

Minnesota Attorney General: Administrative Rules Proceedings

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August 20, 2018

ADMIN 1000

STATE OF MINNESOTA

DEPARTMENT Labor and Industry

Office Memorandum

TO : Michael B. Miller
Special Assistant
Attorney General

DATE: 11-7-77

FROM : JON K. MURPHY
Special Assistant
Attorney General

PHONE:

SUBJECT:

Recd 11/7/77

Enclosed are the Department of Labor and Industry's proposed amendments to the existing rules governing the payment of minimum wages.

The three areas where substantial changes are proposed are:

(1) tip credit - L.S. 8;

(2) exemptions - L.S. 15; and

(3) lodging allowance - L.S. 7.

Please find two sets of documents. The original set from top to bottom includes:

1. Statement of Compliance.
2. Rules as adopted. (The amended changes have been incorporated into the applicable existing rules.)
3. Report of Chief Hearing Examiner.
4. Findings of Fact & Order Adopting Rules.
5. Report of Hearing Examiner.
6. Order For Hearing.
7. Notice of Hearing.
8. Statement of Need.
9. Affidavit of Acquisition.
10. Certificate of Delivery together with a copy of the list of names. (Please note the list of names is an original. On the same day, an identical list was obtained for rules pertaining to employment agencies. Both notices were thus sent in one envelope.)
11. Affidavit of Mailing.
12. The transcript and entire record of the Hearing Examiner's Office.
13. The rules as proposed. (Proposed amendments to existing rules are underlined.)

The second set of documents contain copies of the items identified above but excluding the Hearing Examiner's record and transcript.

Should you have any questions, please advise.

J.K.M.

JKM:js

DEPARTMENT OF LABOR AND INDUSTRY

A. Proposed Rules amending Department of Labor and Industry Rules and Regulations Relating to Labor Standards Division.

B. The following Rules are amended pursuant to the authority contained in M.S. 177.28.

LS 1 Minimum Wage Rate for Minors. Employers claiming an employee is under 18 must have his or her birthdate, substantiated by a birth certificate or an age certificate issued by the Department of Labor and Industry (through the local Superintendent of Schools) or a photocopy of the employee's driver's license included in the payroll records kept for such employee. Failure to provide proof of the ages of minors employed makes the employer liable for the adult minimum wage. The Child Labor Standards Act provides as follows: M.S. 181A.06 Subd. 1. Every employer shall require proof of the age of any minor employee or prospective employee by requiring the minor to submit an age certificate, a copy of his birth certificate, or a copy of his driver's license. Upon the request of a minor, an age certificate shall be issued by or under the authority of the school superintendent of the district in which the applicant resides. Superintendents, principals, or headmasters of independent or parochial schools shall issue age certificates to minors who attend such schools. 181A.12 Subd. 1. Any employer who hinders or delays the department or its authorized representative in the performance of its duties under sections 181A.01 to 181A.12 or refuses to admit the

commissioner or his authorized representative to any place of employment or refuses to make certificates or lists available as required by sections 181A.01 to 181A.12, or otherwise violates any provisions of sections 181A.01 to 181A.12 or any regulations issued pursuant thereto shall, upon conviction therefor, be guilty of a gross misdemeanor. Subd. 2. Any other person violating any provision of sections 181A.01 to 181A.12 or any regulations issued pursuant thereto or assisting another in such violation is guilty of a misdemeanor.

LS 2 Learners or Apprentices. A learner is a student enrolled in a state approved high school vocational on-the-job training program in which supervision is provided by the school for the on-the-job experiences, a training plan is established for each individual student learner, and school credit is given for job experiences. For the first 300 hours of employment, the learner shall be paid at a rate of not less than ~~$1.89 per hour~~ the wage rate for minors.

LS 3 Handicapped Worker Permits. Subminimum wage rates may be paid to handicapped workers only after receiving a permit from the Labor Standards Division. If no permit is issued, a worker, no matter how severely handicapped, shall be paid the minimum wage. The subminimum rate will be based on the extent to which the worker's performance is limited but in no case may it fall below 50% of minimum wage. ~~Permits-issued-prior-to-January-1, 1974,-will-remain-in-effect-for-the-duration-stated-therein.~~

No profit-making organization may employ handicapped workers at a subminimum wage for more than 10% of its total work force unless granted a special permit by the Commissioner of Labor and Industry to exceed the 10% limitation.

Sheltered workshops are excluded from the above percentage limitations of numbers of employees and percentage of minimum wage, but not from the permit requirement.

LS 4 Equal Pay for Handicapped. Where a handicapped person is now performing or is being considered for employment where he or she will perform work which is equal to work performed by a non-handicapped person such handicapped person shall be paid the same wage as a non-handicapped person with similar experiences.

LS 5 Part-time Rates. Part-time employees may not be paid wages below the minimum rates established for adults and minors, except as provided for under Minnesota Statute 177.23 Subdivisions 11 and 12.

LS 6 Meal Allowance. A meal allowance is credited toward the minimum wage only when the meal is furnished by the employer and accepted by the employee. The employer shall not require the employee to accept meals as a condition of employment. A meal is defined as an adequate portion of a variety of wholesome, nutritious foods and shall include at least one food from each of the following four groups: fruits or vegetables; cereals, bread or potatoes; eggs, meat or fish; milk, tea or coffee, except that for breakfast, eggs, meat or fish may be omitted if both cereal or bread are offered. The employer must keep a record of each meal accepted by the employee.

Meals must be consistent with the employee's work shift. Meal periods of less than twenty minutes may not be deducted from hours worked, nor may meal periods be deducted where the employee is not entirely free from work responsibility.

The meal allowance is ~~$.90~~ $1.15 per meal.

LS 7 Lodging Allowance. A lodging allowance is credited toward the minimum wage only for lodging furnished by the employer and accepted by the employee. Lodging means living accommodations which are adequate, decent, and sanitary according to usual and customary standards.

The lodging allowance is ~~$1.45~~ $1.50 per day.

LS 8 Tip Credit -- Definitions and Clarifications.

(a) M.S. 177.28 Subd. 4 "provides that a tip credit may not be taken unless at the time the credit is taken the employer has received a signed statement for that pay period from the tipped employee stating that he did receive and retain during that pay period all gratuities received by him in an amount equal to or greater than the credit applied against the wages due by his employer. The statements shall be maintained by the employer as part of his business records."

(b) The department in its investigations and audits shall require the employer to provide the signed tip statements at the time of its audit or no tip credit will be allowed.

(c) Tip credit is based on the actual amount of tips received by the employee divided by the number of hours worked in a given pay period. A maximum tip credit may be allowed up to 20% of the applicable minimum wage. The employer's records must also indicate that the individual employee received at least $35.00 per month in gratuities in order that any tip credit be allowed in that period.

(d) Tip pooling may not be a condition of employment. Tip sharing or pooling shall be on an individual person-to-person basis. Another employee who benefits because the recipient shares the gratuity with him or her shall not have such remuneration considered in the calculation of his or her wages.

(e) A gratuity is presented indirectly when the sum of money is included in the statement of charges and no notice is made on the statement indicating that the amount is not a tip to be presented to the employee as a gratuity.

(f) A service person is one who in a given situation performs the main service for a customer and is to be considered the recipient of the gratuity for purposes of wage calculation.

(g) Gratuities presented to a service person via inclusion on a charge or credit card shall be credited to that pay period for which they appear on the service person's tip statement.

(h) Money presented by customers, guests or patrons at a banquet as a gratuity to be divided among the service people shall be credited to that time period for which it appears on the service person's tip statement.

(i) Where a tip is given by a customer through a credit or charge card, the full amount of tip must be allowed the service person minus only the percentage deducted from the tip in the same ratio as the percentage deducted from the total bill by the service company.

(j) Tip credit may only be claimed or allowed consistent with the provisions of this rule.

LS 9 Deductions. Deductions from the minimum wage, whether direct or indirect, may not be made for shortages in money receipts or merchanidse, for the purchase or maintenance of uniforms, for spoilage, for breakage, for cash shortages or losses resulting from walkouts, bad checks or robbery or for fines for disciplinary purposes. These are considered matters separate from wages. ~~No employee shall be required to contribute directly or indirectly from the minimum wage for the purchase or maintenance of uniforms.~~ The term "uniform" means wearing apparel and accessories ~~of distinctive design or color~~ required by the employer to be worn by the employee as a condition of employment.

LS 12 Hours Worked. Hours worked include training time, call time, cleaning time, waiting time, or any other time when the employee must be either on the premises of the employer or involved in the performance of duties in connection with his or her employment. Rest periods of less than 20 minutes may not be deducted from total hours worked.

LS 14 Workweek. The period of time used for determining compliance with the minimum wage rate, overtime compensation, and designation as a part-time employee is the workweek, which is defined as a fixed and regularly recurring period of 168 hours -- seven consecutive 24 hour periods. This is true whether the employee is paid on an hourly, piecework, commission, or any other basis. Once the workweek is established, it remains fixed, although it may be changed if the change is intended as permanent rather than as an evasion of the overtime provisions. If no workweek is designated, it shall follow the calendar week.

The Commissioner of Labor and Industry may upon receiving application made by an employer establish a different period of time to be used as workweek for purposes of this regulation.

No employer shall be deemed to have violated Section 5, Minnesota Statute 177.25 Subdivision 1 by employing any employee of a retail or service establishment for a workweek in excess of the applicable workweek specified therein, if (1) the regular rate of pay of such employee is in excess of one and one-half times the minimum hourly rate applicable to him under ~~section 4,~~ Minnesota Statute 177.24 and (2) more than half ~~his~~ the compensation for a representative period (not less than one month) represents commissions on goods or services. In determining the proporation of compensation representing commissions, all earnings resulting from the application of a bona fide commission rate shall be deemed commissions on goods or services without regard to whether the computed commissions exceed the draw or guarantee.

LS 15 Executive, Administrative, Professional Personnel. The primary duties of the employee are determinative of his or her status under this exemption. Only where the employee's primary duties meet all the criteria under a particular test may the employer consider the employee to be exempt from the overtime wage provisions.

(a) Manage: For purposes of this rule, the term manage means to control and direct the business operations of a given enterprise, department or branch establishment. Duties involved in managing must be other than routine and repetitious and must involve the making of decisions and the issuance of directions to other employees which involve skill and judgement. The term includes those employees that act primarily and principally in a directive capacity as opposed to those who primarily do the actual work.

(b) Discretionary Powers: The thrust of this criteria is to distinguish between those employees empowered to independently commit their employers on matters of importance and those employees who merely make day to day decisions which, although necessary to the daily operations of the employer's business, are routine, or follow prescribed procedures, or involve a determination of whether specific standards are met, or are lacking in substantial importance to the employer's business as a whole. One test which should be utilized in determining whether an employee exercises discretionary powers is to ask whether the decisions being made involve a discretion as to company policy or procedure or commit the employer on matters of substantial

importance. Mere recommendations with respect to policies and procedures are not sufficient unless it can be shown that the employer consistently accepted and followed those recommendations.

(c) Sole Charge: Only one employee per enterprise, department or branch establishment may be considered to be in sole charge regardless of the number of work shifts per day.

(d) In determining exempt and non-exempt work under this rule, work directly related to executive or administrative work may be included if the executive work which it relates to is actually performed by the employee. It is not sufficient to claim certain work is exempt where the executive or administrative function it might be directly related to is not performed by the employee.

(e) Monetary amounts on salary tests will coincide and adjust with current Federal Fair Labor Standards Act.

EXECUTIVE Test I

(a) receives at least ~~$200~~ $250 per week in salary

(b) manages the enterprise by which he is employed or a recognized department of subdivision thereof;

(c) customarily directs the work of two or more other employees.

EXECUTIVE Test II

(a) receives at least ~~$125~~ $155 per week in salary;

(b) manages and supervises a department of at least two other full-time people (a full-time employee is defined as one who works at least 35 hours in a workweek);

(c) has authority to hire or fire ~~or~~ and suggest changes in employees' status;

(d) regularly exercises discretionary powers;

(e) either

(1) devotes less than 20% of time worked (or 40% in retail or service establishments) to non-exempt work, or

(2) owns 20% or more of the business, or

(3) has sole charge of an independent or branch establishment.

ADMINISTRATIVE Test I

(a) receives at least ~~$200~~ $250 per week in salary or fee;

(b) either

(1) performs office or nonmanual work directly related to management policies or general business operations, or

(2) performs functions in the administration of a school system or subdivision thereof, in work directly relating to academic instruction;

(c) regularly exercises discretion or independent judgement.

ADMINISTRATIVE Test II

(a) receives at least ~~$425~~ $155 per week in salary or fee;

(b) either

(1) performs office or nonmanual work directly related to business operations or management policies, or

(2) administers an educational system or subdivision thereof in work relating to academic instruction;

(c) regularly exercises discretion and independent judgement and makes important decisions;

(d) either

(1) directly assists owner of bona fide executive or administrative employee, or

(2) performs supervised work only along lines requiring special training or experience, or

(3) executes special assignments;

(e) devotes less than 20% of time worked (or 40% in retail or service establishments) to non-exempt work.

PROFESSIONAL Test I

(a) receives at least ~~$200~~ $250 per week in salary or fee;

(b) either

(1) performs work requiring advanced knowledge in a field of science or learning, or

(2) performs work as a teacher in the activity of imparting knowledge, or

(3) performs work requiring invention, imagination, or talent in a recognized field of artistic endeavor;

(c) consistently exercises discretion and judgement.

PROFESSIONAL Test II

(a) receives at least ~~$440~~ $170 per week in salary or fee;

(b) either

(1) performs work requiring advanced knowledge in a field of learning customarily acquired by prolonged specialized intellectual study (not a general academic education, an apprenticeship, or training in routine mental or physical processes), or

(2) performs original work dependent on his own creativeness in a recognized field of artistic endeavor, or

(3) is a certified teacher working as such or recognized as such in the school system where he works;

(c) consistently exercises judgement and discretion;

(d) performs predominantly intellectual work so varied that the output cannot be standardized by time necessary for accomplishment;

(e) devotes less than 20% of his hours worked to activities not essential to his professional work.

LS 16 Outside ~~Saleesman~~ Salesperson. ~~Saleesman~~ Salesperson is defined as one who makes sales of, or obtains orders or contracts for, materials, services, or the use of facilities for which payment will be made. Incidental deliveries, collections, and other non-sales or non-solicitation work that is directly related to the primary sales duties shall be considered the work of a ~~saleesman~~ salesperson. An outside ~~saleesman~~ salesperson is hired for the express purpose of performing such duties away from ~~his~~ the employer's place(s) of business and conducts no more than 20% of ~~his~~ sales on those premises. ~~His~~ The hours of non-outisde sales work may not exceed 20% of the hours worked by employees who are not outside ~~saleesmen~~ salespersons.

LS 17 Gratuitous Service. Gratuitous service is voluntarily donated work performed by a person who receives for it no monetary compensation or other valuable consideration. ~~He~~ The individual may be reimbursed for out-of-pocket expenses needed to perform the services, but only if these expenses are itemized. The acceptance of an expense allowance (that is, a gross sum provided him with no itemized list of expenses) makes the individual non-exempt. (See Chapter 177.23 Subdivision 7(5))

"Non-profit organization" is defined as a corporation, community chest, fund, or foundation, organized and operated exclusively for religious, charitable, scientific, literary, or educational purposes, or for the prevention of cruelty to children or animals, no part of the net earning of which inures to the benefit of any private shareholder or individual, and no substantial part of the activities of which is carrying on propaganda, or otherwise attempting to influence legislation. (See Chapter 177.23 Subdivision 7(5)

LS 18 Wages, how often paid. The payment of wages due must be made at least once every 30 days.

LS Regulation #18 adopted 1-1-74 is repealed.

STATE OF MINNESOTA

DEPARTMENT OF LABOR AND INDUSTRY

In the Matter of the Proposed Adoption of Rules of the Labor Standards Division, Department of Labor and Industry, Governing Minimum Wages.

ORDER FOR HEARING

IT IS HEREBY ORDERED that a public hearing on the above-captioned rules be held in the State Office Building, Room 81, St. Paul, Minnesota 55155, on September 13, 1977 commencing at 9:00 a.m., and continuing until all persons have had an opportunity to be heard.

IT IS FURTHER ORDERED that a Notice of Hearing be mailed to all persons or representatives of associations or other interested groups who have registered their names with the Secretary of State for that purpose.

IT IS FURTHER ORDERED that the Notice of Hearing be published in the State Register.

Date: 7/12/77

E. I. Malone

E. I. Malone, Commissioner
Department of Labor and Industry

STATE OF MINNESOTA

DEPARTMENT OF LABOR AND INDUSTRY

In the Matter of the Proposed Adoption of Rules of the Labor Standards Division, Department of Labor and Industry, Governing Minimum Wages.

NOTICE OF HEARING

NOTICE IS HEREBY GIVEN that a public hearing in the above-entitled matter will be held in the State Office Building, Room 81, St. Paul, Minnesota 55155, on September 13, 1977, commencing at 9:00 a.m., and continuing until all persons have had an opportunity to be heard concerning the adoption of the proposed rules captioned above by submitting either oral or written data, statements, or arguments. Statements may be made orally and written materisla may be submitted at the hearing. In addition, written materials may be submitted by mail to Mr. Peter C. Erickson, State Office of Hearing Examiners, 1745 University Avenue, St. Paul, Minnesota 55104 (296-8118), either before the hearing or within five (5) working days after the close of the hearing unless the hearing examiner orders a longer period of time which may not exceed twenty (20) days.

The proposed rules are intended to amend and revise Labor Standards Regulations, L.S. 1-18, which relate to Minnesota's Fair Labor Standards Act and which were adopted pursuant to Minn. Laws 1973, Chapter 721. Those rules have never been amended or revised. The purposes of the proposed rules are to update and revise the existing rules and to provide consistency with statutory changes

which were made to the Fair Labor Standards Act by Minn. Laws 1977, Chapter 183 and Minn. Laws 1977, Chapter 369. The specific regulations which are to be amended are Labor Standard Regulations 1, 2, 3, 4, 5, 6, 7, 8, 9, 12, 14, 15, 16, 17, and 18.

These rules are proposed pursuant to the authority vested in the Commissioner by the provisions of Minn. Stat. § 177.28 (1976) and pursuant to the general authority vested in the Department of Labor and Industry by the provisions of Minn. Stat. § 175.171, Subd. 2 (1976).

A copy of the proposed rules may be obtained by writing the Department of Labor and Industry, Space Center Building, 444 Lafayette Road, St. Paul, Minnesota 55101. Additional copies of the proposed rules will be available at the door on the day of the hearing. A "statement of need" explaining why the agency feels the proposed rules are necessary and a "statement of evidence" outlining the testimony they will be introducing will be filed with the Hearing Examiners Office at least 25 days prior to the hearing and will be available there for public inspection.

Please be advised that pursuant to Minn. Stat. § 10A.01, Subd. 11 (1976) any individual engaged for pay or other consideration for the purpose of representing persons or associations attempting to influence administrative action, such as the promulgation of these rules, must register with the State Ethics Commission as a lobbyist within five days of the commencement of such activity by the individual.

Date: 7-12-77

E. I. Malone

E. I. MALONE, Commissioner
Department of Labor and Industry

STATE OF MINNESOTA

COUNTY OF RAMSEY

MINNESOTA DEPARTMENT

OF LABOR AND INDUSTRY

In the matter of the Proposed Adoption of Rules of the Department of Labor and Industry Governing Minimum Wages.

AFFIDAVIT OF ACQUISITION OF MAILING LIST

Jacki K. Brueggeman, being duly sworn on oath deposes and says:

1. I am a representative for the Department of Labor and Industry, State of Minnesota.

2. On the 9th day of August, 1977, I went to the Secretary of State's Office for the State of Minnesota and requested a current list of all representatives of associations or other interested groups or persons who had registered their names with the Secretary of State for the purpose of obtaining notices of public hearings relating to the promulgation of rules pursuant to M.S. § 15.0412.

3. That on the 9th day of August, 1977, in response to the above request, the Secretary of State provided me with such a list, a copy of which is attached hereto and incorporated by reference.

Further affiant sayeth not.

Jacki K. Brueggeman

Subscribed and sworn to before me this 9th day of August, 1977.

Joy G. Bergh

Notary Public

JOY G. BERGH
NOTARY PUBLIC-MINNESOTA
RAMSEY COUNTY
My Comm. Expires May ,18 1983

STATE OF MINNESOTA)
) ss.
COUNTY OF RAMSEY)

IN THE MATTER OF THE PROPOSED ADOPTION OF RULES OF THE LABOR STANDARDS DIVISION, DEPARTMENT OF LABOR AND INDUSTRY GOVERNING MINIMUM WAGES.

AFFIDAVIT OF MAILING

ROBERT D. FRY, being first duly sworn, deposes and says:

That on the 11th day of August, 1977, at the City of St. Paul, County of Ramsey, State of Minnesota, he served the attached Notice of Hearing by depositing in the United States mail at said City of St. Paul, true and correct copies thereof, properly enveloped, with postage prepaid, to all persons and associations at the addresses listed on the attached Certificate of the Secretary of State.

Robert D Fry

Subscribed and sworn to before me this 11th day of August, 1977.

JACALYN K. BRUEGGEMAN
NOTARY PUBLIC-MINNESOTA
RAMSEY COUNTY
My Comm. Expires May 18 1983

Jacalyn K. Brueggeman
Notary Public

STATE OF MINNESOTA
DEPARTMENT OF LABOR AND INDUSTRY

IN THE MATTER OF THE PROPOSED)
ADOPTION OF RULES OF THE)
DEPARTMENT OF LABOR AND INDUSTRY)
GOVERNING MINIMUM WAGES)

CERTIFICATE OF DELIVERY:
SECRETARY OF STATE LIST

I hereby certify that the attached 499 labels and 9 pages constitute the complete list of persons, associations, and other interested groups who as of 8:45 o'clock A.M., this 9th day of August, 1977, have requested pursuant to M.S. 1976, Sec. 15.0412, that their names be placed on file with the Secretary of State for the purpose of receiving notice of public hearing on proposed rules on the subject captioned above.

Joan Anderson Growe

SECRETARY OF STATE
JOAN ANDERSON GROWE

By
Cheri L. Mattson

STATE OF MINNESOTA
OFFICE OF HEARING EXAMINERS

FOR THE DEPARTMENT OF LABOR AND INDUSTRY

In the Matter of the Proposed Adoption of Rules of the Labor Standards Division, Department of Labor and Industry, Governing Minimum Wages.

REPORT OF HEARING EXAMINER

The above-entitled matter came on for hearing before Hearing Examiner Peter C. Erickson of the State Office of Hearing Examiners at 9:00 a.m. on Tuesday, September 13, 1977, in Room 81, State Office Building, Saint Paul, Minnesota.

Jon Murphy, Special Assistant Attorney General, Fifth Floor, Space Center Building, appeared as counsel on behalf of the Department of Labor and Industry, E. I. Malone, Commissioner, Kurt Pinke, Director of the Labor Standards Division, and Bob Fry, Assistant Director, testified on behalf of the Department in support of the proposed rules. The hearing continued until all interested groups or persons had an opportunity to be heard concerning the adoption of the proposed rules.

Pursuant to Minn. Stat. § 15.0412, subd. 4, this Report shall be available for review to all affected individuals upon request for at least five days.

The Department of Labor and Industry shall, if it proposes to adopt the rules as originally proposed or amended, submit the complete hearing record, including its Findings and Order, to the Chief Hearing Examiner no earlier than five days subsequent to the receipt of this Report. This submission shall clearly indicate any changes made to the rules as originally proposed, preferably in the format that will be submitted to the State Register for publication. The Chief Hearing Examiner shall complete his review and submit his report to the Department on the issues of substantial changes in the rule and compliance with Minn. Stat. § 15.0412 within ten calendar days. Thereafter, the Department shall be responsible for filing the rules with the

Attorney General and for notifying persons who have indicated that they wish to be notified of such filing.

Based upon all the records and proceedings herein, the Examiner makes the following:

FINDINGS OF FACT

1. On July 13, 1977, the Department filed the following documents with the Chief Hearing Examiner:

(a) A copy of the proposed rules;
(b) A proposed Order for Hearing;
(c) A proposed Notice of Hearing; and
(d) A Statement of the estimated length and number of people attending the hearing.

2. On August 8, 1977, a Notice of Hearing and a copy of the proposed rules were published at 2 State Register 188.

3. On August 11, 1977, the Department mailed the Notice of Hearing to all persons and associations who had registered their names with the Secretary of State for the purpose of receiving such notice.

4. On August 16, 1977, the Department filed the following documents:

(a) The Order for Hearing;
(b) The Notice of Hearing as mailed;
(c) The Affidavit of Receipt of the Secretary of State's list;
(d) The Affidavit of Mailing;
(e) The Secretary of State's Certificate and list;
(f) The Statement of Need;
(g) The Statement of Evidence, including the names of witnesses to be called; and
(h) The names of Department personnel who will represent the agency.

The documents were available for inspection at the Office of Hearing Examiners from the date of filing to the date of the hearing.

5. The record remained open through October 3, 1977, for the receipt of written comments and statements.

6. Statutory authority to promulgate the proposed rules is contained in Minn. Stat. §§ 177.28, 175.171, subd. 2, and 177.23, subd. 4 (1976).

7. The proposed amendments to LS 1 are necessary to add non-discriminatory language; to add another means of obtaining proof of age; and to add statutory language to inform employers

of the penalties allowed under the Child Labor Standards Act.

a. W. J. "Chum" Bohr, Executive Vice President of the Minnesota Restaurant Association, suggested that LS 1 be amended to read, "...issued by the Department of Labor and Industry, a photocopy of the employee's driver's license or a Minnesota identification card issued by the Department of Transportation." This amendment would include the identification alternative set out in Chapter 361, 1977 Laws.

8. The proposed amendment to LS 2 deletes the specific wage rate for "learners" and substitutes in place thereof the wage rate for minors. This is necessary so that a new rule would not have to be promulgated every time the wage rate for minors is changed by statute.

a. Mr. Al Brodie, representing the Minnesota Motel Association, suggested that the words, or 90% of the minimum wage, whichever is less, be added at the end of LS 2 just in case the minor rate were taken out of the law.

9. The proposed amendment to LS 3 is necessary to delete obsolete language.

10. The proposed amendment to LS 4 is necessary to add non-discriminatory language.

11. The proposed amendment to LS 5 is necessary to specify the two statutory exceptions to paying full minimum wages to part-time employees.

12. The proposed amendment to LS 6 is necessary to increase the meal allowance deduction proportionally with the increase in the minimum wage.

13. The proposed amendment to LS 7 is necessary to increase the lodging allowance deduction proportionally with the increase in the minimum wage.

a. The following persons commented in favor of a suggestion to change the "Lodging Allowance" to the fair market value of the accommodations: John Hormer, Esq., representing the Minnesota Multi-Housing Association; Steve Hofstad, President of Action Property Management; David Costello, on behalf of Draper

and Kramer, Inc.; and Roy C. Munson, Executive Secretary of the Minnesota Turkey Growers Association, Inc. The basis for this change is set out in Mr. Horner's comments below:

I. A lodging allowance prescribed in the form of a specific monetary amount is unnecessary and arbitrary as it applies to the multi-housing industry.

A. The virtually universal tradition and custom of the multi-housing industry is to compensate on-site personnel in whole or in part by the use of a residential unit.

B. Providing a residential unit to an employee constitutes a genuine cost in cash or its equivalent to the employer in that the residence would otherwise be rented at fair market value received in money.

C. The use of a residential unit constitutes a genuine benefit to the employee.

1. This is his chief place of residence and not a temporary or seasonal dwelling place.

2. The use of a residence represents true and fair value in cash or its equivalent that the employee would otherwise have to pay.

3. This form of compensation is a reasonable allowance. The recent Minnesota Metropolitan area apartment management survey (copy attached) indicates that credits granted to on-site employees through the use of a residence are well within the average ranges of applicable rents.

D. The fair market value of an apartment or other residential unit is clearly and well defined in cash or its equivalent. It is easily calculated so as to avoid disputes and litigation, and there is little or no chance for a landlord to inflate the credit allowed by assigning an overly large, arbitrary, or unreasonable value to the residential unit.

II. This form of compensation is a genuine benefit to the employee.

A. For many employees this is a part-time and informal occupation. Such employees are glad to have the opportunity to work off some of their rent.

B. In many instances, the employee resided in the building first, and only at some later time became an employee.

C. This type of employment and compensation through the use of an apartment is very appropriate for many students, spouses, and retired people, etc., who perhaps could not or would not otherwise be employed.

D. Strict observance or enforcement of LS 7 in its current form tends to result in a number of undesirable effects, not least of which is the destruction of the status of such compensation as not constituting income under the Federal

Income Tax Law. For example: An employee who is now compensated through the use of an apartment that would otherwise rent in the moderate range of $200, and which employee is in the moderate federal income tax bracket of 15%, would have to pay an additional $360 in federal income tax alone were his compensation to be received in cash. This is a very significant detriment to that employee.

* * *

IV. Proposed language to amend LS 7.

LS 7 Lodging Allowance. A lodging allowance is credited toward the minimum wage only for lodging furnished by the employer and accepted by the employee. Lodging means living accommodations which are adequate, decent, and sanitary according to usual and customary standards.

The lodging allowance is ~~$1.15~~ $1.50 per day, except that lodging, the nature of which is ordinarily and commonly considered to be a tenancy in the chief place of residence of the employee, shall be credited toward the minimum wage of that employee at the rate of the fair market value of the lodging provided. The monetary equivalent of the credit given the employee shall be presumed to be at the rate of the fair market value of the residential unit if such credit either does not exceed by more than 10% the average rent or appropriate prorated share of such rent charged for similar residential units in the building in which the employee's residence is located, or if the credit does not exceed by more than 10% the rent or appropriate prorated share of the rent formerly charged the employee or the immediately preceding tenant of that unit in cash or equivalent.

Regarding the language of the above amendment, we feel that the best definition of the type of lodging that is to be credited at fair market value is by the nature of the tenancy itself. Definitions based on other factors such as duration of the occupancy, size, quality or characteristics of the unit occupied, or location of the unit contain the potential of producing erratic results in their application to a specific situation.

We feel that the two alternate tests of fair market value stated in the amendment are the most appropriate ones for this purpose. As you know there are several standard methods for assessing the fair market value of an interest in realty. We feel that the cost/replacement approach and the capitalization of net economic income approach are not appropriate in this instance. The most appropriate methods are the use of comparables that are as similar as possible to the subject property as is stated in test 1 above. The second test is simply an application of the definition of fair market value itself: the price agreed upon in an arms length transaction by a willing buyer and a willing seller.

* * *

Because of the importance of defining the type of lodging intended to be valued at fair market value

without including any lodging not so intended, I wish to enter into the record the following alternate definitions for your consideration: "...lodging, the nature of which is ordinarily and commonly considered to be a tenancy in the chief (or principal, or permanent) place of (permanent) residence of the employee,..."

In conclusion we feel that the existence of a set monetary lodging allowance works a severe hardship on rental housing owners and managers, leads to substantial uncertainty as it applies to the rental housing industry, and is not needed for the protection of on-site rental housing employees.

14. LS 8 has been completely rewritten to clarify ambiguities and misinterpretations of its effect. The changes are based upon direct experiences of the division, Federal court cases, recommendations of hearing examiners, and suggestions from employers, employees, and the public at large. It will aid and assist employers and employees in a better understanding of tip credit and its ramifications.

a. Mr. Brodie suggested that the words, for three years, be added to the end of LS 8(a) to set out the requirements of the law for employers.

15. The proposed amendments to LS 9 are necessary to clarify the intent of the rule as originally promulgated. The changes are based on the kinds of questions and problems encountered by the Department during the past three years.

16. The proposed amendment to LS 12 is necessary to add non-discriminatory language.

17. The proposed amendments to LS 14 are necessary to correct an obsolete citation and to add non-discriminatory language.

18. The proposed amendments to LS 15 are necessary to specify definitions for the terms used in the rule and make the rule congruent with federal law.

a. LS 15(e) states, "Monetary amounts...will coincide and adjust with current Federal Fair Labor Standards Act." The question arose as to whether this section is an unconstitutional delegation of power by the Department to the federal government.

b. Ms. Wendy M. Borsheim, President of the Minnesota Retail Federation, suggested that the word "or" in section (c) of

of Executive test II not be stricken so that the rule would be the same as federal law. The Department concurred in that amendment. Mr. James E. Toepel, Executive Director of the Northwestern Lumbermans Association, also commented in favor of that change.

c. Ms. Borsheim also suggested that the words "must be other than routine and repetitious and" be deleted from the definition of "manage" in LS 15(a). Her reasons for the change are as follows:

> The term "routine and repetitious" would be impossible to comply with and retain a managerial exemption. As you are aware, every job regardless of capacity has certain necessary "routine and repetitive" functions to be accomplished.
>
> For example, the Manager of a Division must routinely and repeatedly counsel employees and assess salaries and progress, yet that person may be unable to hire or fire personnel.
>
> Attorneys must bill time to clients on a routine basis, repetitive but necessary functions, yet few attorneys handle hiring or firing of general personnel, rather this is carried out by one or two specific members of the firm, etc.
>
> I think the business place is replete with examples of where a manager may not be able to meet all three criteria.

19. The proposed amendments to LS 16 and 17 are necessary to add non-discriminatory language.

20. Proposed new LS 18 states how often wages must be paid by employers. This provision is necessary because both employers and employees have requested that standards be adopted in this regard.

Based upon the foregoing Findings of Fact, the Examiner makes the following:

CONCLUSIONS

1. Due, timely and adequate legal notice of the hearing was properly served and filed by the Department of Labor and Industry. All other substantive and procedural requirements of statute or rule have been complied with.

2. Pursuant to Minn. Stat. § 15.052, subd. 3 (1976), it is the duty of the Hearing Examiner to: "...(4) make a report

on each proposed agency action...taking notice of the degree to which the agency has (i) documented its statutory authority to take the proposed action, (ii) fulfilled all relevant, substantive and procedural requirements of law or rule, and (iii) demonstrated the need for and reasonableness of its proposed action with an affirmative presentation of facts."

3. The Hearing Examiner concludes that the proposed rules be amended as set out in Findings 7 a., 18 b. and 18 c. for the reasons stated therein.

4. The Hearing Examiner concludes that LS 15(e) is an unconstitutional delegation of authority by the Department. see Wallace v. Commissioner of Taxation, 184 N.W.2d 588 (1971). The section should be deleted.

5. The Examiner concludes that Mr. Brodie's suggestion as set out in Finding 14 a. is reasonable should the Department decide to amend LS 8 accordingly. However, the rule as proposed is reasonable.

6. The Examiner concludes that a lodging allowance, constituting the fair market value of the quarters provided, is a proper deduction when the employee has a property right to a tenancy for a specific period of time. The primary argument for a fair market value deduction was the great disparity between $1.50 per day and the actual value of the lodging provided. This argument was made by the apartment owners who provide residential units. The Examiner concludes that the lodging provided for which the deduction is taken, must have exclusive, self contained bathroom and kitchen facilities. The 10% figures that Mr. Horner is suggesting (see Finding 13 a.) only add a variable to the market value which does not seem warranted. LS 7 should be amended as follows:

> The lodging allowance is ~~$1.15~~ $1.50 per day, except that lodging, the nature of which is ordinarily and commonly considered to be a tenancy in the chief place of residence of the employee, shall be credited toward the minimum wage of that employee at the rate of the fair market value of the lodging provided. The tenancy shall be evidenced by a written lease

agreement providing for at least a month to month tenancy, and shall include exclusive, self contained bathroom and kitchen facilities.

7. Proposed LS 1 and LS 8 duplicate statutory language. Based on the testimony taken at hearing, the Examiner concludes that the duplication is "crucial to the ability of a person affected by [the] rule[s] to comprehend its meaning and effect." see Laws 1977, ch. 443, sec. 2.

8. The Examiner concludes that the Department has documented its statutory authority to promulgate the proposed rules and the need for and reasonableness of the proposed rules have been demonstrated by an affirmative presentation of facts.

9. The Examiner concludes that the amendments he is suggesting to the proposed rules make the rules more reasonable and none constitute a substantial change.

Based upon the foregoing Conclusions, the Examiner makes the following:

RECOMMENDATION

That the Department of Labor and Industry adopt the proposed rules as recommended to be amended in this Report. See Conclusions 3, 4, and 6.

Dated: October 26, 1977.

Peter C. Erickson

PETER C. ERICKSON
Hearing Examiner

Jon K. Murphy
Special Assistant
Attorney General

December 20, 1977

-Labor Standards Division, LS 1 Minimum Wage Rate for Minors

STATE OF MINNESOTA

DEPARTMENT OF LABOR AND INDUSTRY

In the Matter Of The Proposed Adoption Of Rules Of The Labor Standards Division, Department of Labor and Industry, Governing Minimum Wages.

SUPPLEMENTAL FINDINGS OF FACT

On November 2, 1977, E. I. Malone, Commissioner, Department of Labor and Industry, issued a FINDINGS OF FACT AND ORDER ADOPTING RULES in the above-entitled matter. These findings supplement and amend those findings and are intended to serve as clarification to the provisions of Rule L.S. 7, entitled "Lodging Allowance". As originally proposed, L.S. 7 provided in part:

> (A) lodging allowance is credited toward the minimum wage only for lodging furnished by the employer and accepted by the employee. (emphasis added.)

As adopted, L.S. 7 provides in part:

> (A) lodging allowance of $1.50 per day may be credited towards the minimum wage if furnished by the employer and accepted by the employee. (emphasis added.)

Under the previous provisions of L.S. 7, the lodging credit was never intended to be a mandatory allowance on the part of the employer. An employer could take advantage of the allowance only if so desired. If not, then the employer must pay the full minimum wage.

Consequently, the department, in utilizing the word may in L.S. 7 as adopted, did not intend to change the nature of the lodging allowance nor an employer's ability to utilize that allowance. An

employer may or may not utilize the allowance just as before the amendment.

The Commissioner therefore finds that since under previous law, the lodging allowance was not mandatory nor was it ever intended to be so, the change in the rule as adopted from the word is to may is not a change from a "mandatory" to a "permissive" allowance, but merely a grammatical change which better explains the nature of a lodging allowance and which does not change its substance or its availability to an employer.

Dated:

E. I. Malone, Commissioner

STATE OF MINNESOTA
DEPARTMENT OF LABOR AND INDUSTRY

In The Matter Of The Proposed Adoption Of Rules Of the Labor Standards Division, Department of Labor and Industry, Governing Minimum Wages.

FINDINGS OF FACT AND ORDER ADOPTING RULES

The above-entitled matter came on for hearing before Hearing Examiner Peter C. Erickson of the State Office of Hearing Examiners at 9:00 a.m. on Tuesday, September 13, 1977, in Room 81, State Office Building, St. Paul, Minnesota after proper notice required by Minn. Stat. § 15.0412 was served upon all persons, associations and other interested groups registered with the Secretary of State for that purpose and published in the State Register.

After affording interested persons an opportunity to present written and oral data, statements and arguments, having heard all of the testimony, having considered all of the evidence adduced and having considered the findings and recommendations contained in the Report of Hearing Examiner herein, and upon the records, files and proceedings herein, and applicable statutory standards or criteria, and having confirmed the need for the above captioned rules;

IT IS HEREBY ORDERED that the findings of fact and recommendations contained in the Report of Hearing Examiner, a copy of which is attached hereto as Exhibit A, be adopted and incorporated herein as the Findings of Fact supporting these rules except as specified as

follows:

1. Paragraph 6 of the Hearing Examiner's Conclusions recommends the addition of a "fair market value" allowance for lodging where the employee has a property right to a tenancy for a specific period of time. The department agrees with the Hearing Examiner's rationale for such allowance. However, in proposing additional language for this allowance, the Hearing Examiner excluded language which exists in the present rule and which was not intended to be deleted by the department in amending Labor Standard Regulation L.S. 7. That language provides, "Lodging means living accommodations which are adequate, decent, and sanitary according to usual and customary standards. The department finds this requirement to be as necessary today as it was found to be in 1974 when initially proposed and adopted to protect and safeguard the health, efficiency, and general well-being of Minnesota's employees. The department further finds that the Hearing Examiner did not intend to recommend the deletion of this language and that, therefore, such language should be incorporated into the language recommended by the Hearing Examiner.

NOW, THEREFORE, IT IS HEREBY ORDERED that the proposed amendments to the Rules and Regulations Relating to Labor Standards Division, as modified by the recommendations of the Hearing Examiner and as modified as stated herein above, which rules are identified as Rules and Regulations Relating to Labor Standards As Amended, are adopted this 2nd day of November, 1977, pursuant to authority vested in me by Minn. Stat. § 177.28.

E. I. Malone

E. I. Malone, Commissioner

-78-002-PE

STATE OF MINNESOTA
OFFICE OF HEARING EXAMINERS

FOR THE DEPARTMENT OF LABOR AND INDUSTRY

IN THE MATTER OF THE PROPOSED ADOPTION OF RULES OF THE LABOR STANDARDS DIVISION, DEPARTMENT OF LABOR AND INDUSTRY, GOVERNING MINIMUM WAGES.

REPORT OF THE CHIEF HEARING EXAMINER

WHEREAS, a hearing was held on September 13, 1977, before Peter C. Erickson, a Hearing Examiner of the State Office of Hearing Examiners, on the above-entitled matter in compliance with Minn. Stat. § 15.0412, Subd. 4; and

WHEREAS, the Report of Hearing Examiner made pursuant to Minn. Stat. § 15.052, Subd. 3, was issued to the Department of Labor and Industry on October 26, 1977; and

WHEREAS, the Department of Labor and Industry has now determined to adopt rules pursuant to Minn. Stat. § 15.0412, Subd. 4; and

WHEREAS, the Department of Labor and Industry has submitted said rules to the Chief Hearing Examiner for review pursuant to Minn. Stat. § 15.052, Subd. 4, and Rule HE 107; and

WHEREAS, the Chief Hearing Examiner finds that the final proposed rules are not substantially different from those proposed at the public hearing and that the Department of Labor and Industry has met all requirements of Minn. Stat. § 15.0412, Subd. 4.

NOW, THEREFORE, upon receipt of this Report, the Department of Labor and Industry has the responsibility of submitting the complete hearing record and the rules as adopted by the Department to the Attorney General and to publish in the State Register, all pursuant to Minn. Stat. § 15.0412, Subd. 4.

Dated this 4th day of November, 1977.

Duane R. Harves

DUANE R. HARVES
Chief Hearing Examiner

DEPARTMENT OF LABOR AND INDUSTRY

Rules and Regulations Relating to Labor Standards Division, As Amended

LS 1 Minimum Wage Rate for Minors. Employers claiming an employee is under 18 must have his or her birthdate substantiated by a birth certificate or an age certificate issued by the Department of Labor and Industry (through the local Superintendent of Schools) or a photocopy of the employee's driver's license or a Minnesota identification card issued by the Department of Transportation included in the payroll records kept for such employee. Failure to provide proof of the ages of minors employed makes the employer liable for the adult minimum wage. The Child Labor Standards Act provides as follows: M.S. 181A.06 subd. 1. Every employer shall require proof of the age of any minor employee or prospective employee by requiring the minor to submit an age certificate, a copy of his birth certificate, or a copy of his driver's license. Upon the request of a minor, an age certificate shall be issued by or under the authority of the school superintendent of the district in which the applicant resides. Superintendents, principals, or headmasters of independent or parochial schools shall issue age certificates to minors who attend such schools. 181A.12 subd. 1. Any employer who hinders or delays the department or its authorized representative in the performance of its duties under sections 181A.01 to 181A.12 or refuses to admit the commissioner or his authorized representative to any place of employment or refuses to make certificates or lists available as required by sections 181A.01 to 181A.12, or otherwise violates any provisions of sections 181A.01 to 181A.12 or any regulations issued pursuant thereto shall, upon conviction therefor, be guilty of a gross misdemeanor. Subd. 2. Any other person violating any provision of sections 181A.01 to 181A.12 or any regulations issued pursuant thereto or assisting another in such a violation is guilty of a misdemeanor.

LS 2 Learners or Apprentices. A learner is a student enrolled in a state approved high school vocational on-the-job training program in which supervision is provided by the school for the on-the-job experiences, a training plan is established for each individual student learner, and school credit is given for job experiences. For the first 300 hours of employment, the learner shall be paid at a rate of not less than the wage rate for minors.

LS 3 Handicapped Worker Permits. Subminimum wage rates may be paid to handicapped workers only after receiving a permit from the Labor Standards Division. If no permit is issued, a worker, no matter how severely handicapped, shall be paid the minimum wage. The subminimum rate will be based on the extent to which the worker's performance is limited but in no case may it fall below 50% of minimum wage.

No profit-making organization may employ handicapped workers at a subminimum wage for more than 10% of its total work force unless granted a special permit by the Commissioner of Labor and Industry to exceed the 10% limitation.

Sheltered workshops are excluded from the above percentage limitations of numbers of employees and percentage of minimum wage, but not from the permit requirement.

LS 4 Equal Pay for Handicapped. Where a handicapped person is now performing or is being considered for employment where he or she will perform work which is equal to work performed by a non-handicapped person such handicapped person shall be paid the same wage as a non-handicapped person with similar experiences.

LS 5 Part-time Rates. Part-time employees may not be paid wages below the minimum rates established for adults and minors, except as provided for under Minnesota Statute 177.23 Subdivisions 11 and 12.

LS 6 Meal Allowance. A meal allowance is credited toward the minimum wage only when the meal is furnished by the employer and accepted by the employee. The employer shall not require the employee to accept meals as a condition of employment. A meal is defined as an adequate portion of a variety of wholesome, nutritious foods and shall include at least one food from each of the following four groups: fruits or vegetables; cereals, bread or potatoes; eggs, meat or fish; milk, tea or coffee, except that for breakfast, eggs, meat or fish may be omitted if both cereal or bread are offered. The employer must keep a record of each meal accepted by the employee.

Meals must be consistent with the employee's work shift. Meal periods of less than twenty minutes may not be deducted from hours worked, nor may meal periods be deducted where the employee is not entirely free from work responsibility.

The meal allowance is $1.15 per meal.

LS 7 Lodging Allowance. A lodging allowance of $1.50 per day may be credited towards the minimum wage if furnished by the employer and accepted by the employee. Such lodging must be adequate, decent, and sanitary according to usual and customary standards. However, lodging, the nature of which is ordinarily and commonly considered to be a tenancy in the chief place of residence of the employee, shall be credited toward the minimum wage of that employee at the rate of the fair market value of the lodging provided. The tenancy shall be evidenced by a written lease agreement providing for at least a month to month tenancy, and shall include exclusive, self contained bathroom and kitchen facilities.

LS 8 Tip Credit--Definitions and Clarifications.

(a) M.S. 177.28 Subd. 4 "provides that a tip credit may not be taken unless at the time the credit is taken the employer has received a signed statement for that pay period from the tipped employee stating that he did receive and retain during that pay period all gratuities received by him in an amount equal to or greater than the credit applied against the wages due by his employer. The statements shall be maintained by the employer as part of his business records."

(b) The department in its investigations and audits shall require the employer to provide the signed tip statements at the time of its audit or no tip credit will be allowed.

(c) Tip credit is based on the actual amount of tips received by the employee divided by the number of hours worked in a given pay period. A maximum tip credit may be allowed up to 20% of the applicable minimum wage. The employer's records must also indicate that the individual employee received at least $35.00 per month in gratuities in order that any tip credit be allowed in that period.

(d) Tip pooling may not be a condition of employment.

Tip sharing or pooling shall be on an individual person-to-person basis. Another employee who benefits because the recipient shares the gratuity with him or her shall not have such remuneration considered in the calculation of his or her wages.

(e) A gratuity is presented indirectly when the sum of money is included in the statement of charges and no notice is made on the statement indicating that the amount is not a tip to be presented to the employee as a gratuity.

(f) A service person is one who in a given situation performs the main service for a customer and is to be considered the recipient of the gratuity for purposes of wage calculation.

(g) Gratuities presented to a service person via inclusion on a charge or credit card shall be credited to that pay period for which they appear on the service person's tip statement.

(h) Money presented by customers, guests or patrons at a banquet as a gratuity to be divided among the service people shall be credited to that time period for which it appears on the service person's tip statement.

(i) Where a tip is given by a customer through a credit or charge card, the full amount of tip must be allowed the service person minus only the percentage deducted from the tip in the same ratio as the percentage deducted from the total bill by the service company.

(j) Tip credit may only be claimed or allowed consistent with the provisions of this rule.

LS 9 Deductions. Deductions from the minimum wage, whether direct or indirect, may not be made for shortages in money receipts or merchandise, for the purchase or maintenance of uniforms, for spoilage, for breakage, for cash shortages or losses resulting from walkouts, bad checks or robbery or for fines for disciplinary purposes. These are considered matters separate from wages. The term "uniform" means wearing apparel and accessories required by the employer to be worn by the employee as a condition of employment.

LS 12 Hours Worked. Hours worked include training time, call time, cleaning time, waiting time, or any other time when the employee must be either on the premises of the employer or involved in the performance of duties in connection with his or her employment. Rest periods of less than 20 minutes may not be deducted from total hours worked.

LS 14 Workweek. The period of time used for determining compliance with the minimum wage rate, overtime compensation, and designation as a part-time employee is the workweek, which is defined as a fixed and regularly recurring period of 168 hours -- seven consecutive 24 hour periods. This is true whether the employee is paid on an hourly, piecework, commission, or any other basis. Once the workweek is established, it remains fixed, although it may be changed if the change is intended as permanent rather than as an evasion of the overtime provisions. If no workweek is designated, it shall follow the calendar week.

The Commissioner of Labor and Industry may upon receiving application made by an employer establish a different period of time to be used as workweek for purposes of this regulation.

No employer shall be deemed to have violated Section 5, Minnesota Statute 177.25 Subdivision 1 by employing any employee of a retail or service establishment for a workweek in excess of the applicable workweek specified therein, if (1) the regular rate of pay of such employee is in excess of one and one-half times the minimum hourly rate applicable to him or her under Minnesota Statute 177.24 and (2) more than half the compensation for a representative period (not less than one month) represents commissions on goods or services. In determining the proportion of compensation representing commissions, all earnings resulting from the application of a bona fide commission rate shall be deemed commissions on goods or services without regard to whether the computed commissions exceed the draw or guarantee.

LS 15 Executive, Administrative, Professional Personnel. The primary duties of the employee are determinative of his or her status under this exemption. Only where the employee's primary duties meet all the criteria under a particular test may the employer consider the employee to be exempt from the overtime wage provisions.

(a) Manage: For purposes of this rule, the term manage means to control and direct the business operations of a given enterprise, department or branch establishment. Duties involved in managing must involve the making of decisions and the issuance of directions to other employees which involve skill and judgment. The term includes those employees that act primarily and principally in a directive capacity as opposed to those who primarily do the actual work.

(b) Discretionary Powers: The thrust of this criteria is to distinguish between those employees empowered to independently commit their employers on matters of importance and those employees who merely make day to day decisions which, although necessary to the daily operations of the employer's business, are routine, or follow prescribed procedures, or involve a determination of whether specific standards are met, or are lacking in substantial importance to the employer's business as a whole. One test which should be utilized in determining whether an employee exercises discretionary powers is to ask whether the decisions being made involve a discretion as to company policy or procedure or commit the employer on matters of substantial importance. Mere recommendations with respect to policies and procedures are not sufficient unless it can be shown that the employer consistently accepted and followed those recommendations.

(c) Sole Charge: Only one employee per enterprise, department or branch establishment may be considered to be in sole charge regardless of the number of work shifts per day.

(d) In determining exempt and non-exempt work under this rule, work directly related to executive or administrative work may be included if the executive work which it relates to is actually performed by the employee. It is not sufficient to claim certain work is exempt where the executive or administrative function it might be directly related to is not performed by the employee.

EXECUTIVE Test I

(a) receives at least $250 per week in salary

(b) manages the enterprise by which he is employed or a recognized department or subdivision thereof;

(c) customarily directs the work of two or more other employees.

EXECUTIVE Test II

(a) receives at least $155 per week in salary;

(b) manages and supervises a department of at least two other full-time people (a full-time employee is defined as one who works at least 35 hours in a workweek);

(c) has authority to hire or fire or suggest changes in employees' status;

(d) regularly exercises discretionary powers;

(e) either

(1) devotes less than 20% of time worked (or 40% in retail or service establishments) to non-exempt work, or

(2) owns 20% or more of the business, or

(3) has sole charge of an independent or branch establishment.

ADMINISTRATIVE Test I

(a) receives at least $250 per week in salary or fee;

(b) either

(1) performs office or nonmanual work directly related to management policies or general business operations, or

(2) performs functions in the administration of a school system or subdivision thereof, in work directly relating to academic instruction;

(c) regularly exercises discretion or independent judgment.

ADMINISTRATIVE Test II

(a) receives at least $155 per week in salary or fee;

(b) either

(1) performs office or nonmanual work directly related to business operations or management policies, or

(2) administers an educational system or subdivision thereof in work relating to academic instruction;

(c) regularly exercises discretion and independent judgment and makes important decisions;

(d) either

(1) directly assists owner or bona fide executive or administrative employee, or

(2) performs supervised work only along lines requiring special training or experience, or

(3) executes special assignments;

(e) devotes less than 20% of time worked (or 40% in retail or service establishments) to non-exempt work.

PROFESSIONAL Test I

(a) receives at least $250 per week in salary or fee;

(b) either

(1) performs work requiring advanced knowledge in a field of science or learning, or

(2) performs work as a teacher in the activity of imparting knowledge, or

(3) performs work requiring invention, imagination, or talent in a recognized field of artistic endeavor;

(c) consistently exercises discretion and judgment.

PROFESSIONAL Test II

(a) receives at least $170 per week in salary or fee;

(b) either

(1) performs work requiring advanced knowledge in a field of learning customarily acquired by prolonged specialized intellectual study (not a general academic education, an apprenticeship, or training in routine mental or physical processes), or

(2) performs original work dependent on his own creativeness in a recognized field of artistic endeavor, or

(3) is a certified teacher working as such or recognized as such in the school system where he works;

(c) consistently exercises judgment and discretion;

(d) performs predominantly intellectual work so varied that the output cannot be standardized by time necessary for accomplishment;

(e) devotes less than 20% of his hours worked to activities not essential to his professional work.

LS 16 Outside Salesperson. Salesperson is defined as one who makes sales of, or obtains orders or contracts for, materials, services, or the use of facilities for which payment will be made. Incidental deliveries, collections, and other non-sales or non-solicitation work that is directly related to the primary sales duties shall be considered the work of a salesperson. An outside salesperson is hired for the express purpose of performing such duties away from the employer's place(s) of business and conducts no more than 20% of sales on those premises. The hours of non-outside sales work may not exceed 20% of the hours worked by employees who are not outside salespersons.

LS 17 Gratuitous Service. Gratuitous service is voluntarily donated work performed by a person who receives for it no monetary compensation or other valuable consideration. The individual may be reimbursed for out-of-pocket expenses needed to perform the services, but only if these expenses are itemized. The acceptance of an expense allowance (that is, a gross sum provided him with no itemized list of expenses) makes the individual non-exempt. (See Chapter 177.23 Subdivision 7(5))

"Non-profit organization" is defined as a corporation, community chest, fund, or foundation, organized and operated exclusively for religious, charitable, scientific, literary, or educational purposes, or for the prevention of cruelty to children or animals, no part of the net earning of which inures to the benefit of any private shareholder or individual, and no substantial part of the activities of which is carrying on propaganda, or otherwise attempting to influence legislation. (See Chapter 177.23 Subdivision 7(5))

LS 18 Wages, how often paid. The payment of wages due must be made at least once every 30 days.

APPROVED AS TO FORM AND LEGALITY
11-30 1977
WARREN SPANNAUS, ATTORNEY GENERAL
BY Lee E. Shelby
SPECIAL ASSISTANT ATTORNEY GENERAL

STATE OF MINNESOTA

DEPARTMENT OF LABOR AND INDUSTRY

IN THE MATTER OF THE PROPOSED ADOPTION OF RULES OF THE LABOR STANDARDS DIVISION, DEPARTMENT OF LABOR AND INDUSTRY, GOVERNING MINIMUM WAGES.

STATEMENT OF EVIDENCE

In addition to the "Statement of Need" which is available for inspection or purchase at the Office of Hearing Examiners, Room 300 - 1745 University Avenue, St. Paul, Minnesota, 55104, and in support of that statement, the Department of Labor and Industry will produce testimony from the following individuals:

1. Kurt Pinke, Director, Labor Standards Division, Department of Labor and Industry;

2. Robert Fry, Assistant Director, Labor Standards Division, Department of Labor and Industry.

Testimony presented by the department will include an explanation and rationale for the proposed amendments to existing rules, and a rule by rule explanation of the proposed rules indicating each rule's necessity and purpose and the manner in which each rule is consistent with the overall intent of the statute, and an explanation of the recent amendments to the provisions of Minn. Stat. § 177.21 et seq. An outline of the department's rationale for the proposed changes is attached and incorporated herein as Exhibit 1.

At hearing the department intends to cite the following laws:

1. Minn. Stat. § 177.21 et seq. (1976);

2. Labor Standards Regulations, LS 1 through 18;

3. Minn. Laws 1977, ch. 369;

4. Minn. Laws 1977, ch. 183; and

5. U. S. Department of Labor Regulations defining the terms "executive", "administrative" and "professional" employees. 29 C.F.R. § 541 et seq.

E. I. Malone

E. I. Malone, Commissioner

DATED: 7-15-77

EXHIBIT 1

JUSTIFICATION AND REASONABLENESS OF PROPOSED RULES

A. The first minimum wage law in Minnesota was enacted by the Legislature in 1973, with an effective date of January 1, 1974. As justification for the statute the Legislature found that it was in the public's interest to have a set minimum wage throughout the State and not as existed at this time eight wage orders based on the type of industry, the size of the town, the experienced and the inexperienced worker, with wage rates ranging from 75¢ an hour to $1.60 an hour which did not meet existing cost of living standards.

B. Minnesota Fair Labor Standards Act as initially enacted set a minimum wage of $1.80 per hour, with the Commissioner to establish regulations under MS 177.28, Subdivisions 3, 4, and 5, defining the terms for the listed items and defining the law under MS 177.23, Subdivision 7 (1), (4), (5), (9), (11), and (12). The regulations were adopted by November 1974 following the procedures outlined in MS 177.28, Subdivisions 2 and 6.

C. The 1976 Legislature increased the minimum wage to $2.10 an hour for adults and $1.89 an hour for minors, effective October 1, 1976. The 1977 Legislature increased the minimum wage to $2.30 an hour for adults and $2.07 an hour for minors, effective September 15, 1977. At this time, a tip credit allowed under MS 177.28, Subdivision 4, amended by the Legislature, raised the threshold to $35 and lowered the credit to 20 percent of the existing minimum wage and added extensive new language. Minnesota Statute 177.23, Subdivision 9, amended by adding new language. MS 177.24 amended by the additions of Subdivisions 1, 2, and 3.

D. Based on the changes enacted by the 1975 and 1976 Legislatures and the input from the public and other interested parties, an advisory board was appointed by the Commissioner under the authority of MS 177.28, Subdivision 1, and met on July 8, 1977, for the purpose of amending the existing regulations.

E. There have been no previous changes in the Rules and Regulations adopted and in force since January 1, 1974.

F. These amendments are proposed to make the existing Rules and Regulations more easily understood and more consistently interpreted. It has been the experience of the Division the language of the present regulations is often confusing, and, as such, leads to difficulties for those who must comply and for those seeking to enforce compliance. Further amendments are proposed in certain regulations pertaining to certain monetary credits and salary ranges. These have become necessary as increasing minimum wages and costs of living have made the levels formerly established obsolete.

G. The Division feels that the adoption of these proposals will make the enforcement of the Minnesota Fair Labor Standards Act more consistent and will make the Act more easily understandable and accessible to the general public.

H. These revised Rules may be cited as the Rules and Regulations of the Labor Standards Division, LSR 1 through LSR 18.

EXHIBIT I-a

RATIONALE

FOR THE PROPOSED CHANGES IN THE

RULES AND REGULATIONS

RELATING TO LABOR STANDARDS DIVISION

LS 1 Three changes are suggested:

1. To add non-discriminatory language changing the wording "his birthdate" to "his or her birthdate."
2. To add another means of obtaining proof of age where needed by an employer; viz, allowing "a photocopy of the employee's driver's license" also to be accepted as substantiating the birthdate.
3. To add language to the rule repeating the law to alert and remind employers of the penalties allowed under The Child Labor Standards Act.

LS 2 A change in wording was made from $1.89 per hour" to "the wage rate for minors." In the event of future changes of the law regarding minimum wage affecting the rate for minors (which could affect learners and apprentices), there would not be a need to change the rule to another monetary value as heretofore but the rule would directly reflect the increase required by law.

LS 3 A change was made to delete language that was functional in the original rule but which language is now obsolete.

LS 4 One change was made to add non-discriminatory language, changing the wording "he will perform" to "he or she will perform."

LS 5 Additional wording was added to show that two exceptions to paying full minimum wages to part-time employees are allowed by Minnesota Statute 177.23, Subdivisions 11 and 12.

LS 6 An increase in the monetary amount of meal allowance is suggested. The increase is in direct proportion to increases in the minimum wage since its inception.

LS 7 An increase in the monetary amount of lodging allowance is recommended. The increase is in direct proportion to increases in the minimum wage since its inception.

LS 8 The entire language was rewritten in this rule. The suggested wording is used to help clarify previous ambiguities and misinterpretations of the law. The changes are based upon direct experiences of the division, Federal court cases, recommendations of hearing officers, and suggestions from employers, employees, and the public at large. It will aid and assist employers and employees in a better understanding of tip credit and its ramifications.

LS 9 Language changes were made to better reflect the intent of the rule as originally propounded. The changes are recommended based on the questions and problems encountered by the division in the course of its work in the past three years.

LS 10 No change

LS 11 No change

LS 12 One change was made to add non-discriminatory language changing the wording "his employment" to "his or her employment."

LS 13 No change

LS 14 Two changes are recommended:

1. The exact Minnesota Statute is given by Chapter number for reference rather than a section number which is obsolete.
2. Non-discriminatory language to replace the wording "his compensation" with "the compensation" is made.

LS 15 Several changes are suggested:

1. Definitions and criteria for

    a. primary duties

    b. manage

    c. discretionary powers

    d. sole charge

    e. exempt and non-exempt

    f. full-time employee

   are included because these key words in Rule LS 15 were the ones most often misinterpreted.

2. A statement is added that "monetary amounts on salary tests will coincide and adjust with current Federal Fair Labor Standards Act." The congruity of such amounts between Federal and State will eliminate much confusion to the public.

3. Each of the salary amounts for each category is listed to reflect the present federal level as stated in the Federal Fair Labor Standards Act. This change was recommended by the 1973 and 1977 Labor Standards Advisory Boards.

LS 16 Changes were made in the language to make it non-discriminatory. "Salesman" was changed to "Salesperson;" "his employer's place" was changed to "<u>the</u> employer's place."

LS 17 Non-discriminatory language was used. "He may be reimbursed" was changed to "<u>the individual</u> may be reimbursed."

The Minnesota Chapter designation referring to gratuitous service was added for a reference convenience.

LS 18 This regulation adopted January 1, 1974 suggest repeal.

New LS 18 This is a completely new statement regarding how often wages must be paid. Employers and employees have consistently requested standards and no regulation, rule or law was extant.

STATE OF MINNESOTA

DEPARTMENT OF LABOR AND INDUSTRY

IN THE MATTER OF THE PROPOSED ADOPTION OF RULES OF THE LABOR STANDARDS DIVISION, DEPARTMENT OF LABOR AND INDUSTRY, GOVERNING MINIMUM WAGES.

STATEMENT OF NEED

The need for the adoption of amendments to present rules covering the subject of minimum wage and overtime standards arises from the Commissioner's duty under Minn. Stat. § 177.28 (1976) to make and revise such regulations, including definition of terms, as he shall deem appropriate to carry out the purposes of this Act, to prevent the circumvention or evasion thereof, and to safeguard the minimum wage and overtime rates established by law.

Minnesota's Fair Labor Standards Act § 177.21 et seq. (1976) was originally enacted in 1973 to be effective January 1, 1974. The present rules promulgated under that act became effective on January 1, 1974. Since that time several additions or changes have been made to the statutory provisions. Specifically, Minn. Laws 1977, ch. 369 added additional language to the definition of gratuities and provided that employers may not directly or indirectly credit or apply gratuities towards payment of minimum wages. That chapter also prohibited what is commonly known as "tip-pooling". It also clarified statutory language pertaining to tip credits, increased the amount of money an employee must receive in tips before he is considered a tipped employee and reduced the percentage of the

minimum wage rate which may be credited for gratuities received by an employee.

Minn. Laws 1977, ch. 183 increased the minimum wage rate for adults to $2.30 per hour and by statute provided for a $2.07 minimum wage rate for minors. These changes necessitate amendments to the present rules to bring them into conformity with the statute.

In addition, the experience of the Labor Standards Division, Department of Labor and Industry in regulating and administrating the Fair Labor Standards Act has apprised it of various problems and situations which necessitate clarification and correction. Working in harmony with the Advisory Board appointed by the Commissioner under the authority of Minn. Stat. § 177.28, subd. 1, and through experiences gained with individual investigations and cases over the past several years, the department finds that the proposed amendments are needed to alleviate those problems, facilitate the administration and regulation of the Fair Labor Standards Act, prevent the circumvention or evasion of its provisions, and to safeguard the minimum wage and overtime rates.

In sum, the adoption of the proposed amendments are necessary to fulfill the department's obligations and duties as found in Minn. Stat. § 177.28 (1976).

E. I. Malone

E. I. Malone, Commissioner

Dated: 2-12-77

STATE OF MINNESOTA

DEPARTMENT OF LABOR AND INDUSTRY

IN THE MATTER OF THE PROPOSED ADOPTION OF RULES OF THE LABOR STANDARDS DIVISION, DEPARTMENT OF LABOR AND INDUSTRY, GOVERNING MINIMUM WAGES.

CERTIFICATE OF COMPLIANCE

I, Jon K. Murphy, Special Assistant Attorney General for the State of Minnesota, do hereby declare that I have examined the proposed rules and all related documents and that, based on them and my personal familiarity with the applicable procedures, the Manual of Rule Making Procedures has been followed.

Dated:

JON K. MURPHY
Special Assistant
Attorney General