STATE OF MINNESOTA
IN COURT OF APPEALS
A22-0946

In re the Matter of the Petition of the Shakopee Mdewakanton Sioux Community for a Declaration that the Minnesota Gambling Control Board Engaged in Unlawful Rulemaking.

Filed February 27, 2023
Reversed; rule declared invalid
Larson, Judge

Office of Administrative Hearings
File No. 82-9017-36565

Skip Durocher, Brian B. Bell, Dorsey & Whitney, L.L.P., Minneapolis, Minnesota; and

Philip Brodeen, Brodeen & Paulson, P.L.L.P., New Brighton, Minnesota (for petitioner Shakopee Mdewakanton Sioux Community)

Keith Ellison, Attorney General, Ryan Pesch, Assistant Attorney General, St. Paul, Minnesota (for respondent Gambling Control Board)

Joseph F. Halloran, Jeffrey K. Holth, James K. Nichols, The Jacobson Law Group, Jacobson, Magnuson, Anderson & Halloran, P.C., St. Paul, Minnesota (for amici curiae Prairie Island Indian Community, Bois Forte Band of Chippewa, Lower Sioux Indian Community in The State of Minnesota, Fond du Lac Band of Lake Superior Chippewa, White Earth Band of Ojibwe, and Leech Lake Band of Ojibwe)

Alan M. Anderson, L. Reagan Florence, Alan Anderson Law Firm, L.LC., Minneapolis, Minnesota (for amicus curiae Pilot Games, Inc.)

Bruce M. Kleven, Minneapolis, Minnesota; and

Lloyd W. Grooms, LWG, P.A., St. Paul, Minnesota (for amicus curiae Electronic Gaming Group of Minnesota)

Considered and decided by Larson, Presiding Judge; Bratvold, Judge; and Gaïtas, Judge.

SYLLABUS

1. This court exercises original jurisdiction over declaratory-judgment actions brought under Minn. Stat. § 14.44 (2022), even when the petition challenges an administrative-law judge's decision under Minn. Stat. § 14.381 (2022), and such declaratory-judgment actions are not subject to a time limit.

2. The Minnesota Gambling Control Board's unpromulgated rule interpreting Minn. Stat. § 349.12, subd. 12b(3) (2022), to allow it to approve electronic-pull tabs with open-all functionality is invalid and cannot be used as a basis for agency action.

OPINION

LARSON, Judge

In this declaratory-judgment action, petitioner Shakopee Mdewakanton Sioux Community (the community) challenges an administrative-law judge's (ALJ) decision under Minn. Stat. § 14.381. The community argues the ALJ erred when it determined that respondent Minnesota Gambling Control Board (the board) had not adopted an invalid unpromulgated rule because the rule comported with the statute's plain meaning. The board responds that (1) the community's petition for declaratory relief is untimely; (2) the board is not enforcing an unpromulgated rule; and (3) even if the board is enforcing an unpromulgated rule, the rule is valid because it is exempt from rulemaking requirements. Because we conclude that the community's declaratory-judgment action is not subject to a time limit, the board's actions constitute unpromulgated rulemaking, and the unpromulgated rule is not exempt from rulemaking requirements, we reverse the ALJ and declare the rule invalid.

FACTS

In 2012, the legislature amended the Minnesota Lawful Gambling and Gambling Devices Act, Minn. Stat. §§ 349.11-.61 (2022),[1] to raise revenue for a new stadium. The 2012 amendments allow electronic-pull tabs[2] at bars and restaurants. *See* 2012 Minn. Laws ch. 299, art. 4 §§ 13-32 at 40-48. As relevant to this appeal, the 2012 amendments state that an electronic-pull tab: "requires that a player must activate or open each electronic pull-tab ticket and each individual line, row, or column of each electronic pull-tab ticket." Minn. Stat. § 349.12, subd. 12b(3).[3]

With the 2012 amendments allowing the use of electronic-pull tabs, the legislature charged the board with authority to "adopt rules it deems necessary to ensure the integrity of electronic pull-tab devices, the electronic pull-tab games played on the devices, and the electronic pull-tab game system necessary to operate them." Minn. Stat. § 349.151, subd. 4d(a). The legislature also required the board to examine electronic-pull tabs prior to authorizing their lease or sale in Minnesota. *Id.*, subd. 4d(c).

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[1] We cite the current version of the Minnesota Lawful Gambling and Gambling Devices Act because amendments since 2012 are not relevant to this case.

[2] A "pull-tab" game is a "single folded or banded paper ticket, multi-ply card with perforated break-open tabs, or a facsimile of a paper pull-tab ticket used in conjunction with an electronic pull-tab device, the face of which is initially covered to conceal one or more numbers or symbols." Minn. Stat. § 349.12, subd. 32. A player "wins" a pull-tab by uncovering three or more consecutive spaces with the same number or symbol in a row, column, or diagonal.

[3] The community, through the Minnesota Indian Gaming Association (MIGA), suggested amendments to the proposed statutory modifications to assuage its concerns that electronic-pull tabs would mimic digital-slot machines—creating direct competition with tribal-gaming establishments. The legislature largely adopted the amendments MIGA proposed—including the language found in section 349.12, subdivision 12b(3). *See* 2012 Minn. Laws ch. 299, art. 4 § 18.

Since 2012, the board has considered individual applications for electronic-pull tabs and approved many electronic-pull tabs each year. The board has approved electronic-pull tabs in various configurations. Central to this case, some electronic-pull tabs allow a player to open every space on a ticket with a single touch, which the parties refer to as "open-all" functionality. The parties dispute when the board first approved an electronic-pull tab with open-all functionality.[4]

On March 8, 2019, at an unrelated public rulemaking hearing, the community and other tribal governments expressed their view that electronic-pull tabs with open-all functionality did not comply with the statutory definition in section 349.12, subdivision 12b(3). While the ALJ found the community's comments were beyond the scope of the rulemaking hearing, the community's comments prompted board action. On March 13, 2019, the board emailed three vendors to inform them that:

> Right or wrong, over time, the idea of 1 touch to open all tabs in a multi-line – 1 window scenario has been allowed based upon the 12c definition. We have revisited and discussed this internally, especially in light of the observation and concerns brought forth. Because the [Minn. Stat. § 349.12, subd. 12b] language is more specific [than Minn. Stat. § 349.12, subd. 12c], there is an argument that the 12b language takes preference over the 12c language and we have been recently advised similarly. Some electronic pull-tab games in the field are subject to this scrutiny.
>
> . . . .

[4] The board asserts that it has reviewed electronic-pull tabs on a case-by-case basis since 2012 and has never denied an electronic-pull tab on the basis that it had open-all functionality. The community asserts that the board did not approve an electronic-pull tab with open-all functionality prior to 2015 and that emails dating back to 2012 show the board did not believe such games complied with the statute. Because this dispute relates to whether unpromulgated rulemaking occurred in 2019, we need not resolve this question.

> Going forward, the Board will not authorize proposed games with tickets that have more than 1 line, row, or column of symbols without the player opening each line. The player must make a separate action to open each line (or row or column) to reveal the result of each line on a ticket. This is regardless of whether the ticket design is a 1 window tab or otherwise.

The board received significant pushback from vendors. One vendor described the email as a "dramatic change in interpretation" that placed a significant burden on smaller vendors. Another vendor responded with a competing statutory analysis. In response, on March 22, 2019, the board reversed course, emailing the same three vendors and announcing it would "cautiously proceed and allow game submissions [with open-all functionality] for positive consideration . . . [and] continue to research this subject to provide [regulated parties] with a clearer interpretation of [section 349.12, subdivision 12b(3)] going forward."

The community petitioned the Office of Administrative Hearings (OAH) pursuant to section 14.381 for an order determining the board engaged in unpromulgated rulemaking when it sent the March 2019 emails and directing the board to cease enforcement of its unpromulgated rule. After a hearing on the matter and post-hearing briefs, the assigned ALJ filed a written order on May 21, 2020, dismissing the community's petition on the basis that the board's unpromulgated rule is consistent with the plain language in section 349.12. The ALJ notified the parties that the community could challenge the ALJ's decision by filing an action in this court pursuant to Minn. Stat. §§ 14.44-.45 (2022).

The community filed a section 14.44 declaratory-judgment action in this court on July 1, 2022, more than two years after the ALJ issued its decision. The community asks

this court to enter a declaratory judgment reversing the ALJ, declaring that the board is enforcing an invalid unpromulgated rule, and directing the board to cease enforcement of the invalid unpromulgated rule.

ISSUES

I. Is the community's declaratory-judgment action in this court untimely because it was filed more than two years after the ALJ order?

II. Do the board's emails indicating that Minn. Stat. § 349.12, subd. 12b(3), allows the board to approve electronic-pull tabs with open-all functionality announce an invalid unpromulgated rule?

ANALYSIS

The community asks this court to declare: (1) that the board adopted an unpromulgated rule and (2) that the unpromulgated rule is invalid because the board did not promulgate it using procedures required under the Minnesota Administrative Procedure Act (MAPA), Minn. Stat. §§ 14.001-.69 (2022). The board argues that this court should dismiss the community's petition on the basis that it is untimely or, alternatively, conclude either that the board is not enforcing an unpromulgated rule or that the unpromulgated rule is exempt from rulemaking requirements.

I.

We first address the board's challenge to the timeliness of the community's declaratory-judgment action before this court. This question requires a brief recitation of the law governing review of agency rulemaking.

An administrative "rule" is "every agency statement of general applicability and future effect, including amendments, suspensions, and repeals of rules, adopted to

implement or make specific the law enforced or administered by that agency or to govern its organization or procedure." Minn. Stat. § 14.02, subd. 4; *Weber v. Hvass*, 626 N.W. 2d 426, 434 (Minn. App. 2001) ("The legislature included all agency activities within the general definition of 'rule,' and then excluded specific activities from the definition as it deemed beneficial to the concerns of efficient government and public participation." (quotation omitted)), *rev. denied* (Minn. June 27, 2001). Generally, an agency must adopt administrative rules in accordance with specific notice-and-comment procedures established in MAPA. *White Bear Lake Care Ctr., Inc. v. Minn. Dep't of Pub. Welfare*, 319 N.W.2d 7, 8 (Minn. 1982). We refer to administrative rules that went through MAPA's notice-and-comment procedures as "promulgated rules" and administrative rules that did not as "unpromulgated rules."[5] *See, e.g.*, *In re PERA Salary Determinations Affecting Retired & Active Emps.*, 820 N.W.2d 563, 570, 573 (Minn. App. 2012).

Procedurally under MAPA, when challenging an agency's enforcement of an unpromulgated rule, a party must first seek a determination from an ALJ. Minn. Stat. § 14.381, subd. 1; *see also Water in Motion, Inc. v. Minn. Dep't of Lab. & Indus.*, No. A16-0335, 2016 WL 7041978, at *4 (Minn. App. Dec. 5, 2016) ("The proper procedure to challenge the alleged enforcement of an unpromulgated rule is to file a petition with [OAH] for decision by an ALJ that can then be appealed to this court." (citing Minn. Stat.

[5] While section 14.381 uses the term "unadopted" rules, the supreme court uses the term "unpromulgated" rules when discussing rulemaking that has not been through the MAPA's notice-and-comment procedures. *See, e.g.*, *St. Otto's Home v. Minn. Dep't of Hum. Servs.*, 437 N.W.2d 35, 45 (Minn. 1989). Therefore, we use the word "unpromulgated" in this opinion.

§§ 14.381, .44)).[6] "The decision of the [ALJ] may [then] be appealed under sections 14.44 and 14.45." Minn. Stat. § 14.381, subd. 2. Section 14.44 states:

> The validity of any rule may be determined upon the petition for a declaratory judgment thereon, addressed to the court of appeals, when it appears that the rule, or its threatened application, interferes with or impairs, or threatens to interfere with or impair the legal rights or privileges of the petitioner. The agency shall be made a party to the proceeding. The declaratory judgment may be rendered whether or not the petitioner has first requested the agency to pass upon the validity of the rule in question, and whether or not the agency has commenced an action against the petitioner to enforce the rule.

Outside the context of unpromulgated rules, we have concluded that, in an action under section 14.44, "[t]his court has *original jurisdiction* to determine the validity of an agency's rules." *Minn. Chamber of Com. v. Minn. Pollution Control Agency*, 469 N.W.2d 100, 102 (Minn. App. 1991) (emphasis added), *rev. denied* (Minn. July 24, 1991). And when we exercise original jurisdiction under section 14.44, the action "is not subject to the time limits placed on appeals from, for example, final orders of contested case hearings." *Fryberger v. Township of Fredenberg*, 428 N.W.2d 601, 605 (Minn. App. 1988), *rev. denied* (Minn. Nov. 16, 1988); *see also Minn. Ctr. for Env't Advoc. v. Minn. Dep't of Nat. Res.*, No. A18-1956, 2019 WL 3545839, at *4 (Minn. App. Aug. 5, 2019) ("Minn. Stat. § 14.44 provides a unique statutory remedy for which the legislature has not provided a statute of limitations.").

[6] We acknowledge the nonbinding nature of nonprecedential opinions, Minn. R. Civ. App. P. 136.01, subd. 1(c) (2022), but observe the persuasive weight of our prior nonprecedential decisions involving a similar procedural posture.

Despite the legislature's clear directive that we review an ALJ's section 14.381 decision using section 14.44, the board asserts that this case is not an "original action" in this court, but an appeal of the ALJ order, and, therefore, either the 30-day appeal period in Minn. Stat. § 14.63[7] or the 60-day appeal period in Minn. R. Civ. App. P. 104.01, subd. 1, applies. This is an issue of first impression; no Minnesota appellate court has decided whether a time limit applies to a declaratory-judgment action brought under section 14.44 when the action challenges an ALJ order issued under section 14.381.

We conclude that, despite an ALJ's prior consideration of the matter, this court has original jurisdiction over a declaratory-judgment petition filed under section 14.44 and the petition is, therefore, not subject to the time limits in section 14.63 or rule 104.01. Reviewing the plain language in the relevant statutes, we conclude that nothing in sections 14.381 or 14.44 undermines our previous holding that we exercise *original jurisdiction* over a declaratory-judgment action filed under section 14.44. *Minn. Chamber of Com.*, 469 N.W.2d at 102. And in the numerous nonprecedential decisions where we have reviewed an ALJ's order under section 14.381, we have never questioned our original

[7] In *Minnesota Association of Homes for the Aging v. Department of Human Services*, we concluded that "[o]nly formally promulgated rules may be challenged in a pre-enforcement action under Minn. Stat. § 14.44." 385 N.W.2d 65, 69 (Minn. App. 1986). In so holding, we determined that the proper avenue to challenge an unpromulgated rule was "in a contested case hearing." *Id.* In 2001, the legislature amended MAPA to add section 14.381, which expressly allows this court to review a challenge to an allegedly unpromulgated rule under section 14.44 after the ALJ issues its decision. *See* 2001 Minn. Laws ch. 179 § 8, at 673-74. This amendment superseded our previous holding that a party must challenge an unpromulgated rule using MAPA's contested-case-hearing procedures, including the 30-day time limit to file a petition for certiorari in this court under section 14.63.

jurisdiction to review the ALJ's decision. *See, e.g.*, *Water in Motion, Inc.*, 2016 WL 7041978, at *3-4; *Waste Mgmt. of Minn., Inc. v. Minn. Pollution Control Agency*, No. A14-0122, 2014 WL 3892576, at *1 (Minn. App. Aug. 11, 2014). We see no reason to depart from our prior precedent that when we exercise original jurisdiction under section 14.44, the action "is not subject to the time limits placed on [other] appeals." *Fryberger*, 428 N.W.2d at 605.

Here, the community petitioned OAH seeking an ALJ order that the board was enforcing an unpromulgated rule. *See* Minn. Stat. § 14.381, subd. 1. The ALJ issued its decision pursuant to section 14.381, subdivision 2, and appropriately notified the parties that the ALJ's decision could "be appealed to the Minnesota Court of Appeals pursuant to the authority of Minn. Stat. §§ 14.44-.45." The community complied with the requirements in section 14.44 and filed a declaratory-judgment action in this court seeking review of the ALJ order. Accordingly, we decline to dismiss this action as untimely.[8]

II.

We next address the community's argument that the ALJ improperly dismissed the community's petition. The community contends that the board issued an unpromulgated

[8] We are unpersuaded by the board's summary argument that the doctrine of laches bars the community's action. "Neither this court nor the supreme court has applied the doctrine of laches in the context of a rules action." *Minn. Ctr. for Env't Advoc.*, 2019 WL 3545839, at *5-6. And while some federal courts have been willing to apply the doctrine to declaratory-judgment actions challenging federal administrative rules, *see, e.g.*, *Indep. Bankers Ass'n of Am. v. Heimann*, 627 F.2d 486, 488 (D.C. Cir. 1980), others have recognized that laches should be applied sparingly in suits "brought to vindicate the public interest," *see, e.g.*, *Apache Survival Coal. v. United States*, 21 F.3d 895, 905 (9th Cir. 1994). Because laches is a discretionary doctrine and this action is based on allegations that an agency is exceeding its authority, we decline to apply the laches doctrine here.

rule when it articulated a blanket policy in the March 2019 emails that section 349.12 allows the board to approve electronic-pull tabs with open-all functionality. And the community asserts that the ALJ improperly decided the unpromulgated rule satisfies an exception to MAPA's rulemaking requirements.

The board responds that the March 2019 emails are not a rule and, instead, a return to the board making case-by-case determinations. Alternatively, the board argues that if the March 2019 emails announced a rule, the ALJ appropriately determined the rule falls under exceptions to MAPA's rulemaking requirements. The parties agree that if the board articulated a rule and the rule does not fit into MAPA's exceptions, the board has issued "an invalid rule, which cannot be used as the basis for agency action." *See In re PERA*, 820 N.W.2d at 573 (quotation omitted).

To resolve the parties' dispute, we must therefore decide (1) whether the board engaged in unpromulgated rulemaking and, if so; (2) whether the ALJ appropriately decided an exception to the rulemaking requirements applied to the board's unpromulgated rule. We address both issues below.

A. The board engaged in unpromulgated rulemaking.

We first address whether the board engaged in unpromulgated rulemaking.

Generally, an agency may formulate policy in two ways: rules or case-by-case determinations. *In re Crown CoCo, Inc.*, 458 N.W.2d 132, 136 (Minn. App. 1990). An agency formulates policy using a "rule" when it makes a "statement of general applicability and future effect." Minn. Stat. § 14.02, subd. 4. This broad definition generally requires an agency to use MAPA's notice-and-comment procedures to promulgate "interpretive

rules[,]"[9] meaning "those that 'make specific the law enforced or administered by the agency.'" *In re PERA*, 820 N.W.2d at 570 (quoting *Cable Comms. Bd. v. Nor-West Cable Comms. P'ship*, 356 N.W.2d 658, 667 (Minn. 1984)).

An agency also formulates policy when it makes decisions on a case-by-case basis, meaning the agency applies a law "to a specific party." *In re Hibbing Taconite Co.*, 431 N.W.2d 885, 894 (Minn. App. 1988). The legislature specifically stated in section 14.381, subdivision 1(b), that an agency does not engage in rulemaking when it "enforces a law . . . by applying the law . . . to specific facts on a case-by-case basis."

Here, the community argues the board adopted an unpromulgated interpretive rule when it articulated a blanket policy in the March 2019 emails that section 349.12 allows the board to approve electronic-pull tabs with open-all functionality. We agree.

In the March 13, 2019 email, the board made the broad policy statement that it would no longer approve electronic-pull tabs with open-all functionality. The board then reversed course in its March 22, 2019 email, informing vendors that it would again consider electronic-pull tabs with open-all functionality. The March 2019 emails did not cabin the rule to the emailed vendors; rather, the March 2019 emails articulated a blanket policy for how the board would make approval decisions in the future—i.e., that it would not disapprove an electronic-pull tab on the basis that it has open-all functionality. Thus, the

[9] The board argues that the March 2019 emails were not rules, but case-by-case determinations. But, the board alternatively argues that if the emails are unpromulgated rules, this court should apply the caselaw related to interpretive rules. Thus, the parties do not dispute that if the March 2019 emails articulated a rule, it is an interpretive rule.

March 2019 emails articulated a "statement of general applicability and future effect." Minn. Stat. § 14.02, subd. 4.

The board disagrees, arguing it has always applied section 349.12 on a case-by-case basis and, therefore, it has never issued an unpromulgated rule. Relying on *L & D Trucking v. Minnesota Department of Transportation*, 600 N.W.2d 734, 735 (Minn. App. 1999), *rev. denied* (Minn. Dec. 21, 1999), the board contends that the March 2019 emails did not articulate a "blanket policy" but, rather, announced a return to conducting case-by-case determinations. We are not persuaded.

L & D Trucking related to the enforcement of a prior district court order enjoining an agency from enforcing an unpromulgated rule. *Id.* After the district court issued its order, the agency sent notices to two contractors stating that they violated the underlying statute. *Id.* at 735, 737. The contractors moved the district court for an order holding the agency in contempt for continuing to enforce its unpromulgated rule. *Id.* at 735. The district court agreed with the contractors that the agency had violated the district court's previous order and held the agency in contempt. *Id.* On appeal, we disagreed with the district court's decision to hold the agency in contempt. *Id.* at 737. We determined that, although the agency was enjoined from enforcing its unpromulgated rule, it could not also be enjoined from applying the statute on a case-by-case basis. *Id.* We noted that "[s]uch a reading . . . would allow a contractor to avoid application of the [underlying statute] simply by claiming that it falls within" the agency's previously unpromulgated rule. *Id.* We concluded that because the agency could not effectively enforce the statute without

applying it on a case-by-case basis, the district court erred when it found the agency in contempt. *Id.* at 737-38.

This case differs dramatically from the facts presented in *L & D Trucking*. There, the two notices were case-by-case determinations enforcing a statute against *specific contractors*. We did not overturn the underlying decision that the agency engaged in unpromulgated rulemaking. Instead, we held the agency must still be allowed to enforce a statute on a case-by-case basis, even when an unpromulgated rule has been invalidated. Here, the board did not apply section 349.12 to specific vendors or specific electronic-pull tabs when it sent the March 2019 emails. Instead, the board articulated its blanket policy regarding whether it would approve electronic-pull tabs with open-all functionality in the future. Furthermore, the parties in *L & D Trucking* agreed that the agency lacked the authority to promulgate rules; thus, the agency's only means to enforce the statute was through case-by-case determinations. *Id.* at 736. In contrast here, the parties acknowledge the board has rulemaking authority and could use MAPA's notice-and-comment procedures to promulgate its section 349.12 interpretation. *See* Minn. Stat. § 349.151, subd. 4d(a). For these reasons, *L & D Trucking* is inapplicable.

The board also argues that even if we conclude the March 13, 2019 email expressed an unpromulgated rule, the March 22, 2019 email overturned that rule and did not itself express an unpromulgated rule because it did not specifically provide that the board would approve electronic-pull tabs with open-all functionality. But we agree with the community that, in the context of this case, the board did not have to state outright it would approve all electronic-pull tabs with open-all functionality. The parties agree that, at least beginning

in 2015, the board approved electronic-pull tabs with open-all functionality. Then, on March 13, 2019, the board articulated a blanket policy that it would not authorize electronic-pull tabs with open-all functionality. The board then reversed course and announced in its March 22, 2019 email that it would "cautiously proceed and allow game submissions for positive consideration under existing methods." In context, this announcement reversed the previous unpromulgated rule that the board would *not* approve electronic-pull tabs with open-all functionality and declared that the agency would, moving forward, use "existing methods"—i.e., the board would not disapprove an electronic-pull tab on the basis that it has open-all functionality.

For these reasons, we conclude the board's March 2019 emails announced an unpromulgated rule that the board will not disapprove an electronic-pull tab on the basis that it has open-all functionality. We must, therefore, determine whether the board's unpromulgated rule fits into an exception to MAPA's rulemaking requirements.

B. The board's unpromulgated rule is invalid.

Because we conclude the March 2019 emails articulate an unpromulgated rule allowing for future approval of electronic-pull tabs with open-all functionality, we must next decide whether the board's unpromulgated rule is nevertheless valid. *See In re PERA*, 820 N.W.2d at 570. In general, an unpromulgated interpretive rule is valid if: (1) "the agency's interpretation of a [statute] corresponds with its plain meaning" or (2) "the [statute] is ambiguous and the agency interpretation is a longstanding one." *Cable Commc'ns Bd.*, 356 N.W.2d at 667. The parties dispute whether the exceptions apply, and we address each in turn below.

1. Plain Meaning

The community argues the ALJ improperly dismissed its petition on the basis that that section 349.12 unambiguously allows the board to approve electronic-pull tabs with open-all functionality. The community asserts that, in fact, section 349.12 unambiguously prohibits electronic-pull tabs with open-all functionality. The board argues the inverse, asking this court to affirm the ALJ because its unpromulgated rule merely conforms to the plain language. We conclude that, contrary to the parties' arguments, the statute is ambiguous and, therefore, the plain-language exception to unpromulgated rulemaking does not apply.

When an agency's interpretation accords with a statute's plain language, the statute authorizes the agency's interpretation and, therefore, the agency did not promulgate a new rule subject to MAPA's rulemaking requirements. *See id.* at 667-68; *In re Application of Crown CoCo, Inc.*, 458 N.W.2d at 137 (recognizing that "the agency's action is authorized by the statute itself" when an agency's interpretation is consistent with the plain language (quotation omitted)). But this rule only applies to an unambiguous statute. *See PERA*, 820 N.W.2d at 570-71 (noting an interpretation must be "longstanding" if the statute is ambiguous).

To determine whether an agency's unpromulgated rule applied the statute's plain language, we focus on the words of the law "to ascertain and effectuate the intention of the legislature." Minn. Stat. § 645.16 (2022); *Minn. Transitions Charter Sch. v. Comm'r of Minn. Dep't of Educ.*, 844 N.W.2d 223, 227 (Minn. App. 2014), *rev. denied* (Minn. May 28, 2014). The first step in our analysis is to determine "whether the statute or regulation

is clear or ambiguous on its face." *In re Minn. Living Assistance, Inc.*, 934 N.W.2d 300, 306 (Minn. 2019). In determining whether a statute is ambiguous, we "construe the statute's words and phrases according to their plain and ordinary meaning." *In re Fin. Responsibility for Out-of-Home Placement Costs for S.M.*, 812 N.W.2d 826, 829 (Minn. 2012). "A statute should be interpreted, whenever possible, to give effect to all of its provisions; 'no word, phrase, or sentence should be deemed superfluous, void, or insignificant.'" *Am. Fam. Ins. Grp. v. Schroedl*, 616 N.W.2d 273, 277 (Minn. 2000) (quoting *Amaral v. Saint Cloud Hosp.*, 598 N.W.2d 379, 384 (Minn. 1999)). "A statute is only ambiguous if its language is subject to more than one reasonable interpretation." *Christianson v. Henke*, 831 N.W.2d 532, 537 (Minn. 2013). "Multiple parts of a statute may be read together so as to ascertain whether the statute is ambiguous." *Id.*

The parties agree that whether the board's unpromulgated rule enforces the plain language turns on the interpretation of section 349.12, subdivision 12b(3). There, the statute defines an electronic-pull-tab device[10] as "a handheld and portable electronic device that . . . requires that a player must activate or open each electronic pull-tab ticket and each *individual* line, row, or column of each electronic pull-tab ticket." Minn. Stat. § 349.12,

[10] We are unconvinced by the board's argument that because subdivision 12b defines electronic-pull tab "devices," its provisions do not apply to electronic-pull tab "games." Section 349.12, subdivision 12c(1) defines an electronic-pull tab "game" as "facsimiles of pull-tab tickets that are played on an electronic pull-tab device." Without an electronic-pull tab "game," an electronic-pull tab "device" cannot require a player to "activate . . . each individual line, row, or column of each electronic pull-tab ticket." Minn. Stat. § 349.12, subd. 12b(3).

subd. 12b(3) (emphasis added). We conclude that the statute's text is susceptible to two reasonable interpretations and is, therefore, ambiguous.

One reasonable interpretation, advanced by the board and adopted by the ALJ, is that the adjective "individual" modifies the nouns "line, row, or column" and, therefore, requires only that a player completely open an electronic-pull tab before beginning another electronic-pull tab. Critical to this interpretation is the absence of an adverb, like "separately" or "individually," to modify the verb "activate." Thus, under this reasonable reading, because nothing modifies the word "activate" and the word "individual" only modifies the nouns "line, row or column," the statute does not require a player to take separate actions on each "line, row or column"—i.e., it does not preclude open-all functionality.

But the community's interpretation is also reasonable. The community asserts that the statute uses the adjectives "each individual" to modify "line, row, or column" and the inclusion of both words means that "some unique action must be taken to open each individual row." The community persuasively asserts that interpreting the statute to merely emphasize that an entire electronic-pull tab must be played before beginning another electronic-pull tab omits the word "individual," because the statute could merely state that a player must open "*each* line, row, or column" to convey the same meaning. Thus, under this reasonable interpretation, the requirement that a player activate "each individual" line must mean something more than that the player must open the entire ticket. Further, the absence of an adverb is not fatal to the community's interpretation. We conclude it is an exceedingly technical construction to insist only adverbs can modify adjectives; "open each

line individually" and "open each individual line" can have the same meaning. *See State v. Townsend*, 941 N.W.2d 108, 111 (Minn. 2020) (holding an infinitive may also function as an adverb). Thus, under this reasonable reading, the statute requires that a player take an affirmative action to open each ticket and to open each line, row, or column on each ticket—i.e., it precludes open-all functionality.

Because the board and community both proffer reasonable interpretations of the statute, we conclude that section 349.12, subdivision 12b(3), is ambiguous. *See Christianson*, 831 N.W.2d at 537. Because the statute is ambiguous, we reverse the ALJ's decision that the plain-language exception to MAPA's rulemaking requirements applies to the board's unpromulgated rule. *See Cable Commc'ns Bd.*, 356 N.W.2d at 667-68.

2. Longstanding Interpretation

The board finally argues that even if its unpromulgated rule is otherwise invalid, it is exempt from MAPA's rulemaking requirements because it is a longstanding interpretation. The board asserts that since 2012 it has consistently applied section 349.12, subdivision 12b(3), on a case-by-case basis to reflect its determination that electronic-pull tabs with open-all functionality comply with the statute. We disagree that the board's case-by-case determinations reflect a longstanding interpretation.

An agency's unpromulgated rule interpreting an ambiguous statute is valid if the interpretation is "longstanding." *West Cable Commc'ns*, 356 N.W.2d at 667. We have noted the relative dearth of authority on what "longstanding" means, but have borrowed from federal authority to identify several relevant factors, including: "the duration and the consistency of an agency's interpretation of a statute[,]" as well as "the thoroughness

evident in its consideration, the validity of its reasoning, its consistency with earlier and later pronouncements, and all those factors which give it power to persuade, if lacking power to control." *In re PERA*, 820 N.W.2d at 571 (citing *United States v. Mead Corp.*, 533 U.S. 218, 228 (2001)).

We conclude that the board's unpromulgated rule is not longstanding. First, the board's supposed "longstanding" interpretation of section 349.12, subdivision 12b(3), "is of uncertain origin." *Id.* at 572. The record lacks any evidence as to when the board adopted its interpretation that open-all functionality complies with the statute. Without knowing the date that the board adopted the rule, "it is difficult to conclude that the interpretation is longstanding." *Id.* Second, the board's "interpretation has been inconsistent over time." *Id.* The shifting positions over a nine-day period in the March 2019 emails alone demonstrates that the interpretation has been inconsistent. Finally, the record shows that even when the board articulated an unpromulgated rule in the March 2019 emails, the board expressed its views in tentative and qualified terms. When the board announced that it would no longer approve electronic-pull tabs with open-all functionality, it stated that, "[r]ight or wrong, over time," it had approved electronic-pull tabs with open-all functionality. When it reversed course nine days later, the board stated that it would "cautiously proceed and allow game submissions for positive consideration[,]" and that it would "continue to research this subject to provide [regulated parties] with a clearer interpretation of this statute going forward." The board's tentative analysis does not show the unpromulgated rule was thoroughly considered, let alone a

longstanding interpretation, and even acknowledges that prior approvals may have been inconsistent with the statute.

We conclude that the board's interpretation of section 349.12, subdivision 12b(3), as it concerns the validity of open-all functionality for electronic-pull tabs, is not a longstanding interpretation of the statute. Thus, the board's interpretation that the statute permits approval of electronic-pull tabs with open-all functionality "is an invalid rule." *See In re PERA*, 820 N.W.2d at 573 (quoting *Good Neighbor*, 428 N.W.2d at 402).

Accordingly, we declare that the board is enforcing an invalid unpromulgated rule that it cannot use as the basis for agency action.

DECISION

We conclude that we exercise original jurisdiction over declaratory-judgment actions brought under section 14.44, even when the petition challenges an ALJ's decision under section 14.381. Because there is no time limit for actions brought under section 14.44, the community's action is not untimely.

We further conclude that the board announced an unpromulgated rule in its March 2019 emails and no exception exempts the rule from MAPA's notice-and-comment rulemaking. We, therefore, declare the rule invalid. The board cannot use the invalid unpromulgated rule as the basis for its action.

Reversed; rule declared invalid.