


# Minnesota Attorney General: Administrative Rules Proceedings

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Version 3
August 20, 2018

#~~294~~
R425

# RULES REVIEW CHECKLIST

DATE RULES RECEIVED [redacted] 5-10 Temporary Rule _____

Resubmitted and Received 6-14-78

DUE DATE [redacted] 5/30

a. Returned to Agency w/o filing w/Secy of State _____
b. Approved _____ Date Sent Back to Agency _____

- - - - - - - - - - - - - - - - - - - - - - - - - - - - - - - - - - - - -

1. Rules as Adopted ✓
2. Rules as Proposed ✓
3. Certificate of Board's Authorizing Resolution, where applicable N.A.
4. Order for Hearing ✓
5. Notice of Hearing ✓
   (i) Sufficiency ✓
6. Secretary of State's List ✓
7. Certificate of Acquisition of Secretary of State's List ✓
8. Affidavit of Mailing ✓
   (i) At least 30 days prior to hearing ✓
9. Statement of Need and Evidence ✓
10. Hearing Examiner's Report ✓
11. Agency's Findings of Fact ✓
12. Certificate of Board's Resolution Adopting Rules, where applicable N.A.
13. Order Adopting ✓
14. ~~Report of Chief Hearing Examiner~~ ✓
    (i) Finding of No Substantial Change ✓
    (ii) Permission to Incorporate by Reference, where applicable N/A
15. Certificate of Compliance with Rulemaking Procedures ✓
16. Copy of Notice of Intent to Solicit Outside Opinion, where applicable [redacted] ✓
17. Petition by Public, where applicable N.A.

Some documents in Power Line Proc. Docket File

# TRANSMITTAL - MESSAGE SLIP

| | |
|---|---|
| **TO** | **LOCATION** |
| **DATE** | **TIME** H/E Rules |
| **FROM** | **LOCATION** |

| **TRANSMITTAL ACTION** | **CALL OR VISIT** |
|---|---|
| ☐ Review and see me | **NAME** |
| ☐ Review and return | |
| ☐ Prepare reply for my sig. | **FROM** |
| ☐ Reply and send me copy | |
| ☐ For your approval | **PHONE NO.** |
| ☐ For your information | |
| ☐ For signature | ☐ Called |
| ☐ As we discussed | ☐ Was here to see you |
| ☐ As you requested | ☐ Please call |
| ☐ Take appropriate action | ☐ Will call again |
| ☐ Notify staff | ☐ Returned your call |

**MESSAGE**

P. 2 303A ~~delete?~~

P. 5 B - ~~Conform to Stat.~~

(Index) NO — C - ~~"and" should be "or"~~

D - ~~Conform to AG rule~~

P. 8 C - ~~order?~~

- no apostrophe in petitioners

P. 9 E - ~~Undetermined w/ costs~~ w/ ~~that consequence~~



p. 11 #2 - ~~automatically~~?

p. 14 D - ~~defined~~?

" 216 - ~~why chief~~? — new stat

p 16 B - ~~why not say "weighted according" or "taken into acct. when det. weight to be given"~~

" 7 - ~~not admissible~~ or ~~inadmissible~~?

p. 17 aa - ~~why any person~~?

p. 18 F - ~~when~~?

" G2 - ~~vague~~ ?

G2 a 1 ~~by its atty or any rep~~ is misplaced ~~should follow "party"~~

Call Bachman

non-lawyer

~~stat~~ p. 2 #7 - ~~contra to 15.04-2 sub 4.~~ - new stat

p. 3 1020 - ~~both.~~ ? OUT is adopted

OUT ● p. 4 1st Q - ~~what the hell? Why; why in this rule~~

● p. 5 104 - ~~last reg't unrelated to s/p~~ comm. w/ S/Rev.

~~p. 7 b - contra to 15.04-2 sub 4~~ new stat.

● p. 8 107 - tie transcript rep. to stat., ~~n/~~ H/E decision

~~p. 9 18a - why approval? auth.?~~ new stat. lead w/ stat

Documents & Rules

~~No Agency worksheet~~

~~(1)~~ No Subst Chg. Chief H.E. Report

~~(1a)~~ No Agency original marked order adopted

(2) Copy of Notice of Intent to Solicit not submitted for review

→ Not proper for review. Gratitous Advice which should be removed

(3) Remind Agency fees are set with approval of Com of Fin. M.S. 16A.126 & 16A.128. Delete from Rules.

~~(4)~~ HE 105 H It's a "std.", albeit a bad one.

* Still a problem Although chg. from proposed, chg. not reflected in "Adopted Amendments..."

(6) "solicited" std. vague - does publishing notice constitute solicitation

→ Internal Mgmt. only

(5) HE 107 (Committed to Agency Discretion?)

- Criteria for when ct. reporter, as opposed to tape recorder, should be used.
- In light of PEER?

(6) HE 110 ~~(c) (1)~~ Chg. in Chief H.E. Review Role to include review for "compliance with M.S. 15.0412, Subd 4."

O.L. - Statute Permits

* (7) HE 111: Substantive Rule beyond Statute with "Minn. Stat. Chp. 15" beyond Statute with 15.0412, Subd. 4 proper

# Contested Case Rules

① p. 27, 4th paragraph 9/27, HE 204A
How about Duane's request adopt of "if not otherwise prohibited as a unauthorized practice of law."
- Record Incomplete

② p. 31 HE 204B
- Dropping word "substantial" more than "more than." ? Other arguments beyond new fee

p. 35
③ ↑ Inconsistency between 204A(8) & 205 noted by H.E. - 9134. H.E.'s finding (Inconsistency is: If agency not a party, is notice required?) provided a conform 204A(8) & 205, which is not do in this case.

④ p. 35 HE 206 How about "unauth. practice of law"?

⑤ p 35 HE 209A - The proposed language not recommended for adoption, yet deletion is not reflected in adopted Rules

⑥ p. 38 - HE 210C "at his discretion" but no criteria vs Judicial Proceedings

⑦ p. 40-41: Seems conflict between HE 211 & HE 210C on how conciliation occurs

⑧ p. 44 HE 215 D Last sentence of 2nd to last paragraph - "PCA ought to be addressed . . . " but it won't by findings

⑨ p 52 HE 217 Gr 2(a)(1) - "At the discretion."

⑩

Pages 1589-1612

# State Register

STATE OF MINNESOTA

RECEIVED
MAY 10 1977
OFFICE OF HEARING EXAMINERS

## HIGHLIGHTS:

Equal Employment Opportunity and School Desegregation
—Adopted Rules from the Department of Education

Snowmobile Noise Reduction
—Proposed Rules from the Department of Natural Resources

University Admissions, Equal Opportunity, and Tuition
—Proposed Rules from the State University Board

Taxation and Inspection of Petroleum Products
—Public Opinion Sought by the Department of Revenue

Hearings for Rulemaking, Contested Cases, Power Plant Sitings, and Transmission Line Routings
—Public Opinion Sought by the Office of Hearing Examiners

Minnesota Chemical Dependency Comprehensive Plan
—Public Opinion Sought by the Department of Public Welfare

Family-Oriented Outpatient Treatment Program
—Requests for Proposals by the Department of Public Welfare

EQC Monitor:

Adopted Rules Governing Assessment of Costs for Environmental Impact Statements
Natural Resource Permit Applications
Negative Declarations
EIS Preparation Notice

VOLUME 1, NUMBER 44

MAY 9, 1977

# Department of Revenue

## Notice of Intent to Solicit Outside Opinion on Rules Governing Taxation and Inspection of Petroleum Products

The Department of Revenue is drafting amendments to the rules relating to taxation and inspection of petroleum products. The rules are authorized by Minn. Stat. § 296.27 (1976). The rules for which amendments are being considered deal with refunds, special fuel requirements and road tax.

All interested or affected persons or groups are requested to participate. Statements of information and comment may be made orally or in writing. Written statements of information and comment may be addressed to:

Mr. James F. Dagen, Director
Petroleum Division
Department of Revenue
1276 University Avenue
St. Paul, Minnesota 55104

Oral statements of information and comment will be received during regular business hours over the telephone at (612) 296-3511, and in person at the above address.

All statements of information and comment must be received by June 1, 1977. Any written materials received by the Agency shall become part of the hearing record.

# Office of Hearing Examiners

## Notice of Intent to Solicit Outside Opinion Regarding Rulemaking, Contested Case, Power Plant Siting, and Transmission Line Routing Hearings

Notice is hereby given, pursuant to the provisions of Minn. Stat. § 15.0412, subd. 6 (1976) that the Minnesota Office of Hearing Examiners will propose to amend the existing rules of procedure governing all rulemaking and contested case hearings and will propose the adoption of new procedural rules relating to the siting of large electric generating plants and the routing of high voltage transmission lines.

All interested parties desiring to submit data or views relating to the proposed amendment and adoption of such rules should address their comments to Duane R. Harves, Chief Hearing Examiner, Office of Hearing Examiners, 1745 University Avenue, St. Paul, Minnesota 55104, telephone: 296-8100. All material received will be made part of the hearing record. All material must be received no later than 4:30 p.m., June 15, 1977.

Duane R. Harves
Chief Hearing Examiner

# Department of Public Welfare Chemical Dependency Programs Division

## Notice of Public Examination and Comment on Minnesota Chemical Dependency Comprehensive Plan

The Chemical Dependency Programs Division of the Department of Public Welfare (State Alcohol and Drug Authority), 4th Floor, Centennial Office Building, 650 Cedar Street, St. Paul, Minnesota, in compliance with P.L. 91-616 and P.L. 92-255, has available for examination and comment the proposed state plan for the provision of alcohol and drug abuse comprehensive services in Minnesota. The plan will be available for public review and comment for 30 days, from May 23rd through June 17th, 1977, at the location indicated above.

## Notice of Request for Proposals

A Request For Proposals (RFP) has been issued by the Chemical Dependency Program Division, Department of Public Welfare (State Alcohol and Drug Authority) on April 29, 1977, for the purpose of providing start-up funds for family oriented outpatient treatment programs. Grants of $10,000 will be awarded for the startup phase of a new family oriented outpatient treatment program or the development of the new component to an existing program. Proposals must be received before June 1, 1977. Persons or organizations wishing to receive the RFP should contact Christine Heath, Chemical Dependency Program Division, 4th Floor, Centennial Office Building, St. Paul, Minnesota, 55155, telephone (612) 296-4615.

ADMIN 1000 (Rev. 1/78)

STATE OF MINNESOTA

DEPARTMENT OFFICE OF HEARING EXAMINERS

# Office Memorandum

TO : J. MICHAEL MILES
Assistant Attorney General

DATE: June 12, 1978

FROM : DUANE R. HARVEY
Chief Hearing Examiner

PHONE: 8100

SUBJECT: OFFICE OF HEARING EXAMINERS' PROCEDURAL RULES

Thank you for forwarding a copy of Mr. Sheehy's memo dated June 6, 1978, to me.

Based upon the comments in that memo, I have prepared a Supplemental Order Adopting Rules and, further, have redone the document entitled "Adopted Amendments to Rules Relating to Procedures for Rulemaking and Contested Case Hearing".

Three copies of each are herewith submitted for resubmission to Mr. Sheehy.

DRH:sh
Encs.

Revised

## TRANSMITTAL - MESSAGE SL

| | |
|---|---|
| TO From Mears | LOCATION |
| DATE 6/6/78 | TIME 8:30 am |
| FROM | LOCATION |

| TRANSMITTAL ACTION | CALL OR VISIT |
|---|---|
| ☐ Review and see me | NAME To: Bob |
| ☐ Review and return | FROM Carlson |
| ☐ Prepare reply for my sig. | PHONE NO. Real Estate |
| ☐ Reply and send me copy | Re: Education Rules |
| ☐ For your approval | ☐ Called |
| ☐ For your information | ☐ Was here to see you |
| ☐ For signature | ☐ Please call |
| ☐ As we discussed | ☐ Will call again |
| ☐ As you requested | ☐ Returned your call |
| ☐ Take appropriate action | |
| ☐ Notify staff | |

**MESSAGE**

Bob,

The above-captioned rules are returned herewith for revision to the following sections:

1511 A.3.: there are two problems with this rule.

1. The use of "may" rather

Admin 1010 (Rev. 9-76) (55)

☐ OVER

than "shall" leaves the rule without an actual standard of application, the wording should be change from "may" to "shall".

2. The phrase "appropriate showing of hardship" is vague for two reasons:

a. What is "appropriate"?

b. What is "hardship"?

P2 b

1512 C.1.: the phrase "...consider, but not be limited to..." is vague for two reasons:

1. If the commissioner considers these standards, is he bound to rely on them in making a decision? If not, then what?

2. If he is not limited to these standards, what other standards will be applied?

If you have any questions regarding these sections, please feel free to call me.

① Martin –
② Ires –

# TRANSMITTAL - MESSAGE S[redacted]

| TO | LOCATION |
|---|---|
| DATE | TIME |
| FROM | LOCATION |

| TRANSMITTAL ACTION | CALL OR VISIT |
|---|---|
| ☐ Review and see me | NAME |
| ☐ Review and return | |
| ☐ Prepare reply for my sig. | FROM Orig of Order |
| ☐ Reply and send me copy | |
| ☐ For your approval | PHONE NO. Adopting |
| ☐ For your information | |
| ☐ For signature | ☐ Called |
| ☐ As we discussed | ☐ Was here to see you |
| ☐ As you requested | ☐ Please call |
| ☐ Take appropriate action | ☐ Will call again |
| ☐ Notify staff | ☐ Returned your call |

**MESSAGE**

① 15I2(c)(1) – "cons. bent w/ (p. 15) be dim. to." out – what is std.?

② form of rules as adopted

Admin 1010 (Rev. 9-76) 55

☐ OVER

1511 A 3.

(3) p. 6 "appropriate hardship"
vague? if so, what is it?
"duty" & "skill"

(4) ~~[redacted]~~

(4) Should it:

~~1512(c) p.~~

424

Commerce -

Securities

Date Rec'd 5/2

Due Date 6/1

Attorney General

J. Michael Miles
Assistant Attorney General

June 23, 1978

Lee E. Sheehy
Special Assistant
Attorney General

296-1288

In the Matter of the Proposed Amendments to the Rules of the Office of the Hearing Examiner Relating to Rulemaking Procedures and Contested Cases

As we discussed, I am returning a portion of the rules in the above-captioned matter relating to rulemaking and contested cases which have been submitted for review as to form and legality for the following reasons:

1. HE 217G(2)(a)(1): The use of the phrase "with the approval" does not cure the problems pointed out in our earlier review. The rule as resubmitted remains unfettered agency discretion. Reasonable restrictions on cross-examination rights pursuant to Minn. Stat. § 15.0419, Subd. 3 (1976) may be proper if the criteria for such restrictions are established by rule.

2. HE 210C: The changes made in the rule as resubmitted does not cure the problems pointed out in our earlier review. The rule as resubmitted remains unfettered agency discretion in the important area of the determination of consolidation of parties.

I have retained copies of all materials relating to this matter. Please do not hesitate to call and discuss this matter with me.

LES:mb

Enclosure

cc: Duane Harves

#425

# RULES REVIEW CHECKLIST

DATE RULES RECEIVED _____ Temporary Rule _____

Resubmitted and Received 6-14-78

DUE DATE 6/23/78

a. Returned to Agency w/o filing w/Secy of State _____
b. Approved _____ Date Sent Back to Agency _____

- - - - - - - - - - - - - - - - - - - - - - - - - - - - - - - - - - - - - - -

1. Rules as Adopted _____
2. Rules as Proposed _____
3. Certificate of Board's Authorizing Resolution, where applicable _____
4. Order for Hearing _____
5. Notice of Hearing _____
   (i) Sufficiency _____
6. Secretary of State's List _____
7. Certificate of Acquisition of Secretary of State's List _____
8. Affidavit of Mailing _____
   (i) At least 30 days prior to hearing _____
9. Statement of Need and Evidence _____
10. Hearing Examiner's Report _____
11. Agency's Findings of Fact _____
12. Certificate of Board's Resolution Adopting Rules, where applicable _____
13. Order Adopting _____
14. Report of Chief Hearing Examiner _____
    (i) Finding of No Substantial Change _____
    (ii) Permission to Incorporate by Reference, where applicable _____
15. Certificate of Compliance with Rulemaking Procedures _____
16. Copy of Notice of Intent to Solicit Outside Opinion, where applicable _____
17. Petition by Public, where applicable _____.

June 17, 1978

Lee,

Attached is Ex. Z-1 Human Rights Dept. Objections to the Hearing Ex's Rules. My Thoughts.

1. Chg. adopted The argument raised with respect to Rule HE 216 and suggesting an amendment to the first sentence of HE 216 (at pp 5 + 6) to acknowledge that Agencies both statutory subpoena power can continue to operate under it is a good one I think. Arguably, a change in the rule is not needed since the statute would supercede the rule. However, if he wants to throw Hum. Rgts a bone it would be a nice gesture. Also such a change might avoid confusion and uncertainty when Hum Rgts continues to operate under the statutory subpoena provision.

2. Rule dropped. I also think the argument about Rule HE 217(c)(7) (pp 6 + 7) is a good one. Again, the point is Hum Rgts want their special circumstance noted (i.e. Hrg Ex's decision binds them).

3. Their argument on the statutory right of cross-examination (p. 7) is valid only if the Hrg Ex denies in full any cross what-so-ever of a particular witness it seems to me. I doubt if a reasonable limitation on scope or duration of cross would ever be overturned.

4. Adopted Rule 103(c)(8) could create problems. However, contrary to the memo, I think judges could call witnesses if they really wanted to under Rule 614 of Rules of Evidence. However, if it is a "surprise" witness there should be an opportunity for the

parties to have discovery. The Hyg Fi should give advance notice of calling witnesses to allow adequate preparation. Courts don't. Whether the rule needs to provide those protections is another question.

Let me know what you think on these points. My feeling is that none of them justify disapproval. However if Hawes ~~who~~ wants to be nice he could adjust Rule HE 216 (PP. 1).

ADMIN 1000 (Rev. 1/78)

STATE OF MINNESOTA

# Office Memorandum

DEPARTMENT Attorney General

TO : Lee E. Sheehy,
Special Assistant
Attorney General

DATE: June 14,1978

FROM : Mike Miles,
Assistant Attorney General

PHONE: 296-6555

SUBJECT: Hearing Examiner's Contested Cases Rules

Attached hereto are the above-captioned rules resubmitted for your review.

JMM/dw

Attachment

STATE OF MINNESOTA
OFFICE OF HEARING EXAMINERS

| | |
|---|---|
| IN THE MATTER OF THE ADOPTION OF AMENDMENTS TO THE RULES OF THE OFFICE OF HEARING EXAMINERS) RELATING TO RULEMAKING PROCEDURES AND CONTESTED CASES. | FINDINGS OF FACT, CONCLUSIONS AND ORDER ADOPTING RULES |

The above-entitled matter came on for hearing before Hearing Examiner Allan W. Klein on October 11, 12, 13, 17, 19, and 20, 1977. The record was closed on November 9, 1977.

After affording all interested persons an opportunity to present written and oral data, statements and arguments, having heard all of the testimony, having carefully considered all of the evidence adduced and the Report of the Hearing Examiner dated April 28, 1978, and upon record, files and proceedings herein, the Chief Hearing Examiner hereby concurs with, adopts and incorporates the attached Findings of Fact, Conclusions and Recommendations of the Hearing Examiner in this matter, except as specified in the following Findings and Conclusions:

1. HE 102 D. and HE 103. The Hearing Examiners's recommendation regarding the "barrier free facility" portion of HE 102 D. has been adopted and the language stricken. The Hearing Examiner found that the rest of the proposal could be adopted. However, because the rest of the proposed language drew such wide response, including some very excellent suggestions, it has been determined that the proposed last sentence of HE 102 D. should be withdrawn as well as all mention of notice to persons other than the statutory requirements in HE 103 and that the issue should be the subject of additional hearings.

2. HE 104. The Hearing Examiner's findings and recommendations for this rule are adopted. Several suggestions for changes were recommended but left to the option of the Office of Hearing Examiners. The rule will be amended to read as follows and for the reasons stated in the Hearing Examiner's Report.

> Statement of Need and Reasonableness. Each agency desiring to adopt rules shall prepare a Statement of Need and Reasonableness which shall be prefiled pursuant to HE 105. The Statement of Need and Reasonableness shall be a document containing, at the

minimum, a summary of all of the evidence and argument which is anticipated to be presented by the agency at the hearing justifying both the need for and the reasonableness of the proposed rule/rules, including citations to any statutes or case law to be relied upon, citations to any economic, scientific or other manuals or treatises to be utilized at the hearing, and a list of any expert witnesses to be called to testify on behalf of the agency, together with a brief summary of the expert opinion to be elicited. The statement need not contain evidence and argument in rebuttal of evidence and argument presented by the public.

The statement shall be prepared with sufficient specificity so that interested persons will be able to fully prepare any testimony or evidence in favor of or in opposition to the rule/rules as proposed. Presentation of evidence or testimony (other than bona fide rebuttal) not summarized in the Statement of Need and Reasonableness may result in the Hearing Examiner, upon proper motion made at the hearing by any interested person, recessing the hearing to a future date in order to allow all interested persons an opportunity to prepare testimony or evidence in opposition to such newly-presented evidence or testimony, which recessing shall be for a period not to exceed 25 calendar days, unless the 25th day is a Saturday, Sunday, or legal holiday, in which case, the next succeeding working day shall be the maximum date for the resumed hearing.

If the agency so desires, the Statement of Need and Reasonableness may contain the verbatim affirmative presentation by the agency which may then be either read at the hearing or, if all persons appearing at the hearing have had an opportunity to review the statement, may be introduced as an exhibit into the record as though read. In such instance, agency personnel or other persons thoroughly familiar with the rules and the agency's statement shall be available at the hearing for questioning by the Hearing Examiner and other interested persons.

3. HE 105 H. For the reasons stated by the Hearing Examiner at page 15 of his report, this rule will be amended to read as follows:

> The names of agency personnel who will represent the agency at the hearing together with the names of any other witnesses solicited by the agency to appear on its behalf.

4. HE 106 A. The Hearing Examiner's recommendation has been adopted. However, the DNR proposal for a separate register has merit and is found to be reasonable, needed and an insubstantial change. The rule, as adopted, amends the proposed language accordingly.

5. HE 112. This rule relates to the effective date of the amendments to these rules. The Hearing Examiner's proposed amendment is herewith adopted with the addition of the words

"of these rules" to be inserted so that the rule reads as follows:

> These rules shall be effective for all rule proceedings initiated five working days after publication of these rules in the State Register.

Clarification is thought to be needed by the addition of the language in order that it be clear that it is publication of these rules and not publication of another agency's proposed rules which would "trigger" the effective date of these rules.

6. HE 202 B. The Hearing Examiner's recommendation of adding the words "by the agency in the Notice of and Order for Hearing" following the words "named as a party" is adopted so that the proposed rule, according to the Hearing Examiner, is reasonable.

7. HE 202 D. The Hearing Examiner found that allowing deposit of papers to be served with the Central Mailing Section, Publications Division, Department of Administration would delay delivery and recommended either deleting the amendment or adding a day to service in HE 209 B. It is found to be reasonable to allow state agencies to utilize Central Mailing but also that the Hearing Examiner is correct in his finding relating to slower service. Therefore, the rule as proposed will be adopted but HE 209 B. will be amended accordingly. As the proposed amendments relate to "Service", it is hereby found that amending HE 209 B., though not proposed originally, would not be a substantial change in that the subject of both rules relates to "service" and that the proposal obviously was raised in such a manner so as to invite reaction, and does not result in a rule substantially different from that proposed.

8. HE 203 C. 8. As reported by the Hearing Examiner, the proposed amendment to this rule was the subject of much comment. The comments and the Hearing Examiner recommended that limitations be placed on the ability of the Hearing Examiner to call witnesses. To amend the proposed amendment as recommended would, in the opinion of the Chief Hearing Examiner, result in a substantial change in the rule as proposed requiring new notice and hearing. As indicated in the Statement of Need, it is believed that the authority to call witnesses presently exists pursuant to the provisions of HE 203 C. 11. Therefore, the proposed amendment is hereby withdrawn and

will be raised again when the Office next proposes to amend its rules.

9. HE 204. This rule as proposed to be amended drew numerous comments. The Hearing Examiner's recommendations are adopted where specific. The Hearing Examiner has recommended several options necessitating additional findings. The term "service" will be substituted for the word "issuance" in the introductory paragraph for the reasons spelled out in the Hearing Examiner's report. The title of 204 A. will also be changed to "Notice and Order" as recommended. The Examiner, at page 30, recommends deleting the term "commencement" from the last sentence in 204 A. 8 and inserting the term "issuance". That alone would not be enough. The term "contested case" must also be deleted and the words "Notice of and Order for Hearing" inserted. In 204 A. 9, the Examiner's recommendation for deleting the word "the" and inserting the word "existing" in the first line is adopted. In 204 B., the Examiner has given the Office a recommendation and an optional recommendation. In the first instance, adding the words "in addition" at the beginning of the second sentence as such would make no sense. Instead, in order to answer the concerns of the Securities Division that they need not obtain permission to issue a Cease and Desist Order with a seven day notice (as provided by statute), the rule will be amended by making it into one sentence. Thus the entire rule will be prefaced by the words "unless otherwise provided by law". The period at the end of the first sentence will become a comma and the words "provided, however, that" will be inserted after the comma. The words "if not contrary to statutory requirements", no longer needed, will be deleted. The second, proposed by the Board of Nursing, is not adopted. The Examiner discusses the proposed deletion of existing rules 204 (c) and (d) (p. 32) and raises an excellent point relating to the existing rule allowing and seemingly encouraging agencies to order additional notice. The comments are well taken and, therefore, the proposal to delete exisitng 204 (d) is withdrawn as it is found that such additional notice should be en-

couraged rather than discouraged. The rule will be renumbered at 204 C and the remaining rules renumbered accordingly. Proposed rule 204 D. (to be renumbered 204 E.) will be amended as recommended by the Examiner (p. 34) by adding the words "prior written" to the rule.

10. HE 205. The Examiner recommended that any changes made in 204 A. 8 should also be reflected here. As no changes are being made in 204 A. 8 which would necessitate changes here, none are made. Although the Examiner has indicated that it might be "desirable" to insert certain language, as it was not recommended, it will not be adopted as he has found the original language both needed and reasonable.

11. HE 206. This rule will be modified, as recommended, to conform to the changes made at HE 204 A. 5.

12. HE 209 B. As a result of the amendments adopted in HE 202 D., it is necessary to amend this rule relating to computation of time for service by mail by adding the following sentence to the existing rule:

> In the event an agency chooses to utilize the Central Mailing Section, Publications Division, Department of Administration, four days shall be added to added to the prescribed period.

13. HE 210. Unless otherwise discussed herein, the Examiner's recommendations are adopted. In the proposed amendments to HE 210 E, the provision relating to presentation of evidence "with or without benefit of oath" is withdrawn for the reasons enumerated by the Examiner and due to his finding of a failure to justify the need and reasonableness (p. 39).

14. HE 211. The Examiner's recommendations on this rule are adopted. However, in reviewing the rule it appears to be internally inconsistent. The rule calls for motions for continuances to be determined by the Chief Hearing Examiner. However, the second time the term Hearing Examiner is used, the word "Chief" was inadvertently left out. The addition is found to be needed, reasonable and does not result in a substantial change.

15. HE 213. As the Examiner pointed out, several comments received merit attention. For the reasons previously given, the

words "if the agency is not a party" will be stricken. For the reasons stated in the Examiner's report, the rule will be adopted to read as follows:

> B. Motions. Any application to the Hearing Examiner for an order shall be by motion which, unless made during a hearing, shall be made in writing, shall state with particularity the grounds therefor, and shall set forth the relief or order sought. Motions provided in these rules require a written notice to all parties and to the agency to be served five days prior to their submission to the Hearing Examiner, except where impractical. The Hearing Examiner may, at his discretion, require a hearing before an order on the motion will be issued. All orders on such motions, other than those made during the course of a hearing, shall be in writing.

It is found that it is necessary to include the words "other than those made during the course of a hearing" in order to insure that written orders are not required during the hearing stage, a requirement which would lead to delay.

16. HE 214. Based on the Examiner's recommendation, HE 214 C. will be amended to include the additional standards relating to discovery motions. Therefore, the second to last sentence will be amended to read as follows:

> Upon the proper motion...of a party's case, are not for purposes of delay, and that the issues or amounts in controversy are significant enough to warrant extensive discovery.

17. HE 217. The Office had proposed an entirely new rule relating to Offers of Proof at 217 C. 7. The proposal drew much comment. As was stated at the hearing, Examiners have always allowed such offers in the past. The proposed rule would not alter that practice. It would, however, create a heavy burden to satisfy and would lead to lengthier transcripts by requiring that such offers be taken in full. Therefore, the rule is withdrawn in its entirety. The rest of the proposed amendments to HE 217 will be adopted as recommended by the Hearing Examiner, as is more fully described below.

In HE 217 F, the following new criteria will be added to the rule:

> 3. Whether or not the delay between the ruling and the motion to certify would adversely affect the prevailing party; or
>
> 4. Whether to wait until after the hearing would render the matter moot and impossible for the agency to reverse or for a reversal to have any meaning; or

5. Whether it is necessary to promote the development of the full record and avoid remanding.

ORDER

NOW, THEREFORE, it is hereby ordered that the rules as recommended for adoption by the Hearing Examiner, as modified herein, be adopted.

Dated this 10th day of May, 1978.

Duane R. Harves

DUANE R. HARVES
Chief Hearing Examiner

ADMIN 1000 (Rev. 1/78)

STATE OF MINNESOTA

DEPARTMENT Attorney General

# Office Memorandum

TO : J. Michael Miles,
Assistant Attorney General

DATE: June 6, 1978

425

FROM : Lee E. Sheehy,
Special Assistant
Attorney General

PHONE: 296-1288

SUBJECT: In the Matter of the Proposed Amendments to the Rules of the Office of the Hearing Examiners Relating to Rulemaking Procedures and Contested Cases and the Adoption of Procedures for Hearing Relating to the Routing or Siting of Large Electric Transmission Facilities.

As we discussed, I am returning the portion of rules in the above-captioned matter relating to rule-making and contested cases which have been submitted for review as to form and legality. These rules have not been approved for the following reasons:

1. HE 105 H, as adopted, is clearly amended beyond the language proposed and published in the State Register. See Order Adopting Rules, Paragraph 3, and Final Hearing Examiner's Report, Paragraph 17. However, this change from the amendment proposed in the State Register is not reflected in the Adopted Rules Amendments, although it must be given the language in the first paragraph of the Adopted Rules.

A similar problem exists for HE 209A. Specifically, HE 209A proposes new language as published in the State Register. The Hearing Examiner recommended that the amendment not be adopted. See Final Hearing Examiner's Report, Paragraph 36. The Order Adopting Rules adopts all such recommendations unless otherwise expressly noted; and no express exception is made in the Order Adopting. Yet the language proposed in the Register is not stricken in the Adopted Rules, as would be required to implement the Hearing Examiner's recommendation.

2. HE 111, as recommended and proposed for adoption, improperly varies the statute. Specifically, the rule proposed for adoption reads in part as follows: "... (s)hould Chief Hearing Examiner find that the agency failed to meet the requirements of Minn. Stat. Ch. 15 or these rules, then the Chief Hearing Examiner shall forthwith notify the agency..." (underlining in original) As noted in the record by several parties, the reference to "Ch. 15" goes beyond the statutory reference to Minn. Stat. § 15.0412, Subd. 4. Further, the rule as written appears improper on its face. For example, the Chief Hearing Examiner could under the rule proposed for adoption require the agency to reconvene a hearing for its failure to comply with the Data Privacy laws or the Official Records Act, both statutory provisions contained in Minn. Stat. Chapter 15. We need not definitively answer the question of

whether such an action by the Chief Hearing Examiner would be proper under the language of Minn. Stat. § 15.0412, Subd. 4, relating to the agency's "fullfilling any relevant substantive or procedural requirement imposed on the agency by law or rule." (Emphasis added.) Suffice to say, it is a genuine question which remains unanswered by the record. For the above reasons, the reference to "Minn. Stat. Ch. 15" improperly varies the statute and must be stricken or replaced by "Minn. Stat. § 15.0412, Subd. 4".

3. The record relating to HE 204A regarding the "unauthorized practice of law" issue appears incomplete. At the hearing, a member of the public recommended that HE 204A be amended to prevent the proposed amended rule from being interpreted as indirect justification for actions which may constitute the unauthorized practice of law. To prevent this possibility, the member of the public suggested adding certain language; and, according to the Hearing Examiner's Report, Paragraph 27, page 27, the Chief Hearing Examiner supported the recommendation. Yet the rule proposed for adoption does not include such language. A serious question of law arises as to whether HE 204A, as proposed for adoption, does improperly encourage the unauthorized practice of law. See Minn. Stat. Section 481.02. This matter must be clarified before the amendment can be approved. This problem is also applicable to HE 206 as proposed for adoption.

4. An inconsistency exists between the requirements of HE 205 and the notice procedure relating to such requirements pursuant to HE 204A (8). HE 204A (8) only requires the Notice of Hearing to advise parties that a Notice of Appearance must be filed if the agency is a party. However, HE 205 requires a Notice of Appearance regardless of whether or not the agency is a party. The inconsistent result may present a due process problem. Since the rules are being returned for other reasons, this office wishes additional findings on this matter. Finding 10 in the Order Adopting Rules is inadequate as it seems to misread or misinterpret the Hearing Examiner's finding in Paragraph 34 of his report. The first and last paragraphs of Paragraph 34 clearly indicate that the Hearing Examiner recommends that HE 205 and HE 204A (8) should be consistent.

5. The appearance of the words "at his discretion" without accompanying criteria upon which to exercise such discretion presents problems in HE 210C and HE 217G (2) (a) (1). As the Hearing Examiner noted in his report when presented with a similar problem, "...the rule should either eliminate the discretion of the hearing examiner recommended by the office (in which case, no standards need be set forth), or it should retain the discretion, but set forth all of the standards intended for use in regulating the exercise of the discretion". See Hearing Examiner's Report, Paragraph 45. Further consideration of this matter is required.

6. The Pollution Control Agency raised concerns relating to HE 215D which the Hearing Examiner acknowledged as meritorius. The record appears incomplete in its disposition of those concerns. Specifically, PCA expressed concern that the Hearing Examiner's rule relating to "proprietary information" could be read to preempt or conflict with PCA's specific statute relating to non-disclosure of propriety information. The Hearing Examiner recognized the merit of this concern and recommended:

> In addition, the concern of the PCA ought to be addressed so that there is no dispute as to how an agency's statute interfaces with the rule. Hearing Examiner's Report, Paragraph 45.

The Order Adopting Rules and Adopted Rules do not dispose of this issue. I have retained copies of all materials relating to this matter. Please do not hesitate to call and discuss those materials of this memorandun with me.

LES/dw
cc To Duane Harves

STATE OF MINNESOTA
OFFICE OF HEARING EXAMINERS

FOR THE OFFICE OF HEARING EXAMINERS

In the Matter of the Proposed Amendments to the Rules of the Office of Hearing Examiners Relating to Rulemaking Procedures and Contested Cases and the Adoption of Procedures for Hearings Relating to the Routing or Siting of Large Electric Transmission Facilities.

FINAL REPORT OF HEARING EXAMINER

The above-entitled matter was heard by Allan W. Klein on the following dates and at the following places:

October 11, 1977 - William Mitchell College of Law
St. Paul, Minnesota

October 12, 1977 - Duluth City Hall
Duluth, Minnesota

October 13, 1977 - Bemidji State College
Bemidji, Minnesota

October 17, 1977 - Vocational-Technical Institute
Alexandria, Minnesota

October 19, 1977 - Rochester Community College
Rochester, Minnesota

October 20, 1977 - Mankato State University
Mankato, Minnesota

This report deals only with the proposed amendments to the existing rules relating to rulemaking and contested case procedures, HE 101-222. It does not deal with the proposed rules for the routing or siting of large electric transmission facilities, proposed HE 401-418. Those proposed rules were the subject of a Partial Report of Hearing Examiner dated January 13, 1978.

Duane R. Harves, Chief Hearing Examiner, and J. Michael Miles, Assistant Attorney General, appeared on behalf of the Office of Hearing Examiners (hereinafter referred to as the "Office"). Approximately 85 people attended the hearings and signed the register. Each hearing session continued until all interested groups and persons had an opportunity to be heard.

Pursuant to Minn. Stat. § 15.0412, subd. 4 (1976), as amended by Laws of Minnesota 1977, Chapter 443, § 2, this Report shall be available to all affected persons upon request for at least five working days before the Office takes any final action on the proposed rules. If the Office proposes to adopt the rules, either as originally proposed or as recommended to be amended by this Report, it shall submit the complete record to the Chief Hearing Examiner no sooner than five working days following receipt of this Report. It shall include the rules as originally proposed and as proposed for adoption in final form. The Chief Hearing Examiner shall complete his review and submit his Report to the Office on the issues of substantial changes in the rules and compliance with Minn. Stat. § 15.0412 within ten calendar days. Thereafter, the Office will be responsible for filing the rules with the Attorney General.

Based upon the transcript of the hearings, the exhibits and the comments received both before and after the hearings, the Hearing Examiner makes the following:

## FINDINGS OF FACT

Historical Background and Procedural Requirements.

1. On May 9, 1977, the Office published in the State Register (1 State Register 1600) a Notice of Intent to Solicit Outside Opinion indicating that it would be proposing amendments to its existing rules of procedure governing all rulemaking and contested case hearings. The Notice invited persons interested in such rules to submit data or views by June 15, 1977.

2. On June 2, 1977, Laws of Minnesota 1977, Chapter 443 (hereinafter "Ch. 443") was approved. All but one of the sections of that act became effective on June 3, 1977. The act made various changes to the Administrative Procedures Act, Minn. Stat. Ch. 15 (1976). The changes related primarily to rulemaking procedures.

3. On September 6, 1977, the Office published in the State Register ( S.R. 382) its Notice of Hearing and Rules as Proposed.

4. On September 7, 1977, the Office 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.

5. On September 9, 1977, the Office 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 Secretary of State's Certificate and list;
(e) The affidavit of mailing;
(f) The Statement of Need and Summary of Evidence;
(g) The names of personnel who will represent the agency.
(h) A copy of the State Register in which the Notice of Hearing was published.
(i) A copy of the rules proposed for adoption.
(j) All materials received in response to the Notice of Intent to Solicit Outside Opinion.

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

6. As was announced at each of the hearing sessions, the record remained open through November 9, 1977. The last transcript of the hearings was received on November 16, 1977. Some 22 comments were filed following the hearing, roughly half of which dealt with the proposed amendments to the existing rules.

STATUTORY AUTHORITY

7. Minn. Stat. § 15.052, subd. 4, is the basis for these proposed amendments. Ch. 443 amended the section to add subpoena power, but otherwise left the rulemaking language substantially intact. That statute states in relevant part:

> The chief hearing examiner shall promulgate rules to govern the procedural conduct of all hearings relating to both rule adoption, amendment, suspension or repeal hearings and contested case hearings. Such procedural rules for hearings shall be binding upon all agencies and shall supersede any other agency procedural rules with which they may

be on conflict. The procedural rules for hearings shall include in addition to normal procedural matters provisions relating to recessing and reconvening new hearings when the proposed final rule of an agency is substantially different from that which was proposed at the public hearing. The procedural rules shall establish a procedure whereby the proposed final rule of an agency shall be reviewed by the chief hearing examiner to determine whether or not a new hearing is required because of substantial changes or failure of the agency to meet the requirements of section 15.0412, subdivision 4.

Proposed HE 102 B.: Order for Hearing

8. The only change proposed for this subdivision was the re-ordering of words to clarify the fact that there was no need for an agency to submit to the Chief Hearing Examiner both an "Order for Hearing" and a separate document entitled "Proposed Order for Hearing." Only the former is needed, but experience had demonstrated that some agencies believed that both were required. The Department of Public Welfare indicated a concern that the proposed change did not adequately clarify the issue, and suggested alternative language (Public Ex. N-2). Unfortunately, the alternative language appears to create more problems that it would solve. The change proposed by the Office is found to be both needed and reasonable, and is recommended for adoption.

Proposed HE 102 C.: Notice of Hearing

9. HE 102 C.6. The only substantial change from the existing rule is made in proposed HE 102 C.6., which presently mandates certain specific language regarding registration of lobbyists with the Ethical Practices Board. The proposed change would eliminate that mandatory language. According to the Office's Statement of Need and Summary of Evidence (hereinafter "Statement"), the reason for the deletion is that the present language no longer conforms to existing statutes. The Statement indicates that new mandatory language is not being suggested because of frequent amendments to the statute, and because Minn. Stat. § 15.0412, subd. 1 (as amended by Ch. 443), prohibits the adoption of a rule which duplicates language contained in Minnesota Statutes unless it is determined that duplication of the language is crucial to the ability of a person affected by a rule to comprehend its meaning and effect. However, the Statement goes on to say that it is the intent of the Office to require some notification based upon whatever the Ethical Practices Board indicates is appropriate. A comment from the Department of Health (Public Ex. Y) indicated that if such were, in fact, the intent of the Office, then the Office must include it as a rule. The comment went on to state that it was best to allow each agency to develop its own statement. Douglas Skor (Pub. Ex. R) suggested that the proposal was too abbreviated, and that non-lobbyists might be inhibited from appearing at rulemaking hearings because they would be unsure of whether they are, or are not, required to register. He recommended that the proposal conform to HE 106 C., which requires the Hearing Examiner to advise persons at the hearing of the registration requirements. The Administrative Law Committee of the Attorney General's office (hereinafter the "Committee"), in Pub. Ex. W, recommended that the statutory definition of a lobbyist be included, as well as an indication questions should be addressed to the Ethical Practices Board, giving its address and telephone number.

It is found that the Office's proposed rule is needed, but that it is unreasonable in its present form in that if the Notice is to contain any reference to lobbyists, the statutory definition of a lobbyist must be set forth to avoid the "chilling effect" which Skor noted. In addition, if the Office were to follow through on its stated plan of requiring specific language, then that language must be included in the rule. To avoid inflexibility, it is recommended that the Committee's suggestion be adopted so that the paragraph would read as follows:

> 6. A statement advising interested persons that lobbyists must register with the State Ethical Practices Board, which statement shall contain the statutory definition of a lobbyist and indicate that questions should be directed to the Board, giving the address and telephone number thereof.

With this change, the proposal is found to be reasonable.

10. HE 102 C.7. The existing rule requires that the Notice include a statement that written material may be submitted and recorded in the record for 20 days after the public hearing ends. It is proposed that the rule be amended to require a notice which states that written material may be submitted five working days after the public hearing ends, or for a longer period, not to exceed 20 days, if ordered by the Hearing Examiner. The Statement indicates that this change is needed to conform the rule to changes made by Ch. 443. There is no question that Ch. 443 did amend Minn. Stat. § 15.0412, subd. 4 (1976) by requiring that the record remain open "for five working days after the public hearing ends, or for a longer period not to exceed 20 days, if ordered by the hearing examiner." The Board of Nursing (Pub. Ex. M-2) recommended that the rules specify that the extended period not exceed 20 calendar days, in order to be consistent with proposed HE 106 B. The Committee (Pub. Ex. W) also recommended the insertion of the word "calendar" for purposes of clarity. Such a change would not only clarify the matter, but also be consistent with Minn. Stat. § 645.15, regarding computation of time. Carter/Locey & Associates (Pub. Ex. J) urged that the amendment not be adopted as proposed because a shorter record period would impinge or impair the right of affected citizens to fully and effectively represent their interests in rulemaking proceedings. Such an argument should be made to the Legislature, not to the Office, because it is the Legislature which has mandated the shorter period.

The Office's proposal is needed to respond to the statutory change, and is reasonable. However, for purposes of clarification, it would be desirable to insert the word "calendar" into the last phrase of the proposed amendment.

11. HE 102 C.8. The Office has proposed a completely new rule which would require the Notice of Hearing to contain certain specified language relating to public notification of the date on which the Hearing Examiner's Report will be available, as well as public notification of the date on which the record has been submitted to the Attorney General by the agency. The Statement indicates that this proposal is a direct result of changes made by Ch. 443. Again, § 15.0412, subd. 4, was amended by addition of the following language:

> The agency shall give notice to all persons who requested to be informed that the hearing record has been submitted to the attorney general.

Chapter 443 did not make changes in that part of Ch. 15 which required that the Hearing Examiner's Report "shall be available to all affected persons upon request" before the agency takes any final action on the rule. Although not specifically mandated by Ch. 443, the Office's proposal to require a statement in the Notice of the fact that persons may request to be notified of the

date on which the Hearing Examiner's Report will be available does provide a substantive method of implementing the legislative mandate that the Report be available.

Both of the notice requirements were generally supported, but commentators did suggest numerous changes to the proposed language. Cooperative Power Association (Pub. Ex. T-2) was concerned about the use of the word "right" in each of the first two sentences of the proposed notice. It was proposed that this be modified by substituting the words "may request that", so that it is clear that the burden of requesting notification is upon the interested person. George A. Beck (Pub. Ex. H), the Department of Health (Pub. Ex. Y), and the Committee (Pub. Ex. W) all were concerned with the fact that the rule does not clearly place the burden upon the agency to notify members of the public when it has submitted the hearing record to the Attorney General. The Department of Health went beyond this, suggesting that any written notice after the hearing be given to the agency, rather than to the Hearing Examiner. John M. Broeker (Pub. Ex. L) stated that the rule should also require notification in the case of resubmissions by the agency to the Attorney General. Douglas L. Skor (Pub. Ex. R) requested that the agency be required to inform interested persons of what action it took, and make available to the public copies of its submission to the Attorney General. He, along with others, also felt that the agency should be required to immediately give notice of its submission to allow the public a reasonable opportunity to submit material to the Attorney General.

It is found that the Office's proposal is both needed and reasonable. None of the comments raised matters which are of such importance as to negate that conclusion. However, the Office's proposal does omit some matters and is less than precise on others. It is therefore recommended that the paragraph be revised to read as follows:

> 8. A separate paragraph which shall read as follows: Notice: Any person may request notification of the date on which the hearing examiner's report will be available, after which date the agency may not take any final action on the rules for a period of five working days. Any person may request notification of the date on which the hearing record has been submitted (or resubmitted) to the Attorney General by the agency. If you desire to be so notified, you may so indicate at the hearing. After the hearing, you may request notification by sending a written request to the Hearing Examiner (in the case of the Hearing Examiner's Report), or to the agency (in the case of the agency submission or resubmission to the Attorney General).

12. HE 102 C.9. This is a completely new rule which requires that the Notice contain certain specified language notifying interested persons that the Statement of Need and Reasonableness will be available for review at the agency and at the Office, that it will include a summary of all of the evidence which will be presented by the agency at the hearing, and that copies may be obtained from the Office at a minimal charge. An early submission from the Department of Corrections (Pub. Ex. A) requested that the proposal be modified to permit publication of the Statement of Need and Reasonableness in the State Register if an agency elects to publish it there. The Department stated that it believed that it might be worthwhile to so publish its Statement, to avoid spending numerous hours prior to the hearing (and at the hearing) informing the public of why it believed that its proposed rules were needed. They also suggested that perhaps it should be mandatory for agencies to publish their statements in the State Register. It is found that any requirement that the Statement be published would be a substantial change requiring another hearing pursuant to Minn. Stat. § 15.052, subd. 4.

Of course, there is no bar to an agency so publishing its Statement should it chose to do so. Whether the proposed rule ought to be amended to permit such publication in lieu of making copies of the Statement available is a close question, but from comments made by the public on other sections of these proposed rules, the Examiner sensed a definite dissatisfaction with availability of the State Register. Therefore, it is not recommended that the publication be allowed to preempt required distribution.

A more substantial problem with the proposed rule was raised by the Board of Dentistry (Pub. Ex. U), and the Department of Health (Pub. Ex. Y). They both argued that any requirement for prefiling or distribution of the Statement of Need and Reasonableness was an attempt by the Office to exceed its statutory authority. They pointed out that nowhere in Ch. 15, as amended, is there any requirement that such a Statement be prepared, filed, or distributed. The present rules of the Office do require prefiling [Minn. Rule HE 105(e) and (i)]. The authority to adopt the present rule came from Minn. Stat. § 15.052, subd. 4 (1975 Supp.), which was quoted earlier in Finding No. 7. The objectors argue that not only is there an absence of specific statutory authority to adopt such a rule, but that § 15.0412, subd. 4, only requires the agency to make its affirmative presentation of facts establishing the need for and reasonableness of the rule "at the public hearing". To follow the objectors' recommendation to its logical conclusion would result in the elimination of what has become an integral part of the rulemaking process. The public had no notice of the possibility that the Statement of Need and Reasonableness might be eliminated, and it would seem that basic due process requires that this question be addressed in a separate proceeding. Therefore, it is specifically found that the Chief Hearing Examiner does have authority, pursuant to §§ 15.052, subd. 4, and 15.0413, subd. 1, to continue to require the prefiling of Statements of Need and Reasonableness. Should the objectors desire to pursue their contention, they are advised to consult § 15.0415 ("Petition for Adoption of Rule"), or § 15.0416 ("Determination of Validity of Rule"), or make their proposal following the next Notice of Intent to Solicit Outside Opinion.

Other comments with regard to this proposed change came from MACI, which suggested (Pub. Ex. K) that the standard used for charging the public for copies of these statements be changed from "a minimal charge" to "a minimal cost recovery charge". They suggested that this be done in order to insure that the charge is a reflection of actual cost recovery, and no more. Such a proposed change would be in keeping with the spirit of these rules, which is to provide as much information as possible to the public at a reasonable cost. However, it is specifically found that the language proposed for adoption by the Office is both needed and reasonable, but that the Office may elect to substitute the language proposed by MACI.

13. HE 102 C.10 This proposed addition to the Notice would require a statement in writing relating to the expenditure of public moneys by local public bodies. The Pollution Control Agency (Pub. Ex. O) pointed out that § 15.0412, subd. 7, requires such a statement only if the adoption of a rule by an agency will require such expenditures. PCA recommended that the proposal be amended to read as follows:

> If required by Minn. Stat. 15.0412, subd. 7, a statement relating to the expenditure of public moneys by local public bodies.

A similar comment was made by the Committee (Pub. Ex. W) and by the Department of Health (Pub. Ex. Y). In its Statement, the

Office asserted that the proposed language "is a direct result of legislative mandate". A review of the statute indicates that not to be the case, and therefore, it is found that to the extent that the Office's proposed rule requires a statement when the statute does not require one, it is an unreasonable burden upon agencies. Therefore, the above-quoted language from the PCA is recommended as a substitution for the Office's proposed language. With that change, the rule is found to be both needed and reasonable.

14. HE 102 D. This amendment to the existing rule would make a number of different changes. Most were non-controversial, although one, dealing with barrier-free facilities for hearings, generated a great deal of comments. The non-controversial changes will be discussed first.

The rule, as proposed, would delete the present requirement that the agency file a statement with the Office relating to the number of persons expected to attend the hearing. The proposal also changes the existing rule by deleting the present requirement that the agency estimate the length of time that will be necessary to conduct the hearing in favor of a requirement that the agency inform the Office of the length of time that will be necessary for the agency to present its evidence at the hearing. The proposal would add a requirement that the agency file a statement disclosing what additional notice, if any, has been given beyond the statutorily required notice. Finally, the existing rule would be modified by adding a final sentence which states that failure of the agency to comply with the advice of the Hearing Examiner relating to time and place of the hearing may result in a finding that the agency has failed to fulfill all relevant, substantive and procedural requirements of law or rule.

George A. Beck (Pub. Ex. H) stated that, in his experience, having an estimate of the number of persons expected to attend and the length of time for the entire hearing was helpful in preparing for a hearing. He also stated that he had found such estimates to be reasonably accurate in the past, and recommended that they be retained. The Office's Statement disagreed, stating that many times an agency has found it impossible to predict the length of time for the entire hearing, although they have been able to accurately predict the length of time it will take the agency to present its own case. The Statement makes no argument in favor of deleting the requirement that an agency estimate the number of persons expected to attend the hearing. With respect to the substitution of an estimate of the length of time necessary for the agency's case for the present requirement of an estimate of the length of time to conduct the entire hearing, it is found that the Office's proposal is both needed and reasonable. Should the Office desire to attempt to gather more information, there is no reason why it could not require its proposal as well as suggesting that the agency attempt to estimate the length of time required to conduct the entire hearing without making that latter suggestion a requirement. The Office gave no evidence to support its deletion of the requirement that the agency estimate the number of persons expected to attend, and therefore, it has not supported the deletion with an affirmative presentation of facts. That requirement should be retained. The addition of language relating to extra-statutory notice is really determined by the discussion below, regarding such notice. See HE 103. Based upon the Findings contained in that discussion, it is found that the Office's proposed language for HE 102 D., referring to such notice, is needed and reasonable.

The Office proposed that the Notice contain a statement by the agency "that the facility where the hearing is to be conducted is free of mobility barriers in accordance with Executive

Order No. 148." The proposed rule also contains language warning agencies of the consequences of failing to comply with the advice of the Hearing Examiner regarding location and timing of hearings. Although commentators tended to lump their responses to these proposals together, they are really two separate proposals, and therefore, will be treated separately below.

With respect to the proposed requirement that the agency state that the facility where the hearing is to be conducted "is free of mobility barriers in accordance with Executive Order No. 148", the Office argued in its Statement that the requirement was needed to insure that the Office did not violate the Executive Order. In addition, the Office stated that § 15.052, subd. 3 (1976) gives to the Hearing Examiner the duty to

> . . . advise an agency as to the location at which and time during which a hearing should be held so as to allow for participation by all affected interests. . . .

Executive Order No. 148, issued on May 5, 1977, states that it is the policy of the State to support a goal of maximum independence for its elderly and disabled citizens, and to therefore provide a barrier-free environment, consistent with existing state and federal legislation. The operative sections of the Order read as follows:

> 1. That all new state-owned buildings shall meet the state building code requirements on accessibility when constructed. In addition, all existing buildings will be brought to handicapped code standards as they are remodelled.
>
> 2. Space in buildings leased for state operations shall be free of mobility barriers.
>
> 3. All meetings and conferences when sponsored by state agencies in non-state facilities shall be held in hotels, motels, restaurants, and other locations that are free of mobility barriers.

The record contains a number of statements questioning the Office's statutory authority to adopt the rule, its reasonableness, and the applicability of the Executive Order to hearings. For example, the Board of Dentistry (Pub. Ex. U) argued that the reference to the Order ought to be deleted, because it applies only to meetings and conferences held in non-State facilities and does not apply to hearings or to state-owned facilities. The Board also argued that it is the agency, not the Office, that would be in violation of the Order. On the other hand, the Department of Labor and Industry (Pub. Ex. P) felt that it was inappropriate to require the agency to bear the responsibility for compliance with the Executive Order when the Office "has the authority to establish the location at which the hearing is held." They suggested that the agency can assure compliance only when it determines the city at which the hearing will be held and checks the facility within that city. The Department of Natural Resources (Pub. Ex. X-2) made two points. The Department argued that if the rule means that no hearing shall be conducted in a building which is not free of mobility barriers, then that is what the rule should say. However, if that is the intent of the rule, the Department argued that it goes beyond the Order, since the Order applies only to hearings conducted in non-State facilities. The second point made by the Department was that the proposed rule may conflict with statutes, citing certain statutes which require that hearings be held in a specific location (such as the county seat of each affected county). It was pointed out

that there may well be some county seats that have no barrier-free buildings available for public hearings, and therefore, the rule would not be reasonable. Senator Wayne Olhoft, who strongly favored the spirit of the proposed addition, stated that in several towns in his district, there simply are not any barrier-free facilities (Tr. 4-79). He, and others, argued that a balance had to be struck between effectively denying some access to a hearing due to barriers, and effectively denying others access to a hearing by holding it in a facility, albeit barrier-free, located many miles from the affected area.

A similar provision was contained in the Office's proposed rules relating to routing or siting of large electric transmission facilities. Judicial notice is taken of the fact that by memo of March 13, 1978, pursuant to Minn. Stat. § 15.0412, subd. 4, the Attorney General found that such a requirement "is beyond the authority for these rules", and directed that it be deleted. In those rules, the Office complied with this finding, and thus, it is recommended that all references to barrier-free facilities be deleted from these rules.

Still remaining is the question of whether the Office has justified its proposal to include in the rule a statement that failure to comply with the advice of the Hearing Examiner may result in a finding that the agency has failed to fulfill all relevant, substantive and procedural requirements of law or rule. The Securities Division of the Department of Commerce (Tr. 1-32) recommended deletion of the language, arguing that Ch. 15 gives the Office only an advisory role, rather than making the Office's advice binding upon the agencies. Essentially the same point was made by Commissioner Sasseville of the Public Service Commission (Tr. 1-35), George A. Beck (Pub. Ex. H), the Board of Dentistry (Pub. Ex. U), and the Department of Health (Pub. Ex. Y). However, the latter two agencies, as well as the Department of Natural Resources (Pub. Ex. X-1), suggested that the rule should establish criteria for siting of hearings. In particular, criteria were requested with respect to the question of when hearings should be held in places other than the metropolitan area. The Department of Health commented as follows:

> ". . . The Department shares the concerned expressed through the proposed rule to assure that the public is provided a meaningful opportunity to participate in the rulemaking process. We also realize that the Office of Hearing Examiner plays an important role in this phase of a rulemaking hearing and that input and suggestions are important. To more fully promote this role, we suggest that the rule contain criteria to assist in selecting times and places for a hearing; particularly in situations where the Hearing Examiner encourages the holding of hearings outside the Twin Cities' area. Examples of some of the criteria would be: The number of comments submitted prior to the hearing; the complexity and significance of the proposed rule; the geographical location of the affected parties; an indication of the potential controversy of the rule; and the probability of significant public interest in the rules.

The Department of Natural Resources commented that, on at least one occasion:

> . . . twenty percent of the time was absorbed by public comment and the Hearing Examiner response concerning allegations that the hearing is being held at an inconvenient time, on a poorly-chosen

> date, at an inconvenient location, in an inadequate facility. And that parking is lousy. . . . If you feel the public would be better served by more careful scheduling and site selection, I would ask you to establish such specific criteria in your rules, so we can have a target that can be hit rather than continually being pilloried over these matters at the start of each hearing.

John M. Broeker (Pub. Ex. L) supported the proposed change, but suggested that the Office should take the initiative to seek out the information necessary to give the most appropriate "advice". Broeker cited an example of poor timing wherein the principal spokesman for an affected industry was unable to attend a scheduled hearing. Apparently, the agency had made no attempt to contact either the industry's trade association or its recognized spokesman prior to scheduling the hearing.

It is found that the use of the word "advise" in Minn. Stat. § 15.052, subd. 3 (1976), implies concurrent authority to set hearing locations and times. This authority is shared by the Office and the agency which is proposing rules. It does not vest the Office with exclusive authority in those areas, nor does it deprive the Office of any authority. Given this concurrent authority, it is found that the rule does not exceed the Office's statutory grant of power. Based upon past experience of the Office, set forth in the record, the vast majority of situations has not led to any questioning of the locations or times suggested by the agencies. Agencies have generally scheduled hearings at appropriate times and places. There have been a few abuses, however, which were cited in the record. Therefore, it is found that the rule, as proposed, is reasonable and needed for those few situations in which agencies do not take into account affected persons or groups of persons in scheduling rulemaking hearings. It is suggested that the Office consider the adoption of criteria, such as those proposed in the quotation above, in order to give some guidance to agencies (and hearing examiners) as to when the Office would find proposed times and locations to be unreasonable. If the adoption of such criteria is found to be a "substantial change", then it is recommended that the Office include them in its next rulemaking proceeding.

Proposed HE 103: Notice

15. Substantial comment resulted from the Office's proposal to extend the scope of persons who should be given notice beyond those who are required to be given notice pursuant to statute. The Office proposes to add to the rule the following language:

> . . . and in addition thereto, the agency should, within reason, attempt to give notice to all other persons or associations known to it to be persons who will be affected by the proposed rule/rules.

The Securities Division of the Department of Commerce recommended deletion of the above-quoted language (Tr. 1-34), arguing that it could be abused by those who seek only to delay the implementation of rules. Commissioner Katherine Sasseville proposed to amend the rule by adding the word "substantially" before the word "affected". William Carstadt, representing Interstate Power Company, supported the general idea of the rule but urged that it be amended to read as follows:

> . . . and in addition thereto, the agency shall, within reason, take appropriate action to attempt to give all other persons or associations known to it to be persons who will be affected by the proposed rule, or rules, opportunity to become aware of the hearings scheduled.

It became clear in subsequent discussion (Tr. 5-193-195) that Mr. Carstadt was attempting to suggest to the Office that methods other than the mailing of a copy of the Notice of Hearing ought to be allowed, so that the goal of widening the scope of persons having notice could be met by other means, such as simply worded newspaper advertisements.

The Minnesota Association of Commerce and Industry (Pub.Ex. K) "strongly concurred" with the proposal, and urged that it be couched in the strongest language possible under existing statutes. The Board of Nursing, on the other hand, argued that the proposal was too vague to be enforceable (Pub. Ex. M-2). In its particular case, there are approximately 40,000 registered nurses who retain non-practicing, rather than active, licenses but are not required to supply current addresses. The Board asked whether it would be expected to attempt a mailing to these people. They proposed that the rule either be deleted, or that there be an addition to the rule stating that failure to comply with the proposed rule would not invalidate a rulemaking proceeding.

The Department of Labor and Industry (Pub. Ex. P) suggested that any attempt to comply with the "gratuitous advice" of the proposed rule would be a frustrating failure. The Board of Dentistry (Pub. Ex. U) requested that criteria be added to guide an agency in determining when and to whom such notices should be given. The Department of Natural Resources again requested that if the rule were to be adopted, it should contain criteria so that it would give an agency "a target we can hit". Finally, the Department of Health (Pub. Ex. Y) also urged that the rule contain minimum standards.

In support of its proposal, the Office cited an example, (and stated that it could cite several others) where an agency could have easily given notice to affected persons, but chose not to. The case cited was that of the Deparment of Natural Resources, which, at the time, was proposing rules on the caging of wild animals in other than public zoos. The rules were directly aimed at "roadside zoos" or tourist attractions located primarily in the northern part of the state. All of the affected businesses were licensed by DNR as Game Farms. None were registered with the Secretary of State to receive notices, and none subscribed to the State Register. The hearing was conducted in St. Paul. The rules, if adopted, would have shut down most, if not all, of these existing businesses. Yet, no notice was given to these affected persons.

It should be remembered that the Office's proposal is really a "non-rule". It does not mandate any additional notice, nor is there any penalty provided for failure to give such additional notice. To the extent that persons seeking delay would attempt to claim that this provision was mandatory, or that it could be enforced, it is specifically found that the agency has not documented its statutory authority to adopt the proposal. However, to the extent that there is no attempt to enforce this standard beyond its present status (merely that of a suggestion), then it is found to be within the statutory mandate of the Office to "see to it that all hearings are conducted in a fair and impartial manner" [Section 15.052, subd. 3 (1976)]. In the case of Welsand v. Railroad and Warehouse Commission, 251 Minn. 504, 88 N.W.2d 834 (1958), the question of the validity of a statutorily-noticed rule and its enforcement against a person who did not receive actual notice of the hearing was placed squarely before the Court. In that case, Welsand's permit as a contract carrier was cancelled by the Commission for violation of a Commission rule, as well as violation of a Commission Order. On appeal,

Welsand argued that the rule was invalid because notice of the public hearing on its adoption was not given to all contract carriers and shippers who would be affected. The Court disagreed, holding that so long as the Commission had followed the statutory requirement, it need not go beyond that. Welsand also argued that despite statutory compliance, the promulgation of the rule was nevertheless invalid on the theory that the statutory provision (which at that time required only mailing to the Sec retary of State's list) does not operate uniformly on all persons similarly situated. The Court disagreed, holding that the notice provision operated uniformly against all persons of the same class, namely, those interested in the Commission's promulgation of rules. None were barred from taking advantage of registration on the Secretary of State's list. The Court went on to state:

> It is not to be overlooked that due process does not require an administrative agency -- here the Commission -- to give notice to all interested parties of a hearing for the promulgation of its rules.

But in the case of Monk & Excelsior v. State Board of Health, 302 Minn. 502, 225 N.W.2d 821 (1975), the Court directed some dicta to a state agency as follows:

> A person dealing with the department is entitled to proper notice of what regulations are being promulgated and are applicable to him. The purpose of the Administrative Procedure Act is to ensure that we have a government of law and not of men. Under that act, administrative officials are not permitted to act on mere whim, nor on their own impulse, however well-intentioned they might be, but must follow due process in their official acts and in the promulgation of rules to defining their operations.

The Welsand case clearly holds that due process does not re quire the giving of notice beyond what is required by statute. The Office has cited no other authority, nor has the Examiner found any, to require the extra-statutory notice suggested by the Office. However, the attitude of the Court in Monk, plus the general thrust of the Act, would indicate that the proposed "non-rule" is consistent with current concepts of due process. Therefore, so long as the proposal is kept in its current, non-mandatory and non-penal form, the Office may adopt it. However, should any person attempt to make it mandatory and enforceable, they must seek such relief from the Legislature. As to its need, the Office has met its burden in the record. As to its reasonableness, it is found that the Office has also met its burden. However, it is recommended that the Sasseville amendment (changing "affected" to "substantially affected") be adopted. The Office may, if it chooses, adopt the spirit of the Carstadt proposal, either using the suggested language, or drafting alternative language embracing the same idea.

Proposed HE 104: Statement of Need and Reasonableness.

16. This is a completely new rule which replaces existing HE 103(e) and (i). However, it goes beyond those existing rules to add new material which the Office, in its Statement, alleged merely reflects what it has been requiring in spite of any specific authority in a rule. Essentially, the rule requires that an agency prefile a Statement of Need and Reasonableness which shall contain, "at the minimum", a summary of all the evidence and argument which will be presented by the agencies at the hearing. It goes on to require that the Statement be prepared with sufficient specificity to allow interested persons to fully prepare for the hearing. Failure to include material in the

Statement would result in the Hearing Examiner, upon motion, recessing the hearing to a future date in order to allow interested persons an opportunity to prepare testimony in opposition to any such newly-presented evidence. Finally, at the option of the agency, the Statement may contain "the verbatim affirmative presentation by the agency" which, if all persons appearing at the hearing have had an opportunity to review, may be introduced in lieu of an oral presentation.

MACI (Pub. Ex. K) strongly supported the proposal and urged that there be no changes made to it. As noted earlier, the Department of Corrections (Pub. Ex. A) suggested that agencies be allowed to publish their Statements in the State Register. The Board of Dentistry (Pub. Ex. U) and the Department of Health (Pub. Ex. Y) both questioned the Office's statutory authority to adopt the rule, pointing out that the proposal, in effect, requires the agency to make its affirmative presentation of facts at least 25 days prior to the hearing, whereas the statute (§ 15.0412, subd. 4) only requires the agency to make its affirmative presentation of facts "at the public hearing". The Office argued, in its Statement, that:

> . . . the purpose behind this new rule is to provide the public an opportunity, well in advance of the public hearing, to review all the evidence and argument the agency proposes to present at the hearing. By providing this advance opportunity to review the agency's case, there can be no justifiable reason for any person to request that the hearing be continued in order for them to review the agency's evidence and prepare rebuttal. Testimony at our initial hearings indicated that many wished the adoption of a rule allowing for such continuances. The 25-day pre-filing requirement was the result of that testimony.

The Office argues that the authority contained in § 15.052, subd. 4, to "promulgate rules to govern the procedural conduct of all hearings" authorizes its prefiling requirement.

It appears to this Examiner that these arguments have all been raised before. While there is some question as to the Office's statutory authority to require prefiling, there is no question but that the Office could, based upon commonly accepted notions of due process, require the recessing of a hearing in order to allow members of the public to properly prepare evidence in rebuttal of the agency's case. Therefore, the conclusions reached by previous Examiners make eminent good sense. The delay and additional expenditure of public effort if such a procedure were to be followed would, in the opinion of this Examiner, render such a procedure unreasonable. No commentator has suggested a better way than that suggested by the Office to satisfy the public's due process right. No commentator provided facts supporting a position that prefiling was so onerous as to render it unreasonable. Therefore, it is found that the concept of prefiling a Statement of Need and Reasonableness does have statutory authority, and is needed.

Once those determinations have been made, the remainder of the proposed rule generally falls into place when viewed from the standpoint of reasonableness. A number of agencies raised questions about their ability to present evidence in rebuttal of evidence presented by the public if the agency's rebuttal evidence was not contained in the original Statement. Reasonableness and due process demand that they be allowed to do so at the original hearing, rather than requiring a recess and presentation of such rebuttal at a later hearing. In order to make

this clear, it is recommended that the words "will be" contained in the sixth line of the proposed rule be deleted, and the words "is anticipated to be" be substituted for them. It is also recommended that the following sentence be placed at the end of the first paragraph. "The Statement need not contain evidence and argument presented by the agency in rebuttal of evidence and argument presented by the public. In addition, it is recommended that the phrase "(other than bona fide rebuttal)" be inserted after the word "testimony" in the fourth line of the second paragraph of the rule.

George A. Beck (Pub. Ex. H), the Board of Nursing (Pub. Ex. M-2), the Board of Dentistry (Pub. Ex. U), the Committee (Pub. Ex. W), and the Department of Health (Pub. Ex. Y) all urged that the second paragraph's provision permitting the Hearing Examiner to recess the hearing in the event that an agency attempted to present evidence not summarized in the Statement (other than rebuttal evidence) was too severe a penalty. Each of them had a different solution, but there is no need to go into all of them because it is found that the remedy contained in that paragraph is reasonable. The Office should examine, and may adopt, at its option, the proposals for improving the paragraph.

The third paragraph of the proposal, which permits the agency to submit its Statement into the record at the hearing, in lieu of making an oral presentation, is found to be both needed and reasonable. There are some hearings in which there is little, if any, interest in most of the rules, and so long as every person has had an opportunity to read the Statement, there is no need to waste time and money having an agency person read it out loud. An alternative, suggested by the Department of Health (Pub. Ex. Y) would be to permit the agency to orally summarize its Statement and insert the Statement into the record. This may be adopted at the option of the Office. Another suggestion from the Department of Health (as well as the Board of Nursing) would be to clarify the language which requires that agency personnel or other persons "preparing the Statement" be available at the hearing for questioning. It was suggested that agency representatives "thoroughly familiar with the rules and the agency's Statement" shall be available for questioning. This change may also be made at the option of the Office.

John M. Broeker (Pub. Ex. L) urged that the rule be amended to provide strong sanctions for those agencies who fail to prefile. He recommended that there be an automatic continuance for 25 days. While it is almost inconceivable that an agency could fail to file the Statement, Broker's suggestion could be implemented if the Office, based on its experience, felt that such an event could occur.

The Department of Labor and Industry suggested that requiring the Statement to be prefiled in all cases is unnecessary because some rules are unimportant and the public does not need the safeguards provided by the rule proposal. The Department did not, however, suggest any criteria to separate the "unimportant" from the important, and it is difficult for this Examiner to compile satisfactory criteria. The suggestion is not recommended for adoption.

Proposed HE 105: Documents to be Filed before Hearing.

17. Although the amendments to this rule (previously HE 103) are minor, they still drew some suggestions from various agencies. All of them centered around the language proposed for paragraph H, which would require the agency to file with the Office:

> The names of agency personnel who will represent the agency at the hearing together with the names of any other witnesses who may appear on behalf of the agency.

It was the second set of witnesses which the agencies commented upon. The Board of Nursing (Pub. Ex. M-2), the Board of Dentistry (Pub. Ex. U), and the Board of Health (Pub. Ex. Y) all feared that an agency would be found to be in violation of the rule if a member of the public appeared, supported the agency's position, yet had not been listed by the agency in its list of witnesses. Such a reading of the proposed rule is far-fetched. The rule as proposed is both needed and reasonable. However, the Office may, at its option, put to rest the fears of the agencies by changing the last phrase of the rule to read "together with the names of any other witnesses solicited by the agency to appear on its behalf.

Proposed HE 106: Conduct of Hearings

18. The Office's proposal makes three changes, only one of which drew any substantial comment. That change was the addition of language to existing HE 104(a) which provides that persons may indicate on a register their desire to be informed of the date on which the Hearing Examiner's report will be available, as well as be informed of the date on which the agency submits the record to the Attorney General. As has been noted in connection with proposed HE 102 C.8., it is more appropriate that the agency, rather than the hearing examiner, notify persons of the date on which the agency submits the record to the Attorney General. MACI and John Broeker both strongly supported the rule as proposed, but Broeker recommended that it include re-submissions in cases where a rule has bounced back and forth between the agency, the hearing examiner and the Attorney General more than once. He also believed that there should be some penalty for failure to notify affected persons. In connection with the penalty, the statute clearly states that the agency shall give notice to all persons requesting to be informed that the hearing record has been submitted to the Attorney General. If an agency failed to give such notice, an affected person could petition the Attorney General to withdraw any approval of the rule and disapprove it on the basis that the agency has not complied with the provisions of Chapter 15. Therefore, the proposed addition does not appear to be necessary, and is not recommended for adoption.

The Department of Natural Resources (Pub. Ex. X-2) made the following criticism of the proposal:

> People should not be given an opportunity to check either of the notice opportunities until the hearing examiner has had a chance to explain what they are about. A separate register for the two notices should be kept at the hearing examiner's table. This is not a significant inconvenience to the public and will save significant amounts of taxpayer's money.

Although the Office's proposal is found to be reasonable as is, it is believed that the Department's suggestion has merit. The Office ought to consider adopting it.

The change made to paragraph B parallels exactly a change made by Chapter 443. It has statutory authority, is needed, and is reasonable.

The change proposed for paragraph C has already been discussed, and is within the Office's statutory authority, needed, and reasonable.

Finally, the change proposed for paragraph I is based upon common sense. It provides that interested persons submitting oral statements are subject to questioning by representatives of the agency, but that interested persons providing written statements are not subject to such questioning. This change was made because most written statements are made subsequent to the hearing, and unless the hearing was reopened, it would be impossible to cross-examine the person submitting them. The change is found to have statutory authority, is needed, and is reasonable.

Proposed HE 107: The Record.

19. Comments on this section essentially divided into two general categories: The close of the record, and preparation of a transcript.

With regard to when the record closes, and what is contained therein, Douglas L. Skor (Pub. Ex. R) suggested that:

> Some protection is needed for the public with respect to statements filed by agencies at the very last minute, often on the day the record is closed. This makes it impossible for the public and even for specifically interested parties to respond to new evidence submitted by the state. At the minimum, agencies should be encouraged in this rule to submit their final statements prior to the final date.

This argument essentially raises the question of who should have the final say -- the agency or the public. This is a policy decision which must be made by the Office. However, were the Office to adopt Mr. Skor's suggestion, and either "encourage" or require the agency to submit their final statements prior to the final date, it is believed that this would be a substantial change. However, Mr. Skor's argument does have some merit, and ought to be considered by the Office for the future.

The Department of Health (Pub. Ex. Y) recommended that the rule be clarified to indicate that comments or documents received after the close of the record are not part of the record. While the Office's proposal is reasonable, it is suggested that the Office consider amending the language of the rule so that the second sentence would read as follows:

> The record in each hearing shall include all of the documents enumerated in HE 105, all written comments or other evidence received prior to, during, or subsequent to the hearing but prior to the close of the record, and a tape recording of the hearing itself unless . . .

With regard to the transcript, John M. Broeker (Pub. Ex. L), and the Department of Health both recommended that the Office's proposal contain criteria to assist in determining when the use of a court reporter would be more appropriate than tape recording. Criteria suggested were the receipt of court appeals, the receipt of a substantial number of adverse written comments, and the complexity of the proposed rules. The statute clearly leaves the decision in the hands of the Chief Hearing Examiner, expressing a preference for tape recording unless he determines that the use or a court reporter is more appropriate. § 15.052, subd. 5 (1977 Supp.). Therefore, any decision of whether to include such criteria is within the province of the Chief Hearing Examiner.

The Pollution Control Agency (Pub. Ex. O) pointed out that § 15.0412, subd. 4 (1977 Supp.), states that "if the agency, the chief hearing examiner or the attorney general request, the hearing examiner shall cause a transcript to be prepared of the hearings." The agency went on to recommend that the proposed rules should be changed to provide that a transcript will be prepared if the agency or the attorney general requests one. Their proposed language would, however, require a court reporter in every case where a transcript has been requested. Although it is unclear, it appears that the agency is opposed to having transcripts prepared from tape recordings. Essentially, the agency is failing to differentiate between two separate questions: Whether a court reporter or a tape recorder should be used and when a transcript should be prepared (regardless of how the hearing was recorded). These are policy matters which the legislature has spoken to, by giving the Chief Hearing Examiner the sole discretion to determine when to use a court reporter, but also mandating that a transcript be prepared if the agency, the Chief-Hearing Examiner, or the Attorney General so requests. With this dichotomy in mind, the comment by the PCA that the proposed rule is in direct conflict with § 15.0412, is rejected.

The Department of Health (Pub. Ex. Y) also recommended that the last sentence of the proposed rule be modified to clearly indicate that the request for notification of the date of the completion of the transcript should be made to the Hearing Examiner. They suggested that this could be accomplished by inserting the words "of the Hearing Examiner" between the words "requesting" and "shall" in the proposed rule. Since it is the Hearing Examiner who is charged with securing the court reporter, and since it is the Office that contracts with court reporters, it would appear that the Hearing Examiner is the appropriate person to handle such notice. The proposed change is recommended for adoption, as it does clarify an otherwise ambiguous point.

The final comment on this proposed rule came from MACI (Pub. Ex. K; Tr. 1-30) which urged that the standard for determining the cost of a transcript be changed from the proposed "reasonable charge" to "reasonable cost recovery charge". Administrative notice is taken of the fact that the Office has written contracts with various court reporters around the State to report its hearings. These contracts include fixed prices for transcripts. Only the Office can determine whether the adoption of the proposed language change would conflict with those contracts. Therefore, no recommendation is made with respect to the proposed change.

The Office does have statutory authority to adopt its proposed rule. The rule is needed, and is reasonable.

Proposed HE 108: Incorporation by Reference

20. Prior to the adoption of Chapter 443, § 15.0412, subd. 4 required that the notice of a rulemaking hearing include the full text of the rule proposed for adoption. In Chapter 443, the following language is added to that section:

> . . . provided that, with the approval of the chief hearing examiner, the agency may incorporate by reference provisions of federal law or rule or other materials from sources which the chief hearing examiner determines are conveniently available for viewing, copying and acquisition by interested persons. The chief hearing examiner shall not approve incorporation by reference of materials which are less than 3,000 words in length or which would require less than five pages of publication in the state register.

The proposed rule requires that approval for incorporation by reference must be obtained prior to publication in the State Register. It requires that such approval be requested in writing, and include the material sought to be incorporated by reference. It also provides that the written request indicate to the Chief Hearing Examiner where the materials are conveniently available for viewing, copying and acquisition by interested persons. It places a ten-working day limit on the Chief Hearing Examiner to either approve or disapprove the request, and requires the agency to maintain a copy of the incorporated materials so long as the rule incorporating them remains in effect.

Both MACI and John Broeker supported the proposed rule. The only negative comment came from the Department of Natural Resources (Pub. Ex. X-2) which argued that the Office did not have statutory authority to adopt the last sentence of the proposed rule, which requires the agency to maintain a copy of the incorporated materials as long as the adopted rule is in effect.

In support of its proposed rule, the Office provided an argument with respect to need and reasonableness, but nothing specific with respect to statutory authority. Therefore, authority must be found in § 15.052, subd. 4, or common law. It is found that there is no specific authority contained in the statute, and the plain wording of the statute relating to rules governing the "procedural conduct of all hearings" does not cover the proposed rule. Therefore, it is recommended that the last sentence of the proposed rule be deleted. As a practical matter, however, it should be noted that earlier in the rule, an agency is required to attach to the request for incorporation a copy of the material sought to be incorporated. Presumably, the Chief Hearing Examiner's Order either approving or disapproving the request would refer to the attached materials. Therefore, to the extent that the request and the order are a part of the official records of the agency required to be maintained pursuant to Minn. Stat. §§ 15.17 and 15.171 (1976), the same result is achieved.

With the change noted above, the proposed rule is found to be needed, reasonable and based upon statutory authority.

Proposed HE 109: Report of the Hearing Examiner

21. This proposal makes a number of changes to what was HE 106.

First of all, it requires that the Hearing Examiner file the original report and the complete record of the proceedings with the agency. There was no objection to the addition of the last phrase which merely sets forth existing practice and assures that the record will be promptly transmitted to the agency. It is clearly within the Office's authority to adopt procedural rules, it is needed and is reasonable.

The second change requires the Office to make a copy of the Report available to any interested person upon request at a reasonable charge. The proposal makes two changes from existing rules, the first of which is to specify that the Office, rather than the agency, must make copies available. The second change is the inclusion of the phrase "at a reasonable charge". With respect to the first change, the Pollution Control Agency argued that both the agency and the Office ought to be required to make copies of the Report available. In support of that position, the agency stated:

> Many state agencies are located at a significant distance from the Office of Hearing Examiners and, in many instances, interested persons will have had numerous dealings with the originating agency and will be more familiar with its location and structure. While the presently pro-

posed amendment would not seem to forbid an agency's direct distribution to interested persons of the Report of Hearing Examiners, the MPCA believes that it would be fairer to the public and less confusing to them if the rule required direct distribution of the report from the agency as well as from the Office of Hearing Examiners. (Emphasis in original)

The Office, in its statement, supported its proposal by pointing out that some agencies have no explicit authority to charge a requesting person a reasonable fee for reproduction, and thus, if they do provide a copy, all taxpayers must pay for the single request. The Statement went on to point out that the Office, being on a revolving fund, does have specific authority to charge for its services. While it is found that requiring the Office to make a copy available is authorized, needed and reasonable, the question of whether the rule ought to be amended by deleting the same requirement for agencies is a closer question. The argument put forth by the PCA is a reasonable one, and to this Examiner, it would be offensive for an agency to refuse to provide a copy if a requesting person were willing to pay a reasonable charge for one. In addition, it would seem to impinge upon the right of interested persons to effectively utilize the five-day waiting period. Although the five-day waiting period set forth in § 15.0412 stands alone, without any corollary explicit statement that affected persons may file exceptions (which is explicitly permitted in the contested case portion of the statute), there is no prohibition against any person making exceptions or argument to an agency during the five-day waiting period. Indeed, even this Examiner admits that hearing examiners do, from time to time, make mistakes, and regular practitioners in the area have advocated lobbying agencies and considering political factors during the waiting period [see Douglas L. Skor "Rulemaking Procedures from the Private Practitioner's Point of View" contained in Administrative Law: Practice, (Advanced Legal Education, 1976)]. Based upon the arguments put forth by the PCA, it is found that the Office's deletion is unreasonable. Therefore, it is recommended that the words "Both the agency and" be inserted before the beginning of the second sentence of the proposed rule.

As was stated earlier, there was also a comment regarding the "reasonable fee" portion of the proposal. The comment came from MACI, which recommended, in lieu thereof, the language "a reasonable cost recovery charge". In Pub. Ex. K, MACI stated that it felt that such a change was necessary to insure that the charge did, in fact, reflect an actual cost recovery fee. The Office's proposal is reasonable and the Office may, or may not, elect to substitute the MACI language.

The next change proposed by the Office is the deletion of the lengthy sentence requiring certain standards to be applied by the Hearing Examiner in drafting a report. The Office's Statement suggests that this deletion was made in order to comply with the prohibition against repeating statutory language contained in Ch. 443. John M. Broeker (Pub. Ex. L) strongly opposed the deletion of the material, but gave no justification to support a finding that duplication of the language would be critical to the ability of a person affected by the rule (presumably a hearing examiner or a reviewing judge) to comprehend its meaning and effect, which justification would be necessary in order to retain the language. It is found that the Office's deletion of the language is based upon statute, is needed to comply with the new provision of Ch. 443, and is reasonable.

The final comment on the rule also came from the PCA, which pointed out that Ch. 443 now requires (in most instances) the issuance of the hearing examiner's report within 30 days. The comment suggested that this deadline should be reflected in the rule. No further justification, however, was given for the pro-

posal, and for the reason given above, with respect to the Broeker proposal, the MPCA proposal is not recommended for adoption.

Proposed HE 110 - Submission of Rule to Chief Hearing Examiner and Proposed HE 111 - Reconvened Hearings

22. Section 15.052, subd. 4, is perhaps more explicit with respect to these proposed rules than any others. The statute specifically provides that the Office's rules:

> shall include . . . provisions relating to recessing and reconvening new hearings when the proposed final rule of an agency is substantially different from that which was proposed at the public hearing. Procedural rules shall establish a procedure whereby the proposed final rule of an agency shall be reviewed by the chief hearing examiner to determine whether or not a new hearing is required because of substantial changes or failure of the agency to meet the requirements of section 15.0412, subd. 4.

Proposed HE 110 and Proposed HE 111 are direct responses to that legislative mandate. Essentially, they make only minor changes to existing rules (HE 107 and HE 108), and due to the lack of substantial change from the earlier rules, and a paucity of comments with respect to them, only those changes which did draw comments will be discussed below (although all have been reviewed by this Examiner).

The Department of Natural Resources (Pub. Ex. X-2) pointed out that proposed HE 110 requires the Chief Hearing Examiner to review and report to the agency solely on the issue of substantial change, rather than also including the issue of compliance with § 15.0412, subd. 4. An examination of the above-quoted grant of rulemaking authority indicates that the rule should include both provisions relating to recessing and reconvening in the event of substantial change and provisions establishing a procedure for review by the Chief Hearing Examiner of substantial change or failure of the agency to meet § 15.0412, subd. 4, in order to determine whether or not a new hearing is required. It would appear that the difference between the two is more one of form than of substance. However, there is no reason not to have a Chief Hearing Examiner's review and report to the agency cover both issues -- substantial change and compliance with 15.0412, subd. 4. Therefore, it is recommended that proposed HE 110 be amended by changing the word "issue" to the word "issues" in the second to the last sentence of the proposed rule, and also by inserting in that same sentence the words "and compliance with § 15.0412, subd. 4" between the word "rule" and the word "within".

The only other substantial criticism of the proposed rule came from the Committee (Pub. Ex. W), DNR, and the Department of Health (Pub. Ex. Y). All three of them pointed out that proposed HE 111 requires reconvening the hearing, or withdrawing the proposed final rule, in the event that the Chief Hearing Examiner finds that the agency failed to meet the requirements of "Minn. Stat. Ch. 15 or these rules". The three commenting agencies all suggested that the statute requires a new hearing if the agency has failed to meet the requirements of "§ 15.0412, subd. 4". Therefore, the agencies are suggesting that by including all of Ch. 15, and the Office's rules, the proposal exceeds the statute. What those commentators overlooked is the fact that the very section they seek to have enforced requires that the agency fulfill any relevant, substantive or procedural requirements imposed on the agency by law or rule. In addition, § 15.052, subd. 3, requires the hearing examiner to take notice of the degree to which the agency has fulfilled all relevant, substantive and procedural requirements of law or rule. Clearly, if

the agency has failed to comply with a procedural rule, unless it is found that such failure did not substantially harm the public), then any rule sought to be adopted is subject to challenge. Therefore, it is entirely appropriate that the Chief Hearing Examiner review not only for compliance with § 15.0412, subd. 4, but also the remainder of Ch. 15, and these rules.

The final substantial comment with respect to these two proposed rules came from Douglas L. Skor (Pub. Ex. R). He recommended that a provision be added at the end of proposed HE 110 which would require the agency to make copies of the final rules available to the public at the time that they were filed with the Attorney General. In his own article, supra, he pointed out that Minn. Rule Atty Gen 305(c) permits the submission of a brief or the making of oral argument to the Attorney General "within ten days after receipt of the rules by the Attorney General". See also, Michael B. Miller, "Appeal of a Rulemaking Proceeding: What to Look for in Planning or Strategy" contained in the same volume as Skor, supra. In order to make such a procedure meaningful, persons must have reasonable access to the rules as finally proposed to be adopted. Since the Office does not maintain a copy of that set of rules after the Chief Hearing Examiner has reviewed them and issued his Report, the only places from which they could be obtained would be either the Attorney General or the agency. Unfortunately, this comment was received on the day before the record closed, and neither agencies nor the Attorney General commented upon it. The Chief Hearing Examiner should determine whether or not it is deemed to be a substantial change. If it is not so deemed, then it is recommended for adoption. If it is so deemed, then it is recommended that the Office consider including it in the next proceeding to amend these rules.

Proposed HE 112 - Effective Date

23. In light of the date of the issuance of this Report, it is recommended that proposed HE 112 be modified to read as follows: These rules shall be effective for all rule proceedings initiated five working days following publication in the State Register.

Unfortunately, when § 15.0412, subd. 4, was amended by Ch. 443, to reduce the waiting period between publication and effective date from 20 to five days, corollary provisions contained in § 15.0413, subds. 1 and 2, were not amended, leaving a conflict between the two dates. Pursuant to § 645.26, subd. 4 (1976), it is found that the effective date should be five working days following publication.

For purposes of giving adequate notice to state agencies affected by these rules, the Office may desire to extend such effective date. In light of the timing of this Report, such an extension (so long as it is for a reasonable length of time) would be justified as being both needed and reasonable. However, whether or not such an extension is made is at the option of the Office.

CONTESTED CASE RULES

Proposed HE 202 - Definitions

24. The various changes proposed by the Office for this list of definitions were generally non-controversial.

The first change would be the deletion of the definition of commencement. This was supported by the Office as being both needed and reasonable because the term is not used within the rules, with one exception wherein it is adequately defined.

The second change proposed by the Office is found throughout these rules, and substitutes the word "assign" or "assignment

for the words "appoint" or "appointment" whenever that word is used is to describe the process by which the Chief Hearing Examiner selects a hearing examiner to hear a contested case. The words are being changed so that they are consistent with the language used in Ch. 15. The change is found to be both needed and reasonable.

The third change did evoke some comment. It has to do with the definition of a "party". It begins by including within that definition "each person named as a party". The Department of Transportation (Pub. Ex. I), and the Pollution Control Agency (Pub. Ex. O) both pointed out that nowhere in the rules is there any procedure for naming a person as a party. They ask where such parties are named, suggesting that the proper place for such name is the Notice of and Order for Hearing. However, the PCA went on to point out that because that document is drafted by the agency, unless the Office's rules specify otherwise, the Office will be delegating those decisions to the agency. The comment went on to point out that in most instances, this decision by the agency will not be merely whimsical, but rather will be controlled by existing rules of the agency, such as Minn. Reg. MPCA 9(e). In order to alert practitioners and others to the fact that such rules do exist, the PCA recommended a change to make this clear.

The PCA also pointed out that in some cases, the agency staff operates differently from the agency decision-maker. In the case of the PCA, it argued that almost always, the Board remains neutral because it must ultimately be the decision-maker, but that the Staff is a vigorous advocate at the hearing. Their comment indicated that that agency was scrupulously careful to maintain the distinction between the two. They recognized, however, that there is a great variety of state agencies operating differently in different factual situations.

Based on these arguments, the MPCA recommended that the rule be revised to read as follows:

> Party means each person named as a party in the notice of hearing or persons granted permission to intervene pursuant to HE 210. The notice of hearing shall name as parties all persons who are so defined by applicable rules of the agency and shall also name as a party the person who has requested that a hearing be held. Persons named as parties in the notice of hearing need not file a petition to intervene pursuant to HE 210. The term "party" shall include the agency, except where the agency participates in the contested case in a neutral or quasi-judicial capacity only. The term "party" may include the agency staff.

The MPCA proposal does take care of the question of where persons are named as parties. It also uses the standard of applicable agency rules to give some guidance to agencies in making their initial determinations. However, there is some question as to whether the last two sentences of the proposed rule adequately deal with the problem of the agency-staff dichotomy.

The Office's proposal is unreasonable in that it fails to state any method for designating parties. However, that problem may be satisfied by merely inserting the words "by the agency in the Notice of and Order for Hearing" following the words "named as a party" in the first sentence of the Office's proposed rule. With this change, the proposed definition is both needed and reasonable.

The final change made by the Office to the existing rules is an addition to the paragraph relating to service. The existing rule specifies that service may be made either personally, or

by First Class United States mail. The proposed addition would allow agencies to make service by depositing items with the Central Mailing Section, Publications Division, Department of Administration. The Office justified this addition by stating that the Department of Administration provides a statewide mail pick-up and delivery service for state agencies, and that there is no purpose in requiring agencies to make special trips to mail boxes, with the concomitant responsibility of maintaining a supply of stamps or petty cash. The only comment on this proposal came from John M. Broeker (Pub. Ex. L) who opposed the use of the Central Mailing Section based on his own experience that material mailed through that Section "has frequently led to long delays". He pointed out that at some point these delays can become prejudicial to other parties, and saw no reason why documents required to be formally served could not be served through direct placement in the United States mails.

Although there is no question as to the Office's statutory authority to adopt the proposed rule, nor is there any question as to whether such a rule is needed in light of the fact that some agencies do use the section while others do not, Broeker raises the question of whether the proposed amendment is reasonable. HE. 209 B. specifies that service by mail shall be presumed to take three days. It is found that Broeker's experience supports the conclusion that the section is not as efficient as the United States mail. The Office has the option of either requiring that documents be placed directly into the United States mail system, and leaving the presumption in HE 209 B. at three days, or it may retain the proposed amendment pertaining to the Central Mailing Section, in which case it must add an additional day to HE 209 B. A third alternative, which would also be acceptable would be to give agencies the option of which to use, and specifying in HE 209 B. that if they used the United States mails, three days' allowance shall be required, but if they use the Central Mailing Section, four days' allowance shall be required. The Office may choose from among these options.

Proposed HE 203: Hearing Examiners

25. The Office's proposal for this rule makes essentially three changes to the existing rule. The appointment-assignment matter has already been discussed above, and will not be repeated.

The first change parallels the change proposed for HE 102 B. clarifying the fact that there is no need for both a proposed Notice of and Order for Hearing as well as the actual Notice of and Order for Hearing. For the reasons discussed in Finding No. 8, the Office's proposal is found to be both needed and reasonable.

The second proposed change deals with Executive Order No. 148, and parallels the discussion in Finding No. 15. For the reasons set forth in that finding, it is recommended that the last sentence of proposed HE 203 A. be deleted in its entirety.

The final change proposed for this rule would permit the Examiner to call witnesses "where he deems it necessary to make a complete record". There was no lack of criticism of this proposal.

The Office, in its Statement, argued that the power to call witnesses was needed because the Hearing Examiner might find that the witnesses sponsored by the existing parties had not sufficiently explored or analyzed an issue of particular significance in the hearing. It was also suggested that the Examiner might find that issues which are important to the resolution of the case had been ignored or neglected by existing parties and that the parties are unable or unwilling to present testimony on that issue. Finally, the Office stated that all the present

hearing examiners, as well as the Chief Hearing Examiner, believe that the authority to call witnesses to make a complete record already exists in Minn. Rule HE 203 C.11, which permits the Hearing Examiner to "do all things necessary and proper to the performance of the foregoing [referring to the enumerated powers in HE 203 B.]". Two commentators generally supported the rule, but felt that there ought to be limitations upon it. The Department of Public Service (Pub. Ex. B) originally proposed the rule, but suggested that the agency for whom the hearing is being held must first approve of any witnesses called by the hearing examiner. The arguments given in the Office's Statement parallel those given by the Department and will not be repeated again. Arguing in favor of its proposal that the agency must approve any witness called by the hearing examiner, the Department suggested that by requiring such approval, there will be a guarantee that the concerns of the examiner are legitimate concerns of the agency. In addition, the Department felt that requiring such approval would allow the agency to make appropriate financial arrangements with the examiner's witness concerning fees, if any, and expenses to be incurred by the witness.

The Committee (Pub. Ex. W) agreed that there may be cases in which the hearing examiner may feel an important point has not been satisfactorily addressed and may wish, for public policy reasons, to have evidence from other witnesses. It argued that even in those cases, however, there should be notice to parties, if not their agreement, and an opportunity for them to exercise discovery with respect to the witnesses to be called by the hearing examiner so as to allow for preparation of cross-examination. The Committee, apparently agreeing with the Commission, recommended that the agency which will render the final decision should be consulted in order to determine whether the area of inquiry to be covered with the potential witness is one which should be addressed in the hearing. The Committee differentiated between traditional adversary proceedings (which would presumably include such things as license revocations, contested permits, etc.) as opposed to non-traditional adversary matters, such as rate-making and convenience and necessity hearings. The Committee supported the Office's proposal (with the limitations contained in the preceding paragraph) for non-traditional adversary matters, but opposed the Office's proposal for traditional adversary proceedings. The Committee argued that calling witnesses in traditional adversary proceedings would detract from the maintenance of an examiner's impartiality by placing him in a non-neutral role. The Committee felt that by calling witnesses, an examiner would be encroaching upon the prerogative of a party who had decided to forego presenting testimony in a certain area. Its comment suggested that the proposed rule was unnecessarily broad and lacking in criteria to guide and control the exercise of the proposed power.

Limitations on the proposed power were also supported by Joe Bizzano, of Northern States Power Company (Tr. 1-68). He suggested that at the very least, the power be restricted to calling witnesses on issues of fact which are crucial to the determination of the case. He cited present practices in the district courts, which usually call witnesses solely as independent experts and charge them with ascertaining some crucial facts in the case. The Chief Hearing Examiner responded (Tr. 1-69) by stating that he was assuming that hearing examiners would be reasonable and would limit their use of the power to situations where an independent outside expert was needed to ascertain relevant facts. He cited, as an example, hearings on environmental impact statements, where perhaps one of the parties had failed to call a witness from the Energy Agency or the Pollution Control Agency who was known to the examiner to have expert knowledge in a field which had not been the subject of testimony. Bizzano also brought up the question of who would pay for these witnesses, with the Chief Hearing Examiner responding that the

Office would have to pay any costs (Tr. 1-68). This is contrasted with the implication, in Pub. Ex. B, that the agency for whom the hearing was being held would be charged with such fees.

Others were completely opposed to the rule. The Board of Nursing (Pub. Ex. M-2) felt that the exercise of such a power would detract from the neutrality of the examiner and recommended that at the least, the rule should specify who would pay any costs. The Board of Dentistry (Pub. Ex. U) argued that there was no statutory authority for the proposed rule and that it was unreasonable because it would not only detract from the neutrality of the examiner, but would give the parties no opportunity to discover what the witness would say. The Department of Health (Pub. Ex. Y) felt the rule was unnecessary, that it detracted from the neutrality of the examiner, that it created surprise for the other parties, and if it were to be retained at all, it should contain procedures for giving notice to parties, allowing discovery, and time for preparation of cross-examination by the parties, with an automatic continuance if the hearing examiner does not give adequate notice so as to allow such discovery. Finally, the Department of Human Rights (Pub. Ex. Z-1) felt that the power was inappropriate in its type of cases in that it would add an element of surprise to the proceedings and make it difficult for any party to be fully prepared for the hearing. It argued that unlike some other hearings, its particular hearings were not susceptible of "expert" testimony which could be rebutted, if necessary, by other "experts", but rather, its cases were more likely to be simple questions of fact (i.e., who said what) for which there was no "expert testimony".

The first question to be answered is whether the Office has statutory authority to enact a rule permitting the hearing examiner to call witnesses. It is found that it does. Not only is such a matter properly within the scope of "procedural conduct", but further support is found in Ch. 443, which permits the hearing examiner to issue a subpoena for the attendance of a witness "upon his own initiative. . .". Is the proposal needed? The Public Service Department felt that it was, as they were the original proposers of the rule. The Office felt that it was, and this Examiner has, in the past, suggested to parties in a contested case that a dispute which could not be resolved by the Examiner (due to lack of expertise) might be resolved by having an independent expert verify the assertions of one of the parties. Is the proposal reasonable? With limitations, it is found to be so. The limitations that are necessary for such a finding relate to the following:

1. If requested by any party, discovery of the witness' testimony shall be allowed to the same extent as permitted under these rules.

2. The witness shall be subject to cross-examination to the same extent as allowed under these rules.

3. The parties shall be notified, as soon as is practical, of the examiner's intent to call the witness.

4. The examiner shall, prior to calling any such witness, obtain the consent of the Chief Hearing Examiner.

5. The Office shall be responsible for the payment of any fees or expenses.*

With the foregoing limitations, the fears of the commentators should be allayed, yet the power will be available when needed.

(See next page for *footnote.)

The only other comment to the proposed rule which has not yet been discussed came from the Board of Nursing (Pub. Ex. M-2) which questioned the deletion of the language "where appropriate" which previously limited the power of the hearing examiner to receive and act upon requests for subpoenas. The Office offered no justification for the proposed deletion, and therefore, it has failed to meet its statutory burden. The phrase should be retained.

Proposed HE 204: Commencement of a Contested Case

26. Introductory Paragraph. The proposed amendments to this paragraph of the rule contain another appointment-assignment change, as well as another reference to combining the Notice of Hearing with the Order for Hearing, so that a single document is now known as the Notice of and Order for Hearing. As has already been found, this change is authorized, needed and reasonable. Both the Committee (Pub. Ex. W) and the Department of Health (Pub. Ex. Y) recommended that the word "issuance" be deleted in favor of the word "service" in the introductory paragraphs so that commencement would be defined by the service of the Notice of and Order for Hearing by the agency. The Committee argued that this change would be consistent with the fact that "service" is defined in proposed HE 202 D., and further pointed out that "service" is the term normally used in the judicial context for the commencement of a civil action. The only difference that the proposed change would make would be in connection with the timing of hearings, which, in some cases, are statutorily required to be held no later than so many days after the "issuance" of the Order (See § 80A.21, subd. 1(a), which states that a hearing shall be held not later than seven days after the "issuance" of a cease and desist order based upon a violation of the Minnesota Securities Act). This is really a minor point, and either word is satisfactory and is found to be reasonable. The option of which to use is left up to the Office.

27. HE 204 A. This paragraph sets forth a "laundry list" of the material which must be contained in the Notice of and Order for Hearing. The first change proposed by the Office is to add the phrase "unless otherwise provided by law" as an introductory phrase to the remainder of the paragraph. The Office's Statement asserts that several agencies have specific statutory authority to issue Orders for Hearing other than as provided by the Office's rules, and since the rules cannot supersede laws duly enacted by the Legislature, some provision must be made to accommodate such statutory provisions. The proposed change drew no comments, and is found to be authorized, needed and reasonable. It is hoped that the confusion created by this dual system of statutes and rules will slowly be eliminated by the Legislature so that the public will know, with some certainty, whether the agency has given proper notice without having to consult both

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*Professor Melvin Goldberg raised the question (Tr. 1-117) of what provisions were made in these rules for persons proceeding in forma pauperis. While his question was aimed at witness fees, it could apply as well to transcripts and other costs incurred in contested case proceedindgs. His question was not answered at the hearings, nor is this Examiner in a position to answer it. It would appear best left for decision at such time as it is raised in the context of a specific proceeding. Minn. Stat. Ch. 563 is pertinent, although there is substantial question of whether it applies to administrative hearings as well as court proceedings. An additional basis for such proceedings may come from the due process and equal protection clauses of the 14th Amendment to the U. S. Constitution, or Art. I, Sec. 8 of the State Constitution. See also, Boddie v. Connecticut, 401 U.S. 371, 28 L.Ed. 113, 91 S.Ct. 780 (1971); U.S. v. Banks, 369 F. Supp. 951 (D.C. Pa. 1974); and McClure v. Salvation Army, 51 FRD 215 (N.D. Ga., 1971).

this rule and the statute (or statutes). The Office might consider contacting the Revisor of Statutes and investigating the possibility of conforming such statutes so that they all refer to "Chapter 15 or the rules adopted thereunder".

It was suggested by George A. Beck (Pub. Ex. H) that this paragraph might be more properly entitled "The Notice and Order". Such a change may be adopted at the discretion of the Office.

A proposed change which drew a substantial amount of comment is contained in subparagraph 5 of the rule. The old rule required the Notice to contain a statement "of the right of parties to be represented by legal counsel". The proposed amendment would retain that old language, but add to it "or by a person other than an attorney, if that person possesses special qualifications pertinent to the subject matter of the hearing." This broadening of notification relating to representatives was proposed by the Public Service Commission (Pub. Ex. B) which stated that it has, in the past, permitted ICC practitioners to appear before it. The Office's Statement alleged that, in fact, this amendment would clarify existing practice. The Office argued that it had no authority, nor did any other state agency, to prevent any person from choosing any other qualified person to represent them in an administrative proceeding (other than an obligation to enforce the prohibition against the unauthorized practice of law). The Statement went on to argue that many groups or associations are unable or unwilling to be represented by legal counsel, and it ought to be made clear to them that they may designate a representative who is not an attorney to represent them at the hearing. Examples of such non-lawyer representation were expressed at the Office's original hearings on these rules by Paul Goldberg of AFSCME (who felt that the rule would prohibit union officials from representing state employees in disciplinary proceedings), and informally from Elmer Berglund (who represents the interests of railroad workers in all hearings relating to requests for variances from clearance requirements for railroads). The Statement alleged that the Office's experience had demonstrated many instances where highly qualified non-attorneys had appeared in a representative capacity, playing a very effective role.

It is important to note that the rule under discussion only deals with what must be contained in the notice. There is a corollary rule (Proposed HE 206) which deals directly with the question of who may represent a party at a contested case hearing. While the two must be consistent, the arguments for or against various kinds of representatives will be dealt with at this time.

At the hearings, Joe Bizzano (Tr. 1-70-73) generally wanted to maximize the formality of hearings and the use of attorneys. He suggested that the rule be modified to give the decision to agencies as to who may appear as a representative in hearings held for them. He cited an existing rule, Minn. Rule PSC 515(a), which limits representatives in certain PSC matters. Bizzano also suggested that the rule be amended by adding the provision "if not otherwise prohibited as the unauthorized practice of law". The Chief Hearing Examiner supported this recommendation (Tr. 1-72). Charles Lefevere, representing Cooperative Power Association, testified (Tr. 1-83-86) against the Office's proposal, arguing that non-lawyers who are not learned in the law, nor bound by ethical constraints or officer-of-the-court responsibilities of attorneys. He favored limiting the participation of non-lawyers to direct examination and cross-examination of witnesses only when the non-lawyer had special expertise in the area of the testimony.

Commissioner Katherine Sasseville (Tr. 1-92-99) asked how this rule would be applied to out-of-state attorneys. She also stated that experience had demonstrated that those who appeared

representing themselves were more likely to come out on the losing end of a decision. She stated that the PSC did favor the use of ICC practitioners and members of the Commission staff. She also favored allowing citizens groups to use their own members. The Chief Hearing Examiner replied to her question by stating that the term "legal counsel" includes out-of-state attorneys (Tr. 1-95).

Karen Carlson, with the Save Lake Superior Association, suggested that introducing the criteria of "special qualifications pertinent to the subject matter" might create more problems than it would solve, and recommended (Tr. 2-29) that a party ought to be able to be represented by legal counsel or not as they saw fit. It is not clear from her testimony whether she intended to prohibit non-lawyers from representing parties regardless of whether they had any "special qualifications" or not. The Chief Hearing Examiner responded by stating that he was not satisfied with the rule as it was proposed by the Office, and that if the examiner did not make changes, he would (Tr. 2-28).

The Public Service Commission, which initiated this proposed change, originally recommended that at the discretion of the hearing examiner, a party may be represented by a person other than an attorney admitted to the bar of the State of Minnesota if that person is admitted to the bar of another state, or possesses special qualifications pertinent to the subject matter of the hearing. (Pub. Ex. B)

John M. Broeker (Pub. Ex. L) stated that it was difficult for non-lawyers to build a proper record at a hearing so as to preserve any errors for appeal. He suggested that at the very least, "special qualifications" should be spelled out.

The Pollution Control Agency (Pub. Ex. O) supported the use of non-attorneys, but feared that the result of the "special qualifications" limitation would be that some groups would be either unrepresented, or else poorly represented by specialists (engineers, etc.) who were not good advocates. The agency recommended that the language relating to "special qualifications" be deleted, so that the rule would provide for representation by legal counsel or a person other than an attorney.

The Department of Natural Resources (Pub. Ex. X-2) suggested the rule should be crystal-clear in allowing a party to represent himself.

The Office's proposal is needed in that it is a basic due process right to be advised of the opportunity for representation by counsel. The numerous comments described above, however, lead the Examiner to the conclusion that the "special qualifications" language proposed by the Office would create more problems than it would solve, and without additional criteria, is unreasonable. Clearly, a party ought to be able to represent himself if he wants to. That is the least that should be added to the rule in order to make it reasonable. While it would certainly be desirable to have every party represented by a competent attorney, learned not only in administrative law and procedures, but also in the subject matter of the issues in the hearing, such a situation is clearly an impossibility. Based upon the record, it is recommended that the rule be modified to read as follows:

> 5. Notification of the right of the parties to be represented by legal counsel, by a person of their choice, or by themselves.

28. HE 204 A.8. The amendments to this paragraph make two changes. The paragraph deals with notices of appearance, stating in what situations they must be filed, and by what dates. The old rule specified that in all cases a Notice of Appearance had

to be filed at least ten days prior to the hearing. The proposed amendment would specify that said notice had to be filed within 20 days of the date of service of the Notice of and Order for Hearing. The rule retained the exception to requiring no notice in the event that the hearing date is less than 20 days from the commencement of the contested case. The second change is to limit the requirement for filing notices to "cases wherein the agency is a party". That is a new limitation not contained in the old rule.

Comments on this paragraph were few. The Securities Division of the Department of Commerce (Tr. 1-115) objected to the retention of the exception which provides that no notice must be filed if the hearing date was less than 20 days from the commencement of the contested case. The objection is based upon the fact that the Securities Division issues a number of orders which are not contested (the respondents default), and the exception does not provide the Division with notice of which cases will be defaulted and which will not. This lack of notice requires the Division to subpoena witnesses in each and every case, thus causing inconvenience to those witnesses when the respondent defaults. The Division favors the deletion of the exception.

The Pollution Control Agency (Pub. Ex. O) pointed out that this paragraph must be read in conjunction with proposed HE 205, and that the two are not consistent. The Agency suggested that the notice be required in all cases, whether or not the agency is a party, because it results in the creation of precise lists of representatives of parties to assure service of process is properly made. The Agency also recommended that the notice of appearance form accompany the notice of hearing in all instances. Thirdly, the Agency recommended that the notice should be due at a time certain based upon the hearing date, for example, ten days prior to the hearing. They suggested that the proposed language (20 days after the notice of hearing) raised problems in some of their cases, in which the Notice of Hearing may have been issued much longer than 30 days before the hearing. Fourthly, the Agency believed that it was valuable to require the filing of a notice of appearance even in those cases in which the hearing is scheduled to be held within 20 days of the publication of the notice of hearing. They suggested it could be filed by a prospective party at the first day of the hearing. Finally, the agency desired sanctions for failing to timely file a notice of appearance.

The Department of Health (Pub. Ex. Y) suggested that there was no reason to require the agency, itself, to file a notice of appearance, for if the purpose of the notice is to provide notice as to which hearings would actually be contested, it should be obvious that if the agency is initiating a case, it will also appear.

The Office's justification for the proposed changes does, in fact, state that the original rule requiring the notice of appearance was adopted to provide notice to the various agencies of which hearings would be actually contested so that they would not have to have all of their witnesses present when a default proceeding was anticipated. The Office argues that the reason for changing the filing deadline was to accommodate larger and lengthier cases, where a prehearing conference is anticipated and where the hearing date may be 45-90 days from the date of the notice. Having the notice of appearance filed earlier gives all parties advance notice of who will be appearing, and who will be representing them. The Statement pointed out that for the "typical" hearing wherein 30 days' notice is being given, the proposed amendment would make no change.

It is found that the Office's proposal to modify the time deadline is both needed and reasonable.

With respect to the Office's proposal to limit the filing of notices to cases "wherein the agency is a party", it would appear that the Office views the notices solely as a device to anticipate defaulted proceedings. The PCA points out that the notices serve other purposes, and ought to be required in all cases. While this unanticipated use of the notices appears beneficial, the question of whether the Office wants to impose this burden upon all contestants is really one of policy. It is found that the Office's proposed limitation is reasonable, but the Office may want to consider whether, in addition, the notices might be needed in all cases to fulfill the uses suggested by the PCA. The question of whether to expand the notice requirement to all cases, based upon the reasoning of the Agency, is left to the discretion of the Office.

The suggestion from the Securities Division and the PCA that notices be required even if the hearing date is less than 20 days from the commencement of the contested case goes to a portion of the existing rule which was not proposed for modification by the Office. It is found that the exemption is not so interrelated with the other proposed changes as to make it "fair game" for change without additional notice. Therefore, it is not recommended that the provision be changed at this time. However, should the Office find merit in the arguments presented in favor of the deletion of that exception, it may recommend such a change at a future date.

The comment from the Department of Health relating to the need for the agency to file a notice may have some value. Whether or not the agency should be exempted from filing such a notice is dependent upon facts not known to this Examiner. Precisely, it is dependent upon whether the name of the agency official or member of the Attorney General's staff required to be contained in the Notice of and Order for Hearing pursuant to the preceding paragraph (HE 204 A.7.) is almost always the same as the person who would be disclosed in the Notice of Appearance. Obviously, if they are the same, there is no need for the agency to file a separate document giving the same information. However, if they are not the same, then it is valuable to have the information which would be provided by the Notice of Appearance. Based upon its experience in this area, the Office may elect whether or not to require the agency to file the Notice.

It should be noted that the word "commencement" appears in the last line of this rule. As the definition of that word has been deleted in Finding No. 24 above, an acceptable substitute, such as "issuance" or "service" should be inserted.

29. HE 204 A.9. In essence, this paragraph is being amended to require agencies to disclose, in the Notice of and Order for Hearing, the possible results of the allegations being taken as true or the issues proved in the event that a party fails to appear at the hearing.

The Office's Statement argues that this addition is needed because most persons receiving such notices are not lawyers and could very easily not understand the ramifications of the allegations being taken as true.

Charles Lefevere, representing Cooperative Power Association, supported the spirit of the proposal, but suggested that in reality, it might be very hard to comply with. He raised the specter of a notice being deemed inadequate (and therefore any hearing held pursuant to said notice being deemed invalid) because an agency had failed to state all of the possible consequences of a failure to appear. He also asked what effect the possibility of public intervenors might have upon the required contents of this notice, and speculated that if the notice did not address their failure to appear, it might also be deemed inadequate. The Chief Hearing Examiner responded that the notice

would only have to contain material relating to the effects of default upon known parties at the time of issuance, and that therefore, public intervenors could not claim defective notice (Tr. 1-82).

The only other comment with regard to this addition came in a subsequent letter from Lefevere (Pub. Ex. T-1), who offered two alternative methods of dealing with the problem which he had raised. The first would insert a period after the word "proved" and delete any subsequent language. The second would be to insert the word "existing" in lieu of the word "the" in the first line of the first sentence of the rule.

It is found that the Office's proposal is needed. It is also found that the proposal is reasonable; but that the addition of the word "existing" in lieu of the word "the" in the first line of the first sentence of the rule would provide a desirable alternative consistent with the Office's stated goal and the need to create a rule which will not lead to the realization of Lefevere's fears. HE 204 B

30. HE 204 B. The changes proposed to this paragraph are not substantive, the amendments merely reordering phrases and shortening the length of the rule.

The Securities Division of the Department of Commerce (Tr. 1-114) argued that the old language was preferable to the proposed amendments, interpreting the amendments to require it to show cause to the Chief Hearing Examiner why a shorter time between service and hearing is required in the public interest and that no interested person would be adversely affected, even though it was permitted by statute to serve a notice in less than 30 days prior to the hearing. That interpretation is open to some question, but in order to assure that these amendments clarify, rather than confuse, it is recommended that the phrase "in addition" be inserted at the front of the second sentence of the proposed rule.

A second problem raised with respect to the proposed amendments came from the Board of Nursing (Pub. Ex. M-2), which recommended a language change for the last phrase of the sentence. As proposed by the Office, the sentence would permit a shorter time between service and hearing upon a showing to the Chief Hearing Examiner that no interested person will be "adversely affected". The Board of Nursing recommended the substitution of the word "prejudiced", arguing that there would be no way of assuring that no person will be adversely affected in some manner if a shorter time is allowed. It would appear that the recommended substitution is more a matter of style than of substance, and the Office may elect to make the substitution, or not, as it sees fit. The Board also recommended that the rule should explicitly provide for a shorter time period if agreed upon by both parties, as well as the hearing examiner. While such a situation might be entirely appropriate for contested cases conducted for the Board of Nursing, where there are rarely intervenors, there are other types of contested cases where public intervenors might effectively be estopped from participating were the rule to provide such an "automatic" method of reducing the time period. For this reason, it is recommended that the Board's suggestion not be adopted.

The Committee (Pub. Ex. W) also recommended the substitution of "prejudiced" for "adversely affected". For the reasons given above, the Office has the option. The Committee and the Department of Health (Pub. Ex. 4) also pointed out that the existing rule permits a shortening of the period upon a showing to the Chief Hearing Examiner that there will be no "substantial adverse effect to the parties". The Office's proposal requires the finding that "no interested person will be adversely affected." The Committee felt that this change placed too severe a restriction upon the Chief Hearing Examiner, and recommended the

retention of the word "substantial [substantially]". This suggested retention is not recommended for adoption because a shortened time period ought to be the exception, rather than the rule, and requiring a relatively high showing prior to creating such an exception is appropriate. The Office's proposal, as originally written, is found to be reasonble, and needed.

31. HE 204(c), (d). Both of these existing rules are proposed to be deleted. The first has been incorporated into proposed HE 205. The second, dealing with publication, is alleged by the Office's Statement to be unnecessary because of clarifications in HE 204 B. That, however, is questionable. In addition, the Office's Statement alleges that the existing rule has lead to confusion and has proven, by experience, to be unnecessary.

The existing rule applied only in cases where the agency participates in the hearing in a neutral or quasi-judicial capacity. In such an event, the rule provided that the Order for Hearing shall be published as required by law, or as ordered by the agency, and copies of the Order for Hearing may be mailed by the agency to persons known to have a direct interest. Obviously, where statutes require publication, nothing in either the old rules or the proposed rules can alter that requirement. However, the existing rule did permit an agency to order publication and to mail notice to persons known to have an interest. Certainly, this rule does not prohibit an agency to order additional publication beyond that which is required by these rules. Therefore, it is agreed that the proposed deletion is needed because the existing rule was, in fact, unnecessary. The same rationale would apply to the "non-rule" permitting an agency (but not requiring it) to mail notice to persons known to have direct interest. What is troublesome about the deletion is that the existing rule indicates an attitude in favor of notice beyond that required by statute or rule. Extensive time at the hearings was devoted to whether such a non-rule is desirable for rulemaking proceedings, with the Office arguing that it was. For some reason, the Office is proposing the deletion of a similar non-rule for contested cases. There is no substantive justification for this difference in the Office's Statement. While the deletion is found to be both needed and reasonable, the Office ought to consider this inconsistency, and decide whether it might not be desirable to retain the last phrase of existing HE 204(d).

32. HE 204 C. The only change which the Office proposed for this rule is a minor wording change to make it consistent with other rules. However, this is an appropriate place to discuss a comment received from the Department of Public Welfare. The comment deals with both proposed HE 204 C. and proposed HE 204 A.4. With the one minor wording change noted above, there were no substantive changes proposed by the Office for either of these existing rules. HE 204 A.4. requires the notice contain:

> A statement of the allegations or issues to be determined together with a citation to the relevant statutes or rules.

Proposed HE 204 C. states that:

> At any time prior to the close of the hearing, the agency may file and serve an amended notice of and order for hearing, provided that, should the amended notice and order raise new issues or allegations, the parties shall have a reasonable time to prepare to meet the new issues or allegations if requested.

The Department recommended that the following language be added to proposed HE 204 C.:

> When issues not raised by the [notice of and] order for hearing are tried by express or implied consent

> of the parties, they shall be treated in all respects as if they had been raised in the [notice and] order. Such amendment of the [notice and] order as may be necessary to conform the [notice and] order to the evidence and to raise the issues may be made upon motion of any party at any time, even after the hearing examiner's proposed decision, but failure to so amend does not affect the result of the trial of these issues.

In the alternative, the Department proposed that the following be added to HE 204 C.:

> In addition, any party may move that the [notice of and] order for hearing be amended to conform to the evidence, with time to meet new allegations, as set forth above.

The Department made extensive argument in support of its proposal, the gist of which is contained in the excerpts from Pub. Ex. Q below:

> The foregoing [first alternative] is modelled on Minn. Rule Civ. P. Rule 15.02. We do not believe pleading requirements for contested cases ought to be more strict and technical than for district court cases.
>
> We feel that in the present and proposed form (HE 204) unduly restricts the agency from presenting evidence and issues beyond the scope of the order for hearing. In effect, the agency's order for hearing is the initial pleading. There is no requirement for other parties to a contested case to make any pleadings. As a result, other parties are not restricted by pleadings in presenting either issues of law or fact. The net effect appears to be to place the agency into a code-pleading situation, where the merits of the case are subject to the adequacy of technical pleadings requirements. It seems that this burden should not rest only on the agency.
>
> In addition, the whole notion of strict pleading requirements continues to wane in importance when it tends to intrude upon reaching the merits of the case.

Attached to Pub. Ex. Q is a brief which was prepared by the Department in a contested case. Support for the Department's position is found in the brief, and anyone interested in the subject should review both the letter and the brief. The matter will not be further discussed here, because, although this Examiner believes that the Department has pointed to an area of the Office's rules which do need clarification and improvement, it is believed that the kind of change proposed by the Department would be substantial, particularly in light of the fact that the Office did not propose any changes to the two relevant rules which would direct the attention of commentators to those rules. However, it is strongly urged that the next time that the Office revises its rules, this matter ought to be thoroughly looked into. In addition, should the Department come across a Notice of Intent to Solicit Outside Opinion with respect to changes in these rules, it should respond to that notice so that the Office may properly deal with its suggestions.

33. HE 204 D. This paragraph represents an entirely new language. According to the Office's Statement, it was proposed by the Public Service Commission (Pub. Ex. B), and was designed for state agencies who have a large number of similar cases and

have developed more flexible and effective procedures to notify parties and other interested persons of the hearing, using procedures which are different from those required by HE 204 A. The proposal requires the concurrence of the Chief Hearing Examiner, and allows agencies to substitute "other documents and procedures" provided that they inform actual and potential parties of the information contained in the HE 204 A. notice.

Douglas L. Skor (Pub. Ex. R) stated that he believed this to be a dangerous rule, and ought to be used only sparingly. To limit the possibility of any abuse, he recommended that the concurrence of the Chief Hearing Examiner be required to be in writing, and given prior to the substitution of any procedure. Secondly, he recommended that the rule specifically exclude any deviations from time requirements (such as 30 days' notice).

Skor also apparently feared that such a substitute procedure might be allowed to alter statutory time requirements. It should be pointed out that the Chief Hearing Examiner has no power to alter statutory time requirements by Order or rule or otherwise.

It is clear from the Office's Statement that the intent of this rule is to permit substitute forms of notice for whole classes of contested cases, rather than individual cases. The individual cases would presumably be covered by the procedures set forth in HE 204 B. Therefore, there is no reason not to require the insertion of the language proposed by Skor, which would add the words "prior written" between the second and third words of the rule proposed by the Office. Not only would this provide the protection desired by Skor, but it would also insulate the Chief Hearing Examiner from requests to "bless" an error which had already occurred. While agencies might desire the flexibility embodied by the Office's original proposal, when dealing with a subject as basic as notice of a hearing, there is no reason to provide such an "out". As stated above, no rule proposed by the Office can shorten a statutory time period. The final question to be dealt with is whether the rule ought to be amended so as to prohibit its use to alter time limits imposed by rule. The need for such limitation is partially removed by requiring prior written concurrence of the Chief Hearing Examiner, as recommended above. Essentially, it boils down to a question of whether the Office's proposal is unreasonable without such a prohibition. There is inadequate support to so find. What the Office may grant by rule (an assumption that 30 days is the required notice), it can alter by rule, so long as it provides adequate justification for need and reasonableness. In some cases, 20 days may be entirely appropriate, while in others, 40 may be needed. In effect, the Office has made its decision with regard to this matter, and absent better justification, it will not be upset. Therefore, the only change recommended for HE 204 D. is the addition of the language between the second and third words of the proposed rule. The remainder of the rule is found to be both needed and reasonable as proposed.

Proposed HE 205: Notice of Appearance

34. There were only two changes proposed to this section, although in order to be consistent with the changes proposed for HE 204 A.8., the Office should conform proposed HE 205 to whatever changes are made in HE 204 A.8.

The first change proposed by the Office deals with the time limit for filing a Notice of Appearance. This matter has been dealt with in Finding No. 28 above, and it is recommended that the Office's proposed language be retained, being found to be both needed and reasonable. The second change proposed by the Office is the addition of a final sentence, which would require that the Notice of Appearance form be included with the Notice of and Order for Hearing in all applicable cases.

The Department of Natural Resources (Pub. Ex. X-2) argued that Notices of Appearance are valueless to some agencies, and

therefore should be optional with each agency. While that may be true, it overlooks the value of the Notice of Appearance form to the hearing examiner.

The Pollution Control Agency (Pub. Ex. O) pointed out that some people confuse the filing of a Notice of Appearance form with the filing of a Petition for Intervention, and assume that if they have filed the appearance form, that is automatically deemed to be a Petition for Intervention. Such is obviously not the case, and to the extent that confusion has occurred in the past (which it has), it would be desirable to include a sentence in HE 205 (or in the Notice of Appearance form itself) referencing HE 202 B., and HE 210, and indicating that the Notice of Appearance form is not a Petition for Intervention.

The conflict between HE 208 A.8. and HE 205, noted by the Pollution Control Agency, was also noted by the Committee (Pub. Ex. W). Depending upon what the Office decides to do with the option recommended for HE 204 A.8. regarding the language "in cases wherein the agency is a party", it would be desirable to be sure that the same language is contained in HE 205. Therefore, if it is to be limited to those kinds of cases, such a limitation should appear in HE 205. If it is not to be so limited, then the HE 205 should indicate that the notice is to be filed in all cases. Essentially the same comment was made by the Department of Transportation (Pub. Ex. I). With the modifications necessary to conform HE 205 with HE 204 A.8., the rule is found to be both needed and reasonable.

Proposed HE 206: Right to Counsel

35. The substance of the Office's proposed change to this paragraph has already been discussed in connection with HE 204 A.4., and there is no need to repeat it all here. The Office should conform proposed HE 206 with its decision on proposed HE 204 A.5. So conformed, the rule is found to be both needed and reasonable.

Proposed HE 209: Time

36. The only change proposed for this rule is to specify that when a period of time prescribed or allowed is less than seven days, intermediate Saturdays, Sundays, and legal holidays shall be excluded in the computation. This change was recommended by the Department of Public Service in Pub. Ex. B, which stated that it was necessary to bring the Office's procedures into conformance with the district court rules of civil procedure. The proposed additional sentence does not appear in the Office's original rules, and the comment suggested that this had caused unnecessary confusion to attorneys and others accustomed to computing time in the method required by the Minnesota Rules of District Court. While this Examiner agrees with the arguments put forward by the comment, he is compelled to point out that Minn. Stat. § 645.15 (1976) is essentially a restatement of the existing HE 209, but does not contain the additional sentence proposed by the Office. Since the statutes govern the executive branch, and the district court rules govern the judicial branch, there is an explanation for the difference between the statute and the district court rules. It is found that the executive branch (including the Office) must be bound by the statute, and that therefore, the proposed addition ought not to be adopted.

Proposed HE 210: Intervention

37. HE 210 A. The only change which the Office proposed for this section was to add the requirement that a person desiring to intervene must serve a copy of the Petition for Intervention upon the agency if the agency is not a party. In its Statement, the Office argued that this was needed to assure that the agency will always know what is going on in the process. Exper-

ience had shown that in cases where the agency was in a neutral role, parties had failed to send copies of motions, requests for continuances, etc. to the agency, causing considerable confusion. This amendment would require that the agency would receive a copy of all Petitions for Intervention.

At the hearing, Commissioner Sasseville (Tr. 1-99), and Carl Sonneman (Tr. 1-102) both pointed out that in the past, when the Public Service Commission has been neutral, its Staff (known as the Participating Department Staff) has intervened as a party. The Staff would receive copies of petitions, but the Commission, itself, would not. While the purpose of the Office's proposed language was to cure that problem, they suggested that the language might not be as clear as possible, particularly considering that more and more citizen groups, not represented by attorneys, are becoming involved in Commission matters. It was suggested by the Hearing Examiner that this problem might be solved internally by having the Commission inform the Staff that the Commission should be given a copy of any petition served upon the Staff. Commissioner Sasseville stated that that would be inconvenient and would cause a delay, particularly when the copying machine breaks down (Tr. 1-102). Both she and Sonneman suggested that since a later section of the rule specifically relates to intervening Staff, their problem could be solved if the proposed addition to this first paragraph were modified to specifically indicate that when the Staff so intervenes as a party, the agency itself shall also be served with copies of notices and motions.

The Committee (Pub. Ex. W) urged that the rule require the agency to be served, suggested that the whole matter could be clarified by merely deleting the phrase "if the agency is not a party", so that the rule would require service upon all existing parties and the agency. This was repeated by the Department of Health (Pub. Ex. Y).

It is found that the language proposed by the Office, while technically absolutely correct, will probably lead to more problems than it would solve. In particular, it is doubted whether it would solve the PSC problem. It is recommended that the language proposed by the Committee be used, which means that the last six words should be deleted from the Office's proposal. To the extent that this continues to create problems for the Commission, or a few other agencies, they can merely request copies from their staff, or request their staff to inform the other parties that the agency is to be served.

The Department of Public Service, in Pub. Ex. B, also suggested the deletion of the last sentence of the existing rule relating to timeliness of a Petition for Intervention. They argued that this was necessary to conform the amendment to another proposal (recommended for adoption as HE 204 D.) so that agencies which have obtained approval from the Chief Hearing Examiner for alternate procedures for giving notice could specify that those alternate procedures would contain a cut-off period for submitting Petitions for Intervention. It was suggested that the sentence be deleted from HE 210 A., but be inserted, with some language excluded, as a new section. Moving the language around is essentially a matter of style, which does not render the Office's proposal unreasonable. The language proposed for exclusion is more to the point in that the Department proposes to exclude from what is presently the last sentence of HE 210 A., the words "in the Order for Hearing", using the argument given above that they ought to be able to specify such a cut-off date in the alternate procedure (in this case, a weekly calendar) which would have been previously approved by the Chief Hearing Examiner. The best way to accommodate this (and not have any question raised as whether an Order for Hearing must be issued solely to give notice of a cut-off date) would be to insert the words "(if one is used" ) in the last sentence of the Office's proposal for HE 210 A., following the words "and Order for Hearing".

In addition, the Commission proposed in Pub. Ex. B. some additions for HE 210 A. which are peculiarly designed for its practice. While it would be desirable to draft a rule which would cover each and every situation, practicality demands that such specific suggestions be excluded in favor of a more general statement. Therefore, the additional language proposed is not recommended for adoption.

Finally, William Carstadt, representing Interstate Power Company, proposed that the standards for judging the sufficiency of a Petition for Intervention ought to be far more restrictive or, in the alternative, each agency ought to be allowed to set specific criteria for intervention (Tr. 5-201). As has been noted with earlier comments, such a suggestion goes beyond the scope of any matter proposed for amendment by the Office, and therefore, if adopted, would constitute a substantial change requiring a new hearing. Again, if the Office is interested in pursuing this matter, it should consider it in a subsequent rulemaking proceeding.

In summary, with the two changes recommended for adoption above, it is found that HE 210 A., as proposed by the Office, is both needed and reasonable.

38. HE 210 B. The only change proposed by the Office to this rule was to require a person filing a Notice of Objection to a Petition for Intervention to serve a copy of such notice upon the agency "if the agency is not a party". The reasons for and against the proposal have already been given above in connection with Petitions for Intervention, and need not be repeated. It is recommended that the same solution be followed as above, placing a period after the word "agency" the first time it appears in the bottom line of the last sentence of the paragraph, and deleting the last seven words. The Office could consider, although it need not adopt, a stylistic change which would delete the word "and" the first time it appears in the second to the last line of the paragraph, and replace it with a comma.

39. HE 210 C. The only change to this paragraph proposed by the Office is the addition of the following sentence:

> In the event the hearing examiner finds that one or more petitions are similar, he may allow the petitions to be consolidated as one, allowing all such petitioners to intervene but only as one party.

The Office's Statement urges that this amendment is necessary to provide the hearing examiner with some flexibility when several Petitions to Intervene are filed having similar interests to protect. It went on to point out:

> Under the present system, theoretically he may choose only one, the rest being denied because their interest is already being protected. This amendment, allowing consolidation of such petitions, will allow all to participate but will keep the number of actual participants at a manageable level..

Commissioner Sasseville raised the problem of various intervenors being unable to agree on a common spokesperson (Tr. 1-103). John M. Broeker (Pub. Ex. L) raised the same problem and urged that any consolidation of parties ought to be discretionary with the hearing examiner depending upon the relationship of the petitioners and their abilities to agree on a spokesperson, strategy, etc.

The comments are well taken, and the position of an intervenor, who has gone to the trouble to petition to intervene, being involuntarily consolidated with others with no control over a

strategy or presentation, would be such as to potentially delay and disrupt the hearing. Therefore, it is found that the Broeker recommendation is a reasonable solution to this problem, and it is recommended that the proposal be modified by adding the following language to the end of the last sentence ", or he may allow them to intervene separately at his discretion."

The existing rule contained three separate "degrees" of intervention. The Office now proposes to delete those in favor of allowing intervenors to have all of the rights of a party. In its Statement, the Office supported this by past experience, which it alleged had shown that the limitations are not needed, serve no practical purpose, and further, do not make sense in that they would allow a "person" to become a "party" without full "party" status. There was no opposition to this proposal, and it is found that the Office has justified its need and reasonableness.

40. HE 210 D.. Essentially, this rule has been significantly shortened by deleting two specific grounds for intervention and requirements for petitioning for intervention. It does retain one existing operative subsection, permitting an agency's staff to petition to intervene where the agency participates in the hearing in a neutral or quasi-judicial capacity. The Office's Statement essentially argued that the proposed deletions were repetitive of other rules. There were no comments on this section of the rule, and it is found that the Office's justification supports the deletions, both as to need and to reasonableness.

41. HE 210 E. The Office's proposals to amend this paragraph drew substantial comments. First of all, the Office proposed that persons other than parties may testify "with or without benefit of oath". The second change proposed by the Office would allow a person, without having intervened, to "question witnesses." Finally, the new rule would allow such persons to be "questioned by parties". In support of its proposals, the Office's Statement alleged that these amendments were aimed primarily at "opening up" the administrative process to the public. According to the Statement:

> Our experience in conducting more than 1500 contested case hearings since January 1, 1976, shows that people do not understand the somewhat complicated "hoops" they must jump through in order to participate at hearings. We have been allowing participation exactly as the new language would allow and have found that the public reaction has been very positive.

With respect to its "no oath" recommendation, the Statement alleged that some find it offensive when they are asked to swear to tell the truth. In addition, most public testimony is alleged to be argument, rather than evidence, and no question of truth is involved. The Statement pointed out (although this rule does not specifically do so) that another rule (proposed HE 217 B.) provides that testimony not subject to oath will be given such weight as the hearing examiner deems appropriate.

In opposition to the no oath proposal, Charles Lefevere argued against the addition on the grounds that it might violate due process. He suggested that contested case hearings are held to elicit facts, not argument (Tr. 1-86). Commissioner Sasseville favored the addition, but urged that the provision allowing the hearing examiner to weigh such testimony differently than sworn testimony ought to be made clear (Tr. 1-107). The Securities Division of the Department of Commerce felt that it is important that parties be entitled to the benefit of sworn testimony (Tr. 1-116). John M. Broeker (Pub. Ex. L) felt that the addition might create problems for district courts reviewing a record under a "substantial evidence" test. He suggested that if

the testimony is worth taking at all, it should be taken under oath. The Board of Nursing (Pub. Ex. M-2) also opposed the addition because its hearings tend to be license revocation hearings, which are serious in nature, and basing revocation upon unsworn testimony might deprive the respondent of a fair hearing. The Board recommended that the rule be modified to exclude disciplinary hearings. Charles Lefevere expanded upon his oral testimony by letter (Pub. Ex. T-1), pointing out that the Office's Statement relating to the offensiveness of an oath neglects the fact that an oath is required to secure a driver's license or sell an automobile, and that contested administrative cases are hardly less important. The Committee (Pub. Ex. W) urged the removal of the addition because these are serious proceedings, due process requires an oath, and trying to explain the hearing examiner's discretion in weighing testimony not given under oath would be confusing. The Department of Natural Resources (Pub. Ex. X-2) supported all of the other changes to this paragraph except for this one, stating that, at a public hearing, the oath can be the difference beteen order and disorder. Finally, the Department of Health (Pub. Ex. Y) recommended that the addition ought to be removed in its entirety, or else ought to be preserved only for certificate of need or certificate of convenience and necessity hearings, as opposed to more traditional adversary contested case-type proceedings. The Department argued that the sanction of perjury should be available in a contested case hearing, and the witness should not have a choice of whether or not that sanction would be applicable.

Before leaving this topic, reference must be made to pages 16-20 of the Partial Report of Hearing Examiner dated January 13, 1978, wherein the same problem was faced with respect to rules on power plant sitings and power line routings. In those situations, while there was substantial opposition to the proposal, there was greater support for it than was evidenced for these rules. In addition, there was a separate legislative mandate to maximize citizen participation for those situations.

Based upon all the comments, it is found that, with one exception, the Office has failed to justify both the need and reasonableness of its proposed addition. That exception relates to certificates of need (and certificates of convenience and necessity). The Office may elect either to drop the proposal completely, or else to adopt it with the limitation that it apply only to certificates of need and certificates of convenience and necessity hearings. If the Office does retain it, it is recommended that a warning concerning HE 217 B. be inserted.

The second proposed change would permit non-parties to question witnesses. In support of the proposal, the Office's Statement offers only general statements about opening up the process and use of such procedures in the past with positive public reaction. It did state that such procedures have also proven to be effective in keeping down the number of Petitions to Intervene, leading to a more manageable hearing process.

Joseph Bizzano of NSP spoke generally in favor of increasing formality and limiting public participation (Tr. 1-73). He specifically objected to permitting the public (as opposed to other parties) to question and cross-examine witnesses of parties. He stated that such questioning requires "a very special expertise, and in the past, it had gotten out of hand and produced an undesirable situation" (Tr. 1-75). The Chief Hearing Examiner responded by stating that the provisions were at the discretion of the hearing examiner, and that, in his opinion, such participation would not be appropriate in a license revocation case before a licensing board, but that it might be appropriate in a rate case before the Public Service Commission or in a case where a public carrier were attempting to close a station (Tr. 1-78). Commissioner Sasseville asked whether such a non-party participant could have the right to get exhibits, or a copy of the final

order. She also asked how do they know when they should file exceptions. She related an instance where a non-party did not receive a copy of the examiner's report, no exceptions were filed with the Commission, and the Commission proceeded to write its final order. After the final order had been issued, the person then wrote a letter to the Commission which was, in essence, a series of exceptions to the examiner's report, and the Commission ultimately amended its order to void various time requirements. The Commissioner stated that she could see a great possibility of such confusion by clouding the status of parties and non-parties by giving these various privileges to non-parties (Tr. 1-106). The Chief Hearing Examiner stated that, as a practical matter, he believed that if there were an aggrieved or interested person, they would keep track of the process (Tr. 1-106).

It is found that the flexibility contained in the Office's proposal is the most reasonable method of experimenting with these new privileges proposed to be granted to non-parties. In situations such as this, only experience will demonstrate whether the privilege is worth retaining in the future or not. It is found that the Office's proposal with respect to non-parties questioning of witnesses is both needed and reasonable, and ought to be adopted without change.

The final proposal of the Office is contained in the last sentence of the proposed paragraph, and would allow persons who elected to participate as a non-party to be questioned by parties. The justification given for this was that it was needed to ensure that parties not be given "second-class status". If the public may be allowed to question witnesses of the parties, parties ought to be allowed to question the public.

Although the Office made it clear in its Statement and in the record that this privilege of questioning the public was at the discretion of the hearing examiner, the Committee (Pub. Ex. W) felt that such discretion was contrary to due process. It argued that parties ought to be entitled to cross-examine those who testify in proceedings which will affect the rights of the parties. This was the only comment with respect to this final sentence, and it points up the problem with the wording of the final sentence. The Chief Hearing Examiner appears to be proposing that parties be able to question members of the public if they give testimony, offer exhibits, note their appearance, or question witnesses. The Committee is arguing in favor of mandatory (rather than discretionary) questioning of the public if they "testify". The Committee's interpretation makes sense out of the Office's Statement relating to not putting parties in a "second-class status". The simple noting of an appearance or questioning of a party's witness ought not to give rise to questioning by parties. However, either direct testimony or the introduction of exhibits do provide a logical basis for questioning by parties. Therefore, it is recommended that the last sentence be revised to read as follows:

> Persons offering testimony or exhibits may be questioned by parties to the proceeding.

With this change, the Office's proposal for the final sentence is found to be both needed and reasonable.

Proposed HE 211: Consolidation

42. The only change proposed by the Office for this rule occurs in HE 211 C.1., relating to petitions for severance. The change is one which has been seen before, in that it requires a party objecting to consolidation to do so by filing a petition with the hearing examiner "and serving upon all parties and the agency if it is not a party". The Office's Statement alleges that the requirement that the petition be served upon all other parties and the agency was left out of the existing rule through

oversight, and is needed to permit any other party or the agency to object to the petition for severance if they choose to do so. The Statement goes on to state that all other motions and petitions are required to be served upon all parties and the agency, and it is only reasonable for this petition to be served in the same fashion.

Both the Committee (Pub. Ex. W) and the Department of Health (Pub. Ex.Y) made the same comment with regard to the wording of this proposal that they did with regard to the wording of previous proposals, recommending that the last six words ("if it is not a party") be omitted. For the same reasons given earlier, it is recommended that those words be omitted. With that omission, the rule is found to be both needed and reasonable.

Proposed HE 212: Disqualification

43. The existing rule on disqualification of hearing examiners was relatively brief and simple, providing for a determination by the Chief Hearing Examiner upon the filing of an affidavit of prejudice no later than five days prior to the date set for hearing. The Office's proposal is much more complex.

After noting an oversight, and after having been advised by the Attorney General of another oversight, and finally after having received criticism of the proposed rule at the first hearing, the Chief Hearing Examiner moved to withdraw the proposed amendment, thus leaving the existing rule as it was prior to the hearings (Tr. 1-111).

Apparently unaware of the Office's decision to withdraw the amendments, a number of commentators submitted substantial criticism.

It is found that the withdrawal does not create a substantial change problem, and that, in light of the criticism, the decision to withdraw is both needed and reasonable.

Proposed HE 213: Prehearing Procedures

44. The only change to the existing rule proposed by the Office is the addition of a paragraph (HE 213 B.), which specifies that prehearing motions must be made in writing, what they must contain, and upon whom they must be served. The proposal also permits (but does not require) a hearing on a prehearing motion prior to the issuance of an order.

The Office's Statement indicates that the new section was added to eliminate confusion which had arisen in the past. It is primarily aimed at discovery motions, most of which do not require a hearing, and that is why the hearing has been made discretionary.

John M. Broeker (Pub. Ex. L) supported the proposal, stating that there had been many occasions in the past necessitating motions, and spelling out a procedure in this amendment would be beneficial to all parties. The Board of Nursing (Pub. Ex. M-2) argued against requiring that all motions be in writing, stating that it would unnecessarily delay the conduct of disciplinary proceedings. The Board felt there should be a provision to allow for verbal agreements between the parties and the hearing examiner. The Board also felt that there ought to be some limit on the submission of written notices, and suggested a five-day notice period. The Committee (Pub. Ex. W) also recommended that a notice be served upon the parties five days in advance of the submission of the motion to the hearing examiner, rather than five days prior to a hearing (which may never be held). This procedure would, it stated, set a specific time period in which objections could be raised. The Committee did believe that orders on motions should be in writing in order to preserve a

complete record of the proceedings. In order to accomplish these goals, they recommended deletion of the last sentence, and substitution of the following language:

> Motions provided in these rules require a written notice to the agency and all parties to be served five days prior to their submission to the hearing examiner. The hearing examiner may, in his discretion, require a hearing before an order or [on] the motion will be issued. All orders on motions shall be in writing.

The Department of Health (Pub. Ex. Y) agreed with the Committee. Finally, the Department of Human Rights (Pub. Ex. Z-1) went beyond the Office's proposals in suggesting that all prehearing agreements, amendments, stipulations, or other matters should be set forth in a prehearing order and made part of the record because, in the past, the Department has allegedly participated in prehearing conferences at which agreements had been reached but at hearing, opposing parties had attempted to reopen the matters previously agreed upon. While it is improper for this Examiner to go into matters not recommended for amendment by the Office, the gist of the Department's proposal would support the Office's amendment to require written motions, and would also support the Committee's recommendation that all orders on motions be in writing.

The Office's proposal is found to be both needed and reasonable. However, the Committee's proposal ought to be examined by the Office as a source of improvements. The only problem with the Committee's proposal is that there are some situations in which a five-day notice would be impractical. This could be cured by adding "(except when impractical)" at the end of the of the Committee's proposal. Were the Office to adopt the Committee's proposal, it would be found to be both needed and reasonable. Another proposal worthy of consideration would be the Board of Nursing's idea of giving the Examiner discretion to waive the procedures in the rule if all parties can agree on a motion.

Proposed HE 214: Discovery

45. Essentially, the amendments to this rule broaden the types of discovery available in contested cases, as well as specifying prohibitions upon privileged or proprietary information. The existing rule limited discovery to specifically enumerated materials and procedures. The Office's proposal retains that limitation, but provides that upon motion, any other means of discovery available pursuant to the Rules of Civil Procedure for the District Courts may be allowed upon a showing that the information sought to be discovered is needed, and that the motion is not made for purposes of delay. As this is the most important part of the Office's proposal, it will be dealt with first, and then the matters of privileged information and proprietary information will be discussed.

The Office's Statement justifying the proposed expansion of discovery methods contains the following:

> One purpose of establishing the Office of Hearing Examiners was to provide for fair and expeditious hearings. Fairness requires opening new means of discovery for all parties. However, in order to conduct all hearings in an expeditious manner, some control must be available. We have had numerous examples over the past year and one-half of cases which have had to be continued several times due to discovery being dragged along. Both the state agencies and the bar have been equally at fault. It is reasonable for parties to have the

> right to an expeditious hearing protected, and this rule is aimed at that right. Further, many contested cases involve issues or amounts that are not significant enough to justify extensive discovery. Many persons find that it is not worthwhile to hire an attorney to write answers to extensive interrogatories. In these cases, it is necessary for the examiner to balance the competing interests.

Comments on the Office's proposal to broaden discovery were varied and numerous. The most common ones suggested that the proposal gave too much discretion to the hearing examiner to limit discovery, and recommended that all forms of discovery available in the court rules be available in these rules, without any motion needing to be made [Board of Nursing (M-2), Department of Natural Resources (X-2), Department of Health (Y), and Department of Human Rights (Z-1)]. On the other hand, John M. Broeker (Pub. Ex. L) feared that even the Office's proposal could be abused and used as a tool to stifle grievances; it ought to be further limited by prohibiting its use where the hearing examiner found it to be "financially inappropriate". The Committee (Pub. Ex. W) and the Department of Health (Pub. Ex. Y) both pointed out that the balancing test suggested by the above-quoted excerpt from the Office's Statement does not appear in the rule. The proposed rule contains standards based on need for the information and prohibitions against delay. The Statement suggests two additional standards will be used: the significance of issues or amounts in controversy, and the need to hire an attorney solely to answer interrogatories. The Committee recommended that the two additional criteria be placed in the rule if the Office plans to utilize them. The Department of Health recommended that this be resolved by adding to the rule the requirement that any discovery documents forwarded to an unrepresented party contain a statement indicating that questions regarding the document could be directed to the hearing examiner, whose role, however, would be limited to explaining the meaning of the discovery document and what it requires.

Another comment from the Committee and the Department recommends that the first sentence of the existing rule should be combined with the first sentence of the proposed amendment to read as follows:

> Upon motion of a party, the hearing examiner may order discovery of any relevant material or information, provided that privileged work product (e.g., that of attorneys, investigators, etc.) and all other privileged information or communications which are recognized by law shall not be discoverable.

Reviewing the various comments, it appears that the first two are inter-related in that the rule should either eliminate the discretion of the hearing examiner recommended by the Office (in which case, no standards need to be set forth), or it should retain the discretion, but set forth all of the standards intended for use in regulating the exercise of the discretion. It is found that the Office has justified retention of discretion for expanded discovery. As a corollary, the Office must then place in the rule the standards which it intends to impose upon hearing examiners regulating the exercise of that discretion. It is better that expansion of discovery procedures evolve slowly, so that the Office can gain experience with the need for such discretion and regulation. It may find that it is unnecessary, in which case it may amend the rule to eliminate it at some time in the future. Therefore, the Office should amend the proposed rule by adding the standards set forth in the Statement (which would include the Broeker comment as part of the material on "issues or amounts in controversy").

With regard to the proposal to merge the first sentence of the existing rule with the first sentence of the proposed amendment, it is found that while the Office's proposal to keep the two separated would be reasonable, the proposed merger is clearer, but the Office may elect which to use.

One other clarification which may be made at the option of the Office would be to change the words "any other means" which appear in the second sentence of the proposed amendment to "any means". This is recommended by the Board of Nursing, the Board of Health, and the Department of Human Rights.

Proposed HE 215 D. relating to proprietary information is a completely new rule. It provides that the hearing examiner may make such protective orders as are reasonable and necessary to prevent the revelation of proprietary information or trade secrets through discovery. The Office's Statement alleged the rule was necessary because the existing rules do not explicitly cover the question [although it may be covered by existing HE 203(c)(10)] and that it is a direct result of a case conducted for the Public Service Commission, and was proposed for inclusion in these rules by the Commission in Pub. Ex. B. At the hearing, Commissioner Sasseville raised the question of whether such a provision might violate the statute on public records, Minn. Stat. § 15.17 (Tr. 1-111). George A. Beck (Pub. Ex. H) suggested that the rule was not clear in that the first sentence appears to absolutely prohibit the revelation of proprietary information or trade secrets, while the next sentence appears to set standards permitting its discovery. Although he did not propose any specific language, the problem would be solved by reordering the concepts along the following lines:

> D. Proprietary information. When a party is asked to reveal material which it considers to be proprietary information or trade secrets, he shall bring the matter . . .

The Pollution Control Agency pointed out that some agencies may already have statutes governing proprietary information, and a provision should be made to accommodate those statutes. The agency recommended that the phrase "and permitted by law" be added to the end of the paragraph. However, it appears that this phrase should more properly be "or as otherwise permitted by law".

Looking at these comments, it would appear that the fear of Commissioner Sasseville is already a matter of common law. If, for example, a person desired to examine the record after the issuance of the examiner's report, the question of how to deal with the proprietary information would be beyond the scope of these rules as the Office has always taken a position that its jurisdiction ends upon the return of the file to the agency. Therefore, resolution of that problem would be left to the agency's attorneys. The Beck proposal ought to be adopted. Although there is no question but that the Beck proposal is merely a restatement of the Office's intentions, that conclusion might not be so obvious to one who has not sat through the hearings and examined all of the exhibits in this proceeding. To avoid any dispute, it is better that the rule be clarified as Beck proposed. In addition, the concern of the PCA ought to be addressed so that there is no dispute as to how an agency's statute interfaces with the rule.

With the changes recommended above, the rule is found to be both needed and reasonable.

Proposed HE 216: Subpoenas

46. The Office's proposal essentially makes three changes to the existing rule. The old rule provided that requests for

subpoenas could be made only in cases involving agencies having statutory subpoena power. Chapter 443 granted subpoena power to the Chief Hearing Examiner, and the Office has deleted the limitation in the existing rule and substituted therefor a rule which provides that following the commencement of a contested case pursuant to these rules, only subpoenas issued by the Chief Hearing Examiner shall be used during the course of the administrative proceeding. That was the most substantial change proposed by the Office. The other two changes are minor, requiring requests for subpoenas to name all persons to be subpoenaed and to be served upon all parties and the agency.

In support of its primary change, the Office's Statement pointed out the statutory change, and argued that in the past, parties other than the agency had to request subpoenas from the agency, but the agency would merely issue its own subpoenas without informing anyone, thus giving themselves an unfair advantage. The Office argued that its proposal would put all parties on equal footing and was required by fundamental fairness.

At the hearing, the Securities Division of the Department of Commerce opposed any limitation on its statutory right to continue to issue subpoenas after an administrative proceeding had commenced, arguing that the Office's proposal to curtail that power went beyond its statutory authority (Tr. 1-116). In response, the Chief Hearing Examiner repeated that continuing the agencies' power to issue their own subpoenas placed them at an unfair advantage vis-a-vis respondents (Tr. 1-117). Essentially the same argument was raised by the Board of Nursing (Pub. Ex. M-2), the Board of Dentistry (Pub. Ex. U), the Committee (Pub. Ex. W), the Department of Natural Resources (Pub. Ex. X-2), the Department of Health (Pub. Ex. Y), and the Department of Human Rights (Pub. Ex. Z). While there were many different words used to express these comments, essentially they boiled down to the following arguments:

1. No agency (including the Office) may limit by rule authority granted to another agency by statute.

2. The proposed rule can only operate within the bounds of an authorizing statute.

   (a) There has been no repeal of agenies' statutory authority by implication because the two statutes are not irreconcilable.

   (b) The legislature intends statutory sections to be interpreted so as to give effect to each statute if possible.

   (c) The Office's rules only supersede procedural rules of agencies with which they conflict, but they may not supersede substantive or procedural statutes.

3. Some statutes explicitly permit the enforcement of agency subpoenas even after complaints have been filed, raising the implication that the agency may continue to issue its subpoenas.

The Office's authority to enact the proposed rule must be based upon either (or both) Minn. Stat. § 15.052, subd. 4, as quoted in Finding No. 7, or the following provision of the same subdivision:

> Upon his own initiative, or upon written request of an interested party, the Chief Hearing Examiner may issue a subpoena for the attendance of a

witness or the production of such books, papers, records or other documents as are material to the matter being heard. The subpoenas shall be enforceable through the district court in the district in which the subpoena is issued.

Based upon the comments cited above, and a review of § 15.052, subd. 4 (1977 Supp.), it is found that the Office may not adopt a rule which conflicts with existing statutes. There is no indication in the record that the legislature intended the Office's subpoena power to be interpreted as limiting the subpoena power granted to agencies in other statutes, and thus, there is no repeal by implication (Minn. Stat. § 645.39), and the different statutes must be construed, if possible, so that effect can be given to both (§ 645.26, subd. 1). Therefore, it is recommended that the first sentence of the proposed rule be deleted in its entirety.

The other two proposed amendments to the existing rule required that requests for subpoenas name all persons to be subpoenaed and that a copy of the request be served upon all parties and the agency. The Office's Statement justified these proposals as needed to permit the Chief Hearing Examiner to fill out the subpoena because he would not issue blank subpoenas, and to assure that everyone (including the agency) knows who is going to be subpoenaed so that they would be able to tell whether or not they wish to move to quash the subpoenas. Objections to these procedures were voiced by a number of commentators. Interested persons are referred to pages 29 to 33 of the Partial Report of Hearing Examiner in this matter for some of those comments. In addition, George A. Beck (Pub. Ex. H) recommended that the rule should clearly state that potential relevance must be shown as to each person sought to be subpoenaed. Douglas M. Skor (Pub. Ex. R) felt it was inappropriate to serve copies of requests for subpoenas on all parties, as discovery procedures are available if parties desire to determine who the witnesses will be for other parties. He pointed out that the district courts do issue blank subpoenas. The Board of Dentistry (Pub. Ex. U) also questioned the need for copying other parties with requests for subpoenas due to the discovery procedures and a fear that allowing parties to object prior to the issuance of a subpoena could result in abuse by those who would attempt to delay the proceeding. The Committee (Pub.Ex. W) also questioned the copying requirements, pointing out that only the recipient of the subpoena is eligible to move to quash a subpoena, others have no standing to do so. Finally, they stated that there is no need for a pre-issuance review of a request, as the vast majority of subpoenas are routinely issued. However, the Committee urged that if the Office were to retain its pre-issuance review system, the rule should specify the criteria to be used in determining whether or not a subpoena should be issued. The Board of Nursing (Pub. Ex. M-2) seemed to oppose the copying requirement out of a desire to protect subpoenaed witnesses from intimidation and harassment by others.

It is found that the Office's proposal to require that individuals sought to be subpoenaed be named (as opposed to issuing blank subpoenas) is both needed and reasonable. However, based on the objections, as well as those noted in the Partial Report, it is found that the Office's proposal requiring that all other parties and the agency be served with a copy of the request for subpoena is not needed. Since the Office has not sought to amend other provisions of the existing rule, comments directed to those provisions have been disregarded.

Proposed HE 217: The Hearing

47. HE 217 B. Essentially, the changes proposed by the Office for this paragraph bring the paragraph into conformity with the changes proposed for HE 210 E. The Office is recommending

that HE 217 B. be amended to provide that all testimony at the hearing be under oath or affirmation "subject only to the provisions of HE 210 E." and that testimony which is not subject to oath or affirmations may be given such weight as the hearing examiner deems appropriate. In support of its position, the Office's Statement urged that it was reasonable to allow the hearing examiner to weigh unsworn testimony "as he is able to observe the witness's demeanor, and knows all of the other evidence in the case which may either support or refute the evidence presented".

Although there were a number of comments submitted in opposition to the proposed addition, all of the arguments have been discussed in connection with Proposed HE 210 E. Therefore, there is no need to repeat them here.

It is found that the Office's proposal is both needed and reasonable. As discussed more fully in that portion of the Partial Report of Hearing Examiner referenced in the discussion of HE 210 E., it is found that permitting the hearing examiner to weigh the testimony constitutes a reasonable "trade-off" if such unsworn testimony is to be allowed at all.

The Office may want to consider the advisability of clarifying HE 217 B. in order to avoid any confusion between limitations placed on testimony given without oath in HE 210 E. and its proposal as presently written. However, such a change is not necessary, and may be made at the election of the Office.

48. HE 217 C. Although there are a number of subparagraphs contained in the present HE 217 (c), the Office has elected not to modify any of them. Rather, it is only proposing to add a new subparagraph dealing with offers of proof. Basically, the subparagraph provides for an offer of proof to be made when an objection to a question propounded to a witness is sustained, unless it is clear that the evidence is not admissible or that the witness is privileged.

In support of its proposal, the Office's Statement indicates that all hearing examiners have allowed such offers in the past, but some had indicated that they would be more comfortable with a specific rule on the subject. The Statement goes on to point out that in the vast majority of cases (except Human Rights and OSHA cases), the hearing examiner only makes recommendations, and but for an offer of proof, it is possible that a matter would have to be remanded for further hearing, causing an additional delay and expense.

George A. Beck (Pub. Ex. H) objected to what he perceived to be limitations upon the discretion of the hearing examiner in the proposed rule. He argued that the proposal's requirement that upon request, evidence be taken in full "unless it clearly appears that the evidence is not admissible on any ground or that the witness is privleged" creates a fairly heavy burden to satisfy, and thus will encourage a lengthier record than necessary. He believed that the rule should state that the evidence may be taken in full at the discretion of the hearing examiner. On the other hand, John M. Broeker (Pub. Ex. L) felt that the proposal gave too much discretion to the hearing examiner. He urged that there should be no limitations upon a requirement that the evidence be taken in full. At a minimum, he urged that the person making the offer of proof ought to be able to fully make that offer and indicate what testimony or evidence is available to support the offer, even though the evidence may not be taken as such.

The Board of Nursing (Pub. Ex. M-2), the Committee (Pub. Ex. W), the Department of Health (Pub. Ex. Y) all pointed out that there is no such thing as a privileged witness, but rather the prohibition ought to extend to privileged testimony. While there were numerous methods proposed to accomplish recognition of this

problem, perhaps the easiest would be the deletion of the words "that the witness" from the last line of the proposed rule.

The Board of Nursing also recommended that offers of proof and the testimony taken pursuant to them ought to be placed in an appendix to a transcript, rather than in the body of the transcript, so that ultimate decision-makers (who may not be attorneys) would not be confused as to whether or not they ought to consider the testimony.

The Pollution Control Agency (Pub. Ex. O) raised concerns somewhat similar to those of the Board of Nursing in that they felt it ought to be made clear that no party should be free to cite such testimony or make argument from it unless and until such time as the examiner's evidentiary ruling had been reversed. The PCA also pointed out that the distinction between evidence taken over objection and an offer of proof has been blurred in the proposed rule, and suggested that the language "take the evidence in full" contained in the second sentence of the proposal ought to be deleted, and the language "allow the offer of proof" ought to be substituted. Essentially the same point was made by the Department of Health (Pub. Ex. Y), which suggested that the heading for the subparagraph ("offers of proof") was inappropriate, and a more precise heading might be "Objections to Testimony".

The Department of Human Rights, citing the fact that its hearings are somewhat unusual in that the hearing examiner's report constitutes the final decision of the agency, rather than the more typical situation where the report constitutes only recommendations to the agency, urged that the provision should explicitly not be applicable to contested cases in which the hearing examiner's report constitutes the final decision of the Department because, under the peculiar circumstances, it is both unnecessary and possibly prejudicial for a hearing examiner to receive such testimony, and may create difficulty for a reviewing court in determining the effect of such testimony on the examiner or its role, if any, in the final decision.

The comments raised a number of signifcant points but the ultimate question is whether the Office's proposal is needed and reasonable. It is found to be so. While the commentators made a number of suggestions for improvements, none of their comments constitute a showing of unreasonableness. Thus, the Office may adopt the rule in its present form. However, it is suggested that the following changes, all insubstantial, would be improvements to the rule as originally proposed:

1. The heading could be changed to "Objections to Testimony."

2. Testimony taken in full, or offers of proof, could be placed in the back of the transcript to avoid confusion.

3. The language "that the witness" in the final phase could be deleted.

4. If the Office intended that testimony taken in full be subject to cross-examination, that could be indicated in the rule.

With or without the above suggestions, the rule is found to be both needed and reasonable.

49. HE 217 D. The Office's proposed changes to this rule require the Hearing Examiner (rather than the agency) to prepare and maintain the official record until the issuance of his final report, at which time the record shall be sent to the agency. The proposal also would include in the record any transcript of the hearing.

The Office's Statement pointed out that in 1976, the Legislature enacted Chapter 68, which amended § 15.0418, to provide that prior to assignment of a case to a hearing examiner, all papers shall be filed with the agency, but subsequent to assignment of the case, all papers shall be filed with the Office, which shall maintain the official record. Upon issuance of the hearing examiner's report, the official record must be certified to the agency.

The Office's Statement alleged that the exclusion of the transcript from the list of items contained in the official record was an oversight.

A separate series of changes is made with regard to the transcript. Proposed for deletion is existing language indicating that a court reporter from the Office would record each contested case unless it was determined that the use of a tape recording device is more appropriate. Secondly, the old rule provided that a transcript would be prepared if requested by a party. It is proposed that the rule be modified to indicate that a transcript would be prepared if requested by any person. Finally, the old rule left the issue of charging for transcripts to the discretion of the Chief Hearing Examiner. The Office's proposal removes that discretion, and requires that he shall impose "a reasonable charge" for a transcript.

The comments on this section included one from John M. Broeker (Pub. Ex. L) urging the Office "to fairly allocate" the cost of preparing a transcript. He stated:

> In many cases, it may be unfair to require the requesting person to bear the cost of transcription. For example, a hearing examiner's recommendation may strongly favor an aggrieved party, yet arbitrarily be ignored by the agency in its order. Under these circumstances, where a court appeal might be necessary, it is unfair to penalize the aggrieved party because of the arbitrariness of the agency. I believe that the Chief Hearing Examiner should have more authority to allocate the charge for a transcript among the parties involved.

The Department of Natural Resources (Pub. Ex. X-2) pointed out that in at least one case, transcript charges were being paid directly to the court reporter by the agency. The Department pointed out that this did not agree with the last sentence of the paragraph.

It is found that the deletion of the requirement that a court reporter from the Office keep a record of each contested case unless it is determined that the use of a tape recording device is more appropriate is both needed and reasonable. Since the existing rule was adopted, changes have taken place, not only within the office, but also in legislation. The Office has severely reduced its staff of court reporters. Further, the presumption in favor of a transcribed record, as opposed to a tape recording, was reversed by Chapter 443, which now provides a tape recording device shall be used unless it is determined that a court reporter is more appropriate.

The proposal to allow any person (rather than just any party) to request that a transcript be prepared is both needed and reasonable.

The provision deleting any discretion in the Chief Hearing Examiner to require persons requesting a transcript to pay a reasonable charge therefor in favor of a mandatory requirement, was not the subject of any justification in the Office's Statement. However, an extensive discussion of the issue of payment for transcripts did take place during the hearings. Reference is

made to the Partial Report of Hearing Examiner, pp. 44 to 47. It should be noted that in the proposed rules for power plant siting and power line routing, discretion was retained. However, as was explained in connection with some other differences between the two sets of rules, that was merely due to the order in which they were drafted, and is not to be taken to reflect any substantive difference between the two (Tr. 1-149). Pursuant to the extensive discussions set forth in the Partial Report, it is found that the Office's proposal is both needed and reasonable, but that the words "from him" should be inserted between the words "copies of the transcript" and "to pay a reasonable charge" contained in the second sentence of the Office's proposal. While the Examiner believes that the allocation proposed by Mr. Broeker has merit, it would require criteria for implementation, and this Examiner is loath to concoct such criteria on his own. Therefore, it is recommended that the Office consider including the Broeker proposal and implementing criteria in a subsequent rule-making proceeding.

50. HE 217 F. With the exception of a minor change in the first paragraph, the essence of the Office's proposal is contained in new material at the end of the paragraph. Essentially, the Office proposes to add language setting forth a procedure for certifying motions to an agency under certain circumstances, at the discretion of the hearing examiner.

The Office's justification for this new material is that it is needed in order to obtain the agency's decision on certain questions before the hearings are concluded. The Office argued:

> Because the hearing examiner does not make a final decision in any sense, the decisions of the hearing examiner must be considered by the parties to be preliminary only. If a motion is decided adversely to a party which necessitates additional time and expense by that party, such as a motion that a certain area of testimony is relevant to the hearing, the parties should have available to it the opportunity to have that question finally decided and thus be relieved of the obligation to present additional testimony or take other action. In addition, many state agencies conduct hearings which require a final decision before a certain statutory deadline, and there is special urgency in those proceedings that the hearing proceed as expeditiously as possible, and that subjects not be considered at the hearing upon the ruling of the hearing examiner only to be finally determined irrelevant in the agency's final decision. (Emphasis in original)

The Statement also points out that the criteria employed and some of the specific language was taken from a federal rule, 28 USC § 1292, under which a large number of interpretative decisions are available to guide the hearing examiner and the parties.

Commissioner Sasseville pointed out that the Public Service Commission had originally proposed this rule in Pub. Ex. B, but that a part of the Commission's proposal was not recommended for adoption by the Office. In the Commission's original proposal, if the Examiner refused to certify a motion of the agency, the moving party could apply to the agency for leave to appeal the matter to it (Tr. 1-112). She pointed out that absent such a provision, the parties would be required to seek relief in district court, necessitating an even more time-consuming and expensive proceeding by the parties than if there were a provision for appeal directly to the agency.

The Pollution Control Agency (Pub. Ex. O) recommended that language be added to the end of the second paragraph of proposed

HE 217 F. which would require that the hearing adjourn until the decision is reviewed by the agency, unless the party requesting the certification agrees that the hearing may continue. Although it is not clear, it appears that the purpose of this is to ensure that the hearing not proceed to adjournment until the agency has responded to the certified motion. While obviously it makes no sense to certify a motion to an agency and then finish the hearing and adjourn prior to receiving the agency's response, to require an automatic adjournment every time a motion is certified could lead to numerous delays and abuses.

Douglas L. Skor (Pub. Ex. R) had a number of comments with respect to the proposal. He first suggested that this procedure should not be limited to "motions", but should apply to any ruling made before or during the hearing. The second suggestion was that the criteria proposed were too severe. He suggested that it should not be necessary for both factors to exist at the same time, and recommended the addition of the third factor, which would be "necessity to promote the development of the full record and avoid remanding."

The Department of Health (Pub. Ex. Y) and the Board of Nursing (Pub. Ex. M-2) both urged that the rule be broadened to include motions decided before the hearing, by adding the language "before or" between the words "hearing examiner" and "during the course". The Department of Health also proposed the deletion of the requirement that a request to certify a motion be made "at the time the hearing examiner rules". The Department argued that if the Office's proposal remains, any party adversely affected will always request certification, while if they had some time to think about it, they might well decide it was unnecessary. To implement this proposal, the Department recommended removing the requirement, but adding as a criteria for the hearing examiner to consider, "whether or not the delay between the ruling and the motion to certify adversely affected the prevailing party." The Department suggested that, in some cases, the delay in making the motion would cause no problem for any person. The Department also urged that the list of criteria be expanded to include "if to wait until after the hearing would render the matter moot and impossible for the agency to reverse, or for a reversal to have any meaning." As an example where such a criterion would be helpful, they suggested that in a motion for change of venue, once the hearing was held, it would be meaningless to have the agency consider the matter. Finally, the Department suggested that all of the criteria, whether they were proposed by the Office or by the Department, should be alternative grounds for certifying a motion, rather than requiring that they all be met.

It is found that the Office's original proposal is both needed and reasonable. However, many of the suggestions would improve the proposal. It is recommended that the Sasseville proposal not be adopted because once a request to certify has been denied by the hearing examiner, he will have made two decisions on the same question. While it is dangerous to speculate on such matters, it is believed that the occasions on which an examiner would be reversed by an agency would be few, and the difficulty of appealing the matter to district court should prevent undue delay which might be caused if the easier agency appeal suggested by the Commissioner were adopted. The Board of Nursing and the Department of Health proposal (that the rule be amended to include prehearing motions) ought to be adopted. There is no reason to exclude them, and it would be proper to get a matter settled before the hearing begins, if at all possible. The language proposed by the Department could achieve that end. The proposal of the PCA relating to adjournment is logical, but as has been noted, the potential for abuse would be severe. It is recommended that the proposal be adopted, but that any adjournment pending decision by the agency be at the discretion of the hearing examiner. The first Skor proposal has been dealt

with by adopting the Nursing-Health proposal. The second Skor proposal, relating to the severance of criteria is recommended for adoption, and may be implemented by merely changing the word "and" at the end of the first criterion to "or". The third Skor proposal, relating to adding the criterion is also recommended for adoption although a parallel procedure exists in proposed HE 217 C.7. However, it is possible that examiners might elect to certify a motion on relevance of testimony rather than treat it under the C.7. procedure. For major portions of testimony, with attendant cross-examination and rebuttal, it would be desirable to permit the examiner to certify to the agency the question of whether the testimony is, in fact, relevant. Therefore, the Office ought to amend the list of criteria by adding the proposed Skor language so that the examiner will have the ability to use either method. The Department of Health proposal relating to timing of the request for certification by deleting the proposed language and substituting an additional criterion is recommended for adoption. However, the Office might want to limit that by requiring that the request for certification must be made within some period (24 hours?) of the examiner's ruling on the original motion. The Department of Health's proposal for an additional criterion relating to mootness and impossibility also ought to be added. Finally, the Department's recommendation that all standards be separated by the word "or" as opposed to the word "and" is also recommended for adoption.

51. HE 217 G.2. There are essentially two major changes made by the Office's proposal for HE 217 G.2. The first essentially limits the number of persons affiliated with a single party who may cross-examine a witness. The second sets forth criteria for establishing the date of the close of the record. A minor change permits the hearing examiner to vary the conduct of the hearing at his discretion.

The Office's justification for these changes is that the practice of examination of witnesses by more than a single person has been found to be necessary, particularly where expert witnesses present testimony. However, it is also necessary to prevent repetitive examination or harassment of a witness by the use of a number of different questioners representing the same party. In support of its proposal to set criteria for establishing the date of the close of the record, the Office alleged that through an oversight in existing rules, there was no provision to formally permit the introduction into the record of a transcript or a late-filed exhibit, as the existing rule provided that the record closed on receipt of the final written memorandum, which oftentimes was not the last item to be filed. The Office stated that the amendment clarifies the different items, receipt of the last of which would close the record. Finally, the Office's justification for giving discretion to the hearing examiner to modify the conduct of the hearing is based upon the belief that in many small, uncontested matters, a more informal hearing process results in greater efficiency and quick disposition. In addition, the Office argued that it ought to have the flexibility to vary procedures where the need to allow public participation is great. Formal procedures "scare out" some members of the public who would otherwise be willing to come forward.

The comments on this proposal were numerous. The three topics will be dealt with separately in the discussion below. With respect to cross-examination limitations, William Carstadt, representing Interstate Power Company, generally supported the goal of the rule, but believed that in all cases, a party's attorney, if one there be, ought also to be able to cross-examine the witness even though another representative of the party has done so. He argued that without such an addition, the cross-examining party would have to choose between being denied the use of an expert or being denied the right of counsel (Tr. 5-203-204). In response to his comment, the Chief Hearing Examiner stated that pursuant to a similar rule (contained in the proposed rules for

power plant siting and power line routing), testimony had suggested that it was possible that one particular witness might testify as to certain engineering factors, certain environmental factors, and some third area, and any one person representing another party may not have expertise in all three areas, and therefore might want to use a different person in each area. The Chief Hearing Examiner stated that the purpose of the rule was to prevent "double-teaming" a witness who was presenting evidence on one issue (Tr. 5-205). Carstadt's comment, however, went only to permitting an attorney for a party to cross-examine along with one expert. John Broeker (Pub. Ex. L) pointed out that the language proposed by the Office implies that only the party can make the objection to harassing cross-examination, not his attorney. He proposed that this be clarified by adding the word "or attorney for the party" between the words "party" and "being" in the last sentence of the Office's proposal. The Committee (Pub. Ex. W) suggested that the rule would be clearer if the words "whose witness is" be inserted at the beginning of the second sentence of the rule, following the words "of the party" and before the words "being cross-examined". As a more general comment, the Department of Natural Resources suggested that the "rights" provided in HE 210 E. ought to be included in HE 217 G., so that there was no confusion regarding the potential conflict. The Department of Health (Pub. Ex. Y) agreed with the Committee's comment. The Department of Human Rights (Pub. Ex. Z-1) urged that there be no restrictions on cross-examination because Minn. Stat. § 15.0419, subd. 3, states that every party or agency shall have the right of cross-examination, and the Office's proposal could not limit that statutory provision.

In examining the comments, that from the Department of Human Rights should be examined first. It is found that the Office's proposal is neither contrary to the statute, nor does it constitute an impermissible limitation of the statutory right. What the statute guarantees is the "right of cross-examination of witnesses who testify", and the Office's proposal only sets forth procedures to implement that right. It should be pointed out that subdivision 1 of the same section permits the Office to exclude "repetitious evidence", and § 15.052, subd. 3, mandates that the hearing examiner see to it that all hearings are conducted "in a fair and impartial manner". The Partial Report of Hearing Examiner, at pp. 16 to 20, discussed alleged incidents of attempts to humiliate witnesses under the guise of cross-examination. For all the above reasons, the Department's argument is rejected. The Carstadt proposal is recommended for adoption, as it is entirely possible that an expert might do very well at dealing with the expert material, but be unfamiliar with some of the legal ramifications of the cross-examination which he has conducted, and an attorney could assure that the party gains the full benefit of the cross-examination. The Broeker proposal is also recommended for adoption. While this examiner would not hesitate to permit an attorney for a party to raise the proper objection, there is no reason not to clarify the rule to assure such a conclusion. The Committee's proposal is also recommended for adoption, again for the sake of clarity. That leaves only the Department of Natural Resources's proposal which would ensure that there is no conflict between HE 210 E. and HE 217 G.2. Changes to reconcile the two proposed rules were not specified by the Department, but it is recommended that the Office, after having decided what changes to make in HE 210 E. and the recommendations made above with regard to this rule, examine the two and determine whether any clarifying language needs to be added.

The second change which prompted comments dealt with the criteria to be used in determining the date of the close of the record. Joseph Bizzano of NSP alluded to a problem which really does not go to the merits or demerits of the Office's proposal. He stated (Tr. 5-24-30) that on occasion, non-parties have submitted materials to the hearing examiner after the hearing, but have failed to send copies to the parties. The parties were un-

aware of these materials having been filed, and thus did not respond to them. Bizzano sought a rule which would require notification to the parties of what has been submitted to the hearing examiner, with such notification coming at a time which would permit the parties to respond to the material. The Chief Hearing Examiner expressed some surprise that this had occurred (Tr. 5-27-28), but did not think a rule was necessary to cure the problem. He believed that hearing examiners ought to be notifying the parties of such materials as a matter of course. This Examiner agrees that the Bizzano proposal really does not go to the merits or demerits of the Office's proposed rule, and would add that parties should take it upon themselves to contact the hearing examiner prior to the close of the record to determine if any such materials do, in fact, exist. In some cases, the volume of public comment is substantial, and if there are numerous parties to the case, it would be unrealistic to expect the public to copy all of them (although it might be technically required). The best solution would be for the parties to keep abreast of what is in the record. No change is recommended as a result of the Bizzano comment. John M. Broeker (Pub. Ex. L) urged that the record be allowed to stay open until such time as the hearing examiner issues his report. He stated that there may be infrequent occasions after the filing of memoranda, transcripts and exhibits, in which new evidence may become available which ought to be considered by the hearing examiner. The Board of Nursing (Pub. Ex. M-2) agreed with the intent of the proposed rule, but felt that it ought to more specifically establish the closing date for the record. They cited the following example as indicative of the problems which they feared might occur:

> . . . The agency could file a brief indicating that the party did not prove a particular point during the hearing. The respondent could agree and, since the record is not closed, submit an additional exhibit to prove the point. Such maneuvering could go on for an extended period unless more definitive timing is established.

The Department of Health (Pub. Ex. Y) also felt that clarification was necessary, particularly with regard to late-filed exhibits. It stated that exhibits could only be introduced at the time of the hearing, and the rule should not provide a party with the ability to hold back or delay the introduction of exhibits in order to eliminate any possible objection or rebuttal.

In response to these comments, it is found that the Bizzano comment ought not to be adopted. The fears raised by the Board of Nursing and Department of Health are based upon a misunderstanding of a late-filed exhibit. The Department is correct in alleging that exhibits should be introduced at the time of hearing, for the very reasons it stated. However, on occasion, it is necessary for the examiner to order that a specific piece of evidence or document be sent to him. In the few cases which this examiner is aware of, in requesting such a document, the examiner has always clearly specified the procedures for rebuttal or cross-examination, if the document is of the type that might need it. However, it is recommended that, in order to clarify this matter, the language "(if requested by the examiner)" be inserted following the words "late-filed exhibits" contained in the last line of the proposed rule.

The final comment to be discussed is that of John Broeker, who urged that the record remain open until the issuance of the examiner's report. This comment is not recommended for adoption at this time, for two reasons. First of all, there must be some cut-off date, or else the fears of the Board of Nursing and the Department of Health will, indeed, become reality. Secondly, experience has shown that where good cause has been shown for the reopening of the record to receive new material, examiners have done so. Such material has included both factual material and

argument based upon new case law. Although requiring a motion is somewhat more cumbersome than the Broeker proposal would be, the need for reopening has been extremely rare, and has always been accomplished where necessary. The Broeker proposal is not recommended for adoption.

The final set of comments dealt with the Office's proposal to give the examiner discretion to vary procedures for the conduct of hearings in the event that he determines that the public interest would be served by doing so. Henry Quade of Mankato objected to the fact that in the past, citizens have always been the last to talk, often late at night. He asked whether there was any procedure to rectify this problem (Tr. 5-169). The Chief Hearing Examiner pointed out that if the Office's proposal is adopted, the hearing examiner would have discretion to alter the order of presentation to allow for those who may have difficulties with baby-sitters, those who must drive a long distance to get home, etc. (Tr. 5-170). John M. Broeker (Pub. Ex. L) strongly supported the proposal, stating that he had been involved in several hearings where deviations from the standard procedure were both appropriate and necessary. There were no comments in opposition, and based upon the arguments set forth in the Statement, as well as those from the public, it is found that the Office's proposal is both needed and reasonable.

It is recommended that the Office's proposals for amendments to these rules be adopted, with the changes recommended above.

Proposed HE 218: The Decision

52. There were essentially three changes proposed for this entire rule. The first, contained in HE 218 B., deletes certain language which is unnecessary if the recommendations for HE 217 G.2.h. are adopted. The second deals with the use of the Central Mailing Section, and is similar to HE 202 D., discussed earlier. The final change requires an agency to send a copy of its final order to the Office of Hearing Examiners.

The Office's Statement contains no justification for the proposed deletion from HE 218 B. However, since it is necessary in order to avoid confusion so long as the change proposed for HE 217 G.2.h. is, in fact, actually made, it is found that the lack of justification is not a problem, as it would be unnecessary. Regarding its proposal to require an agency to send to the Office a copy of its final order in the contested case, the Statement alleges that such a rule is necessary to maintain uniformity in decisions of the various examiners consistent with precedents of the agency. In order to know what the agency's precedents are, it is necessary for the Office to have a copy of final reports. A second justification for requiring a copy of the order is that since a majority of hearings are tape recorded, with no transcript being prepared, it is necessary to know when the action of the agency has become final, and the appeals period has run, so that the tapes may be erased and reused.

A comment came from Commissioner Sasseville who urged that amendments be made to portions of HE 218 which were not proposed for amendment by the Office. As has been held previously, such matters are not "fair game" for comment, although the Office may want to consider the comments (which are contained at Tr. 1-66 and 1-113) for later action. Charles Lefevere, representing Cooperative Power Association, recommended that references to "regular mail" be changed to "first class mail" to avoid any confusion (Tr. 1-87 and Pub. Ex. T-1). The Chief Hearing Examiner replied by stating that such was his intent, and he had no opposition to making the proposed change (Tr. 1-88). It is recommended that the change be made. John M. Broeker (Pub. Ex. L) made the same comment with regard to the use of the central mail system for this rule as he did with regard to proposed HE 202 D. The same resolution of the problem is recommended for this rule as was recommended for HE 202 D. Finally, Douglas L.

Skor (Pub. Ex. R) recommended that the agency be required to provide copies of its final order to interested persons. Although this matter was discussed in connection with a rulemaking rule at the end of Finding No. 22, the same arguments for rulemaking do not apply to contested cases in that parties to contested cases are required to be served with a copy of the final order of the agency. Apparently, Skor's concern relates to non-parties obtaining copies of the agency's final order. Although these are certainly public records, that does not mean that copies will be provided automatically. Since this suggestion does not relate to any part of the rule which has been recommended for change by the Office, it is not "fair game", but it is recommended that the Office consider the feasibility of such a requirement in any future rulemaking proceeding.

With the changes recommended above, the proposals for this rule are found to be both needed and reasonable.

Proposed HE 222: Effective Date

53. The same procedure recommended in Finding No. 23 is recommended for this rule.

## CONCLUSIONS

1. Timely and adequate legal notice of the hearing was properly served and published by the Office. All other substantive and procedural requirements of statute and rule have been fulfilled.

2. The Office of Hearing Examiner has demonstrated its statutory authority to adopt the proposed rules, with the exceptions specifically noted above.

3. With the exceptions noted in the Findings above, the Office has demonstrated that the proposed rules are necessary and reasonable.

Dated this 28th day of April, 1978.

Allan W. Klein

ALLAN W. KLEIN
Hearing Examiner

## M E M O R A N D U M

It should be pointed out that a finding of reasonableness by the Hearing Examiner does not and should not preclude or discourage the Office from modifying the language of a rule based upon a further examination of the record, particularly those suggestions noted as "desirable" herein, provided that no substantial change is made and providing that the final rule is based upon facts appearing in the record. There is a natural reluctance to make changes unless absolutely required. But such an attitude puts to waste the many hours of legal talent which the commentators have supplied to the Office (at no cost to the Office). The Office may make insubstantial changes which would clarify and improve the rules. It is urged to take advantage of this opportunity to do so.

Attorney General

J. Michael Miles
Assistant Attorney General

July 6, 1978

Lee E. Sheehy
Special Assistant
Attorney General

296-1288

In the Matter of the Adoption of Amendments to the Rules of the Office of Hearing Examiners Relating to Rulemaking Procedures and Contested Cases

Your clients rules have been approved by this office and filed with the Secretary of State. Note that they have NOT been filed with the State Register; this must be done promptly by your agency.

If you have any questions in this regard, please contact me.

LES:mb

Enclosure

cc: Duane Harves, Chief Hearing Examiner

STATE OF MINNESOTA
OFFICE OF HEARING EXAMINERS

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|---|---|
| IN THE MATTER OF THE ADOPTION OF AMENDMENTS TO THE RULES OF THE OFFICE OF HEARING EXAMINERS RELATING TO RULEMAKING PROCEDURES AND CONTESTED CASES. | FINDINGS OF FACT, CONCLUSIONS AND ORDER ADOPTING RULES |

The above-entitled matter came on for hearing before Hearing Examiner Allan W. Klein on October 11, 12, 13, 17, 19, and 20, 1977. The record was closed on November 9, 1977.

After affording all interested persons an opportunity to present written and oral data, statements and arguments, having heard all of the testimony, having carefully considered all of the evidence adduced and the Report of the Hearing Examiner dated April 28, 1978, and upon record, files and proceedings herein, the Chief Hearing Examiner hereby concurs with, adopts and incorporates the attached Findings of Fact, Conclusions and Recommendations of the Hearing Examiner in this matter, except as specified in the following Findings and Conclusions:

1. HE 102 D. and HE 103. The Hearing Examiners's recommendation regarding the "barrier free facility" portion of HE 102 D. has been adopted and the language stricken. The Hearing Examiner found that the rest of the proposal could be adopted. However, because the rest of the proposed language drew such wide response, including some very excellent suggestions, it has been determined that the proposed last sentence of HE 102 D. should be withdrawn as well as all mention of notice to persons other than the statutory requirements in HE 103 and that the issue should be the subject of additional hearings.

2. HE 104. The Hearing Examiner's findings and recommendations for this rule are adopted. Several suggestions for changes were recommended but left to the option of the Office of Hearing Examiners. The rule will be amended to read as follows and for the reasons stated in the Hearing Examiner's Report.

> Statement of Need and Reasonableness. Each agency desiring to adopt rules shall prepare a Statement of Need and Reasonableness which shall be prefiled pursuant to HE 105. The Statement of Need and Reasonableness shall be a document containing, at the

minimum, a summary of all of the evidence and argument which is anticipated to be presented by the agency at the hearing justifying both the need for and the reasonableness of the proposed rule/rules, including citations to any statutes or case law to be relied upon, citations to any economic, scientific or other manuals or treatises to be utilized at the hearing, and a list of any expert witnesses to be called to testify on behalf of the agency, together with a brief summary of the expert opinion to be elicited. The statement need not contain evidence and argument in rebuttal of evidence and argument presented by the public.

The statement shall be prepared with sufficient specificity so that interested persons will be able to fully prepare any testimony or evidence in favor of or in opposition to the rule/rules as proposed. Presentation of evidence or testimony (other than bona fide rebuttal) not summarized in the Statement of Need and Reasonableness may result in the Hearing Examiner, upon proper motion made at the hearing by any interested person, recessing the hearing to a future date in order to allow all interested persons an opportunity to prepare testimony or evidence in opposition to such newly-presented evidence or testimony, which recessing shall be for a period not to exceed 25 calendar days, unless the 25th day is a Saturday, Sunday, or legal holiday, in which case, the next succeeding working day shall be the maximum date for the resumed hearing.

If the agency so desires, the Statement of Need and Reasonableness may contain the verbatim affirmative presentation by the agency which may then be either read at the hearing or, if all persons appearing at the hearing have had an opportunity to review the statement, may be introduced as an exhibit into the record as though read. In such instance, agency personnel or other persons thoroughly familiar with the rules and the agency's statement shall be available at the hearing for questioning by the Hearing Examiner and other interested persons.

3. HE 105 H. For the reasons stated by the Hearing Examiner at page 15 of his report, this rule will be amended to read as follows:

> The names of agency personnel who will represent the agency at the hearing together with the names of any other witnesses solicited by the agency to appear on its behalf.

4. HE 106 A. The Hearing Examiner's recommendation has been adopted. However, the DNR proposal for a separate register has merit and is found to be reasonable, needed and an insubstantial change. The rule, as adopted, amends the proposed language accordingly.

5. HE 112. This rule relates to the effective date of the amendments to these rules. The Hearing Examiner's proposed amendment is herewith adopted with the addition of the words

"of these rules" to be inserted so that the rule reads as follows:

> These rules shall be effective for all rule proceedings initiated five working days after publication of these rules in the State Register.

Clarification is thought to be needed by the addition of the language in order that it be clear that it is publication of these rules and not publication of another agency's proposed rules which would "trigger" the effective date of these rules.

6. HE 202 B. The Hearing Examiner's recommendation of adding the words "by the agency in the Notice of and Order for Hearing" following the words "named as a party" is adopted so that the proposed rule, according to the Hearing Examiner, is reasonable.

7. HE 202 D. The Hearing Examiner found that allowing deposit of papers to be served with the Central Mailing Section, Publications Division, Department of Administration would delay delivery and recommended either deleting the amendment or adding a day to service in HE 209 B. It is found to be reasonable to allow state agencies to utilize Central Mailing but also that the Hearing Examiner is correct in his finding relating to slower service. Therefore, the rule as proposed will be adopted but HE 209 B. will be amended accordingly. As the proposed amendments relate to "Service", it is hereby found that amending HE 209 B., though not proposed originally, would not be a substantial change in that the subject of both rules relates to "service" and that the proposal obviously was raised in such a manner so as to invite reaction, and does not result in a rule substantially different from that proposed.

8. HE 203 C. 8. As reported by the Hearing Examiner, the proposed amendment to this rule was the subject of much comment. The comments and the Hearing Examiner recommended that limitations be placed on the ability of the Hearing Examiner to call witnesses. To amend the proposed amendment as recommended would, in the opinion of the Chief Hearing Examiner, result in a substantial change in the rule as proposed requiring new notice and hearing. As indicated in the Statement of Need, it is believed that the authority to call witnesses presently exists pursuant to the provisions of HE 203 C. 11. Therefore, the proposed amendment is hereby withdrawn and

will be raised again when the Office next proposes to amend its rules.

9. HE 204. This rule as proposed to be amended drew numerous comments. The Hearing Examiner's recommendations are adopted where specific. The Hearing Examiner has recommended several options necessitating additional findings. The term "service" will be substituted for the word "issuance" in the introductory paragraph for the reasons spelled out in the Hearing Examiner's report. The title of 204 A. will also be changed to "Notice and Order" as recommended. The Examiner, at page 30, recommends deleting the term "commencement" from the last sentence in 204 A. 8 and inserting the term "issuance". That alone would not be enough. The term "contested case" must also be deleted and the words "Notice of and Order for Hearing" inserted. In 204 A. 9, the Examiner's recommendation for deleting the word "the" and inserting the word "existing" in the first line is adopted. In 204 B., the Examiner has given the Office a recommendation and an optional recommendation. In the first instance, adding the words "in addition" at the beginning of the second sentence as such would make no sense. Instead, in order to answer the concerns of the Securities Division that they need not obtain permission to issue a Cease and Desist Order with a seven day notice (as provided by statute), the rule will be amended by making it into one sentence. Thus the entire rule will be prefaced by the words "unless otherwise provided by law". The period at the end of the first sentence will become a comma and the words "provided, however, that" will be inserted after the comma. The words "if not contrary to statutory requirements", no longer needed, will be deleted. The second, proposed by the Board of Nursing, is not adopted. The Examiner discusses the proposed deletion of existing rules 204 (c) and (d) (p. 32) and raises an excellent point relating to the existing rule allowing and seemingly encouraging agencies to order additional notice. The comments are well taken and, therefore, the proposal to delete exisitng 204 (d) is withdrawn as it is found that such additional notice should be en-

couraged rather than discouraged. The rule will be renumbered at 204 C and the remaining rules renumbered accordingly. Proposed rule 204 D. (to be renumbered 204 E.) will be amended as recommended by the Examiner (p. 34) by adding the words "prior written" to the rule.

10. HE 205. The Examiner recommended that any changes made in 204 A. 8 should also be reflected here. As no changes are being made in 204 A. 8 which would necessitate changes here, none are made. Although the Examiner has indicated that it might be "desirable" to insert certain language, as it was not recommended, it will not be adopted as he has found the original language both needed and reasonable.

11. HE 206. This rule will be modified, as recommended, to conform to the changes made at HE 204 A. 5.

12. HE 209 B. As a result of the amendments adopted in HE 202 D., it is necessary to amend this rule relating to computation of time for service by mail by adding the following sentence to the existing rule:

> In the event an agency chooses to utilize the Central Mailing Section, Publications Division, Department of Administration, four days shall be added to added to the prescribed period.

13. HE 210. Unless otherwise discussed herein, the Examiner's recommendations are adopted. In the proposed amendments to HE 210 E, the provision relating to presentation of evidence "with or without benefit of oath" is withdrawn for the reasons enumerated by the Examiner and due to his finding of a failure to justify the need and reasonableness (p. 39).

14. HE 211. The Examiner's recommendations on this rule are adopted. However, in reviewing the rule it appears to be internally inconsistent. The rule calls for motions for continuances to be determined by the Chief Hearing Examiner. However, the second time the term Hearing Examiner is used, the word "Chief" was inadvertently left out. The addition is found to be needed, reasonable and does not result in a substantial change.

15. HE 213. As the Examiner pointed out, several comments received merit attention. For the reasons previously given, the

words "if the agency is not a party" will be stricken. For the reasons stated in the Examiner's report, the rule will be adopted to read as follows:

> B. Motions. Any application to the Hearing Examiner for an order shall be by motion which, unless made during a hearing, shall be made in writing, shall state with particularity the grounds therefor, and shall set forth the relief or order sought. Motions provided in these rules require a written notice to all parties and to the agency to be served five days prior to their submission to the Hearing Examiner, except where impractical. The Hearing Examiner may, at his discretion, require a hearing before an order on the motion will be issued. All orders on such motions, other than those made during the course of a hearing, shall be in writing.

It is found that it is necessary to include the words "other than those made during the course of a hearing" in order to insure that written orders are not required during the hearing stage, a requirement which would lead to delay.

16. HE 214. Based on the Examiner's recommendation, HE 214 C. will be amended to include the additional standards relating to discovery motions. Therefore, the second to last sentence will be amended to read as follows:

> Upon the proper motion...of a party's case, are not for purposes of delay, and that the issues or amounts in controversy are significant enough to warrant extensive discovery.

17. HE 217. The Office had proposed an entirely new rule relating to Offers of Proof at 217 C. 7. The proposal drew much comment. As was stated at the hearing, Examiners have always allowed such offers in the past. The proposed rule would not alter that practice. It would, however, create a heavy burden to satisfy and would lead to lengthier transcripts by requiring that such offers be taken in full. Therefore, the rule is withdrawn in its entirety. The rest of the proposed amendments to HE 217 will be adopted as recommended by the Hearing Examiner, as is more fully described below.

In HE 217 F, the following new criteria will be added to the rule:

> 3. Whether or not the delay between the ruling and the motion to certify would adversely affect the prevailing party; or
>
> 4. Whether to wait until after the hearing would render the matter moot and impossible for the agency to reverse or for a reversal to have any meaning; or

5. Whether it is necessary to promote the development of the full record and avoid remanding.

ORDER

NOW, THEREFORE, it is hereby ordered that the rules as recommended for adopted by the Hearing Examiner, as modified herein, be adopted.

Dated this 10th day of May, 1978.

DUANE R. HARVES
Chief Hearing Examiner

STATE OF MINNESOTA
OFFICE OF HEARING EXAMINERS

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| IN THE MATTER OF THE ADOPTION OF AMENDMENTS TO THE RULES OF THE OFFICE OF HEARING EXAMINERS RELATING TO RULEMAKING PROCEDURES AND CONTESTED CASES. | SUPPLEMENTAL FINDINGS OF FACT, CONCLUSIONS AND ORDER ADOPTING RULES |

The above-entitled matter came on for hearing before Hearing Examiner Allan W. Klein on October 11, 12, 13, 17, 19 and 20, 1977. The record was closed on November 9, 1977.

The Hearing Examiner issued his final report on April 28, 1978, after which the Chief Hearing Examiner prepared Findings of Fact, Conclusions and Order Adopting Rules dated May 10, 1978. The Chief Hearing Examiner then submitted the rules and all of the records and files herein to the Attorney General for his review relating to form and legality, pursuant to Minn. Stat. § 15.0412, Subd. 4.

The Attorney General, having reviewed the files and records, did, on June 6, 1978, return the rules as having not been approved. Based upon the Attorney General's memorandum dated June 6, 1978, and all of the files, records and proceedings herein, the Chief Hearing Examiner now makes these supplemental Findings of Fact, Conclusions and Order Adopting Rules.

1. HE 105 H. The Attorney General found that the Chief Hearing Examiner, in his previous order, did in fact amend HE 105 H from the language which had been proposed in the publication in the State Register. The same problem was found to exist in HE 209 A. It is therefore reaffirmed that the recommendations of the Hearing Examiner are adopted and that the rules, as therefore amended, are not substantial changes from the rules as originally proposed in the State Register.

2. HE 111. After having reviewed the comments of the Attorney General and re-reviewed the record in the matter, it is hereby found that the reference to Minn. Stat. Chapter 15 is an improper reference as being too broad in that Minn. Stat. Chapter 15 covers many more items than the Minnesota Administrative Pro-

cedure Act. It is therefore found that the correct reference should be Minn. Stat. § 15.0412, Subd. 4, and it is further concluded that this change would not be a substantial change.

3. Based upon a review of the Attorney General's comments, and upon a re-review of the Hearing Examiner's Findings and the transcript of the proceedings, it is hereby found that adding the language "if not otherwise prohibited as the unauthorized practice of law" to HE 204 A 5, is both needed and reasonable and would not be a substantial change. In making such change, it is also found that the same changes are needed and reasonable in HE 206 and that such would not be a substantial change.

4. HE 205. Based upon a review of the Attorney General's comments, a review of the record, a review of the Hearing Examiner's Report and the Order Adopting Rules, it is hereby found that it is both needed and reasonable to amend proposed HE 205 for internal consistency. It is found that by striking the first "the" in the first sentence and inserting the word "a" and by inserting the words "wherein the agency is a party" after the words "contested case hearing" will add such consistency and is both needed, reasonable and an insubstantial change.

5. The Attorney General has found that having the words "at his discretion" in HE 210 C and similar words in HE 217 G (2) (a)(1) without accompanying criteria would pose a problem. Therefore, the words will be striken from HE 210 C and in HE 217 G (2) (a)(1), the words "at the discretion of" will be striken and the words "with the approval of" will be inserted.

6. HE 214 D. As was pointed out by the Attorney General, the Chief Hearing Examiner did comment on the Pollution Control Agency concern which related to the rule on proprietary information. It is found that the adoption of the proposal of the Hearing Examiner would be reasonable, needed and not a substantial change. Therefore, the rule will be amended by adding the language "or as otherwise provided by law" at the end of the rule.

Based upon the foregoing, it is hereby ordered that the Findings of Fact, Conclusions and Order Adopting Rules dated May 10, 1978, be amended as indicated herein.

Dated this 12th day

of June, 1978.

DUANE R. HARVES
Chief Hearing Examiner

OFFICE OF HEARING EXAMINERS

ADOPTED AMENDMENTS TO RULES RELATING TO PROCEDURES FOR RULEMAKING AND CONTESTED CASE HEARINGS

The rules published at the State Register, Volume 2, Number 9, pp. 382 - 393, September 6, 1977 (2 S.R. pp. 382 - 393) are adopted and are identical in every respect to their proposed form, with the following amendments:

HE 102 C. 6. A statement advising interested persons that lobbyists must register with the State Ethical Practices Board, which statement shall contain the statutory definition of a lobbyist and indicate that questions should be directed to the Board, giving the address and telephone number thereof.

HE 102 C. 7. A statement that written material may be submitted and recorded in the hearing record for five working days after the public hearing ends, or for a longer period not to exceed 20 calendar days if ordered by the Hearing Examiner.

HE 102 C. 8. A separate paragraph which shall read as follows:

> Notice: ~~All persons have the right to be notified~~ Any person may request notification of the date on which the Hearing Examiner's Report will be available, after which date the agency may not take any final action on the rules for a period of five working days. ~~All persons have the right to be informed~~ Any person may request notification of the date on which the hearing record has been submitted (or resubmitted) to the Attorney General by the agency. If you desire to be so

notified, you may so indicate at the hearing ~~do-so-by-so indicating-at-the-hearing-or-by-written-request-sent-to the-Hearing-Examiner-prior-to-the-close-of-the-record.~~ After the hearing, you may request notification by sending a written request to the Hearing Examiner (in the case of the Hearing Examiner's Report), or to the agency (in the case of the agency's submission or re-submission to the Attorney General).

HE 102 C. 10. ~~A-statement-which-fulfills-the-requirements-of~~ If required by Minn. Stat. § 15.0412, subd. 7, a statement relating to the expenditure of public monies by local public bodies.

HE 102 D. A statement by the agency of the number of persons expected to attend the hearing and the estimated length of time that will be necessary for the agency to present its evidence at the hearing~~,-a-statement-by-the-agency-that-the-facility-where-the hearing-is-to-be-conducted-is-free-of-mobility-barriers-in-accordance-with-Executive-Order-No.-148,-and-a-statement-by-the-agency of-what-additional-notice,-if-any,-has-been-given-pursuant-to-HE-103~~.

Within ten days of receipt of the aforementioned documents, the Chief Hearing Examiner shall appoint a Hearing Examiner to preside at the hearing and the Hearing Examiner shall advise the agency as to the location at which and time during which a hearing should be held so as to allow for participation by all affected interests. ~~Failure-of-the-agency-to-comply-with-the-advice-of-the-Hearing Examiner-may-result-in-a-finding-that-the-agency-has-failed-to-fulfill-all-relevant,-substantive-and-procedural-requirements-of-law or-rule.~~

HE 103 Notice. The Notice of Hearing shall be given pursuant to the provisions of Minn. Stat. § 15.0412, subd. 4~~,-and-in-addition-thereto,-the-agency-should,-within-reason,-attempt-to-give-notice-to-all-other-persons-or-associations-known-to-it-to-be-persons-who-will-be-affected-by-the-proposed-rule/rules~~.

HE 104 Statement of Need and Reasonableness. Each agency desiring to adopt rules shall prepare a Statement of Need and Reasonableness which shall be prefiled pursuant to HE 105. The Statement of Need and Reasonableness shall be a document containing, at the minimum, a summary of all of the evidence and argument which ~~will~~ is anticipated to be presented by the agency at the hearing justifying both the need for and the reasonableness of the proposed rule/rules, including citations to any statutes or case law to be relied upon, citations to any economic, scientific or other manuals or treatises to be utilized at the hearing, and a list of any expert witnesses to be called to testify on behalf of the agency, together with a brief summary of the expert opinion to be elicited. The statement need not contain evidence and argument in rebuttal of evidence and argument presented by the public.

The statement shall be prepared with sufficient specificity so that interested persons will be able to fully prepare any testimony or evidence in favor of or in opposition to the rule/rules as proposed. Presentation of evidence or testimony (other than bona fide rebuttal) not summarized in the Statement of Need and Reasonableness may result in the Hearing Examiner, upon proper motion made at the hearing by any interested person, recessing the hearing to a future date in order to allow all interested per-

sons an opportunity to prepare testimony or evidence in opposition to such newly-presented evidence or testimony, which recessing shall be for a period not to exceed 25 calendar days, unless the 25th day is a Saturday, Sunday, or legal holiday, in which case, the next succeeding working day shall be the maximum date for the resumed hearing.

If the agency so desires, the Statement of Need and Reasonableness may contain the verbatim affirmative presentation by the agency which may then be either read at the hearing or, if all persons appearing at the hearing have had an opportunity to review the statement, may be introduced as an exhibit into the record as though read. In such instance, agency personnel or other persons ~~preparing the~~ thoroughly familiar with the rules and the agency's statement shall be available at the hearing for questioning by the Hearing Examiner and other interested persons.

HE 106 A. All persons intending to present evidence or questions, other than agency personnel previously disclosed to the Hearing Examiner under HE 103, shall register with the Hearing Examiner prior to the presentation of evidence or questions by writing their names, addresses, telephone numbers and the names of any individuals or associations that the persons represent in connection with the hearing, on a register to be provided by the Hearing Examiner~~,~~. The Hearing Examiner shall keep a second register which ~~register~~ shall ~~also~~ include a section where persons may indicate their desire to be informed of the date on which the Hearing Examiner's Report will be available and the date on which the agency submits the record to the Attorney General.

HE 107 The Record. The record shall be closed upon the last date for receipt of written statements. The record in each hearing shall include all of the documents enumerated in HE 105, all written comments or other evidence received prior to, during or subsequent to the hearing but prior to the close of the record, and a tape recording of the hearing itself unless the Chief Hearing Examiner has determined that the use of a reporter is more appropriate. In the event a transcript of the proceedings has been prepared, it shall be part of the record, and copies will be available to persons requesting them at a reasonable charge. The charge shall be set by the Chief Hearing Examiner, and all monies received for transcripts shall be payable to the State Treasury and shall be deposited in the Office of Hearing Examiners' account in the State Treasury. The agency and any other person so requesting of the Hearing Examiner shall be notified of the date of the completion of the transcript.

HE 108 Incorporation by Reference. When an agency desires approval of the Chief Hearing Examiner to incorporate certain materials by reference in its rule, such approval must be obtained prior to the publication of the proposed rules in the State Register. The agency shall submit its request in writing and shall include with the request, the materials sought to be incorporated and shall further indicate to the Chief Hearing Examiner where the materials are conveniently available for viewing, copying and acquisition by interested persons. The Chief Hearing Examiner shall have ten working days to approve or disapprove the request. ~~The agency shall maintain a copy of the incorporated materials as long as the adopted rule is in effect.~~

HE 109 Report of the Hearing Examiner. Subsequent to the close of the record and the completion of the transcript of the hearing, the Hearing Examiner shall make his report pursuant to Minn. Stat. § 15.052, subd. 3, and shall file the original of said report together with the complete record of the proceedings with the agency. Both the agency, if authorized by statute, and the Office of Hearing Examiners shall make a copy of said report available to any interested person upon request at a reasonable charge.

HE 110 Submission of Rule to Chief Hearing Examiner. The agency shall, if it proposes to adopt the rules as originally proposed or amended, submit a copy of the Order Adopting Rules, a copy of any additional agency findings, a copy of the rules as originally proposed, and a copy of the rules as adopted to the Chief Hearing Examiner, for review pursuant to Minn. Stat. § 15.052, subd. 4. The submission to the Chief Hearing Examiner shall precede review by the Attorney General. The Chief Hearing Examiner shall complete his review and submit his report to the agency on the issues of substantial changes in the rule and compliance with § 15.0412, subd. 4, within ten calendar days. The agency will be responsible for filing the rules with the Attorney General.

HE 112 Effective Date. These rules shall be effective for all rule proceedings initiated ~~after December 31, 1977~~ five working days after publication of these rules in the State Register.

HE 202 B. Party. Party means each person named as a party by the agency in the Notice of an Order for Hearing or persons granted permission to intervene pursuant to HE 210. The term "party" shall include the agency, except when the agency participates in the contested case in a neutral or quasi-judicial capacity only.

HE 203 A. Request for Assignment. Any agency desiring to order a contested case hearing shall first file with the Chief Hearing Examiner a request for assignment of a Hearing Examiner together with the Notice of and Order for Hearing proposed to be issued which shall include a proposed time, date and place for the hearing. ~~The request shall include a statement by the agency that the facility where the hearing is to be conducted is free of mobility barriers in accordance with Executive Order No. 148.~~

HE 203 C. Duties. Consistent with law the Hearing Examiner shall perform the following duties:

1. Grant or deny a demand for a more definite statement of charges.

2. Grant or deny requests for discovery or for the taking of depositions.

3. Receive and act upon requests for subpoenas where appropriate.

4. Hear and rule on motions.

5. Preside at the contested case hearing.

6. Administer oaths and affirmations.

7. Grant or deny continuances.

8. Examine witnesses ~~and call witnesses~~ where he deems it necessary to make a complete record.

9. Prepare findings of fact, conclusions and recommendations.

10. Make preliminary, interlocutory or other orders as he deems appropriate.

11. Do all things necessary and proper to the performance of the foregoing.

12. In his discretion, perform such other duties as may be delegated to him by the agency ordering the hearing.

HE 204 Commencement of a Contested Case. A contested case is commenced, subsequent to the assignment of a Hearing Examiner, by the ~~issuance~~ service of a Notice of and Order for Hearing by the agency.

A. The Notice and Order. Unless otherwise provided by law, a Notice of and Order for Hearing, which shall be a single document, shall be served upon all parties and shall contain, among other things, the following:

1. The time, date and place for the hearing.

2. Name and address and telephone number of the Hearing Examiner.

3. A citation to the agency's statutory authority to hold the hearing and to take the action proposed.

4. A statement of the allegations or issues to be determined together with a citation to the relevant statutes or rules.

5. Notification of the right of the parties to be represented by legal counsel, by a person of their choice, or by themselves ~~or by a person other than an attorney, if that person possesses special qualifications pertinent to the subject matter of the hearing~~.

6. A citation to these rules and to any applicable procedural rules of the agency.

7. A statement advising the parties of the name of the agency official or member of the Attorney General's staff to be contacted to discuss informal disposition pursuant to HE 207 or discovery pursuant to HE 214.

8. In cases wherein the agency is a party, a statement advising the parties that a Notice of Appearance must be filed with the Hearing Examiner within 20 days of the date of service of the Notice of and Order for Hearing if a party intends to appear at the hearing unless the hearing date is less than 20 days from the ~~commencement~~ issuance of the ~~contested-case~~ Notice of and Order for Hearing.

9. A statement advising ~~the~~ existing parties that failure to appear at the hearing may result in the allegations of the Notice of and Order for Hearing being taken as true, or the issues set out being deemed proved, and a statement which explains the possible results of the allegations being taken as true or the issues proved.

B. Service. Unless otherwise provided by law, the Notice of and Order for Hearing shall be served not less than 30 days prior to the hearing~~.~~, provided, however, that ~~A~~ a shorter time may be allowed, ~~if not contrary to statutory requirements,~~ where it can be shown to the Chief Hearing Examiner that a shorter time is required in the public interest and that no interested person will be adversely affected.

C. Publication. Where the agency participates in the hearing in a neutral or quasi-judicial capacity, the Notice of and Order for Hearing shall be published as required by law or as ordered by the agency and copies of the Notice of and Order for Hearing may be mailed by the agency to persons known to have a direct interest.

~~C~~D. Amendments. At any time prior to the close of the hearing the agency may file and serve an amended Notice of and Order for Hearing, provided that, should the amended Notice and Order raise new issues or allegations, the parties shall have a reasonable time to prepare to meet the new issues or allegations if requested.

~~D~~E. Alternatives. With the prior written concurrence of the Chief Hearing Examiner, an agency may substitute other documents and procedures for the Notice of and Order for Hearing provided that the documents and procedures inform actual and potential parties of the information contained in HE 204 A. 1 - 9 above.

HE 206 Right to Counsel. Any party may be represented by legal counsel throughout the proceedings in a contested case before an agency, by a person of their choice, or by themselves ~~or by a person other than an attorney, if that person possesses special qualifications pertinent to the subject matter of the hearing~~.

HE 209 B. Additional Time After Service by Mail. Whenever a party has the right or is required to do some act or take some action within a prescribed period after the service of a notice or other paper upon him, or whenever such service is required to be made within a prescribed period before a specified event, and

the notice or paper is served by mail, three days shall be added to the prescribed period. In the event an agency chooses to utilize the Central Mailing Section, Publications Division, Department of Administration, four days shall be added to the prescribed period.

HE 210 Intervention.

A. Petition. Any person desiring to intervene in a contested case as a party shall submit a timely petition to intervene to the Hearing Examiner and shall serve the petition upon all existing parties and the agency ~~if the agency is not a party~~. Timeliness will be determined by the Hearing Examiner in each case based on circumstances at the time of filing. The petition shall show how the petitioner's legal rights, duties, or privileges may be determined or affected by the contested case, and shall set forth the grounds and purposes for which intervention is sought and shall indicate petitioner's statutory right to intervene if one should exist. The agency may, with the consent of the Chief Hearing Examiner, and where good reason appears therefor, specify in the Notice of and Order for Hearing (if one is used) the final date upon which a petition for intervention may be submitted to the Hearing Examiner.

B. Objection. Any party may object to the petition for intervention by filing a Notice of Objection with the Hearing Examiner within 7 days of service of the petition. The Notice shall state the party's reasons for objection and shall be served upon all parties, ~~and~~ the person petitioning to intervene and the agency ~~if the agency is not a party~~.

C. Order. The Hearing Examiner shall allow intervention upon a proper showing pursuant to HE 210 A. unless the Hearing Examiner finds that the petitioner's interest is adequately represented by one or more parties participating in the case. In the event the Hearing Examiner finds that one or more petitions are similar, he may allow the petitions to be consolidated as one, allowing all such petitioners to intervene but only as one party, or he may allow them to intervene separately at his discretion.

D. Agency in a Neutral Capacity. Where the agency participates in the hearing in a neutral or quasi-judicial capacity, the agency staff, or a portion of the agency staff, may petition to intervene under the rule.

E. Participation by the Public. The Hearing Examiner, may, in the absence of a petition to intervene, nevertheless hear the testimony, ~~with or without benefit of oath,~~ and receive exhibits from any person at the hearing, or allow a person to note his appearance, or allow a person to question witnesses, but no person shall become, or be deemed to have become, a party by reason of such participation. Persons ~~allowed to participate as above~~ offering testimony or exhibits may be questioned by parties to the proceeding.

HE 211 Consolidation.

A. Authority. Whenever, before hearing on any contested case, the Chief Hearing Examiner, either on his own motion or on the motion of the Hearing Examiner assigned to the case, or upon petition by any party, determines (a) that separate contested

cases present substantially the same issues of fact and law; (b) that a holding in one case would affect the rights of parties in another case; and (c) the consolidation would not substantially prejudice any party, the Chief Hearing Examiner may order such cases consolidated for a single hearing on the merits. Nothwithstanding the requirements of this rule, the parties may stipulate and agree to such consolidation.

B. Notice of Order. Following an order for consolidation the Hearing Examiner shall forthwith serve on all parties a copy of the order for consolidation. The order shall contain, among other things:

1. A description of the cases for consolidation.

2. The reasons for consolidation.

3. Notification of a consolidated prehearing conference if one has been requested.

C. Objection to Consolidation.

1. Petition for Severance. Any party may object to consolidation by filing with the Hearing Examiner, and serving upon all parties and the agency ~~if it is not a party~~, at least 7 days prior to the hearing in the case, a petition for severance from consolidation, setting forth petitioner's name and address, the title of his case prior to consolidation, and the reasons for his petition.

HE 212 Disqualification. The Hearing Examiner shall withdraw from participation in a contested case at any time if he deems himself disqualified for any reason. Upon the filing in good faith by a party of an affidavit of prejudice the Chief Hearing Examiner shall~~, absent objection from another party,~~

~~reassign-the-case-to-another-Hearing-Examiner.--Any-party-may object-to-the-affidavit-of-prejudice.--In-such-instance,-the Chief-Hearing-Examiner-shall-determine-the-matter-as-a-part-of the-record.--All-affidavits-of-prejudice-and-objections-thereto shall-be-served-on-all-parties-and-the-agency-if-the-agency-is not-a-party,-and-shall-state-with-specificity-the-reasons-for-the-affidavit-or-the-objections-thereto.~~

~~In-the-event-another-affidavit-of-prejudice-is-filed-by-any party,-the-Chief-Hearing-Examiner-shall~~ determine the matter as a part of the record provided the affidavit shall be filed no later than ~~15~~ days prior to the date set for hearing.

HE 213 B. Motions. Any application to the Hearing Examiner for an order shall be by motion which, unless made during a hearing, shall be made in writing, shall state with particularity the grounds therefor, and shall set forth the relief or order sought. Motions provided in these rules ~~are-motions-requiring~~ require a written notice to all parties and to the agency ~~if-the-agency-is not-a-party,-and-may-require-a-hearing-before-the-order-can-be issued~~ to be served five days prior to their submission to the Hearing Examiner, except where impractical. The Hearing Examiner may, at his discretion, require a hearing before an order on the motion will be issued. All orders on such motions, other than those made during the course of a hearing, shall be in writing.

HE 214 C. Motion to Hearing Examiner. Upon the motion of a party, the Hearing Examiner may order discovery of any other relevant material or information, provided that privileged work

product (e.g. that of attorneys, investigators, etc.) shall not be discoverable. The Hearing Examiner shall also recognize all other privileged information or communications which are recognized at law. Upon proper motion made to the Hearing Examiner, any ~~other~~ means of discovery available pursuant to the Rules of Civil Procedure for the District Courts of the State of Minnesota may be allowed provided that such requests can be shown to be needed for the proper presentation of a party's case, ~~and~~ are not for purposes of delay, and that the issues or amounts in controversy are significant enough to warrant extensive discovery. Upon the failure of a party to reasonably comply with an order of the Hearing Examiner made pursuant to this rule, the Hearing Examiner may make a further order as follows:

1. An order that the subject matter of the order for discovery or any other relevant facts shall be taken as established for the purposes of the case in accordance with the claim of the party requesting the order.

2. An order refusing to allow the party failing to comply to support or oppose designated claims or defenses, or prohibiting him from introducing designated matters in evidence.

D. Proprietary Information. ~~Nothing in these rules shall require the revealing of proprietary information or trade secrets.~~ When a party is asked to reveal ~~such information,~~ material which it considers to be proprietary information or trade secrets, he shall bring the matter to the attention of the Hearing Examiner, who shall make such protective orders as are reasonable and necessary.

HE 216 Subpoenas. ~~Following the commencement of a contested case pursuant to these rules, only subpoenas issued by the Chief Hearing Examiner shall be used during the course of the administrative proceeding.~~ Requests for subpoenas for the attendance of witnesses or the production of documents shall be made in writing to the Hearing Examiner~~, and copies served upon all parties and the agency if the agency is not a party~~, and shall contain a brief statement demonstrating the potential relevance of the testimony or evidence sought and shall identify any documents sought with specificity, and shall name all persons to be subpoenaed.

HE 217 The Hearing.

B. Witnesses. Any party may be a witness or may present witnesses on his behalf at the hearing. All oral testimony at the hearing shall be under oath or affirmation ~~subject only to the provisions of HE 210 E. Testimony offered not subject to oath or affirmation shall be given such weight as the Hearing Examiner deems appropriate~~. At the request of a party or upon his own motion the Hearing Examiner may exclude witnesses from the hearing room so that they cannot hear the testimony of other witnesses.

C. Rules of Evidence.

~~7. Offer of Proof. If an objection to a question propounded to a witness is sustained, the examining person may make a specific offer of what he expects to prove by the answer of the witness. Upon request, the Examiner shall take the evidence~~

~~in-full,-unless-it-clearly-appears-that-the-evidence-is-not-admissible-on-any-ground-or-that-the-witness-is-privileged.~~

D. The Record.

3. The Transcript. The verbatim record shall be transcribed if requested by any person or in the discretion of the Chief Hearing Examiner. If a transcription is made, the Chief Hearing Examiner shall require the requesting person and other persons who request copies of the transcript from him to pay a reasonable charge therefor. The charge shall be set by the Chief Hearing Examiner and all monies received for transcripts shall be payable to the State Treasurer and shall be deposited in the State Office of Hearing Examiners account in the State Treasury.

F. Motions to the Agency. No Motions shall be made directly to or be decided by the agency subsequent to the assignment of a Hearing Examiner and prior to the completion and filing of the Hearing Examiner's report unless the motion is certified to the agency by the Hearing Examiner. Uncertified motions shall be made to the Hearing Examiner and considered by the agency in its consideration of the record as a whole subsequent to the filing of the Hearing Examiner's report.

Any party may request that a motion decided adversely to that party by the Hearing Examiner before or during the course of the hearing be certified by the Hearing Examiner to the agency. ~~Such-request-must-be-made-at-the-time-the-Hearing-Examiner-rules-on-the-motion.~~ In deciding what motions should be certified, the Examiner shall consider the following:

1. Whether the motion involves a controlling question of law as to which there is substantial ground for a difference of opinion; ~~and~~ or

2. Whether a final determination by the agency on the motion would materially advance the ultimate termination of the hearing~~.~~; or

3. Whether or not the delay between the ruling and the motion to certify would adversely affect the prevailing party; or

4. Whether to wait until after the hearing would render the matter moot and impossible for the agency to reverse or for a reversal to have any meaning; or

5. Whether it is necessary to promote the development of the full record and avoid remanding.

G. Hearing Procedure.

2. a. (1) All parties may present evidence and argument with respect to the issues and cross-examine witnesses. At the discretion of the Hearing Examiner, a party, by its attorney or by any representative of that party, or by any combination of such persons, may cross-examine each witness, provided that only one such person and the attorney representing the party shall cross-examine each witness on behalf of a party on any one subject matter of testimony. At the request of the party or the attorney for the party whose witness is being cross-examined, the Hearing Examiner may make such rulings as are necessary to prevent repetitive or irrelevant questioning and to expedite the cross-examination to the extent consistent with disclosure of all relevant testimony and information.

h. The record of the hearing shall be closed upon receipt of the final written memorandum, transcript, if any, or late filed exhibits (if requested by the Examiner), whichever occurs latest.

HE 218 B. Hearing Examiner's Report. Following the close of the record the Hearing Examiner shall make his report pursuant to Minn. Stat. § 15.052, Subd. 3, and, upon completion, a copy of said report shall be served upon all parties by ~~regular~~ First Class mail or by depositing it with Central Mailing Section, Publications Division, Department of Administration.

HE 222 Effective Date. These rules shall be effective for all contested cases commenced ~~after December 31, 1977~~ five working days after publication of these rules in the State Register.

Proposed Amendments to

RULES OF THE OFFICE OF HEARING EXAMINERS

RULE-MAKING PROCEDURES

HE 102 [~~(b)~~] B. [~~A proposed~~] The Order for Hearing proposed to be issued. The [proposed] Order for Hearing must contain the following:

[~~(1)~~] 1. A proposed time, date and place for the hearing to be held.

[~~(2)~~] 2. A statement that the Notice of Hearing shall be given to all persons who have registered with the Secretary of State for that purpose and a statement that the Notice of Hearing shall be published in the State Register.

[~~(3)~~] 3. The signature of the person authorized to order a hearing. If a board is ordering the hearing, the person signing the order must be so authorized and a document of authority must be attached to the Order for Hearing.

HE 102 [~~(c)~~] C. [~~A proposed~~] The Notice of Hearing proposed to be issued must contain the following:

[~~(1)~~] 1. A proposed time, date and place for the hearing to be held.

[~~(2)~~] 2. A statement that all interested or affected persons will have an opportunity to participate.

[~~(3)~~] 3. A statement or a description of the subject and issues involved. If the proposed rules themselves are not included with the Notice of Hearing, then the Notice must clearly indicate the nature and extent of the proposed rules and a statement shall be included announcing the availability and the means

of obtaining upon request at least one free copy of the proposed rules.

[~~4.~~] 4. A citation to the agency's statutory authority to promulgate the proposed rules.

[~~5.~~] 5. A statement describing the manner in which interested persons may present their views.

[~~6.~~] 6. A statement advising interested persons that lobbyists must register with the State [~~Ethics Commission,~~] Ethical Practices Board. [~~which statement shall be substantially as follows:~~

~~Under Minn. Stat. § 10A.01, subd. 11 (1974), 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.~~]

[~~7.~~] 7. A statement that written material may be submitted and recorded in the hearing record for [~~20~~] five working days after the public hearing ends, or for a longer period not to exceed 20 days if ordered by the hearing Examiner.

8. A separate paragraph which shall read as follows:

Notice: All persons have the right to be notified of the date on which the Hearing Examiner's Report will be available, after which date the agency may not take any final action on the rules for a period of five working days. All persons have the right to be informed of the date on which the hearing record has been submitted

to the Attorney General by the agency. If you desire to be so notified, you may do so by so indicating at the hearing or by written request sent to the Hearing Examiner prior to the close of the record.

9. A separate paragraph which shall read as follows: Notice is hereby given that 25 days prior to the hearing a statement of need and reasonableness will be available for review at the agency and at the Office of Hearing Examiners. This statement of need and reasonableness will include a summary of all of the evidence which will be presented by the agency at the hearing justifying both the need for and the reasonableness of the proposed rule/rules. Copies of the statement of need and reasonableness may be obtained from the Office of Hearing Examiners at a minimal charge.

10. A statement which fulfills the requirements of Minn. Stat. § 15.0412, subd. 7, relating to the expenditure of public monies by local public bodies.

HE 102 [~~(d)~~] D. A statement by the agency of the [~~number of persons expected to attend the hearing and the~~] estimated length of time that will be necessary for the agency to present its evidence [~~to conduct~~] at the hearing, a statement by the agency that the facility where the hearing is to be conducted is free of mobility barriers in accordance with Executive Order No. 148, and a statement by the agency of what additional notice, if any, has been given pursuant to HE 103.

Within ten days of receipt of the aforementioned documents, the Chief Hearing Examiner shall appoint a Hearing Examiner to preside at the hearing and the Hearing Examiner shall advise the agency as to the location at which and time during which a hearing should be held so as to allow for participation by all affected interests. Failure of the agency to comply with the advice of the Hearing Examiner may reslut in a finding that the agency has failed to fulfill all relevant, substantive and procedural requirements of law or rule.

HE 103 Notice. The Notice of Hearing shall be given pursuant to the provisions of Minn. Stat. § 15.0412, subd. 4, and in addition thereto, the agency should, within reason, attempt to give notice to all other persons or associations known to it to be persons who will be affected by the proposed rule/rules.

HE 104 Statement of Need and Reasonableness. Each agency desiring to adopt rules shall prepare a Statement of Need and Reasonableness which shall be prefiled pursuant to HE 105. The Statement of Need and Reasonableness shall be a document containing, at the minimum, a summary of all of the evidence and argument which will be presented by the agency at the hearing justifying both the need for and the reasonableness of the proposed rule/rules, including citations to any statutes or case law to be relied upon, citations to any economic, scientific or other manuals or treatises to be utilized at the hearing, and a list of any expert witnesses to be called to testify on behalf of the agency, together with a brief summary of the expert opinion to be elicited.

The statement shall be prepared with sufficient specificity so that interested persons will be able to fully prepare any testimony or evidence in favor of or in opposition to the rule/rules as proposed. Presentation of evidence or testimony not summarized in the Statement of Need and Reasonableness may result in the Hearing Examiner, upon proper motion made at the hearing by any interested person, recessing the hearing to a future date in order to allow all interested persons an opportunity to prepare testimony or evidence in opposition to such newly-presented evidence or testimony, which recessing shall be for a period not to exceed 25 calendar days, unless the 25th day is a Saturday, Sunday, or legal holiday, in which case, the next succeeding working day shall be the maximum date for the resumed hearing.

If the agency so desires, the Statement of Need and Reasonableness may contain the verbatim affirmative presentation by the agency which may then be either read at the hearing or, if all persons appearing at the hearing have had an opportunity to review the statement, may be introduced as an exhibit into the record as though read. In such instance, agency personnel or other persons preparing the statement shall be available at the hearing for questioning by the Hearing Examiner and other interested persons.

HE [~~103~~] 105 Documents to be Filed Before Hearing. At least 25 days prior to the date and time of the hearing, the agency shall file with the Chief Hearing Examiner or his designee copies of the following documents:

[~~(a)~~] A. The Order for Hearing.

[~~(b)~~] B. The Notice of Hearing as mailed.

[~~(c)~~] C. The affidavit of receipt of the Secretary of State's list.

[~~(d)~~] D. [The] An Affidavit of Mailing the Notice to all persons on the Secretary of State's list.

[~~(e)~~] E. The Statement of Need and Reasonableness.

[~~(f)~~] F. The petition requesting a rule hearing, if one has been filed pursuant to Minn. Stat. § 15.0415.

[~~(g)~~] G. All materials received following a notice made pursuant to Minn. Stat. § 15.0412, subd. 5, together with a ci tation to said notice.

[~~(h)~~] H. The names of agency personnel who will represent the agency at the hearing together with the names of any other witnesses who may appear [~~appearing~~] on behalf of the agency.

~~[(i) A statement summarizing the evidence to be presented at the hearing in support of the proposed rules, including citations to any statutes or case law to be relied upon, citations to any economic, scientific or other manuals or treatises to be utilized at the hearing and a list of any expert witnesses to be called to testify on behalf of the agency together with a brief summary of the expert opinion to be elicited.]~~

HE [~~104~~] 106 Conduct of Hearings. All hearings held pursuant to Minn. Stat. § 15.0412 shall proceed substantially in the following manner:

[~~(a)~~] A. All persons intending to present evidence or questions, other than agency personnel previously disclosed to the

Hearing Examiner under HE 103, shall register with the Hearing Examiner prior to their presentation of evidence or questions by writing their names, addresses, telephone numbers and the names of any individuals or associations that the persons represent in connection with the hearing, on a register to be provided by the [~~agency~~] Hearing Examiner, which register shall also include a section where persons may indicate their desire to be informed of the date on which the Hearing Examiner's Report will be available and the date on which the agency submits the record to the Attorney General.

[~~(b)~~] B. The Hearing Examiner shall convene the hearing at the proper time and shall explain to all persons present the purpose of the hearing and the procedure to be followed at the hearing. The Hearing Examiner shall notify all persons present that the record will remain open for [~~20~~] five working days following the hearing, or for a longer period not to exceed 20 calendar days if ordered by the Hearing Examiner, for the receipt of written statements concerning the proposed rule or rules.

[~~(c)~~] C. The Hearing Examiner shall advise the persons present of the requirements of [~~Minn. Stat. § 10A.01, subd. 11 (1974)~~] Minnesota Statutes Chapter 10A concerning the registration of lobbyists.

[~~(d)~~] D. The agency representatives and any others who will be presenting the agency position at the hearing shall identify themselves for the record.

[~~(e)~~] E. The agency shall make available copies of the proposed rule at the hearing.

[~~(f)~~] F. The agency shall introduce its exhibits relevant to the proposed rule including written material received prior to the hearing.

[~~(g)~~] G. The agency shall make its affirmative presentation of facts showing the need for and the reasonableness of the proposed rule and shall present any other evidence it deems necessary to fulfill all relevant, substantive and procedural, statutory or regulatory requirements.

[~~(h)~~] H. Interested persons shall be given an opportunity to address questions to the agency representatives or witnesses.

[~~(i)~~] I. Interested persons shall be given an opportunity to be heard on the proposed rule and/or to present written evidence. All interested persons submitting oral [~~or written~~] statements are subject to questioning by representatives of the agency. Interested persons may also be questioned by other non-agency persons present if they so consent.

HE [~~105~~] 107 The Record. The record shall be closed upon the last date for receipt of written statements. [~~A court reporter from the Office of Hearing Examiners shall keep a record at each hearing unless the Chief Hearing Examiner determines that the use of an audiomagnetic recording device is more appropriate. The verbatim record will be transcribed and copies available to persons requesting them at a reasonable charge.~~] The record in each hearing shall include all of the documents enumerated in HE 105, all written comments received prior to, during or subsequent to the hearing, and a tape recording of the hearing itself unless the Chief Hearing Examiner has determined that the use of a

reporter is more appropriate. In the event a transcript of the proceedings has been prepared, it shall be part of the record, and copies will be available to persons requesting them at a reasonable charge. The charge shall be set by the Chief Hearing Examiner, and all monies received for transcripts shall be payable to the State Treasury and shall be deposited in the Office of Hearing Examiners' account in the State Treasury. The agency and any other person so requesting shall be notified of the date of the completion of the transcript.

HE 108 Incorporation by Reference. When an agency desires approval of the Chief Hearing Examiner to incorporate certain materials by reference in its rule, such approval must be obtained prior to the publication of the proposed rules in the State Register. The agency shall submit its request in writing and shall include with the request, the materials sought to be incorporated and shall further indicate to the Chief Hearing Examiner where the materials are conveniently available for viewing, copying and acquisition by interested persons. The Chief Hearing Examiner shall have ten working days to approve or disapprove the request. The agency shall maintain a copy of the incorporated materials as long as the adopted rule is in effect.

HE [~~106~~] 109 Report of the Hearing Examiner. Subsequent to the close of the record and the completion of the transcript of the hearing, the Hearing Examiner shall make his report pursuant to Minn. Stat. § 15.052, subd. 3, and shall file the original of said report together with the complete record of the proceedings

with the agency [~~and a copy with the Chief Hearing Examiner.~~] The [agency] Office of Hearing Examiners shall make a copy of said report available to any interested person upon request at a reasonable charge. [~~The Hearing Examiner's report shall state his findings of fact and his conclusions and recommendations, taking notice of the degree to which the agency (a) documented its statutory authority to take the proposed action, (b) fulfilled all relevant, substantive and procedural requirements of law or rule, and (c) demonstrated the need for and reasonableness of its proposed action with an affirmative presentation of facts.~~]

HE [~~107~~] 110 Submission of Rule to Chief Hearing Examiner. [~~No earlier than ten days subsequent to the receipt of the Hearing Examiner's report,~~] [t]The agency shall, if it proposes to adopt the rules as originally proposed or amended, submit [~~the complete hearing record~~] a copy of the Order Adopting Rules, a copy of any additional agency findings, a copy of the rules as originally proposed, and a copy of the rules as adopted to the Chief Hearing Examiner, [~~including the rule as originally proposed, and the rule as proposed for adoption in its final form, should there be any difference,~~] for review pursuant to Minn. Stat. § 15.052, subd. 4. The submission to the Chief Hearing Examiner shall precede review by the Attorney General. The Chief Hearing Examiner shall complete his review and submit his report to the agency on the issue of substantial changes in the rule within ten calendar days. The agency will be responsible for filing the rules with the Attorney General.

HE [108] 111 Reconvened Hearings. Should the Chief Hearing Examiner find, after a review of the record, that the proposed final rule is substantially different from the rule which was proposed at the public hearing, or should the Chief Hearing Examiner find that the agency failed to meet the requirements of Minn. Stat. Ch. 15 or these rules, then the Chief Hearing Examiner shall forthwith notify the agency and the Attorney General of said finding. The agency shall then either withdraw the proposed final rule or reconvene the rule hearing. The reconvening of the rule hearing shall comply with all statutory and regulatory requirements as if a new rule hearing were being held. In determining whether the proposed final rule is substantially different, the Chief Hearing Examiner shall consider the degree to which it:

[(1)] A. Affects classes of persons not represented at the previous hearing; or

[(2)] B. Goes to a new subject matter of significant substantive effect; or

[(3)] C. Makes a major subsantive change that was not raised by the original Notice of Hearing in such a way as to invite reaction at the hearing; or

[(4)] D. Results in a rule findamentally different from that contained in the Notice of Hearing.

HE [109] 112. Effective Date. These rules shall be effective for all rule proceedings initiated after December 31, [1975] 1977.

HE 113-199 Reserved for Future Use.

STATE OF MINNESOTA
OFFICE OF HEARING EXAMINERS

IN THE MATTER OF THE ADOPTION )
OF AMENDMENTS TO THE RULES OF )
THE OFFICE OF HEARING EXAMINERS)
RELATING TO RULEMAKING PROCE- )
DURES AND CONTESTED CASES. )

REPORT OF THE
CHIEF HEARING EXAMINER

WHEREAS, hearings were held in October, 1977, before Allan W. Klein, a Hearing Examiner working for the State Office of Hearing Examiners under the terms of a Professional-Technical Contract, on the above-entitled matter in compliance with Minn. Stat. § 15.0412, Subd. 4; and

WHEREAS, the final report of the Hearing Examiner made pursuant to Minn. Stat. § 15.052, Subd. 3, was issued to the Office of Hearing Examiners on April 28, 1978; and

WHEREAS, the Office of Hearing Examiners has now determined to adopt rules pursuant to Minn. Stat. § 15.0412, Subd. 4; and

WHEREAS, the Office of Hearing Examiners, by its Chief Hearing Examiner, did adopt the above-referenced rules on May 10, 1978; and

WHEREAS, the Chief Hearing Examiner, pursuant to Minn. Stat. § 15.052, Subd. 4, and Rule HE 107, must review all rules; and

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

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

Dated this 5th day
of June, 1978.

Duane R. Harves

DUANE R. HARVES
Chief Hearing Examiner

PROPOSED AMENDMENTS TO
RULES OF THE OFFICE OF HEARING EXAMINERS

CONTESTED CASE PROCEDURES

HE 202 Definitions.

[~~(a) Commencement. Commencement means service of an order for hearing upon any party.~~]

[~~(b)~~] A. Hearing Examiner. The Hearing Examiner means the person or persons [~~appointed~~] assigned by the Chief Hearing Examiner pursuant to Minn. Stat. § 15.052, Subd. 3, to hear the contested case.

[~~(c)~~] B. Party. Party means each person named [~~or admitted~~] as a party or [~~properly seeking and entitled as of right to be admitted as a party~~] persons granted permission to intervene pursuant to HE 210. The term "party" shall include the agency, except when the agency participates in the contested case in a neutral or quasi-judicial capacity only.

[~~(d)~~] C. Person. Person means any individual, partnership, corporation, joint stock company, unincorporated association or society, municipal corporation, or any government or governmental subdivision, unit or agency other than a court of law.

[~~(e)~~] D. Service; Serve. Service or serve means personal service or, unless otherwise provided by law, service by First Class United States mail, postage prepaid and addressed to the party at his last known address. An affidavit of service shall be made by the person making such service. Service by mail is complete upon the placing of the item to be served in the mail.

Agencies of the State of Minnesota may also serve by depositing the item to be served with Central Mailing Section, Publications Division, Department of Administration.

HE 203 Hearing Examiners.

[~~(a)~~] A. Request for [~~Appointment~~] Assignment. Any agency desiring to order a contested case hearing shall first file with the Chief Hearing Examiner a request for [~~appointment~~] assignment of a Hearing Examiner together with [~~a proposed~~] the notice of and order for hearing proposed to be issued which shall include [~~including~~] a proposed time, date and place for the hearing. The request shall include a statement by the agency that the facility where the hearing is to be conducted is free of mobility barriers in accordance with Executive Order No. 148.

[~~(b)~~] B. [~~Appointment~~] Assignment. Within ten days of receipt of a request pursuant to HE 203 [~~(a)~~] A., the Chief Hearing Examiner shall [~~appoint~~] assign a Hearing Examiner to hear the case and the Hearing Examiner shall advise the agency as to the location at which and time during which a hearing should be held so as to allow for participation by all affected persons.

[~~(c)~~] C. Duties. Consistent with law the Hearing Examiner shall perform the following duties:

[~~(1)~~] 1. Grant or deny a demand for a more definite statement of charges.

[~~(2)~~] 2. Grant or deny requests for discovery or for the taking of depositions.

[~~(3)~~] 3. Receive and act upon requests for subpoenas [~~where appropriate~~].

[~~4~~] 4. Hear and rule on motions.

[~~5~~] 5. Preside at the contested case hearing.

[~~6~~] 6. Administer oaths and affirmations.

[~~7~~] 7. Grant or deny continuances.

[~~8~~] 8. Examine witnesses and call witnesses where he deems it necessary to make a complete record.

[~~9~~] 9. Prepare findings of fact, conclusions and recommendations.

[~~10~~] 10. Make preliminary, interlocutory or other orders as he deems appropriate.

[~~11~~] 11. Do all things necessary and proper to the performance of the foregoing.

[~~12~~] 12. In his discretion, perform such other duties as may be delegated to him by the agency ordering the hearing.

204 Commencement of a Contested Case. A contested case is commenced, subsequent to the [~~appointment~~] assignment of a Hearing Examiner, by the issuance of a[~~n~~] notice of and order for hearing by the agency.

[~~a~~] A. The Order. Unless otherwise provided by law, a[~~n~~] notice of and order for hearing, which shall be a single document, shall be served upon all parties and shall contain, among other things, the following:

[~~1~~] 1. The time, date and place for the hearing.

[~~2~~] 2. Name and address and telephone number of the Hearing Examiner.

[~~3~~] 3. A citation to the agency's statutory authority

to hold the hearing and to take the action proposed.

[~~(4)~~] 4. A statement of the allegations or issues to be determined together with a citation to the relevant statutes or rules.

[~~(5)~~] 5. Notification of the right of the parties to be represented by legal counsel or by a person other than an attorney, if that person possesses special qualifications pertinent to the subject matter of the hearing.

[~~(6)~~] 6. A citation to these rules and to any applicable procedural rules of the agency.

[~~(7)~~] 7. A statement advising the parties of the name of the agency official or member of the Attorney General's staff to be contacted to discuss informal disposition pursuant to HE 207 or discovery pursuant to HE 214.

[~~(8)~~] 8. In cases wherein the agency is a party, [A] a statement advising the parties that a Notice of Appearance must be filed with the Hearing Examiner [~~at least ten days prior to the hearing~~] within 20 days of the date of service of the Notice of and Order for Hearing if a party intends to appear at the hearing unless the hearing date is less than 20 days from the commencement of the contested case.

[~~(9)~~] 9. A statement advising the parties that failure to appear at the hearing may result in the allegations of the notice of and order for hearing being taken as true, or the issues set out being deemed proved, and a statement which explains the possible results of the allegations being taken as true or the issues proved.

[~~(b)~~] B. Service. Unless otherwise provided by law, [T]the notice of and order for hearing shall be served not less than 30 days prior to the hearing. [~~unless otherwise provided by law, or~~] A shorter time may be allowed, if not contrary to statutory requirements, where it can be shown to the Chief Hearing Examiner that a shorter time is required in the public interest and that no interested person will be adversely affected [~~without substantial adverse effect to the parties, and a copy shall be served upon the Hearing Examiner appointed to hear the case~~].

[~~(c) Notice. The Notice of Appearance form provided for in HE 205 shall be included with each order for hearing served by the agency.~~]

[~~(d) Publication. Where the agency participates in the hearing in a neutral or quasi-judicial capacity, the order for hearing shall be published as required by law or as ordered by the agency and copies of the order for hearing may be mailed by the agency to persons known to have a direct interest.~~]

[~~(e)~~] C. Amendments. At any time prior to the close of the hearing the agency may file and serve an amended notice of and order for hearing, provided that, should the amended notice and order raise new issues or allegations, the parties shall have a reasonable time to prepare to meet the new issues or allegations if requested.

D. Alternatives. With the concurrence of the Chief Hearing Examiner, an agency may substitute other documents and procedures for the notice of and order for hearing provided that the documents and procedures inform actual and potential parties of the information contained in HE 204 A. 1 - 9 above.

HE 205 Notice of Appearance. Each party intending to appear at the contested case hearing shall file with the Hearing Examiner a Notice of Appearance which shall advise the Hearing Examiner of the party's intent to appear and shall indicate the title of the case, the agency ordering the hearing, the party's current address and telephone number and the name, office address, and telephone number of the party's attorney. The Notice of Appearance shall be filed with the Hearing Examiner [~~at least 10 days prior to the hearing~~] within 20 days of the date of service of the Notice of and Order for Hearing, except that, where the hearing date is less than 20 days from the commencement of the contested case, the Notice of Appearance shall not be necessary. The failure to file a Notice may, in the discretion of the Hearing Examiner, result in a continuance of the hearing if the party failing to file appears at the hearing. The form shall be included with the Notice of and Order for Hearing in all applicable cases.

HE 206 Right to Counsel. Any party may be represented by legal counsel throughout the proceedings in a contested case before an agency or by a person other than an attorney, if that person possesses special qualifications pertinent to the subject matter of the hearing.

HE 209 Time.

[~~(a)~~] A. Computation of Time. In computing any period of time prescribed by these rules or the procedural rules of any agency, the day of the last act, event, or default from which the designated period of time begins to run shall not be included. The last day of the period so computed shall be included, unless it is a Saturday, Sunday or a legal holiday. When the period of time prescribed or allowed is less than 7 days, intermediate Saturdays, Sundays, and legal holidays shall be excluded in the computation.

[~~(b)~~] B. Additional Time after Service by Mail. Whenever a party has the right or is required to do some act or take some action within a prescribed period after the service of a notice or other paper upon him, or whenever such service is required to be made within a prescribed period before a specified event, and the notice or paper is served by mail, three days shall be added to the prescribed period.

HE 210 Intervention.

[~~(a)~~] A. Petition. Any person desiring to intervene in a contested case as a party shall submit a timely petition to intervene to the Hearing Examiner and shall serve the petition upon all existing parties and the agency if the agency is not a party.

Timeliness will be determined by the Hearing Examiner in each case based on circumstances at the time of filing. The petition shall show how the petitioner's legal rights, duties, or privileges may be determined or affected by the contested case, and shall set forth the grounds and purposes for which intervention is sought and shall indicate petitioner's statutory right to intervene if one should exist. The agency may, with the consent of the Chief Hearing Examiner, and where good reason appears therefor, specify in the Notice of and Order for Hearing the final date upon which a petition for intervention may be submitted to the Hearing Examiner.

[~~(b)~~] B. Objection. Any party may object to the petition for intervention by filing a Notice of Objection with the Hearing Examiner within 7 days of service of the petition. The Notice shall state the party's reasons for objection and shall be served upon all parties and the person petitioning to intervene and the agency if the agency is not a party.

[~~(c)~~] C. Order. The Hearing Examiner shall allow intervention upon a proper showing pursuant to HE 210 [~~(a)~~] A. unless the Hearing Examiner finds that the petitioner's interest is adequately represented by one or more parties participating in the case. In the event the Hearing Examiner finds that one or more petitions are similar, he may allow the petitions to be consolidated as one, allowing all such petitioners to intervene but only as one party. [~~The order allowing intervention shall specify the extent of participation permitted the intervenor and shall state the Hearing Examiner's reasons therefor. An intervenor may be allowed to:~~

~~(1)--File a written brief without acquiring the status of a party; or~~

~~(2)--File a written brief, introduce evidence and cross-examine witnesses at the hearing, but without acquiring the status of a party; or~~

~~(3)--Intervene as a party with all the rights of a party.~~]

[~~(d)~~] D. Agency in a Neutral Capacity. Where the agency participates in the hearing in a neutral or quasi-judicial capacity, [~~then:~~

~~(1) Any person intending to object to or protest an application or petition or other request of a party may petition to intervene under this rule and, in addition to the requirements of HE-210(a), shall set forth the grounds of the objection or protest.~~

~~(2)--Any person desiring to claim the same right or privilege as that requested by an applicant, petitioner or similar party may petition to intervene under this rule, and in addition to the requirements of HE 210(a), he shall set forth the grounds of his competing claim.~~]

[~~(3)~~] [~~T~~]the agency staff, or a portion of the agency staff, may petition to intervene under the rule.

[~~(e)~~] E. Participation by the Public. [~~Regardless of the status of the agency,~~] [~~t~~]The Hearing Examiner, may, in the absence of a petition to intervene, nevertheless hear the testimony, with or without benefit of oath, and receive exhibits from any person at the hearing, or allow a person to note his appearance, or allow a person to question witnesses, but no person shall become, or be deemed to have become, a party by reason of such participation. Persons allowed to participate as above may be questioned by parties to the proceeding.

HE 211 Consolidation.

[~~(a)~~] A. Authority. Whenever, before hearing on any contested case, the Chief Hearing Examiner, either on his own motion or on the motion of the Hearing Examiner assigned to the case, or upon petition by any party, determines (a) that separate contested cases present substantially the same issues of fact and law; (b) that a holding in one case would affect the rights of parties in another case; and (c) the consolidation would not substantially prejudice any party, the Hearing Examiner may order such cases consolidated for a single hearing on the merits. Notwithstanding the requirements of this rule, the parties may stipulate and agree to such consolidation.

[~~(b)~~] B. Notice of Order. Following an order for consolidation the Hearing Examiner shall forthwith serve on all parties a copy of the order for consolidation. The order shall contain, among other things:

[~~(1)~~] 1. A description of the cases for consolidation.

[~~(2)~~] 2. The reasons for consolidation.

[~~(3)~~] 3. Notification of a consolidated prehearing conference if one has been requested.

[~~(c)~~] C. Objection to Consolidation.

[~~(1)~~] 1. Petition for Severance. Any party may object to consolidation by filing with the Hearing Examiner, and serving upon all parties and the agency if it is not a party, at least 7 days prior to the hearing in the case a petition for severance from consolidation, setting forth petitioner's name and address, the

title of his case prior to consolidation, and the reasons for his petition.

[~~(2)~~] 2. Determination. If the Hearing Examiner finds that consolidation would prejudice petitioner, he may order such severance or other relief as he deems necessary.

HE 212 Disqualification. The Hearing Examiner shall withdraw from participation in a contested case at any time if he deems himself disqualified for any reason. Upon the filing in good faith by a party of an affidavit of prejudice the Chief Hearing Examiner shall, absent objection from another party, reassign the case to another Hearing Examiner. Any party may object to the affidavit of prejudice. In such instance, the Chief Hearing Examiner shall determine the matter as a part of the record. All affidavits of prejudice and objections thereto shall be served on all parties and the agency if the agency is not a party, and shall state with specificity the reasons for the affidavit or the objections thereto.

In the event another affidavit of prejudice is filed by any party, the Chief Hearing Examiner shall determine the matter as a part of the record provided the affidavit shall be filed no later than 15 days prior to the date set for hearing.

HE 213 Prehearing [~~Conference~~] Procedures.

A. Prehearing Conference.

[~~(a)~~] 1. Purpose. The purpose of the prehearing conference is to simplify the issues to be determined, to consider amendment of the agency's order if necessary, to obtain stipulations in regard to foundation for testimony or exhibits, to consider the proposed witnesses for each party, to consider such other matters that may be necessary or advisable and, if possible,

to reach a settlement without the necessity for further hearing.

[~~(b)~~] 2. Procedure. Upon the request of any party or upon his own motion, the Hearing Examiner may, in his discretion, hold a prehearing conference prior to each contested case hearing. The Hearing Examiner may require the parties to file a prehearing statement prior to the prehearing conference which shall contain such items as the Hearing Examiner deems necessary to promote a useful prehearing conference. A prehearing conference shall be an informal proceeding conducted expeditiously by the Hearing Examiner. Agreements on the simplification of issues, amendments, stipulations, or other matters may be entered on the record or may be made the subject of an order by the Hearing Examiner. Any final settlement shall be set forth in a settlement agreement or consent order and made a part of the record.

B. Motions. Any application to the Hearing Examiner for an order shall be by motion which, unless made during a hearing, shall be made in writing, shall state with particularity the grounds therefor, and shall set forth the relief or order sought. Motions provided in these rules are motions requiring a written notice to all parties and to the agency if the agency is not a party, and may require a hearing before the order can be issued.

HE 214 Discovery.

[~~(a)~~] A. Demand. Each party shall, within 10 days of a demand by another party, disclose the following:

[~~(1)~~] 1. The names and addresses of all witnesses that the party intends to call at the hearing. All witnesses

unknown at the time of said disclosure shall be disclosed as soon as they become known.

[~~(2)~~] 2. Any relevant written or recorded statements made by a party or by witnesses on behalf of a party. The demanding party shall be permitted to inspect and reproduce any such statements. Any party unreasonably failing upon demand to make the disclosure required by this rule may, in the discretion of the Hearing Examiner, be foreclosed from presenting any evidence at the hearing through witnesses not disclosed or through witnesses whose statements are not disclosed.

[~~(b)~~] B. Requests for Admissions. A party may serve upon any other party a written request for the admission of relevant facts or opinions, or of the application of law to relevant facts or opinions, including the genuineness of any documents. The request must be served at least 15 days prior to the hearing and it shall be answered in writing by the party to whom the request is directed within 10 days of receipt of the request. The written answer shall either admit or deny the truth of the matters contained in the request or shall make a specific objection thereto. Failure to make a written answer shall result in the subject matter of the request being deemed admitted.

[~~(c)~~] C. Motion to Hearing Examiner. Upon the motion of a party, the Hearing Examiner may order discovery of any other relevant material or information, provided that privileged work product (e.g. that of attorneys, investigators, etc.) shall not be discoverable. The Hearing Examiner shall also recognize all

other privileged information or communications which are recognized at law. Upon proper motion made to the Hearing Examiner, any other means of discovery available pursuant to the Rules of Civil Procedure for the District Courts of the State of Minnesota may be allowed provided that such requests can be shown to be needed for the proper presentation of a party's case and not for purposes of delay. Upon the failure of a party to reasonably comply with an order of the Hearing Examiner made pursuant to this rule, the Hearing Examiner may make a further order as follows:

[~~(1)~~] 1. An order that the subject matter of the order for discovery or any other relevant facts shall be taken as established for the purposes of the case in accordance with the claim of the party requesting the order.

[~~(2)~~] 2. An order refusing to allow the party failing to comply to support or oppose designated claims or defenses, or prohibiting him from introducing designated matters in evidence.

D. Proprietary Information. Nothing in these rules shall require the revealing of proprietary information or trade secrets. When a party is asked to reveal such information, he shall bring the matter to the attention of the Hearing Examiner, who shall make such protective orders as are reasonable and necessary.

HE 216 Subpoenas. Following the commencement of a contested case pursuant to these rules, only subpoenas issued by the Chief Hearing Examiner shall be used during the course of the administrative proceeding. Requests for subpoenas for the attendance of witnesses or the production of documents shall be made in writing

to the Hearing Examiner, and copies served upon all parties and the agency if the agency is not a party, and shall contain a brief statement demonstrating the potential relevance of the testimony or evidence sought and shall identify any documents sought with specificity, and shall name all persons to be subpoenaed. [~~Requests for subpoenas may be made only in cases wherein the agency involved has statutory subpoena power.~~]

[~~(a)~~] A. Service of Subpoenas.

[~~(1)~~] 1. A subpoena shall be served in the manner provided by the Rules of Civil Procedure for the District Courts of the State of Minnesota unless otherwise provided by law.

[~~(2)~~] 2. The cost of service, fees, and expenses of any witnesses subpoenaed shall be paid by the party at whose request the witness appears.

[~~(3)~~] 3. The person serving the subpoena shall make proof of service by filing the subpoena with the Hearing Examiner, together with his affidavit of service.

[~~(b)~~] B. Motion to Quash. Upon the motion made promptly, and in any event at or before the time specified in the subpoena for compliance therewith, the Hearing Examiner may quash or modify the subpoena if he finds that it is unreasonable or oppressive.

HE 217 The Hearing.

[~~(b)~~] B. Witnesses. Any party may be a witness or may present witnesses on his behalf at the hearing. All oral testimony

at the hearing shall be under oath or affirmation subject only to the provisions of HE 210 E. Testimony offered not subject to oath or affirmation shall be given such weight as the Hearing Examiner deems appropriate. At the request of a party or upon his own motion the Hearing Examiner may exclude witnesses from the hearing room so that they cannot hear the testimony of other witnesses.

[~~(c)~~] C. Rules of Evidence.

7. Offer of Proof. If an objection to a question propounded to a witness is sustained, the examining person may make a specific offer of what he expects to prove by the answer of the witness. Upon request, the Examiner shall take the evidence in full, unless it clearly appears that the evidence is not admissible on any ground or that the witness is privileged.

[~~(d)~~] D. The Record.

[~~(1)~~] 1. [~~Agency Prepares Record.~~] The [~~agency~~] Hearing Examiner shall prepare and maintain the official record in each contested case until the issuance of his final report, at which time the record shall be sent to the agency.

[~~(2)~~] 2. What the Record Shall Contain. The record in a contested case shall contain:

[~~(aa)~~] a. All pleadings, motions and orders;

[~~(bb)~~] b. Evidence received or considered;

[~~(cc)~~] c. Offers of proof, objections and rulings thereon;

[~~(dd)~~] d. The Hearing Examiner's findings of fact, conclusions and recommendations;

[~~(ee)~~] e. All memoranda or data submitted by any party in connection with the case[.]; f. The transcript of the hearing, if one was prepared.

[~~(3)~~] 3. The Transcript.

[~~(aa)---Reporter.---A court reporter from the Office of Hearing Examiners shall keep a record at each contested case hearing unless the Chief Hearing Examiner determines that the use of an audio magnetic recording device is more appropriate.~~]

[~~(bb)--Transcription.~~] The verbatim record shall be transcribed if requested by [~~a party~~] any person or in the discretion of the Chief Hearing Examiner. If a transcription is made, the Chief Hearing Examiner [~~may~~] shall require the requesting [~~party~~] person and other [~~parties~~] persons who request copies of the transcript to pay a reasonable charge therefor. The charge shall be set by the Chief Hearing Examiner and all monies received for transcripts shall be payable to the State Treasurer and shall be deposited in the State Office of Hearing Examiners account in the State Treasury.

[~~(ff)~~] F. Motions [~~of~~] to the Agency. No Motions shall be made directly to or be decided by the agency subsequent to the [~~appointment~~] assignment of a Hearing Examiner and prior to the completion and filing of the Hearing Examiner's report unless the motion is certified to the agency by the Hearing Examiner. Uncertified motions shall be made to the Hearing Examiner and con-

sidered by the agency in its consideration of the record as a whole subsequent to the filing of the Hearing Examiner's report.

Any party may request that a motion decided adversely to that party by the Hearing Examiner during the course of the hearing be certified by the Hearing Examiner to the agency. Such request must be made at the time the Hearing Examiner rules on the motion. In deciding what motions should be certified, the Examiner shall consider the following:

1. Whether the motion involves a controlling question of law as to which there is substantial ground for a difference of opinion; and

2. Whether a final determination by the agency on the motion would materially advance the ultimate termination of the hearing.

[~~(g)~~] G. Hearing Procedure.

[~~(2)~~] 2. Conduct of the Hearing. Unless the Hearing Examiner determines that the public interest will be equally served otherwise, [~~T~~]the hearing shall be conducted substantially in the following manner:

[~~(aa)~~] a. After opening the hearing, the Hearing Examiner shall indicate the procedural rules for the hearing including the following:

[~~(i)~~] (1) All parties may present evidence and argument with respect to the issues and cross-examine witnesses. At the discretion of the Hearing Examiner, a party, by its attorney or by any representative of that party, or by any combination of such persons, may cross-examine each witness, provided that only one person shall cross-examine each witness on behalf of a party on any one subject matter of testimony. At the request of

the party being cross-examined, the Hearing Examiner may make such rulings as are necessary to prevent repetitive or irrelevant questioning and to expedite the cross-examination to the extent consistent with disclosure of all relevant testimony and information.

[~~(hh)~~] h. The record of the hearing shall be closed upon receipt of the final written memorandum, transcript, if any, or late filed exhibits, whichever occurs latest.

HE 218 The Decision.

[~~(a)~~] A. Basis for Determination.

[~~(1)~~] 1. The Record. No factual information or evidence, except tax returns and tax reports, which is not a part of the record shall be considered by the Hearing Examiner or the agency in the determination of a contested case.

[~~(2)~~] 2. Administrative Notice. The Hearing Examiner and agency may take administrative notice of general, technical or scientific facts within their specialized knowledge in conformance with the requirements of Minn. Stat. § 15.0419, Subd. 4.

[~~(b)~~] B. Hearing Examiner's Report. Following the close of the record [~~and the completion of the transcript,~~] the Hearing Examiner shall make his report pursuant to Minn. Stat. § 15.052, Subd. 3, and, upon completion, a copy of said report shall be served upon all parties by regular mail or by depositing it with Central Mailing Section, Publications Division, Department of Administration.

[~~(c)~~] C. Agency Decision. Following receipt of the Hearing

Examiners' report, the agency shall proceed to make its final decision in accordance with Minn. Stat. § 15.0421 and Minn. Stat. § 15.0422, and shall send a copy of such final order to the Office of Hearing Examiners.

HE 222 Effective Date. These rules shall be effective for all contested cases commenced after December 31, [~~1975~~] 1977.