

OFFICIAL OPINION NO. 75-106, Interpretation of statutory definition of "rule," SDCL 1-26-1(7)

STATE OF SOUTH DAKOTA
OFFICE OF
THE ATTORNEY GENERAL

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State Capitol Building
Pierre, South Dakota 57501

OFFICIAL OPINION NO. 75-106

Interpretation of statutory definition of "rule," SDCL 1-26-1(7)

Dear Mr. Vickerman:

You have requested an official opinion on behalf of the Legislative Interim Rules Committee relating to the following factual situations:

I. The division of highways has been removing official route markers (destination signs) from state highways in the Black Hills area. These are not advertising signs. They are official highway division signs giving information on the correct route to take to reach various destinations within the Black Hills area. Representatives from the Office of Urban and Traffic Engineer of the highway division met with the interim rules review committee at their May meeting. The committee members were told that the removal of these signs was discretionary with the highway division and was done to make highway signing throughout the nation more uniform.

II. The division of social welfare is transferring a caseworker from Redfield. After July first, it is anticipated that the Redfield office will be staffed by a half-time food stamp worker and a part-time ADC eligibility worker from the Aberdeen service center.

Based on the above fact situations your question is:

Do the actions of the division of highways and the division of social welfare come with the definition of "rule" contained in SDCL 1-26-1?

SDCL 1-26-1(7) defines "rule" as:

Each agency statement of general applicability that implements, interprets, or prescribes law, policy, procedure, or practice requirements of any agency. The term includes the amendment or repeal of a prior rule, but does not include:

(a) statements concerning only the internal management of an agency and not affecting private rights or procedure available to the public, or

(b) declaratory rules issued pursuant to § 1-26-15;

A rule is a statement of *general applicability* according to the above definition. In my view the removal or placing of a few official highway signs, or the restaffing of a single city's welfare office can hardly be seen as statements of "general applicability." The facts presented deal with two *isolated incidents* where agencies have exercised some discretion in making internal management decisions. The facts submitted do *not* establish any pattern or practice that would indicate a broad policy change within the Division of Highways or the Division of Social Welfare. The law does not contemplate that each and every action of state government which could arguably have some remote effect on private citizens' rights or procedures available to the public must be done pursuant to SDCL 1-26 procedures. The Administrative Procedures Act by its own terms is applicable to statements of general applicability that implement, interpret or prescribe law, policy, procedure or practice requirements of an agency. SDCL 1-26 is not a procedural prerequisite to all valid governmental action.

The Administrative Procedures Act is an important piece of legislation involving and informing the public on an increasing basis about the decision making process of government. The question of when governmental action must be based on or conducted pursuant to SDCL 1-26 procedures is a question that arises with increasing frequency as administrative law grows in South Dakota. The question is a real concern and is difficult to answer in a way that clearly provides a workable guideline to follow in the future. No complete, all-embracing answer to this concern can be given; every questionable situation must be reviewed individually. If, upon careful review of the facts, the agency is not engaged in practices which will result in a general policy change, the agency is probably not

required to implement a formal "rule." If, on the other hand, the agency's actions indicate a decided shift in policy, procedure, or practice *of general applicability*, the agency would be required to promulgate a "rule."

It is my feeling that the above guidelines constitute a fair interpretation of SDCL 1-26-1(7). It is my opinion that the scope of the definition of rule in SDCL 1-26-1(7) does not embrace a policy requiring the Division of Highways to promulgate a rule before they can post or remove certain highway route markers, or requiring the Division of Social Welfare to promulgate a rule before restaffing a single office with part-time personnel. If, however, the Division of Highways were to undertake a state-wide program of traffic route marker changes, and the Division of Social Welfare began a systematic elimination of caseworkers from local welfare offices, such actions would, in effect, be statements of general applicability and would require that rules be enacted to implement the policies. Specific piecemeal actions are not a valid exception or subterfuge to get around SDCL 1-26 if such actions are in effect part of a general program or plan of action. SDCL 1-26 is not, however, a mandatory procedural prerequisite for all valid governmental action.

Respectfully submitted,

William Janklow
Attorney General

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