

Tony Evers

Office of the Governor | State of Wisconsin

August 6, 2019

By Hand Delivery

The Honorable Joshua Kaul, Attorney General
Wisconsin Department of Justice
State Capitol, Room 114 East
Madison, Wisconsin 53702

Re: Request for a formal opinion of the attorney general

Dear Attorney General Kaul:

On behalf of Governor Tony Evers, I am requesting a formal attorney general opinion regarding the applicability of 2011 Act 21 ("Act 21") to an agency's ability to promulgate or enforce certain administrative rules, specifically:

- (1) Whether state agencies may promulgate administrative rules pursuant to a statute that provides for explicit, broad rulemaking authority; and
- (2) Whether an agency may rely on explicit, broad rulemaking authority to prescribe standards, requirements, or thresholds in an administrative rule.

The Wisconsin Statutes require state agencies to promulgate administrative rules for "each statement of general policy and each interpretation of a statute which it specifically adopts to govern its enforcement or administration of that statute." Wis. Stat. § 227.10(1). At the same time, agencies may only promulgate an administrative rule if authorized by statute, and statutes that describe an agency's general powers or duties do not provide rulemaking authority. Wis. Stats. §§ 227.10(2m), 227.11(2)(a)2.

State law, however, frequently provides broad, explicit grants of rulemaking authority. Most importantly, pursuant to Wis. Stat. § 227.11(2)(a), each agency "may promulgate rules interpreting provisions of any statute enforced or administered by the agency, if the agency considers it necessary to effectuate the purpose of the statute..." Similarly, when state law mandates an agency take a particular action, the agency has explicit rulemaking authority to do so. *Wisconsin Ass'n of State Prosecutors v. Wisconsin Employment Relations Comm'n*, 2018 WI 17, ¶ 42, 380 Wis. 2d 1, 25, ("[S]tatutory mandates are also statutory authorizations . . . [An agency] is expressly authorized under the statute to execute any predicate acts which are necessary to carrying out its mandated duties.").

In addition, state law frequently provides specific agencies with broad grants of rulemaking authority. The Department of Transportation, for example, "may make reasonable and

uniform . . . rules deemed necessary to the discharge of the powers, duties, and functions vested in the department.” Wis. Stat. § 58.16(1). The Department of Administration “shall promulgate rules for administering the department and performing duties assigned to it.” Wis. Stat. § 16.004(1). The Department of Safety and Professional Services (DSPS) “shall adopt reasonable and proper rules and regulations relative to the exercise of its powers and authorities...” Wis. Stat. § 101.02(1)(b). And the Department of Health Services “shall adopt rules” to administer subchapters I and II of Wis. Stat. ch. 150. Wis. Stat. § 150.03.

On their face, these statutes grant agencies with broad and explicit rulemaking authority. However, in OAG-04-17, former Attorney General Brad Schimel opined that statutes like these do not grant rulemaking power despite their plain language. In discussing the DSPS’s broad rulemaking authority under Wis. Stat. § 101.02(1)(b), the former attorney general stated:

[T]his language is best read as “describing the agency’s general powers or duties,” and therefore, this section “does not confer rule-making authority” under Wis. Stat. § 227.11(2)(a)2.

OAG-04-17, ¶ 22.

This conclusion is erroneous because it ignores the plain text of the statute, which grants the DSPS broad rulemaking authority. *See State ex rel. Kalal v. Circuit Court for Dane Cty.*, 2004 WI 58, ¶ 46, 271 Wis. 2d 633, 663. Again, Wis. Stat. § 101.02(1)(b) mandates that the DSPS “shall adopt” rules related to its powers. This is not a general description of the agency’s powers contemplated by Wis. Stat. § 227.11(2)(a)2. It is a statutory requirement for the DSPS to promulgate rules. By contrast, other statutes do simply describe an agencies general powers and duties. *See e.g.*, Wis. Stat. § 16.003 (describing the purpose of the Department of Administration); Wis. Stat. § 321.03(1)(a) and (b) (describing the general powers and duties of the Department of Military Affairs). Had the legislature intended to remove broad authority to promulgate administrative rules, it could have done so by repealing the statutes that grant broad rulemaking authority, but it did not.

Further, the opinion’s conclusion regarding Wis. Stat. § 101.02(1)(b) makes Wis. Stat. § 101.02(1)(c) superfluous. Specifically, Wis. Stat. § 101.02(1)(b) states that it is subject to par. (c). Paragraph (c), in turn, states that if the DSPS promulgates rules under paragraph (b), the rules shall be in conformance with rules, if any, promulgated by the DSPS under Wis. Stat. § 440.03(1). This requirement is unnecessary if Wis. Stat. § 101.02(1)(b) does not authorize the DSPS to promulgate rules in the first place. As such, the conclusion in OAG-04-17 regarding Wis. Stat. § 101.02(1)(b) violates the rules of statutory interpretation because it does not “give reasonable effect to every word, in order to avoid surplusage.” *Kalal*, 2004 WI 58, ¶ 46.

In conclusion, Wis. Stat. § 227.11(2)(a)2. does not prohibit an agency from promulgating an administrative rule if another statute provides the agency with a broad grant of rulemaking authority.

My second question concerns Wis. Stat. § 227.11(2)(a)3., which reads:

A statutory provision containing a specific standard, requirement, or threshold does not confer on the agency the authority to promulgate, enforce, or administer a rule that contains a standard, requirement, or threshold that is more restrictive than the standard, requirement, or threshold contained in the statutory provision.

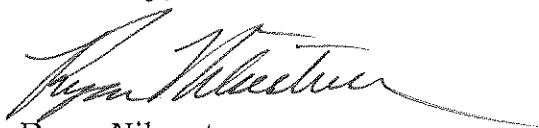
In OAG-04-17, former Attorney General Brad Schimel opined that Act 21 prevented the DSPS from administering a rule requiring fire sprinklers in buildings with four or more dwellings. State law mandates that the DSPS “shall require an automatic sprinkler system or 2-hour fire resistance” in any multi-family building containing more than 20 dwelling units. Wis. Stat. § 101.14(4m)(b). DSPS promulgated an administrative rule, Wis. Admin. Code § SPS 362.0903(5)(b), which required fire sprinklers in multi-family buildings containing four dwellings. The former attorney general opined that this rule conflicts with Wis. Stat. § 227.11(2)(a)3. because the rule’s requirement was more “restrictive” than statute. Specifically, the former attorney general opined that because four units is less than 20, the rule was more restrictive for home builders and, therefore, impermissible under Wis. Stat. § 227.11(2)(a)3.

This conclusion is based on the opinion’s flawed analysis of Wis. Stat. §§ 101.02(1)(b) and 227.11(2)(a), as discussed above. Further, it is unclear to whom the “more restrictive” limitation in Wis. Stat. § 227.11(2)(a)3. applies. The former attorney general assumed, with no discussion or analysis, that it applied to home builders. But perspective matters; what is “more restrictive” to one can simultaneously be less restrictive to another.

Additionally, rules promulgated under explicit, broad, general rulemaking authority do not run afoul of Wis. Stat. § 227.11(2)(a)3. The statute, on its face, simply prohibits an agency from using a standard, requirement, or threshold in statute as the sole basis for a “more restrictive” standard, requirement, or threshold in rule. For example, the Department of Transportation (DOT) could not use the weight limitations for vehicles contained in Wis. Stat. § 348.15 as the sole basis to establish more restrictive weight limits in rule. However, nothing in Wis. Stat. § 227.11(2)(a)3. prohibits the DOT from establishing a more restrictive weight limit in rule if another statute provided it with the authority to do so.

I appreciate your consideration of this request.

Sincerely,



Ryan Nilsestuen
Chief Legal Counsel
Office of Governor Tony Evers