floor of the House when a representative offered an amendment to a pending bill to end enforcement of the state jail standards until such time as a special committee composed of county commissioners, law enforcement officials, judges and representatives of the public could review the rules and make a determination as to their need and reasonableness. Several House members argued against this amendment on the grounds that it circumvented a procedure that was already in place for the review of rules, the LCRAR. The amendment was defeated, but with the underlying assumption that the LCRAR would be requested to review the state jail standards.

At the next meeting of the Health, Welfare and Corrections Appropriations Division a resolution was passed which requested the Chairman of the Appropriations Committee to request the LCRAR to review the rules setting standards for county and regional jails. The Chairman of Appropriations did not make this request, but the Chairman of the Health, Welfare and Corrections Division of Appropriations, Representative Paul McCarron, requested that the Commission undertake such a review.

At the June 18 meeting, the members of the LCRAR discussed the controversy which existed over the standards for regional and county jails. They agreed that the rules needed to be reviewed but that it would be premature of the Commission to consider suspension of any of the rules at that point. They also agreed it would be premature to request the Department of Corrections to go to a formal hearing on a revised set of rules before a comprehensive review had been made of the rules. Therefore, the following resolution was approved unanimously by the LCRAR:

"Be it resolved that:

The LCRAR requests the Department of Corrections to conduct a review of the present jail standards, 11 MCAR 2.100, with the review committee to include representatives of the Minnesota Association of Counties and the Minnesota Sheriffs' Association, selected so as to assure fair geographic, economic and demographic distribution.

We further request the Department of Corrections to keep the LCRAR informed of progress of the review and to make a final report to the Commission on its findings and conclusions.

We request the Department of Corrections to present a plan and schedule for its review to the LCRAR on July 16, 1980."

The Department of Corrections has complied with all parts of this resolution and has continued to report monthly to the LCRAR. The report of the Task Force is to be submitted to the Commissioner of Corrections in January, 1981. After the Department reviews it, a presentation will be made to the LCRAR. The Department plans to hold a hearing on new rules by June, 1981.

10. Energy Agency Rules on Outdoor Display Lighting

In July, 1980, Representative Wayne Simoneau, on behalf of the Minnesota Automobile Dealers Association(MADA),requested the LCRAR to review the Energy Agency's rules which regulate the use, quantity and efficiency of outdoor display lighting(6MCAR 2.2120).

The rules were adopted September, 1979, but the standards for outdoor display lighting did not actually go into effect until July 1, 1980.

The MADA objected to the rules for three major reasons: (1) the way in which they were adopted contravened the intent of the Administrative Procedure Act; (2) the inclusion of "security lighting" in the definition of "outdoor display lighting" was contrary to legislative intent; and (3) the application of the rules, as written, to the MADA was unreasonable and improper.

The Energy Agency was originally given the authority to adopt proposed rules under Minnesota Statutes(1978),Section 116H.12,Subd. 1b, which provides:"the director shall develop proposed rules, pursuant to Chapter 15, by October 1, 1977,

setting standards covering permissible hours of operation, quantity and efficiency of outdoor display lighting" and defining "outdoor display lighting." This provision was added during the conference committee meetings on the 1977 energy bill (Chapter 381, Laws of 1977). It was a compromise between a stronger position advocated by the House Environment and Natural Resources Committee, which authorized the Energy Agency to promulgate rules and the position of the Senate, which had rejected a more restrictive outdoor display lighting provision.

Thus, when the Energy Agency gave notice of hearing, it was to deal with proposed rules, not rules for final adoption. The MADA contended that for that reason they did not at first respond as vigorously as they might have. In the 1979 session, legislation was introduced to give the Energy Agency authority to promulgate rules. This was embodied in the energy bill passed in the May, 1979 special session (S.F. 2). It amended Minnesota Statutes, Section 116.12, Subd. 1b to direct the director of the Energy Agency to promulgate final rules by July 1, 1979. The only way the Energy Agency could comply with this directive in the time allotted was to adopt as final the rules it had gone to hearing with as only proposed. The MADA objected to this kind of procedure in that it contravened the intent of the APA. It was MADA's position that the Energy Agency should go back to hearing on final rules.

It was the contention of the MADA that the Energy Agency also exceeded its authority by proposing rules which regulate the permissible quantity of security lighting. Minnesota Statutes, Section 116H.12, Subd. 1a provides that "outdoor display lighting shall include building facade lighting, other decorative lighting, and all billboards and advertising signs except those which identify a commercial establishment which is open for business at that hour." The MADA contended that since the statute makes no mention of lighting used for purposes other than display, such as security lighting, and since security lighting is different from display lighting, it should not be regulated pursuant to Minnesota Statutes, Section 116H.12. The Energy Agency maintained that security lighting falls under the broad scope of "outdoor display lighting" and that since the same lighting is used both for display and for security, the Agency has the authority to regulate it.

Finally, the MADA asserted that the Energy Agency did not make a sufficient affirmative presentation of facts to demonstrate the need and reasonableness of the rules, especially as they relate to security lighting.

The MADA believed that the Hearing Examiner gave credence to their objections when he suggested in his report that there should be "further discussions between Agency and MADA representatives to develop specific standards for the retail automobile dealers' needs. Such specific standards could then be considered for promulgation as a rule."

The Director of the Energy Agency took note of the Hearing Examiner's

recommendation when he published his Findings of Fact, Conclusions and Decision on September 5, 1979. In the Findings of Fact, he stated, "As soon as the rules are effective the Agency will publish a notice seeking comment from automobile dealers and will consider adding specifics to the rules to meet industry concerns if evidence of the need for such specifics is shown." Ten months later, the Energy Agency had not published notice seeking comment and no further discussions had been held with representatives of the automobile dealers.

A hearing on the issue was scheduled for October, 1980. However, at a meeting of the LCRAR held on September 17, 1980, Mr. Dick Wallen, Assistant Director for Data and Analysis, Energy Agency, testified that staff of the Energy Agency had met with representatives of the MADA and that they had come to an agreement on changes in the rules which the Agency would propose.

The LCRAR agreed not to hold a hearing pending action by the Energy Agency. On December 29, 1980, the Agency published notice of intent to amend the rules through use of the noncontroversial rulemaking proceedings. The proposed rule amendment, which was agreed to by the MADA,read as follows:

6 MCAR § 2.2120 Permissible quantity.

A. Beginning July 1, 1980, the provisions of 6 MCAR § 2.2102 B. and C. notwithstanding, no person shall operate security lighting that exceeds .05 watts per square foot for the area lighted for security purposes, except that security lighting installed and placed in operation prior to July 1, 1981, may continue to operate at levels not exceeding .10 watts per square foot.

The Energy Agency expects to adopt the amended rule early in 1981.

11. Department of Revenue Rules Regarding Exemption from Sales Tax for Religious, Charitable and Educational Organizations

A complaint was brought before the LCRAR dealing with the Department of Revenue's rules for imposing a sales tax on religious, charitable and educational institutions under certain conditions. The specific rules in question were Tax S & U 108E, Tax S & U 108E 5, Tax S & U 108H, and Tax S & U 411f. All of these rules deal with the serving of meals either at or by religious, charitable, or educational organizations. The problem which was presented to the LCRAR revolved around the fact that in some instances these organizations were exempt from paying the sales tax on meals served or purchased by them, but in others they weren't exempt. A great deal of confusion on the part of the public resulted. Catering firms, in particular, claimed to be hurt by the rules, since some organizations thought they were exempt from the sales tax in all instances and thus refused to pay it even in those instances when the law and rules required payment of the tax.

Catering firms thus requested the LCRAR to review the relevant rules on the grounds that

(a) the Department of Revenue has exceeded its statutory authority in taxing meals served by caterers to organizations which are exempt from the tax when they serve the meal themselves, and

(b) the rules are unclear to religious, charitable and educational institutions who believe that their tax exempt status is broader than it actually is.

The law (Minnesota Statutes, Section 297A.01, Subdivision 3, (c)) provides that meals and lunches served at public and private schools, universities or colleges, or the occasional meal furnished, prepared or served by a charitable or church organization are exempt from the sales tax.

The rules further clarify the statute. What constitutes an "occasional meal" is defined in Tax S & U 108E and 411f. Services provided by caterers are addressed in Tax S & U 108E 5. This rule provides that meals prepared or served by a hotel, catering firm or other commercial enterprise for a charitable or church organization are not occasional meals. Thus, the consideration paid to the hotel or caterer for such meals by the organization, its members or the general public is taxable. However, Tax S & U 108H provides that catered meals served at schools do not constitute taxable transactions.

The confusion seemed to arise from the fact that when a religious organization served an occasional meal on its premises, prepared by its members, for which it sold tickets, no sales tax was due. But when the church had the meal served by a caterer, it had to pay the sales tax.

Educational institutions did not have to pay the sales tax when a meal was catered at the school. But if the meal were catered for the school off school premises (e.g. for a school picnic at a park), then the transaction was taxable.

And, finally, charitable and church organizations who had a meal catered for their members were exempt if they had the meal served at the local school, but not in their own building.

Representatives of the Department of Revenue who testified at the hearing held by the LCRAR agreed that the situation was confusing and probably needed clarification. But they maintained that even if the LCRAR were to suspend the relevant rules, the Department would still be obligated to collect the tax under their interpretation of the law. Therefore, any necessary changes must be in the statutes, not in the rules.

The Department of Revenue, as well as counsel to the LCRAR, advised that the best route to follow would be to amend Minnesota Statutes,

Section 297A.25, Subdivision 1, (p). This portion of the law exempts from the sales tax:

> The gross receipts from the sale of tangible personal property to, and the storage, use or other consumption of such property by, any corporation, society, association, foundation, or institution organized and operated exclusively for charitable, religious or educational purposes if the property purchased is to be used in the performance of charitable, religious or educational functions, or any senior citizen group or association of groups that in general limits membership to persons age 55 or older and is organized and operated exclusively for pleasure, recreation and other nonprofit purposes, no part of the net earnings of which inures to the benefit of any private shareholders;

At the hearing, the question was raised as to why this exemption did not cover meals either served or purchased by religious and charitable organizations. The Department of Revenue responded that no such exemption could be claimed since, under their interpretation of common law, meals are held to be a service, not property. However, the law could be amended to specifically include meals in the exemption enjoyed by religious, charitable and educational organizations. If this were done, it would mean that all meals provided by such organizations would be exempt from the sales tax, regardless of where or how they were served. This would serve to remove the inequities and the confusion surrounding the tax exempt status of these organizations.

Such a bill has been drafted and signed by all members of the LCRAR. It will be introduced in the 1981 Legislative Session.

VI. LEGISLATIVE ISSUES RELATED TO LCRAR RECOMMENDATIONS CONSIDERED IN 1980

1. Standing Committees' Recommendations for Suspension of Minnesota Department of Health(MDH) Rules

The House Health and Welfare Committee and the Senate Health, Welfare and Corrections Committee both recommended that the LCRAR suspend the Health Department rules prohibiting the use of double beds in nursing and boarding care homes and the use of locks on patient doors in nursing homes - the LCRAR subsequently voted on March 5, 1980, to suspend these rules.

2. Resolution to Congress and the President re: 30-60-90 Day Physician Visits

At its January 29, 1980, meeting, the LCRAR voted to send a resolution to Congress and the President requesting them to take all action necessary to change Health, Education and Welfare(now called Health and Human Services) regulations so that physician visits to medically stable residents of certain health care facilities would be required only quarterly or semi-annually. The resolution passed the Minnesota House and was recommended to pass by the Senate Health, Welfare and Corrections Committee but was not acted upon by the Senate Rules Committee; thus, the full Senate did not have the opportunity to vote on the resolution. Similar resolutions were sent by the Commission directly to Health, Education and Welfare(HEW), with copies to the Minnesota Congressional delegation, and to the Committee on Human Resources of the National Conference of State Legislatures(NCSL).

3. Passage of House File 1666, Chapter 370

This bill ratified the LCRAR suspension of the Department of Transportation(DOT) rule which prohibited angle parking on any state-aid road. In both the House and Senate the bill was passed unanimously by those present and voting. It was signed by the Governor and became Chapter 370, Laws of 1980.

4. Amendments to Administrative Procedure Act, House File 874, Which Affected LCRAR

House File 874(which became Chapter 615, Laws of 1980)amended the LCRAR statute, Minnesota Statutes, Section 3.965, in both technical and substantive ways. Subdivision 2 of Minnesota Statutes, Section 3.965 was amended to extend the authority of the LCRAR to include review of rules promulgated by the Corrections Board and Board of Pardons; the unemployment insurance program in the Department of Economic Security; the Director of Mediation Services; the Workers' Compensation Division in the Department of Labor and Industry; the Workers' Compensation Court of Appeals; and the Department of Military Affairs.

In Subdivision 3 of Minnesota Statutes, Section 3.965, the word "department" was changed to "agency" in order to bring Subdivision 3 into conformity with

Subdivision 2, which provides that "the Commission shall promote adequate and proper rules by agencies and an understanding upon the part of the public respecting them." Amending Subdivision 3 to change "department" to "agency" makes it clear that the Commission can request an "agency," as defined in Minnesota Statutes, Section 15.0411, Subdivision 2, to hold a public hearing in respect to recommendations made pursuant to Subdivision 2.

Subdivision 3 was further clarified by adding language at the end of the first sentence so that it now reads: "By a vote of a majority of its members, the Commission may request any agency issuing rules to hold a public hearing in respect to recommendations made pursuant to Subdivision 2, including any recommendations made by the commission to promote adequate and proper rules and recommendations contained in the commission's biennial report."

This simply makes it clear that the phrase "pursuant to Subdivision 2" means all of Subdivision 2 and not merely the last line of that subdivision.

Minnesota Statutes, Section 3.965, Subdivision 4 was also amended. In the last two sentences, the insertion of "committees'" before "recommendation" and changing "recommendation is" to "recommendations are" in both sentences clarifies that it is the recommendation from the appropriate House and Senate committees that is necessary before suspension of a rule can take effect.

The other change in Subdivision 4 clarifies when the 60 days for recommendation by a committee begin to run. The law now reads: "No suspension shall take effect until the committees' recommendations are received, or 60 days after referral of the question of suspension to the speaker of the house and the president of the senate." This provision was added because it is essential to assure that the process cannot be drawn out indefinitely.

The most important change relative to the authority of the LCRAR was made in an amendment to Minnesota Statutes, Section 15.0412, Subdivision 2. It addresses the question of who should set the standard of need and reasonableness of a rule. There was a great deal of discussion on this in the Governmental Operations committee, with basically two positions stated. The Attorney General and most state agencies took the position that the agencies themselves should be the ones to determine when and if a rule was both necessary and reasonable because only the agencies possessed the factual data and expertise to make that decision.

Another position was taken by the Chief Hearing Examiner. He maintained that someone needed the authority to review an agency's statement of reasonableness and need --that there had to be some sort of standards by which such a statement should be judged.

The compromise which was finally worked out between these two positions provides that if the hearing examiner finds that the agency has failed to establish need and reasonableness of a rule and the Chief Hearing Examiner approves such a finding, the agency may appeal that decision to the LCRAR which would have 30 days in which to discuss the issue.

The LCRAR would then render an opinion on the need and reasonableness of the rule, but the opinion would be advisory only. The practical effect of the opinion, however, would be more than advisory. It is extremely unlikely that an agency would ever proceed to adopt a rule which the LCRAR had found to to be unnecessary and unreasonable since the LCRAR could then suspend that rule.

5. Action on Issues Referred to Policy Committees Regarding Health Care Issues

(a) Pre-admission screening

The issue of developing guidelines for admission to long term care health facilities was referred to the House and Senate policy committees by the LCRAR. A bill was passed(Senate File 702) which establishes a statewide system of screening of Medicaid recipients by county social service agencies before such recipients are admitted to long term care facilities. The pre-admission screening system will be phased in gradually ($48,000 is the initial appropriation). The purpose of the system is to prevent inappropriate nursing home placement and to contain costs associated with inappropriate nursing homes admissions. The law became Chapter 575, Laws of 1980.

(b) Reporting of abuse of vulnerable adults

The LCRAR requested the legislative policy committees to take up the issue of reporting of abuse of vulnerable adults. House File 1942 passed in the 1980 session; it clarifies what constitutes abuse of vulnerable adults and it sets forth the procedure for reporting such abuse. The law is patterned after the child abuse reporting law. It became Chapter 542, Laws of 1980.

VII. LCRAR RECOMMENDATIONS FOR LEGISLATIVE ACTION

Under Minnesota Statutes, Section 3.965, the LCRAR is directed to "make a biennial report to the legislature and governor of its activities and include therein its recommendations." In the course of the last two years, the LCRAR has noted several areas in the law which pose a problem or which have the potential to do so. A number of these problems were remedied in the 1980 Legislative Session(see Part IX of this report). However, problem areas still remain. The LCRAR, therefore, requests legislative action on the following four issues:

1. Changing Time Frame in Which Agencies Are Required to Hold a Rule Hearing

One of the tools which the LCRAR possesses to promote adequate and proper rules is the authority to request agencies to go to hearing. In the past year, the Commission requested four agencies to hold a formal rules hearing. The statute provides that such a hearing is to be held within 60 days of receipt of the request from the LCRAR. Recent changes in the Administrative Procedure Act(APA) make it extremely difficult for agencies to meet this deadline.

The Commission feels it would be appropriate in some instances to lengthen the time period because agencies will need to get approval of a proposed rule's form before publishing it with a notice of hearing in the State Register. Form approval is a new requirement which goes into effect July 1, 1981, and it is likely to increase the time needed before a hearing can be conducted.

It isalso felt to be appropriate to allow the LCRAR to have more flexibility to set the length of the time period with respect to requests for hearings about complicated rules. The LCRAR has in some cases in the past delayed the actual request but put an agency on notice that a request for a hearing would be forthcoming, thereby effectively giving the agency more than 60 days to hold the requested hearing. Giving the LCRAR statutory authority to allow longer time periods to comply with its requests would simply conform the statute to present practice.

Therefore, the LCRAR recommends that Minnesota Statutes, Section 3.965, Subdivision 3, be amended to read:

> Subd. 3.Public hearings by state agencies. By a vote of a majority of its members, the commission may request any agency issuing rules to hold a public hearing in respect to recommendations made pursuant to subdivision 2 including recommendations made by the commission to promote adequate and proper rules by that agency and recommendations contained in the commission's biennial report. The agency shall give notice as provided in section 15.0412, subdivision 4 of a hearing thereon, to be conducted in accordance with section 15.0412.

The hearing shall be held not more than 60 days after receipt of the request or within any other longer time period specified by the commission in its request.

2. Procedures to Be Used at Hearing Held by Agencies at the Request of the LCRAR

Current law is vague about what kind of need and reasonableness statement must be presented by an agency to support the rule about which a requested hearing is being held. One agency, for instance, merely supported the need for its rule by citing the LCRAR request to hold a hearing.

Current rules of the office Administrative Hearings require agencies to show the need for and reasonableness only of amendments to rules. Some hearings requested by the LCRAR might involve a request to re-justify rules which an agency does not want to change. Technically, an agency would not have to re-justify an unamended rule under the Hearing Examiners' rules.

Therefore, in order to clarify this situation, the LCRAR recommends that Minnesota Statutes, Section 3.965, Subdivision 3, be amended to read:

> Subd. 3. Public hearings by state agencies. By a vote of a majority of its members, the commission may request any agency issuing rules to hold a public hearing in respect to recommendations made pursuant to subdivision 2 including recommendations made by the commission to promote adequate and proper rules by that agency and recommendations contained in the commission's biennial report. The agency shall give notice as provided in section 15.0412, subdivision 4 of a hearing thereon. The hearing shall be held not more than 60 days after receipt of the request. The hearing shall be conducted in accordance with the procedural requirements of section 15.0412, except that the agency shall present a statement rejustifying the need for and reasonableness of any existing rule on which the commission has requested a hearing even if the agency chooses not to propose amendments to the rule. The need for and reasonableness of a rule on which the commission requests a hearing shall be shown with the same kind of evidence that would be necessary during any other hearing governed by section 15.0412.

3. Publication of Notice of Suspension in State Register

Another part of the LCRAR statute which is in need of clarification relates to the publication of suspension of a rule. The statute is silent as to whether, where or when notice must be published when a rule is suspended. In the past, when the Commission has suspended a rule, notice of that fact was published in the State Register, even though there was no requirement to do so.

However, there is a requirement for publication by an agency of the suspension of a rule.

According to Minnesota Statutes, Section 15.0413, Subdivision 2, suspensions of rules are not effective until five working days after notice of the suspension published in the State Register.

Minnesota Statutes, Section 3.965 should be amended to require the LCRAR to publish the notice of suspension in order to clarify that we need not wait for the agency whose rule is suspended to do the publishing. This would eliminate any delay in the suspension which could be caused by foot dragging on the part of the agency.

Therefore, the LCRAR recommends that Minnesota Statutes, Section 3.965, Subdivision 5, be amended to read:

> Subd. 5. (NOTICE OF SUSPENSION.) In addition to the other requirements of this section, no suspension shall take effect until notice has been published in compliance with section 15.0413, subdivision 2. The commission shall send the notice to the state register.

4. Clarifying the Definition of "Rule."

The Minnesota Administrative Procedure Act(APA) defines "rule" as "every agency statement of general applicability and future effect" and it further provides that "every rule approved by the attorney general and filed in the office of the secretary of state as provided in section 15.0412 shall have the force and effect of law.."(underlining added).

This would seem to make it clear that all properly adopted rules have the force and effect of law. But the Minnesota Supreme Court has, through its decisions, created different categories of rules, some of which have the force and effect of law and some of which do not. This leaves the legislature, state agencies and the public in the position of not knowing whether a certain rule has the force and effect of law until it is tested in court. It is doubtful that the legislature ever intended to create this kind of uncertain situation.

The situation is especially confusing in that the Minnesota Supreme Court has not fully defined the categories of rules which it has set up--legislative or substantive, procedural and interpretive. What it has said is that decisions regarding the types of rules and their effect will have to be made on a case by case basis. Thus, even after the public, as well as state agencies, have gone to a great deal of time, effort and expense to get rules adopted, they could be forced to expend a great deal more time, effort and money in court to find out if the rules had the force and effect of law. The statute should be clarified to assure that all properly adopted rules are accorded the status of law.

Therefore, the LCRAR recommends that Chapter 15 of Minnesota Statutes be amended in the following ways:

Clarifying amendment to Section 15.0411

Subd. 3. (1) "Rule" includes every agency statement of general applicability and future effect, including the amendment, suspension, or repeal thereof, made to implement or make specific the law enforced or administered by it or to govern its organization or procedure, but does not include (a) rules concerning only the internal management of the agency or other agencies, and which do not directly affect the rights of or procedure available to the public; or (b) rules of the commissioner of corrections relating to the internal management of institutions under his control and those rules governing the inmates thereof prescribed pursuant to section 609.105; or (c) rules of the division of game and fish published in accordance with section 97.53; or (d) rules relating to weight limitations on the use of highways when the substance of such rules is indicated to the public by means of signs; or (e) opinions of the attorney general.

(2) "Rule" includes the types of agency statements described in clause (1) regardless of whether the rule might be known as an interpretive rule, a procedural rule, or a substantive rule promulgated pursuant to a delegation of legislative power.

Clarifying amendment to Section 15.0413

Subdivision 1. Every rule, as defined in section 15.0411, subdivision 3, which is approved by the attorney general and filed in the office of the secretary of state as provided in section 15.0412 shall have the force and effect of law five working days after its publication in the state register unless a later date is required by statute or specified in the rule. The secretary of state shall keep a permanent record of rules filed with that office open to public inspection.

APPENDIX I

LCRAR STATUTE

3.965 LEGISLATIVE COMMISSION TO REVIEW ADMINISTRATIVE RULES.

Subdivision 1. Composition; meetings. A legislative commission for review of administrative rules, consisting of five senators appointed by the committee on committees of the senate and five representatives appointed by the speaker of the house of representatives shall be appointed. The commission shall meet at the call of its chairman or upon a call signed by two of its members or signed by five members of the legislature. The legislative commission chairmanship shall alternate between the two houses of the legislature every two years.

Subd. 2. Review of rules by commission. The commission shall promote adequate and proper rules by agencies and an understanding upon the part of the public respecting them. The jurisdiction of the commission shall include all rules as defined in section 15.0411, subdivision 3 and all rules promulgated by the department of military affairs. It may hold public hearings to investigate complaints with respect to rules if it considers the complaints meritorious and worthy of attention and may, on the basis of the testimony received at the public hearings, suspend any rule complained of by the affirmative vote of at least six members provided the provisions of subdivision 4 have been met. If any rule is suspended, the commission shall as soon as possible place before the legislature, at the next year's session, a bill to repeal the suspended rule. If the bill is defeated, or fails of enactment in that year's session, the rule shall stand and the commission may not suspend it again. If the bill becomes law, the rule is repealed and shall not be enacted again unless a law specifically authorizes the adoption of that rule. The commission shall make a biennial report to the legislature and governor of its activities and include therein its recommendations.

Subd. 3. Public hearings by state agencies. By a vote of a majority of its members, the commission may request any agency issuing rules to hold a public hearing in respect to recommendations made pursuant to subdivision 2 including recommendations made by the commission to promote adequate and proper rules by that agency and recommendations contained in the commission's biennial report. The agency shall give notice as provided in section 15.0412, subdivision 4 of a hearing thereon, to be conducted in accordance with section 15.0412. The hearing shall be held not more than 60 days after receipt of the request.

Subd. 4. Review by standing committees. Before the commission suspends any rule, it shall request the speaker of the house and the president of the senate to refer the question of suspension of the given rule or rules to the appropriate committee or committees of the respective houses for the committees' recommendations. No suspension shall take effect until the committees' recommendations are received, or 60 days after referral of the question of suspension to the speaker of the house and the president of the senate. However, the recommendations shall be advisory only.

History: 1974 c 355 s 69; 1975 c 271 s 6; 1980 c 618 s 26

APPENDIX II

REVIEW OF NEED AND REASONABLENESS OF A RULE BY LCRAR UNDER ADMINISTRATIVE PROCEDURE ACT

15.0412 RULES, PROCEDURES.

Subd. 4d. After allowing written material to be submitted and recorded in the hearing record for five working days after the public hearing ends, or for a longer period not to exceed 20 days if ordered by the hearing examiner, the hearing examiner assigned to the hearing shall proceed to write a report as provided for in section 15.052, subdivision 3. If the report contains a finding that the proposed rule is substantially different from that which was proposed at the public hearing, or that the agency has not met the requirements of subdivisions 4 to 4f, it shall be submitted to the chief hearing examiner for approval. If the chief hearing examiner approves the finding of the hearing examiner, he shall advise the agency of actions which will correct the defects, and the agency shall not adopt the rule until the chief hearing examiner determines that the defects have been corrected. If the chief hearing examiner determines that the need for and reasonableness ~~of the~~ rule has not been established pursuant to subdivision 4, clause (c), and if the agency does not elect to follow the suggested actions of the hearing examiner to correct that defect, then the agency shall submit the proposed rule to the legislative commission to review administrative rules for the commission's advice and comment. The agency shall not proceed to adopt the rule until it has received and considered the advice of the commission; provided, that the agency is not required to delay adoption longer than 30 days after the commission's receipt of the agency's submission. Advice of the commission shall not be binding on the agency. The report shall be completed within 30 days after the close of the hearing record unless the chief hearing examiner, upon written request of the agency or the hearing examiner, orders an extension. In no case shall an extension be granted if the chief hearing examiner determines that an extension would prohibit a rule from being adopted or becoming effective until after a date for adoption or effectiveness as required by statute. The report shall be available to all affected persons upon request for at least five working days before the agency takes any final action on the rule. (Underlining added)