Rulemaking by the Rules

by Katherine White

This regular Insight *department examines policymaking and the decision-making process in the judicial branch of state government. This installment examines a recent N.C. Court of Appeals decision*—Whittington v. Flaherty—*restricting the rulemaking authority of state agencies to powers expressly granted by the N.C. General Assembly.*

Few of North Carolina's taxpayers have ever heard of the Administrative Rules Review Commission—the ARRC, as it's known to capital insiders. Indeed, even veteran state government workers would be hard-pressed to say where the agency is located, or what it does. But the agency has more potential clout in it than a Louisville Slugger, and it sometimes finds itself embroiled in a *cause célèbre*. Now a state Court of Appeals decision—in *Whittington v. N.C. Department of Human Resources*—highlights concerns about the agency's ability to question the legality of an administrative rule.

For the most part, the small state agency with a staff of four quietly goes about its business of reviewing the thousands of administrative rules cranked out by other state agencies. These rules run the gamut from acquisition of state property to operations of the state zoo, but they deal with carrying out the programs and policies formally adopted by the N.C. General Assembly and interpreted by the executive branch of state government. And the tedious job of sorting through the tens of thousands of these rules means that the ARRC sometimes finds itself at the epicenter of storms swirling over policy questions that are not the purview of the commission—whether, for example, it is appropriate to spank children in day care centers, or how to provide counseling to pregnant mothers applying for state-funded abortions.

The ARRC was intended to perform an important function, acting as a sort of strainer to filter proposed rules that pose problems and earmark them for further study by the agency that proposed the rules. Specifically, the ARRC reviews rules on three criteria: (1) Does the rule have adequate statutory authority? (2) Is the rule clearly and unambiguously drawn? And (3) is the rule reasonably necessary, either to enable the agency to performed a statutorily-assigned function, or to carry out a program or policy?[1]

But the ARRC has come under enfilading fire—from some critics who say the agency doesn't have enough authority, and from others who say the agency gums up the work of government. Recently, its authority to review rules was challenged by the State Board of Education in conjunction with emergency, temporary rules the education board enacted to block local school contracts with Channel One, a commercial television venture for public schools. The state Supreme Court side stepped the issue, resolving the dispute on other grounds.[2]

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And Gov. James G. Martin considered recommending cutting the ARRC's funding—an estimated savings of about $250,000 a year—to help remedy the budget crunch facing the state, but decided to keep it in his budget proposal to the 1991 General Assembly. Such a cut was unlikely to be accepted by the General Assembly because the legislature insisted on setting up the ARRC in the first place. The cut would have eliminated the agency and put a halt to its review process.

The Administrative Rules Review Commission and its predecessors have been around North Carolina state government for about 15 years. They represent an attempt by the General Assembly to exercise oversight of the executive branch and to keep the executive branch from invading the legislators' exclusive right to legislate.[3] The ARRC mission is not to set public policy but to ensure that the public policy set by the General Assembly is carried out by the governor and other executive branch officials within the rules they adopt.

When rules are ambiguous or exceed an agency's authority, the ARRC tells the agency to correct them—but the ARRC cannot veto rules or even stop them from being put into effect. It can only advise the executive branch agency that there is a problem with a rule and that it should be revised or eliminated. In the more-than-18,000 rules reviewed since the present ARRC started work in 1986, state agencies have refused to follow the changes proposed by the ARRC only 52 times. The ARRC has delayed rules on 118 occasions, objected to 570 rules, and recommended technical changes in 1,566 cases.

The North Carolina Bar Association supports the uniformity the ARRC has brought to the state rule-making process. Now, most agencies (except for the departments of Correction, Revenue, and Transportation, and for certain commissions including the Employment Security Commission, the N.C. Utilities Commission, and the Industrial Commission) must submit their rules to the ARRC for review.[4] Because the rules are reviewed by a central agency, the rules now have a uniform style and format. In addition, the Office of Administrative Hearings publishes rules in organized binders, updates them regularly, and publishes a monthly register of all proposed rule changes as well. All these rules appear in the *North Carolina Register*, which also includes executive orders of the governor and other information about executive, legislative, or judicial branch actions related to the Administrative Procedure Act.[5]

"I think that it's helpful for rules to be reviewed, and when ARRC flags a rule as having a problem, it's corrected [by the agency] more times than not," says Ann Reed, senior deputy attorney general and chair of the N.C. Bar Association's Administrative Law Section.

Still, the ARRC is a thorn in the side to some state officials who have to write rules and who must submit their work to a reviewing agency. To others, it's an additional layer of bureaucracy. Yet others question whether the ARRC has sufficient power to do its job. If the ARRC had more powers, for instance, it might have saved N.C. taxpayers a lot of time and money in some recent litigation—nearly $200,000.

Consider what happened in *Whittington v. The North Carolina Department of Human Resources*.[6] In that case, the state's Social Services Commission adopted rules that expanded the responsibilities of local social service agencies when counseling pregnant women who applied for state-paid abortions—and, critics contended, went well beyond the Social Services Commission's statutory authority. The Social Services Commission's rules were engineered in 1986 by former commission Chairman Barry McCarty, a religion professor and a prominent figure in the anti-abortion movement. The proposed rules would have required local social service agencies to (1) offer each woman who applied for public abortion funds an opportunity to see fetal models showing growth and development of the fetus, and (2) notify a district attorney when a woman applying for a state-funded abortion mentioned allegations of rape or incest.[7]

The Social Services Commission had already purchased 100 fetal model sets—each containing nine enlarged fetal models showing the development of the human fetus at monthly stages of pregnancy—at a cost of more than $35,000. The theory was that if pregnant women were shown the models of developing fetuses, they would be far less likely to want to go through with the abortions.

But opponents said there was a problem with what the Social Services Commission wanted to do: it didn't really have the authority to make those rules, or to require the county social workers to show the fetal models to a pregnant woman. The General Assembly had added language to the bill appropriating funds for abortions declaring that "designation of services to be provided or the designation of providers shall be done only by enactment of law by the General Assembly."[8]

That "only by enactment of law" seemed clear to opponents of the rules—that only the General

Assembly could designate services to be provided, and that the Social Services Commission could not. The ARRC dutifully objected to their enactment. The rules originally had been proposed by the Social Services Commission in March 1986 and almost immediately drew fire from the Attorney General's Office. Assistant Attorney General Henry T. Rosser advised the Department of Human Resources on March 20, 1986, that the Social Services Commission lacked the authority to adopt the rules it proposed. In a follow-up letter on May 20, 1986, Attorney General Lacy Thornburg, a Democrat, told McCarty, a Republican, that he agreed with Rosser's informal opinion and added, ". . . it is the opinion of this office."

But despite this advice from the Social Services Commission's own lawyers, then-Rep. Paul Stam (R-Wake), a leading legislative opponent of abortion, was pushing hard for the rules' enactment. The commission in October agreed to go ahead with the rules. For one thing, the commission believed it was authorized to adopt rules because the General Assembly had created the Administrative Procedure Act, which sets forth how state agencies can adopt rules—and the Social Services Commission is subject to the APA.[9] And the commission reasoned that it had authority to adopt rules because it is a tenet of North Carolina law that administrative authority generally should be broadly construed.

The rules were adopted on Oct. 30, 1986, after the Martin administration got clearance to hire outside attorneys to represent the commission in litigation or other legal matters that were sure to materialize.[10] The Social Services Commission adopted its two rules and sent them to the ARRC for review.

Ten weeks later, on Jan. 15, 1987, the ARRC met to examine the proposed rules, and its conclusion was clear: the Social Services Commission didn't have the power to adopt such rules. On Feb. 26, 1987, the Social Services Commission said it would proceed with the rules anyway, since the ARRC didn't have the power to veto the rules, and on March 2, 1987, the Administrative Rules Review Commission advised the General Assembly that the ARRC objected to the rules. That delayed the matter for three months, but on June 1, 1987, the rules took effect anyway.[11]

Planned Parenthood of Charlotte, among others, challenged the rules in Wake County Superior Court on June 11, 1987, on the ground that the General Assembly had limited the authority of the commission, precluding the challenged rules. That court issued a preliminary injunction on July 1, 1987, and heard arguments on Nov. 9, 1988. A month later, on Dec. 8, 1988, the trial court found that the two rules were *ultra vires* [a legal term meaning, literally, "beyond the powers"] and exceeded the scope of the administrative authority of the Social Services Commission.[12] The Social Services Commission appealed to the N.C. Court of Appeals in hopes of finding support for its argument that it had the authority to adopt rules to administer the abortion program despite the legislature's restriction that services would be provided "only by enactment of law by the General Assembly." But on Nov. 20, 1990, the three-judge panel of the Court of Appeals backed up the ARRC's original advice.

"Had the legislature desired to carve an exception under any of the subsections to permit the Social Services Commission to promulgate rules, it could have done so," concluded Appeals Judge Robert F. Orr, a Republican, for the unanimous panel. "The legislature did this for certain other rules. . . . Had the legislature intended to leave room for additional future rules, such as the rules in the present case, it could have done so," Orr added.[13]

Judge Orr noted that despite all the controversy, the case was not a question about the morality of abortions, or about the propriety of taxpayers funding abortions. Rather, Orr wrote, "it is a case solely about administrative rule-making authority and whether the trial court erred" when it found the Social Services Commission had no authority to adopt the fetal model rules.

The Appeals Court also noted that the Social Services Commission does have general rule-making authority for social services programs—just not the authority to adopt rules on which services may be offered in connection with the state abortion fund. But the court also gently admonished the legislature to be more specific in the future if it wished to permit—or limit—rule-making authority. The court put it this way: ". . . we note that it is the legislature's obligation to clarify its intent should it deem such clarification to be necessary."

The Department of Human Resources did not appeal the court's decision. Secretary of Human Resources David Flaherty, a defendant in the case, accepts the correctness of the court's decision in the *Whittington* case, but he raises questions about the ARRC's power to delay a rule. When the ARRC objects to a rule, that automatically delays implementation of the rule for 90 days. "I don't think the ARRC has been good for the state. It's

tremendously increased the cost of doing business. It's another layer of bureaucracy and all they do is recommend," Flaherty says. "It delays [challenged rules] from getting to the courts" where the rules ultimately receive a binding determination.

The *Whittington* litigation cost the state $190,620.33 in legal fees and other expenses, revealing a down-side to the ARRC's work. But defenders say that's not the commission's fault. "The authority is very limited," says Jack Stevens, an Asheville lawyer and former ARRC chairman. "You can't stop a rule. All you can do is slow it up." The ultimate decision, of course, is made by the courts.

Stevens doubts that the General Assembly wanted to render the ARRC powerless to stop a rule, and he cites a provision in the law that allows the ARRC to hold public hearings on challenged rules—something the ARRC has never done. Stevens surmises that those who drafted the ARRC provision envisioned "that you'd call a public hearing and put it [the contested rule] off for three months so that the legislature could come in and act," Stevens said. But that doesn't explain why the legislature didn't act in early 1987, while it was in session and while the fetal model rule and

Reviewing Rules from Another Perspective

by Charles D. Case

A tremendous avalanche of rules is being promulgated by the agencies. I keep up primarily with the environmental rules, and there are thousands of pages of them promulgated at the state and federal level every year. Without an adequate procedure for reviewing those rules effectively, there is no check on the power of the unelected bureaucracy. The legislature cannot keep up with all of the rules that are being passed. In a sense, the *Whittington* case is a bad example of the need and appropriateness of ARRC's review of a rule: *Whittington* looked at a simple, short, well-publicized rule that was extensively debated and monitored in the press. The more typical rule—at least in the environmental area—is long, complicated, technical, and costly to implement. The environmental rules share with the pregnancy-related rules in *Whittington* the fact that both are controversial, which, again, may make them less instructive as examples.

The primary threat to liberty, due process and fair play comes from rules that are promulgated quietly, with little review and less controversy, but that have adverse impacts that fall disproportionately on the particular group that has the misfortune of being in the wrong regulatory place at the wrong regulatory time. The threat most frequently comes not in huge leaps involving fetal models or similar concrete situations, but through small nibbles, nips, bits and slices that gradually carve up the regulated community. The ball-point pen example [see footnote 3, page 63] is actually a better example for that. In and of itself, it meant little. It probably cost little in terms of costs or time to use a pen. There were even good reasons, the agency claimed, for requiring that pens be used. Fortunately, Representative Watkins and others realized that it was an instructive paradigm for a deeper problem: a bureaucracy that chipped away at liberty and fairness without any contravening oversight.

Frogs get cooked without ever realizing it, because they get placed in tepid water that is then gradually warmed so slowly that they never know what happens to them. In much the same way, regulatory agencies make small incursions with rules that rarely—if ever—provide the regulatory community with sufficient cause to act to avoid the problem.

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the rape and incest reporting rule were in abeyance.

The legislature has an opportunity to address the limits placed on the ARRC in the 1991 session. A legislative study commission met in 1990 to discuss, among other things, the problems stemming from the ARRC's lack of power to stop a rule. Constitutional experts have frequently insisted that giving the ARRC outright veto would violate the N.C. Constitution's separation of powers ban on delegating legislative authority to another branch of government. To avoid such a problem, the Legislative Research Commission Study Committee on the Administrative Procedure Act has recommended that the 1991 General Assembly adopt a bill requiring an *agency* to go to court for specific permission to adopt a rule if the ARRC first flagged that rule as being beyond the agency's statutory authority or unnecessary.[14]

The power to stop rules—in effect giving the ARRC a veto—could be construed as a violation of the separation of powers clause or as an unconstitutional delegation of authority by the General Assembly, said Dan McLawhorn, a special deputy attorney general in charge of the Environmental Law Division of the Attorney General's Office. The General Assembly would be giving its power to determine policy to an executive branch agency if such a path were followed, he said.[15]

A cheaper alternative would provide that a challenged rule automatically would expire if the General Assembly did not act to authorize it within a given legislative session. But concerns about separation of powers would also make this alternative unconstitutional, McLawhorn says.[16] Both proposals, McLawhorn says, "give the ARRC the power to delay indefinitely the effective date of duly adopted rules which it deems in excess of statutory authority"—the first delay becoming permanent if the legislature did not act to reaffirm the rule, and the second delay lasting indefinitely unless and until the adopting agency got a court order declaring the rule valid.

McLawhorn said, "The proposed bills, if enacted, would likely be held to violate the constitution by vesting the ARRC with judicial powers reserved to the courts and with supreme legislative powers reserved to the General Assembly." Thus, the two bills likely would be unconstitutional delegations of powers and violate the separation of powers doctrine, McLawhorn said, and "neither may survive a challenge."

The ARRC and its predecessors have been the source of perennial controversies in the General Assembly—over the balance of power among the three branches of government and the power of individual agencies to run their own affairs. It appears that 1991 will be no different.

FOOTNOTES

[1] G.S. 143B-30.1–.2 The larger Administrative Procedure Act, which governs how administrative rules must be drawn, has six primary purposes—(1) to allow groups affected by rules to know of them before they take effect; (2) to allow citizen input into rule-making; (3) to allow public access to rules once they are adopted; (4) to ensure that all significant agency policies are put into writing; (5) to establish a uniform system of administrative procedures for state agencies to follow; and (6) to establish a uniform system of appeals from those rules. For more on the APA, see Bill Finger et al., "Assessing the Administrative Procedure Act," a special report by the N.C. Center for Public Policy Research, May 1985.

[2] See *North Carolina v. Whittle Communications,* No. 164 PA 90, North Carolina Supreme Court, filed April 3, 1991. The state petitioned for reconsideration, but the Supreme Court denied that petition April 22, 1991. In *Whittle,* the State Board of Education argued that it was not subject to the ARRC when it wrote rules pursuant to its constitutional power, as opposed to its statutory authority. The rule in this case is 16 N.C. Administrative Code 6D .0105.

[3] Initially, the General Assembly for a few months had a committee which reviewed rules made by the executive branch and whose powers included the right, never used, to veto the rules. After *State ex rel. Wallace v. Bone,* 304 N.C. 591, 286 S.E.2d 79 (1982), in which the North Carolina Supreme Court required strict separation of powers among the three branches of government, the General Assembly—fearing a challenge based upon the principles outlined in that case—established a review commission that operated under the executive branch.

The Office of Administrative Hearings was created in part because a law partner of the late Rep. Billy Watkins (D-Granville) received in 1984 a morass of rules from the state's Medical Assistance Division. He received one set of rules, followed by a second set of amendments and had a difficult time figuring out what they meant. At that time there was no register of rules and no system for maintaining them in one place. Another popular reason given at the time for creating the agency was a Wildlife Resources Commission rule that required forms to be filled out only with a ballpoint pen. The forms used pressure sensitive paper for copies which meant a felt tip pen wouldn't do. But the peculiar specificity of the ball-point pen rule heightened the General Assembly's interest in getting a handle on the rule-making process. Others attribute Watkin's keen interest in the APA to yet another administrative rule that in effect outlawed beer drinking on Kerr Lake, the popular reservoir on the Virginia-North Carolina border which lay partly in Watkin's district.

The ARRC and the accompanying Office of Administrative Hearings represent a trend in state governments nationally as well. In 1988, the ARRC was separated from the Office of Administrative Hearings and now operates as an independent agency. See G.S. 143B-30.1(c).

Since its inception in 1986 and through Dec. 31, 1990, the ARRC has reviewed 18,007 rule filings, delayed 118 rules, filed 570 objections to rules and recommended 1,566 technical changes. In 52 instances, the rule-making agency has refused to accept the recommended changes from the ARRC.

[4] Under G.S. 150B-1(d), the following agencies are exempted from the ARRC rule review: Department of Transportation, Department of Revenue, Department of Correction, Utilities Commission, Industrial Commission, Occupational Safety and Health Review Board, Employment Security Commission, and the Administrative Rules Review Commission itself.

The Bar Association supports including these agencies under the ARRC umbrella and plans to lobby the General Assembly for the change. A legislative study commission considered inclusion of the agencies but decided against recommending that change to the 1991 session. However, S.B. 12, moving through the 1991 General Assembly, would put the departments of Correction, Transportation, and Revenue back under the auspices of the Administrative Procedure Act and subject to rules review by the ARRC.

[5] G.S. 150B-63.

[6] *Whittington v. N.C. Department of Human Resources,* 100 NC App 603, 398 SE2d 40, decided Nov. 20, 1990.

[7] The rule involving fetal models was proposed as 10 N.C. Administrative Code 42W .0003(c), while the rule on reporting cases of rape or incest was proposed as 10 N.C. Administrative Code 42W .0005.

[8] Chapter 479 of the 1985 N.C. Session Laws, s. 93.

[9] G.S. 150B-1(d).

[10] G.S. 114-2.3 authorizes the state to employ private counsel when the Attorney General's Office decides it cannot provide that counsel to a state agency. The governor must formally request private counsel, and the attorney general must formally approve it. In this case, formal approval came by letter on Oct. 21, 1986, from Attorney General Lacy Thornburg (signed by Senior Deputy Attorney General William P. O'Connell) to Gov. James G. Martin.

[11] G.S. 143B-30.2(c) provides that when the ARRC objects to a rule, its implementation will be delayed "for a period not to exceed 90 days."

[12] No. 87 CVS 4867 (Wake County), Dec. 8, 1988.

[13] *Whittington,* supra, at 613. Judges Sidney S. Eagles, Jr. and Jack Cozort concurred in the decision. The defendants did not appeal.

[14] Report To The 1991 General Assembly of North Carolina, 1991 Session, the Legislative Research Commission's Committee on the Administrative Procedure Act, Dec. 14, 1990.

[15] For the opinion on the constitutionality of this proposal, see memorandum dated Feb. 22, 1991, "Separation of Powers, Powers of Judicial Department; Administrative Agencies," N.C. Department of Justice.

[16] For more on the separation of powers doctrine in North Carolina, see *Boards, Commissions, and Councils in the Executive Branch of North Carolina State Government,* N.C. Center for Public Policy Research, 1984, pp. 41–63. That report also noted that too many boards or commissions with rulemaking power can weaken legislative authority. "The number of rulemaking boards in state agencies inherently affects the strength of executive officials. Heads of departments which have advisory groups instead of rulemaking groups have more authority over internal management. An abundance of policymaking boards in a department leads to executive officials having limited control over programs they must manage. Having too many boards also disperses power and accountability to the people," the report said on p. 91. For more on legislative vetoes and constitutional questions, see *Immigration and Naturalization Service v. Jagdish Rai Chadha,* 462 U.S. 919, 77 L.Ed. 2d 317, 103 8. Ct. 2764 (1983). See also a 1974 North Carolina case, *Revco v. Board of Pharmacy,* 21 NC App 156 (1974), for more on the courts' willingness to throw out rules if agencies do not have the statutory authority to adopt them.