Statements of Policy or Disguised Rulemakings:

Bedford v. Commonwealth DEP Revisited

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Part I. Introduction

Agencies of the Commonwealth of Pennsylvania regularly publish regulations and policy statements in the Pennsylvania Bulletin. The promulgation of these two forms of documents must follow distinct requirements, dictated by statutory law. At the risk of oversimplification, regulations have the binding force of law while policy statements provide guidance. The 2009 case of *Bedford v. Commonwealth, Department of Environmental Protection* before the Pennsylvania Commonwealth Court is, in the author's view, the seminal decision treating this distinction.

Determining which "track" must be followed, *i.e.* determining whether in a given matter an agency should issue a binding regulation or a guiding policy statement, presents a challenge to the agencies, agency counsel, and ultimately the courts. Given that the policy statement track is administratively simpler, the author

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posited that there may be policy statements that, as drafted, could function as regulations but had escaped the more rigorous regulatory review process. The author reviewed the last three years of policy statements published in the Pennsylvania Bulletin and found (i) a reasonable degree of agency compliance, (ii) some instances of apparent noncompliance, and (iii) ways in which the processes governing the issuance of policy statements could be improved.

Part II. Background

Are there purported policy statements that use language which would only be appropriate in regulations? Are there policy statements that are applied as though they constituted binding regulations? Are there policy statements that restrict agency discretion and, in effect, create a binding norm? This is the three-part "binding norm" test set forth in the seminal case of *Borough of Bedford v. Commonwealth Department of Environmental Protection.*[1] In the decade since *Bedford* was decided, practitioners have wondered about the degree to which agency attorneys, regulators, and the courts have adhered to the *Bedford* principles.

During the author's review of recent issues of the Pennsylvania Bulletin, specific attention was given to matters explicitly labelled as statements of policy. In this way, the author was able to review express language and determine if the plain language used in a policy statement created a binding norm and restricted agency discretion, thereby fulfilling two of the key tenets of the three *Bedford* tests for deeming a policy statement a binding regulation in fact.[2]

What could not be done from an examination of the language in a policy statement was determining how a given policy statement is being implemented. To review the implementation of even one policy statement without the benefit of a litigated case would be a challenging endeavor indeed. Only through a review of the case law can one gain some insight into how policy statements in general are being implemented by the agencies. Of course, the limitation here is that case law is only created when a regulated entity, a citizens group, or an individual objects and brings a legal action or an appeal of an agency decision.[3]

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[1] 972 A.2d 53, 63 n.15 (Pa. Commw. Ct. 2009) (en banc) (Leavitt, J.) (quoting Milcreek Manor v. Dep't of Pub. Welfare, 796 A.2d 1020, 1026 n.10 (Pa. Commw. Ct. 2002)).

[2] *See id.* A document which meets any one of the three tests (language, restriction of discretion, and implementation) is or should be a regulation subject to regulatory review.

[3] For the regulated community, staying on the good side of the regulators is ordinarily advisable. For citizen groups and individual "watchdogs," there may be less concern about offending regulators but more concern about the adequacy of resources to

Yet another limitation arises from the fact that policy statements, or documents functioning as policy statements, are not always published in the Pennsylvania Bulletin. This may very well have a practical basis; there may be too much in the way of agency documentation describing in a way that is legally permissible how agencies intend to act, or how agencies interpret a statute or regulation.[4]

The author also omitted from a detailed review, documents in the Pennsylvania Bulletin labeled as "notices." The analysis applied here to published statements of policy would apply equally well to any notices that are in fact disguised regulations.[5] The potential for this, while not nonexistent, seems to be not as great.

The author must concede at the onset that comprehensively assessing how the agencies are preparing and implementing policy statements and notices would be impractical.

The author did find several policy statements in his review that appeared to fail to satisfy two of the three *Bedford* tests[6] and therefore appeared to be regulations in disguise which probably should have been subject to regulatory review. The fact that the remaining test – implementation – cannot be addressed without factual inquiry, was the precise problem in *Bedford*: the case was remanded for a factual

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undertake costly litigation. Either way, there are disincentives to the development of case law.

[4] Consider, for example, the voluminous documentation of recent agency actions related to the novel coronavirus ("COVID-19") pandemic, which has required extremely rapid governmental responses to changing circumstances and which have been promulgated without the benefit of publication in the Pennsylvania Bulletin.

[5] The reality that "notices" or other publications can, in fact, be policy statements was noted by the *Bedford* court, *Bedford*, 972 A.2d at 65, and therefore logically notices might also be disguised regulations. *See, e.g.*, 50 Pa. Bull. 3956–65 (Aug. 1, 2020) (constituting a Department of Health notice which purported to establish approvals for breathalizer testing devices, but is nevertheless identified as "regulations" in the introduction); 50 Pa. Bull. 1842–61 (Mar. 28, 2020) (compiling notices totaling 20 pages of two of the Pennsylvania Department of Agriculture's grant programs, containing solicitation and application procedures, criteria for awards, and terms of the grant agreements).

[6] *Bedford*, 972 A.2d at 53 n.15.

determination as to how the policy statement was actually being applied.[7] Only the case law provides a window of sorts to make that evaluation.[8]

This Article reviews and discusses the relevant statutes, *Bedford* and subsequent cases that illustrate its principles, and recent policy statements, and makes recommendations as to how agency counsel, the Pennsylvania Attorney General, and the Commonwealth General Assembly might enhance the application of *Bedford* principles.

Part III. The Statutes

Understanding the nature and permissible use of policy statements requires reference to three distinct but interconnecting statutes: the Commonwealth Documents Law of 1968,[9] the Commonwealth Attorneys Act of 1980,[10] and the Regulatory Review Act of 1982.[11] For purposes of this Article, these statutes should be read *in pari materia*, although some definitions may differ.

The Documents Law was the first of the three statutes to be enacted and, broadly speaking, prescribes the process for adoption of regulations. A regulation is defined there as:

> [a]ny rule or regulation, or order in the nature of a rule or regulation, promulgated by an agency under statutory authority in the administration of

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[7] *Id.* at 67–68, 69 (noting that relevant questions left to be answered included (i) "[h]ow have the Department [of Environmental Protection] personnel interpreted and implemented the [policy,]" (ii) "[h]ow much discretion can Department personnel exercise when implementing the [policy] and how much discretion is actually being exercised," (iii) "[w]hat happens to a permittee that does not comply with the requirements of the [policy]," and (iv) "[w]hat internal guidance, either written or oral, was given to the Department's regional offices about implementation of the [policy], when issuing . . . permits?").

[8] The author makes no assumption that policy statements are never or rarely implemented in a way that offends the Regulatory Review Act. In fact, the opposite may be true, *i.e.* that, notwithstanding legal requirements, some administrators apply policy statements as if elements of the policy statement were regulatory in character.

[9] 1968 Pa. Laws 769, Pub. L. No. 1968-240 (codified as amended at 45 PA. STAT. § 1101 and 45 PA. CONS. STAT. § 501) (hereinafter "Documents Law").

[10] 1980 Pa. Laws 950, Pub. L. No. 1980-164 (codified as amended at 71 PA. STAT. § 732-101) (hereinafter "Attorneys Act").

[11] 1982 Pa. Laws 633, Pub. L. No. 1982-181 (codified as amended at 71 PA. STAT. § 745.1) (hereinafter "Regulatory Act").

> any statute administered by or relating to the agency, or prescribing the practice or procedure before such agency. The term includes a proclamation, executive order, executive directive or other similar document promulgated by the Governor.[12]

This definition is somewhat "circular," as has been observed by one commentator[13]; a regulation is in part defined as a regulation. At the time that the General Assembly amended the Documents Law in 2014,[14] the legislature missed a valuable opportunity to utilize the *Bedford* standard to define exactly what constitutes a regulation.

The Documents Law also provides a definition of a policy statement. A policy statement is defined as:

> [a]ny document, except an adjudication or a regulation, promulgated by an agency which sets forth substantive or procedural personal or property rights, privileges, immunities, duties, liabilities or obligations of the public or any part thereof, and includes, without limiting the generality of the foregoing, any document interpreting or implementing any statute enforced or administered by such agency.[15]

A policy statement is therefore defined by what it is not: an adjudication or regulation. This definition also suffers from the failure to state explicitly the nonbinding nature of a policy statement. The import of these two definitions is that it has been left to the courts to flesh out how these crucial terms are applied. Given that policy statements are not necessarily published,[16] there is the potential for unpublished policy statements, as well of course published ones, to escape attention

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[12] 45 PA. CONS. STAT. § 501.

[13] Terrance J. Fitzpatrick, *The Use of General Policy Orders in Place of Regulations by the Pennsylvania Public Utility Commission*, 26 WIDENER L.J. 1, 5 (2017).

[14] 2014 Pa. Laws 2461, Pub. L. 2014-133. The 2014 amendment dealt with unrelated matters.

[15] 45 PA. CONS. STAT. § 501 (defining a "Statement of Policy").

[16] 45 PA. STAT. § 1207 (requiring the "agency text of all administrative and other *regulations"* to be published) (emphasis added); *see* Pa. Human Relations Comm'n v. Norristown Area Sch. Dist., 374 A.2d 671 (Pa. 1977) (holding that certain guidelines for the desegregation of public schools constituted policy statements and not regulations which would be "subject to the filing and publication requirements" of the predecessor of the Documents Law). *But see* 1 PA. CODE §§ 3.26a; 13.1 (requiring policy statements to be published in order to have effect against persons without actual knowledge of their content). Of course, policy statements are in theory never effective so as to be binding.

and review. A document that is functionally a regulation but not within an exception[17] and not processed in accordance with the Documents Law is invalid.[18]

The Attorneys Act was enacted in 1980 following a 1978 amendment to the Pennsylvania Constitution that created the Office of the Attorney General.[19] Relevant here are specific responsibilities given to the Attorney General to review and approve regulations: "The Attorney General shall review for form and legality, all proposed rules and regulations of Commonwealth agencies before they are deposited with the Legislative Reference Bureau . . . ."[20]

The Attorney General's power to review regulations is explicit. It does not appear, however, as though the Pennsylvania General Assembly gave thought to the notion that this power implicitly requires or should require review of policy statements.[21] Indeed, how can it be said that the Attorney General is reviewing regulations if regulations disguised as policy statements escape review?

The Regulatory Act, enacted in 1982, is the third of the relevant enactments, and provides a very complex and time-consuming framework for the promulgation of rules and regulations. The Regulatory Act defines regulation in a slightly different

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[17] Section 1204 of the Documents Law provides that, within certain explicitly described circumstances, an "administrative regulation or change therein" need not be subject, or fully subject, to the notice and adoption procedures of sections 1201 and 1202—the sections that are at the core of otherwise required regulatory requirements. It is interesting that there appears to be so little attention to these provisions. *See Fitzpatrick, supra note 13, at 21 n.94. See also infra* note 52.

[18] 45 PA. STAT. § 1208; Borough of Bedford v. Commonwealth, Dep't of Envtl. Prot., 972 A.2d 53, 62–63 (Pa. Commw. Ct. 2009) ("The effect of an agency's failure to promulgate a regulation in accordance with . . . various statutory requirements is to have the regulation declared a nullity. It is little wonder that agencies take the statement of policy route, which is free of the burdens imposed upon an agency's promulgation of a regulation.") (citing Automobile Serv. Councils of Pa. v. Larson, 474 A.2d 404, 405 (Pa. Commw. Ct. 1984)).

[19] PA. CONST. of 1968, art. 4, § 4.1 (1978).

[20] 71 PA. STAT. §732-204(b).

[21] One could speculate that the Governor's General Counsel might object to oversight by the Attorney General of what the General Counsel might consider agency business of more routine matters committed to his or her office. While unlikely from a political perspective, the prospect of oversight by the Attorney General of policy statements could be reduced by recognition that some policy statements being issued seem to stray somewhat from the spirit if not the letter of *Bedford*. *See infra* Part V (discussing current policy statements).

manner than the Documents Law does, but not in a way that is material to the discussion here.[22]

In its definitions, the Regulatory Act references both the Documents Law and Attorneys Act, as well it should. However, the Regulatory Act neither defines nor references policy statements, and therefore does nothing substantive to address the question of how the regulatory review process is susceptible to being bypassed, whether in good faith or not, thereby avoiding the rigors the Regulatory Act imposes on the regulatory process.[23] In other words, the Regulatory Act does nothing to require the agency authors of a policy statement to avoid creation of a binding norm. Although "oversight in order to foster executive branch accountability" is a stated part of legislative intent,[24] apparently that oversight does not extend to policy statements.[25] Enter *Bedford* and its progeny.

The Regulatory Act reflects a tangle of intricate procedures. Perhaps it needs to be intricate, but it seems to us that this complexity could be self-defeating. For over three decades, Commonwealth agencies have had tremendous incentive to avoid the rigors of the Regulatory Act by simply labelling a document as a policy statement.[26] Might it not further the purposes of the Regulatory Act, if this process were simplified, and there was less incentive to avoid its demands?[27]

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[22] *See* 71 PA. STAT. § 745.3 (adding to the Document Law's definition of a regulation a document that amends or revises an existing regulation but deleting proclamations, executive orders, directives, and similar documents).

[23] *Cf.* 71 PA. STAT. § 745.5b(b) (compiling detailed eight criteria with ten sub-criteria for review of a regulation).

[24] 71 PA. STAT. § 745.2(a).

[25] *See* Molly Elizabeth Zarefoss, Note, *Northwestern Youth Services, Inc. v. Commonwealth, Department of Commonwealth, Department of Public Welfare: The Unsatisfactory Distinction Between Administrative Agency Pronouncements and Regulations*, 24 WIDENER L.J. 473 (2015); Daniel R. Schuckers, *The Rise of Pennsylvania's Administrative Agencies and Legislative and Judicial Attempts to Constrain Them*, 81 PA. B. ASS'N Q. 124 (2010).

[26] Fitzpatrick, *supra* note 13 *passim* (discussing examples of the Pennsylvania Public Utility Commission seeming to evade administrative procedure requirements through the issuance of "general policy orders"). What Mr. Fitzpatrick found in his review of PUC policy statements was that promulgation of binding norms reflected in such general policy orders did not follow the process dictated by the Regulatory Act.

[27] The General Assembly knows how to modify the processes of the Regulatory Act. *See, e.g.*, 35 PA. STAT. § 10231.1107(a) (waiving certain provisions of the Documents

Part IV. Bedford and Its Progeny

Borough of Bedford v. Commonwealth, Department of Environmental Protection[28] is the seminal case in Pennsylvania discussing the distinction between regulations and policy statements. The case arose in the Pennsylvania Commonwealth Court's original jurisdiction, in the context of the Department of Environmental Protection's motion for summary judgment.[29] The petitioners there were a collection of municipalities (the "Bedford Group") subject to standards issued by DEP without the benefit of the regulatory review process.[30] The standards consisted of a compliance plan for reducing pollutants being discharged and flowing ultimately into the Chesapeake Bay.[31] Specifically, the plan contemplated the replacement of all discharge permits currently held by the Bedford Group with permits that included stricter limitations on pollutants.[32] The Bedford Group asserted that the plan amounted to a regulation, given that the Group's members would need to conform their operations to plan requirements,[33] while DEP argued that the plan "constitute[d] a statement of policy, not a regulation, which merely provide[d] guidance to DEP staff and to those regulated by the Clean Water Act."[34]

To resolve the summary judgment motion, the Commonwealth Court needed to deal with the ambiguities in the statutory definitions of policy statements and regulations. This is what courts do, of course.[35] A regulation, the court concluded, establishes a "binding norm" that has the force of law, binds the agency and restricts

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Law, the Regulatory Act, and the Attorneys Act for medical marijuana temporary regulations).

[28] 972 A.2d 53 (Pa. Commw. Ct. 2009) (en banc).

[29] *Id.* at 58.

[30] *Id.* at 57.

[31] *Id.*

[32] *Id.* at 58.

[33] *Id.* at 65–66.

[34] *Id.* at 64–65.

[35] Marbury v. Madison, 5 U.S. (1 Cranch) 137, 177 (1807) ("It is emphatically the province and duty of the judicial department to say what the law is. Those who apply the rule to particular cases, must of necessity expound and interpret that rule. If two laws conflict with each other, the courts must decide on the operation of each.").

discretion.[36] A policy statement, on the other hand, has no immediate effect, is an expression of general, future intent as to actions or adjudications, and does not limit the discretion of the agency.[37] The court summarized this standard in a footnote, articulating a three-part test for future analyses: "In order to ascertain whether a binding norm has been created, 'the reviewing tribunal must consider the provision's plain language, the manner in which it has been implemented by the agency and whether the section restricts the agency's discretion.'"[38]

In reaching the merits of the appeal, the *Bedford* majority denied DEP's motion for summary judgment.[39] Interestingly, the majority accepted that the plan's "expressions of future intent, flexibility and commitment to use discretion support[ed] DEP's position that the Compliance Plan is a statement of policy."[40] In effect the majority accepted DEP's contention that the plain language of a guidance document did not itself make the plan a regulation, and that there was no explicit restriction on the discretion of the agency. Summary judgment was not appropriate, however, given that the "evidence [was] incomplete on how the [plan] will function."[41] To restate this, the language used in drafting a document will not by itself avoid a finding that the document will operate as a regulation and that agency discretion is being restricted. The converse is also true, however. Where plain language makes the

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[36] *Bedford*, 972 A.2d at 63

[37] *Id.* at 64. One might reasonably conclude that demonstration of actual departures from a strict application of a document would ordinarily be conclusive in demonstrating that a document is a policy statement.

[38] *Id.* at 63 n.15 (quoting Millcreek Manor v. Dep't of Pub. Welfare, 796 A.2d 1020, 1026 n.10 (Pa. Commw. Ct. 2002)). Triggering any part of the three-part binding norm test mandates treatment of the policy statement as an improperly promulgated regulation.

[39] *Bedford*, 972 A.2d at 68.

[40] *Id.* at 67; *see also* Ctr. Dauphin Sch. Dist. v. Commonwealth, Dep't of Educ., 608 A.2d 576, 582 (Pa. Commw. Ct. 1992) ("By preparing the document [related to desegregation in schools], the Pennsylvania Human Relations Commission had 'not departed from its case-by-case approach to racial imbalance in schools, but ha[d] merely formulated general policy statements and made recommendations to aid school districts in developing plans which the Commission will find acceptable'") (quoting Pa. Human Relations Comm'n v. Norristown Area Sch. Dist., 342 A.2d 464, 468 (Pa. 1975)).

[41] *Bedford*, 972 A.2d at 61; *see supra* note 7.

document's requirements mandatory or restricts agency discretion, the document must be reviewed as a regulation, pursuant to the Regulatory Act. [42]

The source of the *Bedford* binding norm test is the Pennsylvania Supreme Court's decision in *Pennsylvania Human Relations Commission v. Norristown Area School District*.[43] In turn, the Pennsylvania Supreme Court's *Norristown* decision relied upon *Pacific Gas & Electric Co. v. FPC*, in which the federal Court of Appeals for the D.C. Circuit held:

> The critical distinction between a substantive rule and a general statement of policy is the different practical effect that these two types of pronouncements have in subsequent administrative proceedings. A properly adopted substantive rule establishes a standard of conduct which has the force of law . . . . The underlying policy embodied in the rule is not generally subject to challenge before the agency.
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> A general statement of policy, on the other hand, does not establish a binding norm . . . . A policy statement announces the agency's tentative intentions for the future. When the agency applies the policy in a particular situation, it must be prepared to support the policy just as if the policy statement had never been issued.[44]

While the binding norm standard did not originate with *Bedford*, the *Bedford* court certainly has given the standard its full acceptance and recognition in contexts where there may or may not be a contemplated proceeding. The binding norm test is more closely associated with *Bedford* than it is with *Norristown*,[45] notwithstanding that the former is clearly the offspring of the latter.

The Pennsylvania Commonwealth Court's *Bedford* decision in 2009 was not aberrational. Cases that preceded it were fully consistent with its principles. In

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[42] *See also id.* 63 ("If an agency simply calls its promulgation a regulation, this ends the inquiry.").

[43] 374 A.2d 671, 676 n.17 (Pa. 1977) (noting that statements of policy issued in advance of formal proceedings did not constitute regulations subject to more stringent review procedures "[s]ince the [Human Relations] Commission is required to conciliate before it issues formal proceedings against . . . parties, [and] statements of policy are helpful to both the Commission and schools in achieving the mandate of [desegregating schools]").

[44] 506 F.2d 33, 38 (D.C. Cir. 1974) (internal quotations and citations omitted).

[45] *See, e.g.*, Keystone Indep. Living, Inc. v. Dep't of Pub. Welfare, No. 1492 C.D. 2014, 2015 WL 5446812, at *8 (Pa. Commw. Ct. 2015).

addition to the Pennsylvania Supreme Court's decision in *Norristown*, *Bedford* built upon decades of precedent leading to the binding norm standard.[46]

The Commonwealth Court's 1991 decision in *Department of Environmental Resources v. Rushton Mining Company* warrants special attention.[47] The *Rushton* case is illustrative of how the courts should deal with the rigid implementation of an unwritten administrative policy. In *Rushton*, the inclusion of a standard conditions clause in mining permits which was never promulgated as a regulation was invalidated because the agency "attempt[ed] to implement a uniform state-wide policy for certain aspects of mine operations" without adhering to mandatory rulemaking statutes.[48] *Rushton*, however, did not involve a document styled as a policy statement, but instead concerned an administrative practice, manifested in the written permits.[49]

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[46] *See, e.g.*, Eastwood Nursing & Rehab. Ctr. v. Dep't of Pub. Welfare, 910 A.2d 134, 142–48 (Pa. Commw. Ct. 2006) (invalidating purported policy statements which were "purposefully written" to include language "characteristic" of policy statements but applied without deviation); Home Builders Ass'n of Chester & Del. Ctys. v. Commonwealth, Dep't of Envtl. Prot., 828 A.2d 446, 453 (Pa. Commw. Ct. 2003) (holding that an announcement of proposed requirements which would be subject to an administrative appeal process did not constitute a binding regulation); Dep't of Envtl. Res. v. Rushton Mining Co., 591 A.2d 1168, 1174 (Pa. Commw. Ct. 1991) (finding that certain state-wide policies applicable to all mining operations created a binding norm and thus constituted regulations subject to promulgation standards under the Documents Law); *see also* Lopata v. Commonwealth of Pa., Unemp't Comp. Bd. of Review, 493 A.2d 657, 660–61 (Pa. 1985) ("[I]t is clear that [the subject Pennsylvania Bulletin notice] does more than simply offer generalized guidelines, or articulate statements of policy. Rather, the standard therein articulated is completely and unequivocally determinative of the issue [explained therein] . . . . The bulletin pronouncement amounts therefore in every sense to a binding rule of law."); Newport Homes, Inc. v. Kasab, 332 A.2d 568, 574 (Pa. Commw. Ct. 1975) (invalidating a Pennsylvania Department of Transportation ("PennDOT") directive which prohibited certain sized mobile homes on the basis that the Secretary of PennDOT reversed an earlier binding regulation without following requisite rulemaking procedures).

[47] 591 A.2d 1168 (Pa. Commw. Ct. 1991).

[48] *Id.* at 1173–74.

[49] *Id.*

In the decade since the *Bedford* decision, its standard has been applied faithfully.[50] The standard as applied by the courts is clear.[51] In practice, how closely are agencies adhering to this standard?

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[50] *See, e.g.*, Mulberry Square Elder Care & Rehab. Ctr. v. Dep't of Human Servs., 191 A.3d 952, 964 (Pa. Commw. Ct. 2018) (noting that compliance with rulemaking procedures is not required when an agency is interpreting its own obligations pursuant to a federal law regarding future enforcement intentions); Cary v. Bureau of Prof'l & Occupational Affairs, 153 A.3d 1205, 1214–15 (Pa. Commw. Ct. 2017) (en banc) (invalidating a policy statement which designated accreditation bodies under the State Board of Medicine that was used to deny a professional license because it "was never promulgated as a regulation"); Weaver Hauling & Excavating v. Dep't of Labor & Indus., Office of Comp. Tax Servs., 132 A.3d 557, 575 (Pa. Commw. Ct. 2016) (noting that an informative pamphlet provided on a government website "is not a regulation or a statute" and therefore not "binding on the Department"); Keystone Indep. Living, Inc. v. Dep't of Pub. Welfare, No. 1492 C.D. 2014, 2015 WL 5446812, at *8 (Pa. Commw. Ct. 2015) (noting that *Bedford's* central holding that "agency regulations must be promulgated in compliance with the procedures and requirements of the Documents Law" is "well settled"); Transp. Servs., Inc. v. Underground Storage Tank Indemnification Bd., 67 A.3d 142, 153–54 (Pa. Commw. Ct. 2013) (invalidating a de facto regulation which required mandatory compliance with a storage tank rule because its pronouncement did not comply with the Documents Law); Northwestern Youth Servs., Inc. v. Commonwealth of Pa., Dep't of Pub. Welfare, 1 A.3d 988, 996 (Pa. Commw. Ct. 2010), *aff'd*, 66 A.3d 301 (Pa. 2013) (invalidating an entry in the Pennsylvania Bulletin which was not issued as a regulation pursuant to the Documents Law).

[51] The standard applied by the courts is clear, although the standard in the statutes is not. In *Northwestern Youth Services v. Commonwealth Department of Public Welfare*, the Pennsylvania Supreme Court decried the absence of statutory clarity, describing the necessity for the courts to create a "conceptual overlay which to a degree . . . moderates . . . formal rulemaking . . . ," and further noted a commentator's criticism of the statutory scheme as "nearly incoherent." 66 A.3d 301, 311 n.12 (Pa. 2013). *See generally* Zarefoss, *supra* note 25. In the view of the author of this article, one should not make too much of the Court's discussion of federal administrative law provisions, and terminology unique to that setting. As confusing as the Pennsylvania statutory scheme is, engrafting federal distinctions between "legislative rules" and "non-legislative rules" would not appear to be helpful. Indeed, the Court itself noted that its discussion of federal law does not "track the terms of the Pennsylvania statutory scheme." *Id*. The author could not agree more.

Part V. Review of Three Years of Policy Statements

What are the distinguishing characteristics of a true policy statement and when does the policy statement become a regulation disguised as a policy statement? The decisions in *Bedford* and the related cases seem to fall into a pattern:

1. Documents that mandate primary conduct by regulated individuals and entities with no apparent flexibility are likely to be problematic, simply because the conduct must conform to an identified binding norm.

2. Documents that advise regulated individuals and persons as to preferred methods of compliance with discretionary government actions, such as approval of applications, speak primarily in an external manner, and are written with explicit flexibility, seem more likely to be acceptable.

3. Documents that advise what factors may be taken into account in the context of an anticipated administrative actions and proceedings, and speak primarily internally, are likely to be sustained.

4. Documents that announce adjudicatory actions taken, or only provide notice of matters that solely within the purview and discretion of an agency, such as meeting notices, agency structure, personnel matters, and actions regarding contracts, are almost certain to be sustained.

At the same time, note that documents that come within one of the Documents Law exceptions found in Section 1204 of Title 45 of Purdon's Pennsylvania Statutes and that modify or omit regulatory procedures[52] are certain to be sustained without regard to the *Bedford* binding norm standard.

With these observations in mind, one can categorize the reviewed policy statements in the following manner: (i) policy statements that seem to comply with *Bedford*, (ii) policy statements that *might* comply with *Bedford*, and (iii) policy statements that do not appear to comply with *Bedford*. The author's review of three years of the Pennsylvania Bulletin disclosed no document expressly based upon a Section 1204 exception.

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[52] Section 1204 of the Documents Law provides that regulatory review procedures found in Sections 1201 and 1202 can be omitted or modified for (1) military affairs, agency personnel, agency procedure or practice, and Commonwealth property, grants or contracts, (2) instances where all persons subject to the regulation receive actual notice, and (3) for good cause shown and recorded in a finding in connection with exigent circumstances where procedures would be "impracticable, unnecessary or contrary to the public interest." *Id.* § 1204(1),(2)&(3). The language of this Section establishes that the document produced is a regulation, but one where regulatory procedures have either been modified or omitted.

A. Policy Statements That Appear to Comply With Bedford Requirements Related to Language and Discretion

The review of policy statements in the Pennsylvania Bulletin provided reasonable evidence of broad recognition of the *Bedford* principles. In general, policy statements reviewed use permissive language that announce intentions and interpretations that the agency expects to apply, do not mandate particular actions, and do not explicitly restrict agency discretion.

On August 24, 2019, the Public Utility Commission ("PUC") issued a guidance on the factors it would consider in reviewing distribution rates.[53] No limiting criteria were stated, and language was included providing that the PUC "may consider . . . other relevant factors."[54] Here, there appears to be no limitation on agency discretion and no language of a mandatory nature.[55]

On February 10, 2018, the PUC issued a "final policy statement regarding the evidentiary criteria used to evaluate motor carrier applications."[56] In effect, this is a pronouncement as to the agency's administrative stance. The PUC added that it "will ordinarily examine" various factors.[57] Nothing in this policy statement seems to establish a binding norm of any kind.

The Department of General Services (DGS) issued a "Universal Restroom Policy" as guidance to its design professionals under contract in connection with construction projects.[58] This appears to be nothing more than a mechanism in furtherance of DGS's contractual rights to direct the work of its design professionals.[59]

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[53] 49 Pa. Bull. 4819 (Aug. 24, 2019).

[54] *Id.* at 4827.

[55] In a similar vein, see 49 Pa. Bull. 5003 (August 31, 2019) (advising what regulated entities "may submit").

[56] 48 Pa. Bull. 882 (Feb. 10, 2018).

[57] *Id.* at 883.

[58] 48 Pa. Bull. 2824 (May 12, 2018).

[59] This document might also have been appropriately denominated a regulation within the Section 1204 exception covering Commonwealth contracts. 45 PA. STAT. § 1204(1)(iv) (and regulatory review procedures omitted or modified). *See also* 48 Pa. Bull. 7781 (implementing construction design requirements to accommodate nursing mothers for Commonwealth capital projects).

The Department of Human Services ("DHS," formerly the Department of Public Welfare) issued a document identified as a policy statement, that sought to define what facilities would be considered outside of the statutory definition of a "Personal Care Home," and the statutory definition of an "Assisted Living Residence."[60] No action was required, and this document added clarification as to DHS's intentions prospectively.

DHS has allowed certain filings to be made electronically and not just via U.S. mail.[61] Since the policy statement provided a notification and was permissive and not restrictive, the statement seems to satisfy the *Bedford*'s test.[62]

B. Policy Statements That Might Have Stretched Bedford's Principles

Not surprisingly, the review identified policy statements that veered close to the line and might even have crossed it in terms of the language used and in appearing to restrict agency discretion.

The PUC issued a policy statement on February 2, 2019 announcing that "jurisdictional electric distribution companies should have" modified tariffs in connection with third-party electric vehicle charging stations.[63] At first blush, this might appear to be a mandate to modify tariffs. Instead, query whether it is instead an announcement of how the PUC expects to proceed in the future when considering tariff approvals.[64]

Similarly, the PUC in a policy statement on March 2, 2019 offered "guidance" on reporting on gross intrastate operating revenues and payment of assessments.[65]

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[60] 48 Pa. Bull. 6654 (Oct. 20, 2018).

[61] 50 Pa. Bull. 1695 (Mar. 21, 2020).

[62] This document might also have been appropriately denominated a regulation (and regulatory review procedures omitted or modified) within the Section 1204 exception covering agency practice and procedure. 45 PA. STAT. § 1204(1)(iii).

[63] 49 Pa. Bull. 466, 469 (Feb. 2, 2019).

[64] This document might also have been appropriately denominated a regulation (and regulatory review procedures omitted or modified) within the Section 1204 exception applicable when "all persons subject" to the document's provisions are given actual notice. 45 PA. STAT. § 1204(2).

[65] 49 Pa. Bull. 929 (Mar. 2, 2019).

Again, has the PUC done anything more than restate existing obligations and indicate how the agency intends to apply existing law?[66]

The PUC also imposed via a policy statement an obligation to file a biennial report on strategies regulated entities had adopted regarding "combined heat and power systems."[67] Isn't the requirement to file a report a new, mandatory obligation?[68]

The Department of Labor & Industry ("L&I") published a document as a policy statement that prohibited the submission of information through any means other than specified electronic forms.[69] L&I added, perhaps inadvertently, that regulations would follow,[70] but such regulations have not been identified. One could reasonably speculate that everyone may be reasonably satisfied with the forms. Nonetheless, there seems to be no flexibility with respect to how this reporting requirement is to be satisfied.[71]

C. Policy Statements That May Well Run Afoul of Bedford's Principles

There were also documents denominated as policy statements that seem to be contrary to the spirit, if not the letter, of *Bedford.*

On February 25, 2017, the Department of State published a policy statement that specified that a registration statement for a limited liability company "must contain a statement" acknowledging, if applicable, status as a restricted professional

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[66] If so, could this obligation fall with the Section 1204 exception (and regulatory review procedures omitted or modified) for the interpretation of a self-executing legislative enactment or existing regulation? 45 PA. STAT. § 1204(1)(v).

[67] 48 Pa. Bull. 3412 (June 9, 2018).

[68] On the other hand, might this document have been appropriately issued as a regulation under a Section 1204 exception, with actual notice given to "all persons subject" to its provisions? 45 PA. STAT. § 1204(2).

[69] 47 Pa. Bull. 440 (Jan. 28, 2017).

[70] *See* 34 PA. CODE. § 123.901 (noting that L&I "intends to promulgate regulations for this purpose as soon as practicable").

[71] There is the possibility that this requirement could have been promulgated as a regulation under the Section 1204 exception for "agency procedure or practice." *See* 45 PA. STAT. § 1204(1)(iii).

corporation.[72] Are requirements related to the content of forms matters that can always be handled by policy statements?

The Department of General Services ("DGS") has responsibility for state procurement and construction contracts and in that capacity administers small and disadvantaged business programs. On April 13, 2019, DGS extended the period of self-certification as a small or disadvantaged business from one to two years in a policy statement and changed criteria for treatment as a small business by modifying requirements which such a business "shall" meet.[73] While DGS and other agencies may issue and revise contract documents as policy statements or even as regulations without compliance with the notice and comment requirements of the Regulatory Act,[74] the administration of a small and disadvantaged business program is arguably of a different character.

The PUC issued "guidelines" to electric distribution companies on June 15, 2019, that included a provision stating that a program participant that does not meet qualification requirements "shall be disqualified."[75] This seems to be in the nature of establishing a binding norm. But query whether an administrative proceeding would be required, at which these guidelines could not be relied upon.

The Auditor General in a policy statement published on February 10, 2018, acknowledged the requirements of the Documents Law and *Bedford* but asserted that implementation of statutory authorization could be accomplished by a policy statement, without regard to what the policy statement actually stated.[76] With all due respect to the Auditor General, this may have missed the issue.[77] Both regulations and policy statements implement statutory commands, but a regulation establishes a binding norm, and a policy statement cannot.[78] Thus, where the purported policy statement requires "[e]very auditee . . . [to] submit a response . . .

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[72] 47 Pa. Bull. 1165, 1166 (Feb. 25, 2017).

[73] 49 Pa. Bull. 1792, 1792 (Apr. 13, 2019).

[74] *See* 45 PA. STAT. § 1204(1)(iv).

[75] 49 Pa. Bull. 3083, 3087 (June 15, 2019).

[76] 48 Pa. Bull. 879 (Feb. 10, 2018).

[77] Borough of Bedford v. Commonwealth, Dep't of Envtl. Prot., 972 A.2d 53, 63 (Pa. Commw. Ct. 2009) ("In sum, a regulation is binding on an agency, and a statement of policy is not.").

[78] *Id.*

within 120 business days"[79] of the issuance of a report, the Auditor General may have gone a bit further than the Regulatory Act and *Bedford* allow.

On June 3, 2017, the Pennsylvania Department of Transportation (PennDOT) issued a policy statement amplifying its understanding of how flashing lights on emergency vehicles are to be installed, as part of chapter treating more broadly the nature of such lights.[80] This seems to be creating a binding norm in every sense of the word, and one that may carry with it potential criminal penalties.[81]

Part VI. Suggestions for Action

These examples illustrate that there is room for improvement, with consequential benefits, and a role for all of the participants in the process.

First, the easiest and most direct route is clearly greater focus on the avoidance of mandatory language in agency pronouncements that are intended to serve as policy statements. Agency personnel can be more careful in maintaining the distinction between regulation and policy.[82] Use of terminology such as "shall," "must," and the like, necessarily invites agency personnel to apply a policy statement rigidly and as a binding norm. Explicit language can be added about the agency's ability and intention to depart from the policy statement in appropriate cases, thus preserving agency discretion. While all of this might require a change in agency culture to a degree, there would not seem to be much of an administrative burden in increasing the care taken during the drafting process.

It is no answer that an agency cannot follow the complex and time-consuming regulatory processes because of compelling exigencies. Existing law allows resort to

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[79] 48 Pa. Bull. 879, 880 (Feb. 10, 2018).

[80] 47 Pa. Bull. 3116 (June 3, 2017).

[81] *See* 67 PA. CODE § 173.6 (recognizing a violation of the Pennsylvania Code chapter regulating lightning systems as a summary offense and imposing penalties under 75 PA. CONS. STAT. § 6502(b)).

[82] By way of illustration, the Pennsylvania Department of Environmental Protection is using an interesting approach by first issuing a regulation pursuant to proper regulatory review procedures and then contemporaneously issuing a policy statement that describes the agency's intentions as to implementation. *See, e.g.*, 50 Pa. Bull. 3426 (July 11, 2020) (revising the Pennsylvania Code through a regulation of water quality standards); 50 Pa. Bull. 3486 (July 11, 2020) (announcing an amendment to water quality toxicity management strategy through a statement of policy). *See generally* Naylor v. Commonwealth Dep't of Pub. Welfare, 54 A.3d 429, 433–34 (Pa. Commw. Ct. 2012) (describing agency requirements under "mandatory, formal rulemaking procedure[s]" under various state laws).

promulgation of a regulation by omitting or modifying notice and comment requirements[83] where the agency "for good cause finds (and incorporates the finding and a brief statement of the reasons therefore in the order adopting the administrative regulation . . .)" that regulatory review processes "are in the circumstances impractical, unnecessary, or contrary to the public interest."[84] There has been little case law dealing with this provision of the Documents Law, and the author did not locate a document in the Pennsylvania Bulletin during his review invoking any provision of Section 1204,[85] yet its invocation would seem to be preferable to promulgating policy statements that are disguised regulations. In the normal course, the regulatory processes should be followed, as cumbersome as they can be. When there is a true exigency, existing law provides a means of addressing realities and could be utilized to a greater extent.[86]

Secondly, it may be appropriate to challenge the notion that the Attorney General's responsibility to review regulations is limited to those documents that are styled as such.[87] Having reviewed several years of documents styled as policy statements and, to a lesser degree, notices, the process of reviewing policy statements for this specific issue (compliance with *Bedford* principles, at least as to language and restriction on agency discretion) would seem to be an inherent function under the Regulatory Act. Should we rely on enforcement mechanisms that are after-the-fact to ensure that a document that creates a binding norm is being promulgated properly? Is it enough that a disguised regulation is labelled as, or wrapped in the language of, a "policy statement" to evade Regulatory Act requirements? This increased oversight would require only review of the language used in the handful of policy statements and notices that are issued monthly.

Further, the Joint Committee on Documents might be able to play a role in certain circumstances. The Regulatory Act provides:

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[83] *See* 45 PA. STAT. §§ 1201; 1202.

[84] 45 Pa. Stat. § 1204(3).

[85] A global pandemic would seem to be within the scope of Section 1204(3), and with good cause and a finding of exigencies, would be the basis for the issuance of a binding regulation. 45 PA. STAT. § 1204(3).

[86] The better practice would seem to be that the regulation promulgated on the grounds of exigencies under Section 1204(3) should implicitly be treated as an interim regulation, and the full and unmodified notice and comment requirements followed in due course. That would at least comport with spirit of the Documents Law, even though no such requirement is explicit.

[87] *See supra* text accompanying note 21

> If the [Regulatory Review C]ommission or a [legislative] committee finds that a published or unpublished document should be promulgated as a regulation, the commission or committee may present the matter to the Joint Committee on Documents. The Joint Committee on Documents shall determine whether the document should be promulgated as a regulation and may order an agency either to promulgate the document as a regulation within 180 days or to desist from the use of the document in the business of the agency.[88]

The limitations on this provision are readily apparent. Only the Regulatory Review Commission or a legislative committee is empowered to challenge the failure to observe the regulatory review requirements. Nonetheless, there does actually exist an administrative, non-judicial mechanism (i.e. the Joint Committee on Documents) for identifying and challenging a policy statement that is a disguised regulation.

Lastly, there is a potential role for the General Assembly. The Regulatory Act could be amended to expand (beyond the Regulatory Review Commission and a legislative committee) the persons that can challenge administratively the failure to observe Regulatory Act requirements under the above-quoted provision of the Regulatory Act. The Attorney General could be explicitly authorized to review policy statements and notices to ascertain whether a binding norm is being created. It might also be helpful to memorialize the binding norm test of *Bedford* in defining and distinguishing between regulations and policy statements. Finally, there is also the theoretical notion that greater specificity in legislation would leave less for the executive branch to regulate, but that would require yet another change in legislative and policymaking culture.

Part VII. Conclusion

Truly, the potential that there are policy statements that are being promulgated without adherence to the complex and somewhat burdensome administrative, regulatory review process is not the most serious problem we have in the Commonwealth of Pennsylvania. And if there were more regulated entities and citizens offended by current practices, the state might have more litigation. And it is easy to play Monday morning quarterback in sharp-shooting agency efforts to deal with on-going, real world challenges. But the purpose of the Regulatory Act is to encourage participation in governmental processes.[89] Policy statements do not have a formal review-and-comment process, whereas regulations do. It could be argued that the current situation represents more significant harm to the body politic than the problem of lack of transparency, and the Commonwealth, its political subdivisions

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[88] 71 PA. STAT. § 745.7a.

[89] Germantown Cab Co. v. Phila. Parking Auth., 993 A.2d 933, 937 (Pa. Commw. 2010) (noting the general purpose of the Documents Law is "to promote public participation in the promulgation" of regulations).

and school districts have certainly expended considerable resources advancing and resisting Right-to-Know document disclosure.

Greater fealty to the regulatory review process would be a good thing. And if we could make it a little easier for the agencies to utilize it, it would be all the better.