

# Rulemaking Authority in N.C.: Canards, Conundrums and Conclusions

Richard Whisnant, UNC School of Government

Three canards, many conundrums and a few tentative conclusions.

*Canard: 1. a groundless rumor or belief. 2. (French) 'duck,' from Old French caner 'to quack'*

## Canards

- ❖ Authority for rulemaking is rarely in question and easily found; more critical is whether there are “adequate guiding standards”
- ❖ Rules have the same legal power as statutes, *inter alia* binding the agency as well as persons outside the agency
- ❖ Rulemaking processes should be *consistent* from authorization to judicial review



## I. Authority for rulemaking is rarely in question; more critical is whether there are “adequate guiding standards”

In days of yore, when I was in law school, and administrative law texts were still written by true believers in the idea that administrative rulemaking was one of the greatest inventions in western law, there was very little attention paid to the ways in which rulemaking was authorized by legislatures. It could be a general authorization, like those frequently given to agencies in the statutes that create and structure them; it could be a specific authorization in a piece of legislation directing the agency to do something new or different; it might even be implied from some other power granted to the agency. The thinking seemed to be: as long as there is some delegation of power to an agency to operate in a public policy area, rulemaking is just one of the options that is more or less baked into the agency's authority. But in exercising that authority, courts regularly said, an agency can't color outside the lines. The agency's *raison d'être* was to apply neutral technical expertise to fill in the dots based on “adequate guiding standards” from the legislature.

A still leading North Carolina case, *Adams v. North Carolina Dept. of Natural and Economic Resources*, 295 N.C. 683 (1978), stated this very well for future disputes in the Tarheel state:

When there is an obvious need for expertise in the achievement of legislative goals the General Assembly is not required to lay down a detailed agenda covering every conceivable problem which might arise in the implementation of the legislation. **It is enough if general policies and standards have been articulated which are sufficient to provide direction to an administrative body possessing the expertise to adapt the legislative goals to varying circumstances.**

Additionally, in determining whether a particular delegation of authority is supported by adequate guiding standards it is permissible to consider whether the authority vested in the agency is subject to procedural safeguards. A key purpose of the adequate guiding standards test is to “insure that the decision-making by the agency is not arbitrary and unreasoned.” Glenn, *supra*. Procedural safeguards tend to encourage adherence to legislative standards by the agency to which power has been delegated. We thus join the growing trend of authority which recognizes that the presence or absence of procedural safeguards is relevant to the broader question of whether a delegation of authority is accompanied by adequate guiding standards. See K. Davis, 1 *Administrative Law Treatise*, § 3.15 at p. 210 (2d ed. 1978).

295 N.C. at 698 (emphasis added).

Within this “classic” framework for thinking about the need for legislative authorization of rulemaking power, a statement like the following would suffice:

(a) There is hereby created the Environmental Management Commission of the Department of Environment and Natural Resources **with the power and duty to promulgate rules to be followed in the protection, preservation, and enhancement of the water and air resources of the State.**

G.S. 143B-282(a) (emphasis added). Then for any instance of challenged rulemaking, the question would be whether the legislature had revealed enough of its intent in the given policy area so that the EMC

rules would fit within “adequate guiding standards.” This is an example of what I will henceforth call a “general authorization for rulemaking.”

There are North Carolina cases, even leading cases still cited and relied on widely, that take this broad view—that a general authorization for rulemaking is enough to uphold challenged rules. Consider *In re Declaratory Ruling by NC Comm’r of Insurance Regarding 11 N.C.A.C. 12.0319*, 134 N.C. App. 22 (1999) (interesting for many reasons including the use of a declaratory ruling to mount a well-financed challenge—the petitioners included Blue Cross and Blue Shield of NC, a host of other insurance companies, and N.C. Citizens for Business and Industry—to a twenty-year old administrative rule).

In 1978 the North Carolina Department of Insurance (NCDI) adopted a rule stating that “Life or accident and health insurance forms shall not contain a provision allowing subrogation of benefits.” 11 N.C.A.C. 12.0319 (anti-subrogation rule). Subrogation lets an insurer step into the shoes of the insured after it pays a claim, and then go after anyone believed to be at fault for the insurable event. The superior court concluded that NCDI exceeded its statutory authority and violated the United States Constitution when it promulgated the anti-subrogation rule, holding that “promulgation of the anti-subrogation rule (1) exceeded the statutory authority of the NCDI, (2) effectively changed North Carolina substantive law allowing legal subrogation, and (3) amounted to an unconstitutional delegation of legislative powers.” 134 N.C. App. at 26.

The Court of Appeals noted the general authority of the Commissioner of Insurance to:

See that all laws of this State that the Commissioner is responsible for administering and the provisions of this Chapter are faithfully executed; and to that end **the Commissioner is authorized to adopt rules in accordance with Chapter 150B of the General Statutes, in order to enforce, carry out and make effective the provisions of those laws.** The Commissioner is **also authorized to adopt such further rules not contrary to those laws that will prevent persons subject to the Commissioner's regulatory authority from engaging in practices injurious to the public.**

G.S. 58-2-40(1) (emphasis added).

Held, this is broad enough authority for the anti-subrogation rule.

This statutory provision gives the Commissioner a broad latitude and flexibility in evaluating other provisions in insurance policies.

. . . .

Given these legislative pronouncements we conclude that “the language of the statute, the spirit of the act, and what the act seeks to accomplish,” all demonstrate a legislative intent to grant the Commissioner of Insurance broad authority to limit insurance policy provisions, like subrogation, that are less favorable to the insured than those specifically addressed by G.S. § 58-51-15.

*In re 11 N.C.A.C. 12.0319*, 134 N.C. App. at 29-30.

The Court of Appeals goes on to cite *Adams* in the way one would cite that case to minimize the need for guiding standards:

When evaluating what constitutes “adequate guiding standards” in the “exercise of delegated powers,” the court has stated that “such declarations need be only as specific as the circumstances permit.” *Bring v. North Carolina State Bar*, 348 N.C. 655, 658, 501 S.E.2d 907, 909, *reh’g denied*, 348 N.C. 655, 514 S.E.2d 271 (1998) (quoting *Adams v. North Carolina Dept. of Natural and Economic Resources*, 295 N.C. 683, 249 S.E.2d 402 (1978)).

When there is an obvious need for expertise in the achievement of legislative goals the General Assembly is not required to lay down a detailed agenda covering every conceivable problem which might arise in the implementation of the legislation. It is enough if general policies and standards have been articulated which are sufficient to provide direction to an administrative body possessing the expertise to adapt the legislative goals to varying circumstances....

*Id.* In addition, the existence of adequate procedural safeguards supports the constitutionality of the delegated power and tends to “insure that the decision-making by the agency is not arbitrary and unreasoned.” *Id.* (“Procedural safeguards tend to encourage adherence to legislative standards by the agency to which power has been delegated.”).

*In re 11 N.C.A.C. 12.0319*, 134 N.C. App. at 33.

In accord is *Mullins v. NC Cr’l Justice Educ. & training Stds. Comm’n*, 125 N.C. App. 339 (1997) (upholding revocation of law enforcement officer’s certification for stealing evidence). In *Mullins* the Court of Appeals cited more law for the idea that agencies have a reservoir of implied and general powers that can be drawn on when their authority is challenged:

This Court in *General Motors Corp. v. Kinlaw*, 78 N.C. App. 521 (1985), held that administrative agencies have powers expressly vested by statute and implied powers reasonably necessary for the agency to function properly. “In addition to the powers expressly vested in an agency by statute, those powers reasonably necessary for the agency to function properly are implied from the legislature’s general grant of authority.” *Id.* at 530(citing *In re Community Association*, 300 N.C. 267, 280, 266 S.E.2d 645, 654-55 (1980); *Charlotte Liberty Mut. Ins. Co. v. State ex rel. Lanier*, 16 N.C. App. 381, 384, 192 S.E.2d 57, 58 (1972)). “An issue as to the existence of power or authority in a particular administrative agency is one primarily of statutory construction.” *Comr. of Insurance v. Rate Bureau*, 300 N.C. 381, 399, 269 S.E.2d 547, 561 (citing *Joseph Burstyn, Inc. v. Wilson*, 303 N.Y. 242, 101 N.E.2d 665 (1951), *rev’d on other grounds*, 343 U.S. 495, 96 L.Ed. 1098 (1952)), *reh’g denied*, 301 N.C. 107, 273 S.E.2d 300 (1980).

125 N.C. App. at 344. The Court of Appeals looks to the general spirit of the agency empowering statute:

The intent of the Legislature in enacting Chapter 17C was to enhance the criminal justice profession through mandated education, training and standards regarding character and moral fitness. Chapter 17C of the North Carolina General Statutes governs the education and training of criminal justice officers. N.C. Gen. Stat. § 17C-1 (1995) provides:

The General Assembly finds that the administration of criminal justice is of statewide concern, and that proper administration is important to the health, safety and welfare of the

people of the State and is of such nature as to require education and training of a professional nature. It is in the public interest that such education and training be made available to persons who seek to become criminal justice officers, persons who are serving as such officers in a temporary or probationary capacity, and persons already in regular service.”

125 N.C. App. at 345. It is not just a rare or random Court of Appeals decision that takes this broad, deferential, context-matters approach to judicial review of agency rules. This was the standard, “modern” approach to review of rulemaking into the 1980s, as enunciated, for example, by the N.C. Supreme Court in *State ex rel. Com’r of Ins. v. N.C. Rate Bureau*, 300 N.C. 381 (1980) (complex litigation over the basic system of insurance rate regulation in NC):

An issue as to the existence of power or authority in a particular administrative agency is one primarily of statutory construction. *Joseph Burstyn, Inc. v. Wilson*, 303 N.Y. 242, 101 N.E.2d 665 (1951), *rev’d. on other grounds*, 343 U.S. 495, 72 S.Ct. 777, 96 L.Ed. 1098 (1952).

In construing the laws creating and empowering administrative agencies, as in any area of law, the primary function of a court is to ensure that the purpose of the Legislature in enacting the law, sometimes referred to as legislative intent, is accomplished..... The best indicia of that legislative purpose are "the language of the statute, the spirit of the act, and what the act seeks to accomplish." *Stevenson v. City of Durham*, 281 N.C. 300, 303, 188 S.E.2d 281, 283 (1972). In addition, a court may consider "circumstances surrounding [the statute's] adoption which throw light upon the evil sought to be remedied." *State ex rel. N. C. Milk Commission v. National Food Stores, Inc.*, 270 N.C. 323, 332, 154 S.E.2d 548, 555 (1967).

....

One of the primary problems in the case before us, and in other cases involving the interpretation of an administrative agency's power, results from the established law that legislative power may not be delegated to an administrative agency unless adequate standards are included in the delegating legislation. The Legislature can obviously not anticipate every problem which will arise before an administrative agency in the administration of an act. The legislative process would be completely frustrated if that body were required to appraise beforehand the myriad situations to which it wished a particular policy to be applied and to formulate specific rules for each situation. Clearly, then, we must expect the Legislature to legislate only so far as is reasonable and practical to do and we must leave to executive officers the authority to accomplish the legislative purpose, guided of course by proper standards. *See, e. g., American Power and Light Company v. Securities and Exchange Commission*, 329 U.S. 90, 67 S.Ct. 133, 91 L.Ed.2d 103 (1946). **The modern tendency is to be more liberal in permitting grants of discretion to administrative agencies in order to ease the administration of laws as the complexity of economic and governmental conditions increases. The realities of modern legislation dealing with complex economic and social problems have led to judicial approval of broad standards for administrative action. Detailed standards are not required, especially in regulatory enactments under the police power.** 1 *Am.Jur.2d*, Administrative Law § 118 (1951). North Carolina cases have long been consistent with this "modern tendency.”

300 N.C. at 399-402 (emphasis added).

In sum, there are published cases in North Carolina that support the idea that authority for agency rulemaking can be found almost anywhere—in general grants of rulemaking authority, in general statements of agency purpose, and even in a notion of implied agency powers, as long as a court sees the rule as somehow furthering legislatively-declared goals.

#### A. Conundrum – statutory requirement for specificity, and other limits

What then to make of G.S. 150B-19?

GS 150B-19(1) An agency may not adopt a rule that “(1) Implements or interprets a law unless that law or another law **specifically authorizes the agency to do so.**”

(emphasis added). This statutory specificity requirement, with other limitations on rulemaking, was added by S.L. 1985-746, the first major revision of North Carolina’s Administrative Procedures Act.

§ 150A-9. Minimum procedural requirements; limitations on rule-making authority; no criminal sanctions authorized.-

(a) It is the intent of this Article to establish basic minimum procedural requirements for the adoption, amendment, or repeal of administrative rules. Except for temporary rules which are provided for in G.S. 150A-13, the provisions of this Article are applicable to the exercise of any rule-making authority conferred by any statute, but nothing in this Article repeals or diminishes additional requirements imposed by law or any summary power granted by law to the State or any State agency. No rule hereafter adopted is valid unless adopted in substantial compliance with this Article.

(b) Each agency shall adopt, amend, suspend or repeal its rules in accordance with the procedures specified in this Article and pursuant to authority delegated by law and in full compliance with its duties and obligations. No agency may adopt any rule that implements or interprets any statute or other legislative enactment unless the power, duty, or authority to carry out the provisions of the statute or enactment is specifically conferred on the agency in the enactment, nor may any agency make any rule enlarging the scope of any trade or profession subject to licensing.

(c) The power to declare what shall constitute a crime and how it shall be punished and the power to establish standards for public conduct are vested exclusively in the General Assembly. No agency may adopt any rule imposing a criminal penalty for any act or failure to act, including the violation of any rule, unless the General Assembly authorizes a criminal sanction and specifies a criminal penalty for violation of the rule.

(d) No agency may adopt as a rule the verbatim text of any federal or North Carolina statute or any federal regulation, but an agency may adopt all or any part of such text by reference under G.S. 150A-14.

Former G.S. 150A-9 (1985) (current language is now GS 150B-19).

This 1985 APA change created the Office of Administrative Hearings, the first of our “central panel” administrative law judges, and the Rules Review Commission, among other things. It grew out, in part, of the furor over the major separation of powers case, *State ex rel. Wallace v. Bone*, 304 N.C. 591 (1982) (striking down as unconstitutional the General Assembly’s placing of four of its members on the Environmental Review Commission).

In case you think current legislative concern and frustration with agency rules is a new thing, note that in 1983 the General Assembly repealed all agency rules and the existing APA, effective July 1, 1985, thus forcing negotiations over a new approach. S.L. 1983-883. A Study Commission looked at possible revisions, focusing on the APA from Minnesota that eventually became the basis for the revised state model APA of 1981. In 1985 a new APA emerged. For a good history of all this, see Jackson Nichols, *The New North Carolina APA: A Practical Guide to Understanding and Using It*, 9 CAMPBELL L. REV. 293 (1987).

Nichols noted G.S. 150B-9 (now 150B-19) in the 1985 APA was a clear indication of the North Carolina legislature’s “preoccupation with rulemaking,” in contrast to other states’ focus on contested case hearings. He also notes that the new language on specificity in authority “reflects legislative concern about the licensing of professions. Under the previous Administrative Rules Review Committee, licensing boards had frequently attempted to establish licensing requirements in areas not addressed by the enabling legislation.” *Id.* at 304. My understanding from discussion with the Rules Review Commission staff is that this is a continuing problem—the desire of occupational licensing agencies to expand their requirements and areas of regulation without specific authority to do so.

The “specificity” requirement of present-day G.S. 150A-19 was applied in *Whittington v. N.C. Dept. of Human Resources*, 100 N.C. App. 603 (1990) (rules about allegations of rape and abortion counseling). In *Whittington*, the Court of Appeals upheld summary judgment for plaintiffs who sought to enjoin enforcement of rules adopted by the Social Services Commission. The rules required directors of county social service departments to report any allegations of rape or incest and to offer each woman who applied for funds for an abortion the opportunity to personally view models showing birth and development of the human embryo and fetus.

The Court of Appeals found the agency did not have specific or implied authority to promulgate the rules in question. Since the rules were adopted by the agency subsequent to the enactment of N.C.G.S. 150B-9, they are subject to the specific requirements of that statute that rules be adopted in accordance with procedures specified in the article and that **agencies are prohibited from adopting any rule implementing or interpreting any statute or other legislative enactment unless specifically authorized to do so in the enactment.**

Let’s consider the full set of G.S. 150B-19 “Restrictions on what can be adopted as a rule”:

An agency may not adopt a rule that does one or more of the following:

- (1) Implements or interprets a law unless that law or another law specifically authorizes the agency to do so.
- (2) Enlarges the scope of a profession, occupation, or field of endeavor for which an occupational license is required.

(3) Imposes criminal liability or a civil penalty for an act or omission, including the violation of a rule, unless a law specifically authorizes the agency to do so or a law declares that violation of the rule is a criminal offense or is grounds for a civil penalty.

(4) Repeats the content of a law, a rule, or a federal regulation. A brief statement that informs the public of a requirement imposed by law does not violate this subdivision and satisfies the "reasonably necessary" standard of review set in G.S. 150B-21.9(a)(3).

(5) Establishes a fee or other charge for providing a service in fulfillment of a duty unless a law specifically authorizes the agency to do so or the fee or other charge is for one of the following:

- a. A service to a State, federal, or local governmental unit.
- b. A copy of part or all of a State publication or other document, the cost of mailing a document, or both.
- c. A transcript of a public hearing.
- d. A conference, workshop, or course.
- e. Data processing services.

(6) Allows the agency to waive or modify a requirement set in a rule unless a rule establishes specific guidelines the agency must follow in determining whether to waive or modify the requirement.

**G.S. 150B-19. Here are some other issues that the Rules Review Commission staff reports seeing regularly with rulemaking authority problems:**

An agency cannot use a rule to require someone to follow a policy or website guidance. Staff counsel see proposed language such as "Applicants will follow the procedure found on the agency website" or "The Division shall issue additional criteria in a policy." This means the agency is proposing to require someone to follow what constitutes a rule under G.S. 150B-2(8a) without subjecting the language to the rulemaking process. RRC staff will recommend objection to the rule.

A process issue: the APA requires an agency to not take any formal action to adopt the rule until the close of the comment period. RRC staff have seen many agencies take final action to adopt days or even mere hours before the comment period closed, often with the caveat, "We'll revisit this if any comments are received before the close of the comment period." *But see* G.S. 150B-21.2(g). If the agency adopts before the close of the comment period, staff will recommend objection for failure to comply with the APA.

Some agencies may try to promulgate a rule to give sweeping, unconstrained authority because they have general authorization for rulemaking. For example, a statute that allows an agency to "implement the Chapter." For example, RRC sees language that says that an individual must show "to the satisfaction of the Board" that their license should be granted, or that licenses may be revoked or denied "at the Board's discretion." While a Board generally has significant statutory authority to license an individual, this does not mean that the rules governing licensure can fail to include specific guidelines regarding what will be required to get the license.



In sum, while there are published opinions saying that general or implied rulemaking authority is adequate for agencies in North Carolina, the APA now requires at least some sort of specific authority in the case of a rule that “implements or interprets a law.”

**B. A further conundrum: is there a “common law” of rulemaking in N.C.?**

Consider the Halifax Smoking Case, *City of Roanoke Rapids v. Peedin*, 124 N.C. App. 578 (1996) (prescribing very limited standards for permissible local Board of Health rules and striking down rules for procedural deficiencies unrelated to any statutory requirements). What happens when a court is faced with agency rules that, despite pretty clear legislative authority, butt up against the court’s sense of the proper role of an agency vis-à-vis important economic and political interests?

In any event, it is unnecessary for purposes of our opinion to resolve the parties' dispute as to whether the statutory sections set out above empowered the Board to adopt the HCSCR. Assuming arguendo the Board was accorded statutory authority to establish rules regulating public smoking, we hold enactment of the HCSCR [Halifax County Smoking Control Rule] exceeded the general limitations imposed upon rule making powers of boards of health.

Our courts have not previously specifically enunciated restrictions on the legislative grant of rule making authority to boards of health. However, **based upon previous holdings in related areas, as well as the holdings of courts in other jurisdictions, we conclude a board of health acts within its rule making powers when it enacts a regulation which (1) is related to the promotion or protection of health, (2) is reasonable in light of the health risk addressed, (3) is not violative of any law or constitutional provision, (4) is not discriminatory, and (5) does not make distinctions based upon policy concerns traditionally reserved for legislative bodies.** See, e.g., *State v. Curtis*, 230 N.C. 169, 171, 52 S.E.2d 364, 365 (1949) (health board not delegated power to pass laws); *Clark's Charlotte, Inc. v. Hunter*, 261 N.C. 222, 229, 134 S.E.2d 364, 369 (1964) (enactment of Sunday regulations generally legitimate exercise of police power and "will be upheld, provided the classification is founded upon reasonable distinctions, affects all persons similarly situated or engaged in the same business without discrimination, and has some reasonable relation to the public peace, welfare, and safety"); see also *Cookie's Diner*, 640 N.E.2d at 1236 (health boards' "regulations designed to promote the general policy of the General Assembly to protect the public health, and [which] are reasonable, nondiscriminatory, and not contrary to constitutional rights and to legislation,. . . would be valid"); *Weber v. Board of Health*, 148 Ohio St. 389, 74 N.E.2d 331, 336 (1947) ("[administrative] bodies must not legislate or make rules which are unreasonable, discriminatory or contrary to constitutional rights"); *Boreali*, 523 N.Y.S.2d at 468, 517 N.E.2d at 1353 ("Even under the broadest and most open-ended of statutory mandates, an administrative agency may not use its authority as a license to correct whatever societal evils it perceives."); and *Matter of Council for Owner Occupied Housing v. Abrams*, 125 A.D.2d 10, 511 N.Y.S.2d 966, 969 (N.Y. App. Div. 1987)("Administrative officers may not act `solely on their own ideas of sound public policy, no matter how excellent such ideas might be."); see also generally 39A C.J.S. Health & Environment § 14 (1976).

**Whatever the statutory authority of the Board to enact regulations governing public smoking, we believe the HCSCR to be invalid as representing distinctions reserved to**

**legislative policy-making, and thus do not discuss the remaining factors.** See *Cookie's Diner*, 640 N.E.2d at 1240-41 (smoking regulations invalid which discriminated among restaurants and businesses on bases of enforceability and economics).

124 N.C. App. at 587-88 (emphasis added). Wait...what? Where did that gloss on rulemaking come from? Oh..."previous holdings in related areas, as well as the holdings of courts in other jurisdictions."

A final conundrum I wish to point out is the (to me) obvious fact that the legislature quite often defers decisions to rulemaking **not because the decisions are relatively trivial, "color inside the lines" decisions, but rather because of the opposite problem: it's too difficult technically or politically for the legislature to come to a precise enough decision on its own to guide regulated entities on the line between right and wrong. In other words, the legislature quite often (it seems to me) lets an agency make the hard calls.** This is the sort of behavior that courts have historically said was forbidden under the anti-delegation doctrine, because it allegedly gives excessive discretion to unelected officials. As I will discuss further in my conclusion to this paper, I believe that thinking ignores the modern (post-modern? Meta-modern?) realities of rulemaking. For example, legislatures have varying levels of trust in their agencies, and generally give such discretion only when the legislature itself is comfortable that the delegation is the best way to proceed. Also, since 1995 at least, in North Carolina, the legislature has crafted ways to make sure that any controversial rules can easily return for its review before they become effective. Courts have not yet adjusted to the fact that there are new post-agency process safeguards on rulemaking. I think they should be encouraged to factor in all the varied processes that rules go through in reviewing a rule's legitimacy.

### C. Conclusions 1

- Can't count on general grants of authority in NC
- Pay attention to statutory limits in GS 150B-19
- No certain formula or magic language in making specific grants of rulemaking authority
- Don't ignore general statements of legislative policy or intent; they do count, especially in dealing with close interpretive questions or rules that run counter to powerful interest groups. I believe the Halifax Smoking Case was an outlier, and should be taken just as a reminder that there is and probably always will be lingering judicial skepticism about the legitimacy of agency rules that take on powerful special interests when and if the legislature itself has not directly done so.

In the end, despite the Halifax Smoking Case and the other complexities and conundrums noted, I believe the Court of Appeals got it right in saying, in the insurance subrogation case, "[i]n construing the laws creating and empowering administrative agencies, as in any area of law, the primary function of a court is to **ensure that the purpose of the Legislature in enacting the law, sometimes referred to as legislative intent, is accomplished. The best indicia of that legislative purpose are "the language of the statute, the spirit of the act, and what the act seeks to accomplish."** 134 N.C. App. at 27. (emphasis added) (citation omitted).

There has also been recent litigation over the question of specific versus broad agency authority for rules at the **federal level**. Consider *Mayo Foundation for Medical Education & Research v. United States*, 562 U.S. 44 (2011) (challenge to rules defining tax status of medical interns). The rule in question

categorically provided that an employee working 40 hours or more a week (as did medical interns) was not a “student” and therefore was not excluded from taxation. The hospital industry challenged this rule, asserting that medical interns, despite their long work hours, were predominantly there for the education, and thus fit under the statutory exemption for students.

Federal administrative law has a more evolved approach to the analysis of agency rules, following the landmark case of *Chevron, USA, Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984) (first ask whether the legislature has specifically addressed the precise point at issue; if not, defer to the agency’s interpretation as long as it is a permissible interpretation of the statute). But the plaintiffs in *Mayo Foundation* pointed out that there was an earlier, special, multi-factor test for the authority for revenue rules, from the case of *National Muffler Dealers Assn., Inc. v. United States*, 440 U.S. 472, 477 (1979) (“A regulation may have particular force if it is a substantially contemporaneous construction of the statute by those presumed to have been aware of congressional intent. If the regulation dates from a later period, the manner in which it evolved merits inquiry. Other relevant considerations are the length of time the regulation has been in effect, the reliance placed on it, the consistency of the Commissioner’s interpretation, and the degree of scrutiny Congress has devoted to the regulation during subsequent re-enactments of the statute.”).

The plaintiffs in *Mayo Foundation* urged the Court to overturn the medical intern rule, using *National Muffler* analysis, because the rule in question, like the rule in *National Muffler*, was based on the agency’s general authority, not a specific Congressional directive to promulgate rules: the general authority

under 26 U.S.C. § 7805(a) to “prescribe all needful rules and regulations for the enforcement” of the Internal Revenue Code. In two decisions predating *Chevron*, this Court stated that “we owe the [Treasury Department’s] interpretation less deference” when it is contained in a rule adopted under that “general authority” than when it is “issued under a specific grant of authority to define a statutory term or prescribe a method of executing a statutory provision.” *Rowan Cos. v. United States*, 452 U.S. 247, 253 (1981); *United States v. Vogel Fertilizer Co.*, 455 U.S. 16, 24 (1982) (quoting *Rowan*).

*Mayo Foundation*, 562 U.S. at 56 (internal citations omitted).

The *Mayo Foundation* Court concluded that *Chevron* had superseded these earlier opinions, so that it need no longer consider whether a rule was promulgated under general versus specific authority. The test would always be the *Chevron* test:

Since *Rowan* and *Vogel* were decided, however, the administrative landscape has changed significantly. We have held that *Chevron* deference is appropriate “when it appears that Congress delegated authority to the agency generally to make rules carrying the force of law, and that the agency interpretation claiming deference was promulgated in the exercise of that authority.” *Mead*, 533 U. S., at 226–227. **Our inquiry in that regard does not turn on whether Congress’s delegation of authority was general or specific.** For example, in *National Cable & Telecommunications Assn., supra*, we held that the Federal Communications Commission was delegated “the authority to promulgate binding legal rules” entitled to *Chevron* deference under statutes that gave the Commission “the authority to ‘execute and enforce,’” and “to ‘prescribe such rules and regulations as may be necessary in the public interest to carry out the provisions’ of,” the Communications Act of 1934. 545 U.S., at 980–981, 125 S. Ct. 2688

(quoting 47 U.S.C. §§ 151, 201(b)). See also *Sullivan v. Everhart*, 494 U.S. 83, 87, 88–89, 110 S. Ct. 960, 108 L.Ed2d 72 (1990) (applying *Chevron* deference to rule promulgated pursuant to delegation of “general authority to ‘make rules and regulations and to establish procedures, not inconsistent with the provisions of this subchapter, which are necessary or appropriate to carry out such provisions’” (quoting 42 U.S.C. § 405(a) (1982 ed.))).

We believe *Chevron* and *Mead*, rather than *National Muffler* and *Rowan*, provide the appropriate framework for evaluating the full-time employee rule.

562 U.S. at 56-57.

In sum, there was a period (the 1980s, so perhaps it can be forgiven) when federal courts were supposed to pay attention to whether agency rules were promulgated under specific versus general authority, and give more deference to those with specific authority—similar, in a way, to the current state of North Carolina administrative law. But as of the *Mayo Foundation* case (2011), the general vs. specific authority question is no longer important at federal law, at least for this purpose of judicial review of an agency’s rule.

For what it’s worth, Justices Scalia and Thomas still regularly resist any approach to rule review that involves deference to agency interpretation. See, e.g., *Decker v. Northwest Env’l Defense Center*, 133 S. Ct. 1326 (2013) (concerning the Environmental Protection Agency’s various regulatory interpretations of the statutory term “point source” as applied to logging operations).



## II. Canard: rules have the same legal power as statutes, *inter alia* binding the agency as well as persons outside the agency.

What is the power of an agency rule? From the very definition of a rule--written with a very broad opening clause, then excluding a "statement [that] does not directly or substantially affect the procedural or substantive rights or duties of a person not employed by the agency or group of agencies," G.S. 150B-2(8a)(a)—it seems clear that rules can and do directly and substantially affect the rights of persons outside the agency. By the way, if the General Assembly directs an agency to "establish a program" and that program wishes to require everyone to follow a certain set of requirements to be eligible for the program, does the agency have to promulgate rules to do so? Yes, though some agencies apparently wish to view "establish a program" as legislative authority to skip the rulemaking.

The longstanding canard is that a rule has the force of law, just like a statute. Rules can thus alter the common law:

Where an agency has the authority to act, its rules and regulations have the binding effect of statutes and may accordingly alter the common law. *Taylor v. Superior Motor Co.*, 227 N.C. 365, 367, 42 S.E.2d 460, 461 (1947) (noting that "proper regulations authorized under the Act have the binding effect of law," because such regulations "are the tools used to effectuate the policy and purposes of the Act.")

*In re 11 N.C.A.C. 12.0319*, 134 N.C. App. at 30.

Similarly, the view has long and generally been that agencies are bound by their own rules ("hoisted on their own canard?"), since the rules are, essentially, just like statutes. See, e.g., *Snow v. Board of Architecture*, 273 N.C. 559 (1968); 2 Am. Jur.2d Administrative Law § 350 (1962) ("Procedural rules are binding upon the agency which enacts them as well as upon the public of the agency, and the agency does not, as a general rule, have the discretion to waive, suspend, or disregard in a particular case a validly adopted rule so long as such rule remains in force.").

### A. Conundrum: maybe not always, so much

To begin, there is not and probably never will be an escape from the view (essentially a political view) of some judges (and probably most legislators) that agencies, not being elected, just can't possibly be legitimately as powerful a legal force as the legislature. Courts are always writing things like: "Whatever force and effect a rule or regulation has is derived entirely from the statute under which it is enacted. Indeed, an administrative agency has no power to promulgate rules and regulations which alter or add to the law it was set up to administer or which have the effect of substantive law" *Hall v. Toreros, II, Inc.*, 176 N.C. App. 309 (2006) (internal citation and quotation omitted), *aff'd per curiam by an equally divided court*, 363 N.C. 114 (2009).

*Toreros* arose over a drunk driving death. A patron at a bar left his seat for awhile, also leaving his unfinished drink (the record is unclear on whether he exercised good bar etiquette by covering the drink with his napkin or coaster), walked outside, but returned later after "final call." The bartender refused to serve the obviously drunk patron another round, but the patron finished his original drink

and took some sips out of drinks of other remaining bar patrons. He then left, drove away, and killed someone in a car accident.

There is an ABC regulation prohibiting a licensee from allowing an intoxicated person to consume alcoholic beverages on the licensed premises. 4 N.C.A.C. 2S.0206 provides that "[n]o permittee or his employees shall allow an intoxicated person to consume alcoholic beverages on his licensed premises." If one treats this rule as if it were a statute, it would (argued the plaintiffs) establish a standard of care that a judge or jury could use to test the decision of the bartender not to stop the drunk patron from further consumption.

But the Court held that the rule did not impose a legal duty on the restaurant business to prevent an intoxicated patron from drinking the rest of his previously purchased drink or that of other customers. The Court looked at the stated purpose of G.S. Chapter 18B, authorizing the ABC commission rules, including the rule in question, and found **no sense that the General Assembly intended direct regulation of the consumption of alcohol by persons at permitted establishments or of protecting the public from bar patrons**. There is a fairly detailed discussion of what the General Assembly did or didn't consider in authorizing rulemaking.

Interestingly, our research reveals the Institute of Government (now School of Government) in 1966, acting at the request and under the direction of the State Board of Alcoholic Control, recommended the amendment of Chapter 18 (now Chapter 18B) to include prohibiting a licensee from "[p]ermit[ing] any intoxicated person to consume intoxicating liquor on the licensed premises," a proposed revision "derived from State ABC Board Regulation No. 30." Loeb, Ben F., Jr., *Regulation of Intoxicating Liquors — A Proposed Revision of Chapter 18, General Statutes of North Carolina*, pp. 143-44 (North Carolina Institute of Government, Dec. 1966). While it is unclear whether the Institute of Government recommendation ever came to the attention of the General Assembly, that body in any event enacted no such amendment when subsequently rewriting Chapter 18 in 1971 or at any later time.

176 N.C. App. at 320-21. The *Toreros* court declined to treat an administrative rule as a safety regulation having the force of a statute and therefore establishing a standard of care.

There are many such judicial expressions of the limited power of agencies in comparison to legislatures, harkening back to the early debates over the federal APA and the continued concerns about delegation and the scope of agency authority.

It's not even always clear that rules must be consistently applied by agencies. There is law to the effect that an agency may determine that a rule as applied in a particular case is void. *See, e.g., Good Hope Health System, LLC v. N.C. Dept. of Health and Human Services*, 188 N.C. App. 68 (2008) (challenging certificate of need for Harnett County hospital).

The *Good Hope* court decided that G.S.150B-33(b) allows an agency to determine that a rule as applied in a particular case is void when the rule is not reasonably necessary in a particular case to enable the agency to fulfill its duty. The statute itself allows an administrative law judge to "Determine that a rule as applied in a particular case is void because (1) it is not within the statutory authority of the agency, (2) is not clear and unambiguous to persons it is intended to direct, guide, or assist, or (3) is not reasonably necessary to enable the agency to fulfill a duty delegated to it by the General Assembly." G.S. 150B-33(b)(9)).

The case has a complex factual and procedural background, but the basic question is: who gets to build a new hospital, and where: Erwin or Lillington? And does the winner of that contest get to deploy a CT scanner? The Court held that **an agency could adopt a finding of an ALJ that a rule as applied in a particular case was void and ignore it.** 188 N.C. App. at 81. This is on judicial review of a contested case; query whether language asserting that an agency itself has this power would get the same respect without an ALJ finding.

Then there are the cases that essentially proclaim “No harm no foul” when it comes to agencies not applying their rules. Consider *Farlow v. N.C. State Board of Chiropractic Examiners*, 76 N.C. App. 202 (1985) (action to determine whether appellant chiropractor engaged in unprofessional conduct).

The Board of Chiropractic Examiners suspended a chiropractor’s license after finding that he requested insurance information prior to seeing the patient and her two children, told the patient that she could collect \$1,800 and he would receive \$1,000, set up a plan of treatment extending over a period of six weeks, told the patient that the scheduled treatment would make the injuries look worse and that by the end of the following month the insurance company would be pushing for a settlement, did not ascertain where the passengers were situated in the vehicle that was involved in the collision, diagnosed symptoms which the patients never reported but which the chiropractor said “would appear in several days,” did not have positive x-rays when the treatment plan was formulated, had no positive findings from examinations or patients’ complaints upon which to base a long range treatment plan, and the patients’ complaints and findings upon examinations supported a diagnosis of simple or moderate muscle strain which would be self-limiting requiring minimal therapeutic utilization.

The Board suspended the chiropractor’s license under 21 N.C.A.C. 10.0301 (4) and (6) for dishonorable conduct. The rule was adopted under an old, repealed statute, which referred to dishonorable conduct. The new, revised statute, G.S. 90-154, referred to “unethical conduct” but did not mention “dishonorable conduct.” The Board did not readopt its regulation after the statute was rewritten. So there was a Board disciplinary determination based on a standard in a rule that no longer meshed perfectly with the statute that originally authorized it.

The Court of Appeals was not much bothered by this argument, or by the chiropractor’s claim for unconstitutional vagueness for the term “dishonorable conduct.” The regulation which requires that chiropractors not engage in dishonorable conduct is not unconstitutionally vague because “a chiropractor of ordinary intelligence would [not] have any difficulty telling that under the regulation prohibiting dishonorable conduct he was forbidden from prescribing treatment for patients which was not to treat their physical ailments but was to build up insurance claims.” 76 N.C. App. at 210.

However, the chiropractor also correctly alleged that the Board failed to issue its decision in a timely manner based on its own rules. This also did not bother the court:

The parties have not cited in their briefs and we have not found a North Carolina case which deals with the power of an administrative agency not to follow its own rules. There have been cases in the federal courts dealing with this question. We believe the rule from these cases is that **a party has the right to require an administrative agency to follow its own rules if its failure to do so would result in a substantial chance that there would be a different result from what the result would be if the rule were followed.** This insures that those who appear before a board will be treated equally. We believe this rationale is sound.

In this case the result was not changed because the Board did not follow its own rule. We do not believe it was prejudicial error for the Board not to do so. The appellant's second assignment of error is overruled.

That is, "no harm, no foul." 76 N.C. App. at 208 (emphasis added).

## B. Conclusions 2

- Rules do have the legal impact of statutes, but not always:
  - Judges (like legislators) will forever resist this conclusion if they dislike the rule.
  - If the outcome seems fair to a court, it will let an agency disregard its own rules.

## III. Canard: rulemaking, like all administrative processes, should be consistent (from authority through judicial review)

Consistency, or even more apparently restrictive, "uniformity," is set out at the very top of the legislature's purposes in enacting the N.C. Administrative Procedures Act: "This Chapter establishes a **uniform system of administrative rule making** and adjudicatory procedures for agencies." G.S. 150B-1(a)(emphasis added).

Consistency as a goal of administrative law goes back to the creation of the federal Administrative Procedures Act in the 1940s, which arose after two major American Bar Association reports in the 1930s complained about the bewildering variety of procedures that lawyers had to deal with from the new federal agencies. Indeed North Carolina's first Administrative Procedures Act (1974, S.L. 1973-1331) came out of a model created by the National Conference of Commissioners on **Uniform State Laws** in 1961.

The earlier-cited N.C. Supreme Court's major insurance case, *State ex rel. Com'r of Ins. v. N.C. Rate Bureau*, 300 N.C. 381 (1980), cites an influential law review article by Prof. Daye of UNC (his "tenure piece," I surmise) on the importance of uniformity in judicial review of administrative decisions. See Charles E. Daye, *North Carolina's New Administrative Procedure Act: An Interpretive Analysis*, 53 N.C. L. REV. 833 (1975). The academic commentator's idea of consistency still has much currency for judges. See, e.g., the 2011 *Mayo Foundation* case from the U.S. Supreme Court: "The Court has '[r]ecogniz[ed] the importance of maintaining a uniform approach to judicial review of administrative action.'" 562 U.S. at 45 (quoting *Dickinson v. Zurko*, 527 U.S. 150, 154 (1999)).

## A. Conundrum: the rulemaking process in NC has never been consistent and gets less so each year.

Yet **almost immediately** after the legislature announces its high and mighty policy of uniformity in administrative process in G.S. 150B-1(a), it goes on to grant over **thirty exemptions from the rules of rulemaking** (G.S. 150B-1(c) (full exemptions from APA) and (d) (exemptions from rulemaking)). The number of exemptions has grown inexorably over the last twenty years. There has been almost no counter-movement towards consistency. The simplest explanation for who gets exempted or specially burdened? Whichever agencies (or functions within agencies) are either most trusted by the legislature or that the legislature wants to keep its distance from.



That, at least, is what things look like for an environmental lawyer in North Carolina. Not only are there particular rulemaking restrictions for environmental rules in the APA, see G.S. 150B-19.3, there are very particular exemptions given by the General Assembly to industries and activities it favors. See, e.g., S.L. 2014-4 (exemptions for oil and gas operations); G.S. 130A-309.207 (coal ash rules exempted from G.S. 150B-19.3).

An important consideration about this conundrum: judges have a tendency to want to make distinctions among types of rules into differences that matter, because doing so can help resolve particular cases. For example, consider *State ex rel. Com'r of Ins. v. N.C. Rate Bureau*, 300 N.C. 381 (1980) (note case is decided under former G.S. 150A). The Court spent time distinguishing different types of rules:

It becomes readily apparent from the statutory definition of "rule," which includes six exceptions, that *different types* of rules were contemplated. This is crucial in the issue confronting us here for two reasons: (1) The distinction is important in determining the requirements that will be imposed in establishing the procedures used in adopting and promulgating the rule, and (2) the distinction between different types of rules is important in determining the validity and legal effect of a challenged rule.

While the distinctions are sometimes blurred and rules often serve two or more purposes simultaneously, agency rules may be grouped into three general categories: procedural rules, interpretive rules, and legislative rules. 1 F. Cooper, *State Administrative Law* 173 (1965); Daye, *supra* at 851-53.

(1) Procedural rules are those which describe *how* the agency will discharge its assigned functions and the requirements others must follow in dealing with the agency. These are the fundamental rules of agency procedures and are essential to efficient agency operation. Generally these rules deal with such matters as forms, instructions and availability for public inspection of all agency rules and policy. See, e. g., G.S. 150A-11(1). Clearly, then, the requirement that data presented in a ratemaking hearing be audited is more than a procedural rule.

(2) Legislative rules are those established by an agency as a result of a delegation of legislative power to the agency. "Legislative rules fill the interstices of statutes. They go beyond mere interpretation of statutory language or application of such language and within statutory limits set down additional substantive requirements." Daye, *supra* at 852-53.

(3) Interpretative rules have been defined as those that interpret and apply the provisions of the statute under which the agency operates. No sanction attaches to the violation of an interpretative rule as such; the sanction attaches to the violation of the statute, which the rule merely interprets. Thus, for example, most of the regulations of the Internal Revenue Service are interpretative.

1 Cooper, *supra* at 174-75.

The crucial determination to be made here is whether the Commissioner's conclusion that data be audited is a legislative or interpretative rule. This is so because interpretative rules and general policy statements of agencies are excluded from the NCAPA rulemaking provisions by G.S. 150A-10(6) and statements of policy or interpretations made in the decision of a

contested case are excluded by G.S. 150A-10(4). On the other hand, substantive legislative rules are not excluded from the NCPA, unless one of the other exclusions applies. We note that none of the remaining exclusions is applicable here.

300 N.C. at 410-411 (emphasis added).

## B. Conclusions



Consistency is not the holy grail in NC rulemaking authority that commentators historically have said (and continue to say) it should be. There is little or no visible, public pushback when the General Assembly proposed special exemptions or requirements for certain types of rules or certain agencies. Who, then, is the “stakeholder” for consistency in rulemaking? Originally it was the bar that represented clients before the New Deal agencies; when, in the 1930s and 1940s, those agencies began developing their own unique, independent administrative processes, the bar complained. The Administrative Procedures Act emerged. The goal of consistency was enshrined.

**Today, in NC at least, I propose that “fidelity” (to legislative intent for agencies) would be a better holy grail.** With the legislature firmly in charge of setting the processes, legislators can tailor rulemaking to try to achieve the results they want, with the processes varying in just the way processes and controls would vary for any principal who hires various agents, to accomplish different things, with varying levels of trust and experience between principal and agent.

I would go further and suggest that **courts should be urged to give meaning to process differences in rulemaking, instead of being urged, as they have been at least since Prof. Daye’s influential 1975 article on the North Carolina Administrative Procedures Act, to use as consistent a form of judicial review as possible across different types of rulemaking.** Is any other outcome really reasonable? Consider two different agencies:

- a. one of which, while litigating a particular contested case, decides it needs to change and expand its rules. It relies on its existing authority to regulate a field, and proposes changes based on this particular contested case, with no special stakeholder input or fiscal analysis.
- b. The other is directed by the legislature to **adopt a rule that is substantively identical to the provisions of a ratified bill.** The bill goes on to say “rules adopted pursuant to this subsection are not subject to Part 3 of Article 2A of Chapter 150B of the General Statutes. Rules adopted pursuant to this subsection shall become effective as provided

in G.S. 150B-21.3(b1) as though 10 or more written objections had been received as provided by G.S. 150B-21.3(b2)."

It seems ludicrous to me to imagine that a court reviewing each of the resulting rules would apply the same tests to determine whether the resulting rules were legitimately authorized and within the agency's discretion. The real test is whether the resulting rules faithfully match the legislature's intent. The process the agencies use to promulgate the rules should provide meaningful input into that judicial review. To return to the case that started this piece, I would suggest that this new attention to the important procedural differences in rulemaking just restores a suggestion made by the N.C. Supreme Court back in the landmark case of *Adams v. North Carolina Dept. of Natural and Economic Resources*, 295 N.C. 683 (1978). There the Court said:

[I]n determining whether a particular delegation of authority is supported by adequate guiding standards it is permissible to consider whether the authority vested in the agency is subject to procedural safeguards. A key purpose of the adequate guiding standards test is to "insure that the decision-making by the agency is not arbitrary and unreasoned." Glenn, *supra*. Procedural safeguards tend to encourage adherence to legislative standards by the agency to which power has been delegated. We thus join the growing trend of authority which recognizes that **the presence or absence of procedural safeguards is relevant to the broader question of whether a delegation of authority is accompanied by adequate guiding standards.** See K. Davis, 1 Administrative Law Treatise, § 3.15 at p. 210 (2d ed. 1978).

295. N.C. at 698 (emphasis added).

Look closer at the cited advice of the great national administrative law scholar, Prof. Kenneth Culp Davis. In his treatise on administrative law, Prof. Davis urged that tests like "adequate guiding standards," which don't really say anything about what is adequate or how the standards must be established, should evolve into more focus on "adequate guiding processes." KENNETH CULP DAVIS, ADMINISTRATIVE LAW TREATISE § 3.14 (2d ed. 1978). Professor Davis traces this evolution, long underway in the federal courts: Beginning in 1980, with *Industrial Union Department, AFL-CIO v. American Petroleum Institute*, 448 U.S. 607 (1980), and *American Textile Manufacturers Institute, Inc. v. Donovan*, 452 U.S. 490 (1981) (cotton dust case), the U.S. Supreme Court has been willing to uphold rules even when it believes Congress has *not* determined the ultimate policy. See KENNETH CULP DAVIS, ADMINISTRATIVE LAW OF THE EIGHTIES: 1989 SUPPLEMENT TO ADMINISTRATIVE LAW TREATISE § 3:1, at 54-58 (1989). On this theory, the chief executive may provide the needed guidance for exercise of major policymaking power.

North Carolina has not yet gone this far. But the continued fraying of the old goal of "consistency" suggests that **courts reviewing agency rules in North Carolina should focus more on process than on legislatively-promulgated standards. In any event, the goal should be fidelity to the legislature's intent, even when that intent is to avoid some of the important but difficult (technically or politically) calls that must be made for a rule to be effective.**