

**STATE OF MICHIGAN
46TH CIRCUIT TRIAL COURT
OTSEGO COUNTY**

IN THE MATTER OF:

Circuit Court Case No: 21-18522-AE

MOAHR Docket No.: 20-007763

MOORE MURPHY HOSPITALITY, LLC
D/B/A IRON PIG SMOKEHOUSE,

Honorable Colin G. Hunter

Petitioner-Plaintiff,

v

MICHIGAN DEPARTMENT OF HEALTH
AND HUMAN SERVICES; GRETCHEN

WHITMER, in her official capacity as Governor
of the State of Michigan

Respondent-Defendant,

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PETITIONER'S BRIEF RE:
THE ORDER OF THE AGENCY IS A RULE
REQUIRING A PUBLIC HEARING BEFORE ADOPTION

AN AGENCY RULE

An administrative rule is defined as “an agency regulation, statement, standard, policy, ruling, or instruction of general applicability that implements or applies law enforced or administered by the agency...” MCL 24.207. The Administrative Procedures Act prohibits rule making without undergoing strict public scrutiny through “public hearings, public participation, notice, approval by the joint committee on administrative rules, and preparation of statements, with intervals between each process” *American Federation v Department of Mental Health* 452 Mich 1 (1996).

A rule not promulgated under the APA is invalid MCL 24.243.

The label the agency gives the directive is not determinative of whether it is a rule *American Federation*. The agency emergency order provides for criminal penalties. In order for the violation to constitute a crime, the directive must have been properly promulgated as a rule. Criminal penalties can arise from a rule violation only when the rule was properly promulgated *Wisconsin v Palm* Wisconsin Supreme Court Case No. 2020AP765-OA.

The definition of rule is to be broadly construed, while the exceptions are to be narrowly construed *American Federation*. MCL 24.207(j) does contain an exception to the statute’s definition of “rule” that applies to a “decision by an agency to exercise a permissive statutory power, although private rights or interests are effected”

The main problem for the agency is that the language within MCL 333.2253 is too general to support application of the exception. MCL 333.2253 prohibits “the gathering of people for any purpose” Based on that language the agency closed in-door dining.

The enabling statute, MCL 333.2253, does not expressly or impliedly authorize the specific action of the agency of closing in-door dining *Detroit v DSS* 431 Mich 172 (1988). If that were sufficient to constitute an explicit or implicit grant of authority to be excepted from the rule-making process of the APA, then the agency would never have to issue APA promulgated rules prohibiting the gathering of people for any purpose.

The exceptions would swallow the rule *American Federation*.

Because the emergency order has the force and effect of law, is of general applicability, and covers a substantive matter, Petitioner has established that the order had to be promulgated under the APA *Delta County v MDNR* 118 Mich App 458 (1982).

WHEREFORE, Petitioner respectfully requests this Court determine the emergency order is invalid as not promulgated under the APA.

Dated: October 15, 2021

David M. Delaney, PLC
Attorney for the Petitioner

