Punch the Clock:
Timing Issues and Substantive Impacts on Administrative Law

by the Honorable Eric L. Lipman

Harvey Mackay, Minnesota's envelope magnate and best-selling author of business leadership books, frequently remarked that over the course of thirty years he started every meeting with his sales force in the same way. Mackay explained that, "I take off my watch, hold it up, and state the following: 'We have no real competitors. This is our only competitor.'" Continued Mackay, "since my only real enemy is the clock, I focus everyday on figuring out how to make the most of the time I have…."

In their recently published article *Deadlines in Administrative Law*,[1] Professors Jacob E. Gersen (Assistant Professor of Law, University of Chicago Law School), and Anne Joseph O'Connell (Assistant Professor of Law, Boalt Hall, School of Law, University of California, Berkeley) seem to pick up right where Mackay and his sales meeting leave off. Gersen and O'Connell closely and deeply examine the imposition of rulemaking deadlines as a frame for understanding regulatory events that later occur. And, while most of the academic literature has ignored time and timing issues as a significant driver of regulatory results, Gersen and O'Connell make findings that are both statistically significant and potentially very important to practitioners.

Among the duo's findings are:

(1) Rulemaking deadlines are more likely to be imposed by Congress when the regulatory policy implicates key state, local or federal governmental concerns – namely that Congress uses deadlines "to constrain agency actions that have a broad effect on powerfully situated political interests;"

(2) There is a general tendency for Congress to impose rulemaking deadlines as to new programs with "new high profile risks for regulation" more than with "older, more familiar risks that may be more serious;"

(3) Deadlines were more likely to be imposed by Congress during periods of divided government (when the Executive Branch agencies were perceived to be further from "legislative ideal points");

(4) While deadlines to complete rulemaking tended to reduce the duration of rulemaking proceedings for the U.S. Department of Health and Human Services by more than 50 percent, for many other agencies, deadlines

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[1] Accessible from the Social Science Research Network, here: http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1085377

reduced the average length of regulatory actions only modestly (on average by roughly 100 days);

(5) Deadlines impose significant constraints on agency resources and create incentives for agencies to seek to avoid notice and comment rulemaking "for deadline driven actions;" and,

(6) Avoiding notice and comment rulemaking increases the risk to agencies that a later challenge to the rules in federal court will be sustained.

Perhaps of greatest interest to Public Lawyers, is this last contention of Gersen and O'Connell – namely that legislatively-imposed deadlines increase the likelihood that a later challenge to promulgated rules will be sustained. For Gersen and O'Connell the argument is two-fold: First, the duo notes that rulemaking deadlines "stand out as one of the few areas where courts will compel agencies to act despite multiple demands on their resources;" a matter that clearly increases the risk to agencies in litigation, if a statutory deadline has not been met. Secondly, to the extent that sharp regulatory deadlines press federal agencies to seek to avoid notice and comment rulemaking, under the "good cause" exception to the federal Administrative Procedures Act, this likewise increases the risk of a successful court challenge. As the authors note: "In lieu of a bright-line rule on deadlines and good cause, courts typically apply a multifactor analysis in assessing whether an agency can rely on a deadline to forego traditional notice and comment procedures…. [A]gencies must exercise care in skipping notice and comment procedures, but if the ordinary requirements of notice and comment are truly burdensome given time constraints from the statute, the agency's decision to avoid costly and time-consuming procedures is likely to be upheld."

While Professors Gersen and O'Connell focused their inquiries on federal rulemaking deadlines, practitioners – both inside and outside of state government – should also be mindful of regulatory deadlines that are closer to home. For example, stakeholders who objected to a proposal regarding behavioral interventions for disabled students, recently challenged a rule proposed by the Minnesota Department of Education as failing to meet an important deadline. The stakeholders asserted that because the legislative authority to amend the rules in question was granted on July 15, 2005, but the Notice of Hearing for the rulemaking was not published until October 15, 2007, more than 18 months later, the Department lost its authority to promulgate any rule. Minn. Stat. § 14.125 requires that an agency "publish a notice of intent to adopt rules or a notice of hearing within 18 months of the effective date of the law authorizing or requiring rules to be adopted, amended, or repealed." If the agency does not meet this timeline, "the authority for the rules expires."

Agreeing with the commentators who objected to the proposed rule, Administrative Law Judge Barbara L. Neilson wrote:

> Because section 14.125 applies to laws enacted after January 1, 1996, "authorizing or requiring rules to be adopted, *amended* or repealed," and the

2005 amendment to section 121A.67 included new language requiring the Department to amend the rules governing the use of aversive and deprivation procedures, the Administrative Law Judge concludes that the requirements of section 14.125 apply to the Department's attempt to exercise that authority as part of this rulemaking proceeding. The fact that the 2005 amendment also contained detailed directions to the Department regarding the content of the rule amendments to be made provides further support for the view that the Legislature intended the directive to be a new instruction to the Department and not simply a continuation of authority previously granted.

In the Matter of the Proposed Amendment to Rules Governing Special Education, Minnesota Rules Chapter 3525, and the Repeal of Minnesota Rules 3525.2435 and 3525.2710, OAH Docket No. 11-1300-19249-1, slip op. at 8-9 (March 3, 2008) (emphasis in original) (http://www.oah.state.mn.us/aljBase/130019249.rr.htm).

So, if you haven't been thinking about how rulemaking deadlines might impact your clients, agency or practice – it just might be high time.

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