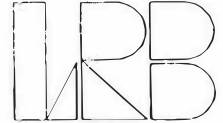


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ADMINISTRATIVE AGENCY RULES

By Wendell K. Kimura

Throughout the state government and county governments there are hundreds of administrative agencies carrying out the various laws of the State and counties. In performing their duties, these agencies adopt, amend, and repeal rules to aid them in their activities. This memo describes the nature and extent of these rules.

Q1: *What is an administrative "agency"?*

A1: An "agency" is a board, commission, department, or officer of the State or county authorized by law to make rules or adjudicate contested cases. These agencies are in the executive branch of our state and county governments. They are not in the legislative branch or the judicial branch of government. The agency does not have to use the term "board, commission, department, or officer" in its title in order to be considered an agency. Examples of agencies are: the Public Utilities Commission (state), the Board of Water Supply (county), the Director of Health (state), etc.

Q2: *What are administrative agency rules?*

A2: They are statements adopted by the administrative agency to implement, interpret, or prescribe the law or policy being administered by that agency. They also include statements that govern the organization, procedure, or practice of that agency.

Q3: *Do these rules have the same effect as laws?*

A3: Yes. Rules that are legally adopted pursuant to statutory authority and in compliance with the Hawaii Administrative Procedures Act have the force and effect of law.

Q4: *What is the difference between a statute and an administrative agency rule?*

A4: A statute is a law enacted by the Legislature.

An administrative agency rule, on the other hand, is adopted by a state or county administrative agency under authority granted to that agency by statute or ordinance. Unless specifically exempted, agencies must follow the procedures set forth in the Hawaii Administrative Procedure Act (HAPA) (Chapter 91, Hawaii Revised Statutes) when adopting, amending, or repealing rules. Among other requirements, HAPA requires agencies to give public notice, to receive and consider comments from the public, to have adopted rules approved by the Governor or the Mayor in the case of counties, and to file certified copies of the rules with the Lt. Governor or the clerk of the county in the case of county rules.

Q5: *What is the Hawaii Administrative Procedure Act (HAPA)?*

A5: The Hawaii Administrative Procedure Act is set forth in Chapter 91, Hawaii Revised Statutes. It is based on the Model State Administrative Procedure Act (1961). The Act is designed to provide uniform standards for all state and county agencies to follow where a personal right, duty, or privilege is at stake, and where rights and duties of the public are involved.

The Act requires state and county agencies to adopt and make public procedural rules, including methods whereby the public can make submissions and requests. The Act also provides for judicial review of agency actions.

Q6: *Are the requirements of the Hawaii Administrative Procedure Act the only requirements imposed on a state agency in adopting rules?*

A6: No. The requirements of HAPA are the only statutory requirements. By administrative directive (AD 99-02), the Governor has imposed additional requirements for state agencies contemplating the adoption, amendment, or repeal of agency rules. Generally, these additional requirements call for proposed rules to be reviewed by the Attorney General and for agencies to prepare fiscal impact statements and small business impact statements for review by the Department of Budget and Finance and the Small Business Regulatory Review Board.

Q7: *Are there some rules that must be adopted by the agencies?*

A7: Yes. Every agency is required to adopt rules describing where and how the public may obtain information or make submissions or requests. Agencies must also adopt rules that set forth the nature and requirements for formal and informal procedures that are available to the public.

Q8: *Are some rules exempt from the usual rulemaking procedures?*

A8: Yes. If there is imminent peril to the public health, safety, or morals, or to livestock and poultry health, emergency rules may be adopted without following the procedures. In addition, the governor is authorized to waive the procedures if a state agency is required by federal law to adopt rules as a condition to receiving federal funds. This same waiver authority is granted to mayors in the case of county agencies. The Legislature may provide other exemptions as the need arises.

Q9: *What is the general nature and basis of authority for administrative agencies' rulemaking powers?*

A9: Generally, the administrative agency has no general, inherent powers. The agency's power is conferred upon it by the Legislature. The agency derives its authority from the enabling statute that mandates the agency's function and grants its power, and from general laws affecting administrative agencies. In other words, the power of the administrative agency to make rules is delegated to it by the Legislature. In the case of county agencies, their authority to make rules is delegated to them by the Legislature or the county councils.

Q10: *In delegating power to administrative agencies, must the Legislature act in a certain way?*

A10: Yes. When the Legislature places discretionary power in an administrative agency, the Legislature must provide adequate "standards" for those who will administer the power. These standards are basic guidelines to guide the agency. These standards must not be unlimited or unreasonable, and must not permit arbitrary actions by the agency. This same requirement is applicable to the counties.

Q11: *Can the Legislature assert more oversight of administrative agency rulemaking?*

A11: Yes. For example, in 1979, the Legislature enacted Act 216, which required that every administrative agency rule, immediately after adoption, must be submitted to the Auditor for its review. Under that Act, the Auditor was required to determine if the rule violated the substantive authority under which the rule was adopted. However, in 1994, the Legislature repealed the foregoing requirement. Today, the Auditor is no longer required to review all rules.

There are other methods of legislative oversight of administrative agency rules. For example, a sunset law may be enacted to provide for automatic termination of rules unless specifically re-authorized by the Legislature. In some states the Legislature provides for suspension of rules, or for the veto of rules. In some states, the Legislature subjects the administrative rules to legislative approval prior to their taking effect.