

Minnesota Attorney General: Administrative Rules Proceedings

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OFFICE OF ADMINISTRATIVE HEARINGS
Rules As Adopted

Chapter One: 9 MCAR §§ 2.101-2.199 Rule Hearing Procedures.

9 MCAR § 2.102 Initiation of Hearing. Any agency desiring to initiate a rule hearing pursuant to Minn. Stat. §§ 15.0411 through 15.0417 and § 15.052 shall first file with the Chief Hearing Examiner or his designee the following documents:

A. A copy of the proposed rule or rules.

HE 9

B. An Order for Hearing ~~which must~~ that shall contain the following:

1. A proposed time, date and place for the hearing to be held.

2. A statement that the Notice of Hearing shall be given to all persons who have registered with the agency for that purpose and a statement that the Notice of Hearing shall be published in the State Register.

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 11

C. The Notice of Hearing proposed to be issued ~~which must~~ that shall contain the following:

1. A proposed time, date and place for the hearing to be held.

2. A statement that all interested or affected persons will have an opportunity to participate.

3. A statement or a description of the subjects 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. A citation to the agency's statutory authority to promulgate the proposed rules.

5. A statement describing the manner in which interested persons may present their views and advising persons that the proposed rule may be modified as a result of the hearing process.

6. A statement advising interested persons that lobbyists must register with the State Ethical Practices Board, which statement shall ~~contain a summary of the statutory definition of a lobbyist and indicate that questions should be directed to the Board, giving the address and telephone number thereof.~~ read as follows: HE 13

Minn. Stat. Ch. 10A requires each lobbyist to register with the State Ethical Practices Board within five days after he or she commences lobbying. A lobbyist is defined in Minn. Stat. § 10A.01, subd. 11 (1979 Supp.) as any individual: HE 13

(a) Engaged for pay or other consideration, or authorized by another individual or association to spend money, who spends more than five hours in any month or more than $250, not including his own travel expenses and membership dues, in any year, for the purpose of attempting to influence legislative or administrative action by communicating or urging others to communicate with public officials; or

(b) Who spends more than $250, not including his own traveling expenses and membership dues, in any year for the purpose of attempting to influence legislative or administrative action by communicating or urging others to communicate with public officials.

The statute provides certain exceptions. Questions should be directed to the Ethical Practices Board, 41 State Office Building, Saint Paul, Minnesota 55155, telephone (612)296-5615.

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

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's submission or resubmission to the Attorney General).

9. A separate paragraph which will 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 Administrative Hearings. This Statement of Need and Reasonableness will include a summary of all ~~of~~ the evidence and argument which ~~is anticipated to be presented by~~ the agency anticipates presenting at the hearing justifying both the need for and the reasonableness of the proposed rule~~/~~ or rules. Copies of the Statement of Need and Reasonableness may be obtained from the Office of Administrative Hearings at a minimal charge. HE 15

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

11. A statement that the rule hearing procedure is governed by Minn. Stat. §§ 15.0411 - 15.0417 and 15.052 and by 9 MCAR §§ 2.101 - 2.113 (Minnesota Code of Agency Rules) and a statement that questions about procedure may be directed to the Hearing Examiner.

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.

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 and shall advise the agency as to whether or not the proposed Notice of Hearing is proper as required by Minn. Stat. § 15.052, subd. 3.

9 MCAR § 2.104 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 9 MCAR § 2.105. 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. To the extent that an agency is proposing amendments to existing rules, the agency need not demonstrate the need for and reasonableness of the existing rules not affected by the proposed amendments.

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, and, provided that copies

are available for review at the hearing, 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 or to briefly summarize all or a portion of the Statement of Need and Reasonableness if requested by the Hearing Examiner.

9 MCAR § 2.105 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 Hearing Examiner assigned to the hearing copies of the following documents:

A. The Notice of Hearing as mailed.

B. The agency's certification that the mailing list required by Minn. Stat. § 15.0412, subd. 4, which was used for the hearing, was accurate and complete.

C. An Affidavit of Mailing of the Notice to all persons on the agency's list.

D. An Affidavit of Additional Notice if such discretionary notice was given pursuant to Minn. Stat. § 15.0412, subd. 4.

E. The Statement of Need and Reasonableness.

F. The petition requesting a rule hearing, if one has been filed pursuant to Minn. Stat. § 15.0415.

G. All materials received following a notice made pursuant to Minn. Stat. § 15.0412, subd. 6, together with a citation to said notice.

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

I. A copy of the State Register in which the notice and rules or rule amendments were published.

9 MCAR § 2.106 Disqualification. The Hearing Examiner shall withdraw from participation in a rulemaking proceeding to which he has been assigned if, at any time, he deems himself disqualified for any reason. Upon the filing in good faith by an affected person of an affidavit of prejudice against the Hearing Examiner, the Chief Hearing Examiner shall determine the matter as a part of the record provided that the affidavit shall be filed no later than five days prior to the date set for hearing.

9 MCAR § 2.107 Conduct of Hearings. All hearings held pursuant to Minn. Stat. § 15.0412 shall proceed substantially in the following manner:

A. All persons intending to present evidence or ask questions ~~attending~~ 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 register shall include a section ~~where~~ in which 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 21

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 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. The Hearing Examiner shall advise the persons present of the requirements of Minn. Stat. ch. 10A concerning the registration of lobbyists.

D. The agency representatives and any others who will be presenting the agency position at the hearing shall identify themselves for the record.

E. The agency shall make available copies of the proposed rule at the hearing.

F. The agency shall introduce its exhibits relevant to the proposed rule including written material received prior to the hearing.

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. Interested persons shall be given an opportunity to address questions to the agency representatives or witnesses.

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 statements are subject to questioning by representatives of the agency.

J. The Hearing Examiner may question all persons, including the agency representatives.

K. The agency may present any further evidence that it deems appropriate in response to statements made by interested persons. Upon such presentation by the agency, interested persons may respond thereto.

L. Consistent with law, the Hearing Examiner shall be authorized to do all things necessary and proper to the performance of the foregoing and to promote justice, fairness and economy, including but not limited to, the power to:

1. Preside at the hearing;

2. Administer oaths or affirmations when he deems it appropriate;

3. Hear and rule on objections and motions;

4. Question witnesses where he deems it necessary to make a complete record;

5. Rule on the admissibility of evidence and strike from the record objectionable evidence.

9 MCAR § 2.108 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 9 MCAR § 2.105, 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 a court reporter has taken the proceedings. 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 for transcripts 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 Administrative Hearings' account in the State Treasury. The agency and any other persons so requesting of the Hearing Examiner shall be notified of the date of the completion of the transcript.

9 MCAR § 2.109 Incorporation by Reference. When an agency desires approval of the Chief Hearing Examiner to incorporate certain materials by reference in its rules, 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.

(Repealed effective 7-1-81 provided that Minn. Laws 1980, Ch. 615, Sec. 43 is not repealed or substantially amended prior to that time.)

9 MCAR § 2.110 Report of the Hearing Examiner.

A. Subsequent to the close of the record, the Hearing Examiner shall make his or her report pursuant to Minn. Stat. § 15.052, subd. 3.~~, and unless the approval of the Chief Hearing Examiner is required pursuant to Minn. Stat. § 15.0412, subd. 4d,~~ If the report contains findings that the rules as last proposed by the agency prior to the close of the record are needed and reasonable and are not substantially changed from those which were published in the State Register, and that the agency has fulfilled the relevant substantive and procedural requirements imposed on the agency by rule or law, the Hearing Examiner 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 Administrative Hearings shall make a

copy of said report available to any interested person upon request at a reasonable charge. ~~The phrase "recommended by the Hearing Examiner" as used in Minn. Stat. § 15.0412, subd. 4e, shall mean those changes in the rule, if any, and based upon the record, which the Hearing Examiner concludes are required in order to make the rule needed and/or reasonable and which would not constitute a substantial change. Where the Hearing Examiner identifies more than one option from which the agency may choose, then each of the options is deemed to be "recommended by the Hearing Examiner" provided that the Hearing Examiner has found, based upon the record, that the option is needed and reasonable and that adoption of the option would not constitute a substantial change.~~

B. If the Hearing Examiner's report contains findings that the rules as last proposed by the agency prior to the close of the hearing are substantially changed from those which were published in the State Register, or that the agency has failed to demonstrate the need or reasonableness of the rules, or has not fulfilled the relevant substantive and procedural requirements imposed on the agency by rule or law, he or she shall submit the report, together with the complete record of the proceedings, to the Chief Hearing Examiner for review pursuant to Minn. Stat. § 15.0412, subd. 4d.

C. Upon receipt of a report from the Hearing Examiner, the Chief Hearing Examiner shall complete his review and submit his report, along with the complete record and the report of the Hearing Examiner, to the agency within 10 calendar days.

~~9 MCAR § 2.111 Submission of rule to Chief Hearing Examiner.~~

~~A. If the Chief Hearing Examiner's approval of the Hearing Examiner's report is required pursuant to Minn. Stat. § 15.0412, subd. 4d, the Hearing Examiner shall submit the report and the record to the Chief Hearing Examiner prior to filing with the agency as required by 9 MCAR § 2.110.~~

~~B. Pursuant to Minn. Stat. § 15.0412, subd. 4e, the agency shall, if it proposes to adopt the rules with changes other than as recommended by the Hearing Examiner, submit, the complete hearing record and a copy of the rules as proposed to be adopted, showing the changes, to the Chief Hearing Examiner.~~

~~C. The Chief Hearing Examiner shall complete his review and submit his report, along with the complete record, to the agency within ten calendar days.~~

9 MCAR § 2.111~~2~~ Substantial change. In determining whether the proposed final rule is substantially different, the Hearing Examiner ~~and the Chief Hearing Examiner~~ shall consider the degree to which it:

A. Affects classes of persons not represented at the previous hearing; or

B. Goes to a new subject matter of significant substantive effect; or

C. Makes a major substantive change that was not raised by the original Notice of Hearing in such a way as to invite reaction at the hearing; or

D. Results in a rule fundamentally different from that contained in the Notice of Hearing.

~~In making his substantial change determination pursuant to Minn. Stat. § 15.0412, subd. 4d, the Hearing Examiner shall compare the proposed rule or rule amendment as published in the State Register with the rule or rule amendment as last proposed by the agency prior to the close of the record. In making his substantial change determination pursuant to Minn. Stat. § 15.0412, subd. 4e, the Chief Hearing Examiner shall compare the rule or rule amendment as published in the State Register with the final rule or rule amendment as adopted by the agency.~~

9 MCAR § 2.112 Agency Adoption of Rules.

A. Upon receipt of a report directly from the Hearing Examiner, the agency shall, if it adopts the rules in accordance with the recommendations of the Hearing Examiner, submit the complete hearing record and a copy of the proposed rules to the Attorney General for a review as to form and legality, pursuant to Minn. Stat. § 15.0412, subd. 4e. If the agency proposes to adopt the rules with changes other than as recommended by the Hearing Examiner, it shall, prior to submitting them to the Attorney General, submit the complete hearing record and a copy of the rules as proposed to be adopted, showing the changes, to the Chief Hearing Examiner for a determination as to substantial change between the final proposed rules and the proposed rules published in the State Register, pursuant to Minn. Stat. § 15.0412, subd. 4e.

B. Upon receipt of a report from the Chief Hearing Examiner, the agency shall, prior to submitting the proposed rules and the complete hearing record to the Attorney General, either take the actions prescribed by the Chief Hearing Examiner to correct any defects in the proposed rules, or proceed under the provisions of Minn. Stat. § 15.0412, subd. 4d.

9 MCAR § 2.113 Effective date. These rules shall be effective for all rule proceedings initiated five working days after publication of these rules in the State Register.

9 MCAR §§ 2.114-2.199 Reserved for future use.

Chapter Two: 9 MCAR §§ 2.210-2.299 Contested Case Procedures.

9 MCAR § 2.201 Scope and purpose. The procedures contained herein shall govern all contested cases required to be conducted by the Office of Administrative Hearings.

9 MCAR § 2.203 Hearing Examiners.

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.

B. Assignment. Within 10 days of the receipt of a request pursuant to 9 MCAR § 2.203 A., the Chief Hearing Examiner shall 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. 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 including 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 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. Recommend a summary disposition of the case or any part thereof where there is no genuine issue as to any material fact or recommend dismissal where the case or any part thereof has become moot or for other reasons. HE 30

12. ~~Require that testimony be prefiled in whole or in part.~~ Permit testimony, upon the request of a party or upon his own motion, to be prefiled ? HE 31

in whole or in part where the prefiling will expedite the conduct and disposition of the case without imposing an undue burden on any party.

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

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

9 MCAR § 2.204 Commencement of a contested case. A contested case is commenced, subsequent to the assignment of a Hearing Examiner, by the 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 if not otherwise prohibited as the unauthorized practice of law.

6. A citation to these rules, to any applicable procedural rules of the agency, and to the contested case provisions of Minn. Stat. Ch. 15.

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 9 MCAR § 2.207 or discovery pursuant to 9 MCAR § 2.214.

8. 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 issuance of the Notice of and Order for Hearing.

9. A statement advising 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 shorter time may be allowed, where it can be shown to the Chief Hearing Examiner that a shorter time is in the public interest and that interested persons are not likely to be prejudiced.

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.

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.

E. Alternative. 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 9 MCAR § 2.204 A.1. - 9. above.

9 MCAR § 2.205 Notice of Appearance. Each party intending to appear at a contested case hearing shall file with the Hearing Examiner and serve upon all other known parties 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 or other representative. The Notice of Appearance shall be filed with the Hearing Examiner 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. A Notice of Appearance form shall be included with the Notice of and Order for Hearing for use by the party served.

9 MCAR § 2.208 Default. The agency may dispose of a contested case adverse to a party which defaults. Upon default, the allegations of or the issues set out in the Notice of and Order for Hearing or other pleading may be taken as true or deemed proved without further evidence. A default occurs when a party fails to appear at a hearing or fails to comply with any interlocutory orders of the Hearing Examiner.

9 MCAR § 2.213 Prehearing procedures.

A. Prehearing conference.

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. Any final settlement shall be set forth in a settlement agreement or consent order and made a part of the record.

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.

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 for in these rules require a written notice, to all parties and to the agency, to be served five days prior to the submission of the motion 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 the hearing, shall be in writing and shall be served upon all parties of record and the agency if it is not a party. In ruling on motions where these rules are silent, the Hearing Examiner ~~may~~ shall apply ~~consider~~ the Rules of Civil Procedure for the District Courts ~~of~~ for the State of Minnesota to the extent that he or she determines that it is appropriate to do so in order to promote a fair and expeditious proceeding. HE 34

9 MCAR § 2.217 The Hearing.

A. Rights of parties. All parties shall have the right to present evidence, rebuttal testimony and argument with respect to the issues and to cross-examine witnesses.

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. 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.

1. General rules. The Hearing Examiner may admit all evidence which possesses probative value, including hearsay, if it is the type of evidence on which reasonable prudent persons are accustomed to rely in the conduct of

their serious affairs. The Hearing Examiner shall give effect to the rules of privilege recognized by law. Evidence which is incompetent, irrelevant, immaterial or unduly repetitious may be excluded.

2. Evidence must be offered to be considered. All evidence to be considered in the case, including all records and documents in the possession of the agency or a true and accurate photocopy thereof, shall be offered and made a part of the record in the case. No other factual information or evidence shall be considered in the determination of the case.

3. Documentary evidence. Documentary evidence in the form of copies or excerpts may be received or incorporated by reference in the discretion of the Hearing Examiner or upon agreement of the parties.

4. Notice of facts. The Hearing Examiner may take notice of judicially cognizable facts but shall do so on the record and with the opportunity for any party to contest the facts so noticed.

5. The burden of and standard of proof. The party proposing that certain action be taken must prove the facts at issue by a preponderance of the evidence, unless the substantive law provides a different burden or standard.

6. Examination of adverse party. A party may call an adverse party or his managing agent or employees or an officer, director, managing agent or employee of the State or any political subdivision thereof or of a public or private corporation or of a partnership or association or body politic which is an adverse party, and interrogate him by leading questions and contradict and impeach him on material matters in all respects as if he had been called by the adverse party. The adverse party may be examined by his counsel upon the subject matter of his examination in chief under the rules applicable to direct examination, and may be cross-examined, contradicted, and impeached by any other party adversely affected by his testimony.

D. The record.

1. The Hearing Examiner shall 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. What the record shall contain. The record in a contested case shall contain:

a. All pleadings, motions and orders;

b. Evidence received or considered;

c. Offers of proof, objections and rulings thereon;

d. The Hearing Examiner's findings of fact, conclusions and recommendations;

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. The transcript. The verbatim record shall be transcribed if requested by the agency, a party 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 Administrative Hearings' Account in the State Treasury.

E. Continuances. A request for continuance shall be made in writing to the Hearing Examiner and shall be served upon all parties of record and the agency if it is not a party.

1. A request for continuance filed not less than five days prior to the hearing may, in the discretion of the Hearing Examiner, be granted upon a showing of good cause. Due regard shall be given to the ability of the party requesting a continuance to effectively proceed without a continuance.

2. A request for a continuance filed within five days of the hearing shall be denied unless good cause exists and the reason for the request could not have been earlier ascertained.

3. During a hearing, if it appears in the interest of justice that further testimony should be received, the Hearing Examiner, in his discretion, may continue the hearing to a future date and such oral notice on the record shall be sufficient.

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 pending motion or 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. 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; 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.

1. Hearing Examiner conduct. The Hearing Examiner shall not communicate, directly or indirectly, in connection with any issue of fact or law with any person or party including the agency concerning any pending case, except upon notice and opportunity for all parties to participate.

2. Conduct of the hearing. Unless the Hearing Examiner determines that the public interest will be equally served otherwise, the hearing shall be conducted substantially in the following manner:

a. After opening the hearing, the Hearing Examiner shall, unless all parties are represented by counsel, state ~~ensure that the parties are aware of~~ the procedural rules for the hearing including the following: HE 38

(1) All parties may present evidence and argument with respect to the issues and cross-examine witnesses. 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.

(2) All parties have a right to be represented by an attorney at the hearing.

(3) The rules of evidence as set forth in 9 MCAR § 2.217 C.1.

b. Any stipulations, settlement agreements or consent orders entered into by any of the parties prior to the hearing shall be entered into the record.

c. The party with the burden of proof may make an opening statement. All other parties may make such statements in a sequence determined by the Hearing Examiner.

d. After any opening statements, the party with the burden of proof shall begin the presentation of evidence. He shall be followed by the other parties in a sequence determined by the Hearing Examiner.

e. Cross-examination of witnesses shall be conducted in a sequence determined by the Hearing Examiner.

f. When all parties and witnesses have been heard, opportunity shall be offered to present final argument, in a sequence determined by the Hearing Examiner. Such final argument may, in the discretion of the Hearing Examiner, be in the form of written memoranda or oral argument, or both. Final argument need not be recorded, in the discretion of the Hearing Examiner. Written memoranda may, in the discretion of the Hearing Examiner, be submitted simultaneously or sequentially and within such time periods as the Hearing Examiner may prescribe.

g. After final argument, the hearing shall be closed or continued at the discretion of the Hearing Examiner. If continued, it shall be either (a) continued to a certain time and day, announced at the time of the hearing and made a part of the record, or (b) continued to a date to be determined later, which must be upon not less than five days' written notice to the parties.

h. The record of the contested case proceeding shall be closed upon receipt of the final written memorandum, transcript, if any, or late filed exhibits which the parties and the Hearing Examiner have agreed should be received into the record, whichever occurs latest.

3. Participation by agency head. An agency which is a party to a contested case may only participate in the hearing by the giving of testimony and through its designated representative or counsel. Where the agency is not a party and participates in the hearing in a neutral or quasi-judicial capacity, the agency head or a member of the governing body of the agency or his delegate may engage in such examination of witnesses as the Hearing Examiner deems appropriate. AE 40

H. Disruption of hearing.

1. Cameras. No televison, newsreel, motion picture, still or other camera, and no mechanical recording devices, other than those provided by the Office of Administrative Hearings or at its discretion, shall be operated in the hearing room during the course of the hearing unless permission is obtained from the Hearing Examiner prior to the opening of the hearing and then subject to such conditions as the Hearing Examiner may impose to avoid disruption of the hearing.

2. Other conduct. Pursuant to and in accordance with the provisions of Minn. Stat. § 624.72, no person shall interfere with the free, proper and lawful access to or egress from the hearing room. No person shall interfere with the conduct of, disrupt or threaten interference with or disruption of the hearing. In the event of such interference or disruption or threat thereof, the Hearing Examiner shall read this rule to those persons causing such interference or disruption and thereafter proceed as he deems appropriate.

9 MCAR § 2.218 The Hearing Examiner report and the agency decision.

A. Basis for the report and the decision.

1. The record. No factual information or evidence 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. 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. Hearing Examiner's report. Following the close of the record, the Hearing Examiner shall make his report pursuant to Minn. Stat. §§ 15.0412, subd. 4d, and 15.052, subd. 3, and, upon completion, a copy of said report shall be served upon all parties by personal service, by First Class mail or by depositing it with the Central Mailing Section, Publications Division, Department of Administration.

C. Agency decision. Following receipt of the Hearing Examiner's report, the agency shall proceed to make its final decision in accordance with Minn. Stat. §§ 15.0421 and 15.0422, and shall serve a copy of its final order upon the Hearing Examiner by First Class mail.

9 MCAR § 2.219 Rehearing. An agency Notice of and Order for rehearing shall be served on all parties in the same manner prescribed for the Notice of and Order for Hearing provided that the Hearing Examiner may permit service of the Notice and Order for Rehearing less than 30 days prior to rehearing. The rehearing shall be conducted in the same manner prescribed for a hearing.

APPROVED AS TO FORM AND LEGALITY
SEP 08 1980
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WARREN SPANNAUS, ATTORNEY GENERAL
BY

SPECIAL ASSISTANT ATTORNEY GENERAL

STATE OF MINNESOTA
DEPARTMENT OF STATE
FILED
SEP - 8 1980
Joan Anderson Growe
Secretary of State
3:05 PM

Amendments as Proposed - Rule Making Hearings

9 MCAR § 2.102 Initiation of Hearing. Any agency desiring to initiate a rule hearing pursuant to Minn. Stat. §§ 15.0411 through ~~15.051~~ 15.0417 and § 15.052 shall first file with the Chief Hearing Examiner or his designee the following documents:

A. A copy of the proposed rule or rules.

B. ~~The~~ An Order for Hearing ~~proposed to be issued. The Order for Hearing~~ which must contain the following:

1. A proposed time, date and place for the hearing to be held.

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

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.

C. The Notice of Hearing proposed to be issued which must contain the following:

1. A proposed time, date and place for the hearing to be held.

2. A statement that all interested or affected persons will have an opportunity to participate.

3. A statement or a description of the subjects 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. A citation to the agency's statutory authority to promulgate the proposed rules.

5. A statement describing the manner in which interested persons may present their views and advising persons that the proposed rule may be modified as a result of the hearing process.

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

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~~ and a statement that the comment period may be extended for a longer period not to exceed 20 calendar days if ordered by the Hearing Examiner at the hearing.

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's submission or resubmission to the Attorney General).

9. A separate paragraph which will 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~~ Administrative Hearings. This Statement of Need and Reasonableness will include a summary of all of the evidence and argument which is anticipated to ~~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~~ Administrative Hearings at a minimal charge.

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

11. A statement that the rule hearing procedure is governed by Minn. Stat. §§ 15.0411 - 15.0417 and 15.052 and by 9 MCAR §§ 2.101 - 2.113 (Minnesota Code of Agency Rules) and a statement that questions about procedure may be directed to the Hearing Examiner.

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.

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 and shall advise the agency as to whether or not the proposed Notice of Hearing is proper as required by Minn. Stat. § 15.052, subd. 3.

9 MCAR § 2.104 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 9 MCAR § 2.105. 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. To the extent that an agency is proposing amendments to existing rules, the agency need not demonstrate the need for and reasonableness of the existing rules not affected by the proposed amendments.

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~~, and, provided that copies are available for review at the hearing, 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

D. The agency representatives and any others who will be presenting the agency position at the hearing shall identify themselves for the record.

E. The agency shall make available copies of the proposed rule at the hearing.

F. The agency shall introduce its exhibits relevant to the proposed rule including written material received prior to the hearing.

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. Interested persons shall be given an opportunity to address questions to the agency representatives or witnesses.

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 statements are subject to questioning by representatives of the agency.

J. The Hearing Examiner may question all persons, including the agency representatives.

K. The agency may present any further evidence that it deems appropriate in response to statements made by interested persons. Upon such presentation by the agency, interested persons may respond thereto.

L. Consistent with law, the Hearing Examiner shall be authorized to do all things necessary and proper to the performance of the foregoing and to promote justice, fairness and economy, including but not limited to, the power to:

1. Preside at the hearing;

2. Administer oaths or affirmations when he deems it appropriate;

3. Hear and rule on objections and motions;

4. Question witnesses where he deems it necessary to make a complete record;

5. Rule on the admissibility of evidence and strike from the record objectionable evidence.

9 MCAR § ~~2.107~~ 2.108 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 9 MCAR § 2.105, 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~~ a court reporter has taken the proceedings. 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 for transcripts 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'~~ Administrative Hearings' account in the State Treasury. The agency and any other persons so requesting of the Hearing Examiner shall be notified of the date of the completion of the transcript.

9 MCAR § ~~2.108~~ 2.109 ~~Incorporation by Reference. When an agency desires approval of the Chief Hearing Examiner to incorporate certain materials by reference in its rules, 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~~.

or to briefly summarize all or a portion of the Statement of Need and Reasonableness if requested by the Hearing Examiner.

9 MCAR § 2.105 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~~ assigned to the hearing copies of the following documents:

~~A. The Order for Hearing.~~

~~A~~B. The Notice of Hearing as mailed.

~~B~~C. ~~The affidavit of receipt of the Secretary of State's list.~~ The agency's certification that the mailing list required by Minn. Stat. § 15.0412, subd. 4, which was used for the hearing, was accurate and complete.

~~C~~D. An Affidavit of Mailing of the Notice to all persons on the ~~Secretary of State's~~ agency's list.

D. An Affidavit of Additional Notice if such discretionary notice was given pursuant to Minn. Stat. § 15.0412, subd. 4.

E. The Statement of Need and Reasonableness.

F. The petition requesting a rule hearing, if one has been filed pursuant to Minn. Stat. § 15.0415.

G. All materials received following a notice made pursuant to Minn. Stat. § 15.0412, subd. 6, together with a citation to said notice.

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

I. A copy of the State Register in which the notice and rules or rule amendments were published.

9 MCAR § 2.106 Disqualification. The Hearing Examiner shall withdraw from participation in a rulemaking proceeding to which he has been assigned if, at any time, he deems himself disqualified for any reason. Upon the filing in good faith by an affected person of an affidavit of prejudice against the Hearing Examiner, the Chief Hearing Examiner shall determine the matter as a part of the record provided that the affidavit shall be filed no later than five days prior to the date set for hearing.

9 MCAR § ~~2.106~~ 2.107 Conduct of Hearings. All hearings held pursuant to Minn. Stat. § 15.0412 shall proceed substantially in the following manner:

A. All persons ~~intending to present evidence or questions, other than agency personnel previously disclosed to the Hearing Examiner under 9 MCAR § 2.105,~~ attending 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~~ shall 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. 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 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. The Hearing Examiner shall advise the persons present of the requirements of Minn. Stat. ch. 10A concerning the registration of lobbyists.

(Repealed effective 7-1-81 provided that Minn. Laws 1980, Ch. 615, Sec. 43 is not repealed or substantially amended prior to that time.)

9 MCAR § ~~2.109~~ 2.110 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 unless the approval of the Chief Hearing Examiner is required pursuant to Minn. Stat. § 15.0412, subd. 4d, 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~~ Administrative Hearings shall make a copy of said report available to any interested person upon request at a reasonable charge. The phrase "recommended by the Hearing Examiner" as used in Minn. Stat. § 15.0412, subd. 4e, shall mean those changes in the rule, if any, and based upon the record, which the Hearing Examiner concludes are required in order to make the rule needed and/or reasonable and which would not constitute a substantial change. Where the Hearing Examiner identifies more than one option from which the agency may choose, then each of the options is deemed to be "recommended by the Hearing Examiner" provided that the Hearing Examiner has found, based upon the record, that the option is needed and reasonable and that adoption of the option would not constitute a substantial change.

9 MCAR § ~~2.110~~ 2.111 Submission of rule to Chief Hearing Examiner.

A. If the Chief Hearing Examiner's approval of the Hearing Examiner's report is required pursuant to Minn. Stat. § 15.0412, subd. 4d, the Hearing Examiner shall submit the report and the record to the Chief Hearing Examiner prior to filing with the agency as required by 9 MCAR § 2.110.

B. Pursuant to Minn. Stat. § 15.0412, subd. 4e, ~~T~~the agency shall, if it proposes to adopt the rules with changes other than as recommended by the Hearing Examiner ~~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~~, the complete hearing record and a copy of the rules as proposed to be adopted, showing the changes, 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~~.

C. The Chief Hearing Examiner shall complete his review and submit his report, along with the complete record, to the agency ~~on the issues of substantial changes in the rule and compliance with Minn. Stat. § 15.0412, subd. 4,~~ within ten calendar days. ~~The agency will be responsible for filing the rules with the Attorney General.~~

9 MCAR § ~~2.111~~ 2.112 Substantial change. ~~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. § 15.0412, subd. 4, 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 Hearing Examiner and the Chief Hearing Examiner shall consider the degree to which it:

A. Affects classes of persons not represented at the previous hearing; or

B. Goes to a new subject matter of significant substantive effect; or

C. Makes a major substantive change that was not raised by the original Notice of Hearing in such a way as to invite reaction at the hearing; or

D. Results in a rule fundamentally different from that contained in the Notice of Hearing.

In making his substantial change determination pursuant to Minn. Stat. § 15.0412, subd. 4d, the Hearing Examiner shall compare the proposed rule or rule amendment as published in the State Register with the rule or rule amendment as last proposed by the agency prior to the close of the record. In making his substantial change determination pursuant to Minn. Stat. § 15.0412,

subd. 4e, the Chief Hearing Examiner shall compare the rule or rule amendment as published in the State Register with the final rule or rule amendment as adopted by the agency.

9 MCAR § ~~2.112~~ 2.113 Effective date. These rules shall be effective for all rule proceedings initiated five working days after publication of these rules in the State Register.

9 MCAR §§ ~~2.113~~ 2.114-2.199 Reserved for future use.

Amendments as Proposed - Contested Case Hearings

9 MCAR § 2.201 Scope and purpose. The procedures contained herein shall govern all contested cases ~~held by any agency of state government as defined in Minn. Stat. § 15.0411, subd. 2.~~ required to be conducted by the Office of Administrative Hearings.

9 MCAR § 2.203 Hearing Examiners.

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.

B. Assignment. Within ~~ten~~ 10 days of the receipt of a request pursuant to 9 MCAR § 2.203 A., the Chief Hearing Examiner shall 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. 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~~ including 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 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. Recommend a summary disposition of the case where there is no genuine issue as to any material fact or recommend dismissal where the case has become moot or for other reasons.

12. Require that testimony be prefiled in whole or in part.

~~11~~ 13. Do all things necessary and proper to the performance of the foregoing.

~~12~~ 14. In his discretion, perform such other duties as may be delegated to him by the agency ordering the hearing.

9 MCAR § 2.204 Commencement of a contested case. A contested case is commenced, subsequent to the assignment of a Hearing Examiner, by the 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 if not otherwise prohibited as the unauthorized practice of law.

6. A citation to these rules, ~~and~~ to any applicable procedural rules of the agency, and to the contested case provisions of Minn. Stat. Ch. 15.

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 9 MCAR § 2.207 or discovery pursuant to 9 MCAR § 2.214.

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 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 issuance of the Notice of and Order for Hearing.

9. A statement advising 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 shorter time may be allowed, 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~~ persons are not likely to be prejudiced.

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.

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.

E. Alternative. 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 9 MCAR § 2.204 A.1. - 9. above.

9 MCAR § 2.205 Notice of Appearance. Each party intending to appear at a contested case hearing ~~wherein the agency is a party~~ shall file with the Hearing Examiner and serve upon all other known parties 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 or other representative. The Notice of Appearance shall be filed with the Hearing Examiner 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~~ A Notice of Appearance form shall be included with the Notice of and Order for Hearing ~~in all applicable cases~~ for use by the party served.

9 MCAR § 2.208 Default. The agency may dispose of a contested case adverse to a party which defaults. Upon default, the allegations of or the issues set out in the Notice of and Order for Hearing or other pleading may be taken as true or deemed proved without further ~~proof~~ evidence. A default occurs when a party fails to appear at a hearing or fails to comply with any interlocutory orders of the Hearing Examiner.

9 MCAR § 2.213 Prehearing procedures.

A. Prehearing conference.

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. Any final settlement shall be set forth in a settlement agreement or consent order and made a part of the record.

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.

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 for in these rules require a written notice, to all parties and to the agency, to be served five days prior to ~~their~~ the submission of the motion to the Hearing Examiner, except where impractical. The Hearing Examiner may, at his ~~desecretion,~~ 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 the hearing, shall be in writing and shall be served upon all parties of record and the agency if it is not a party. In ruling on motions where these rules are silent, the Hearing Examiner may consider the Rules of Civil Procedure for the District Courts of the State of Minnesota to the extent that it is appropriate to do so.

9 MCAR § 2.217 The Hearing.

A. Rights of parties. All parties shall have the right to present evidence, rebuttal testimony and argument with respect to the issues and to cross-examine witnesses.

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. 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.

1. General rules. The Hearing Examiner may admit all evidence which possesses probative value, including hearsay, if it is the type of evidence on which reasonable prudent persons are accustomed to rely in the conduct of their serious affairs. The Hearing Examiner shall give effect to the rules of

privilege recognized by law. Evidence which is incompetent, irrelevant, immaterial or unduly repetitious may be excluded.

2. Evidence must be offered to be considered. All evidence to be considered in the case, including all records and documents ~~(except tax returns and tax reports)~~ in the possession of the agency or a true and accurate photocopy thereof, shall be offered and made a part of the record in the case. No other factual information or evidence ~~(except tax returns and tax reports)~~ shall be considered in the determination of the case.

3. Documentary evidence. Documentary evidence in the form of copies or excerpts may be received or incorporated by reference in the discretion of the Hearing Examiner or upon agreement of the parties.

4. Notice of facts. The Hearing Examiner may take notice of judicially cognizable facts but shall do so on the record and with the opportunity for any party to ~~rebut~~ contest the facts so noticed.

5. The burden of and standard of proof. The party ~~initiating the contested case~~ proposing that certain action be taken must prove the facts at issue by a preponderance of the evidence, unless the substantive law provides a different burden or standard.

6. Examination of adverse party. A party may call an adverse party or his managing agent or employees or an officer, director, managing agent or employee of the State or any political subdivision thereof or of a public or private corporation or of a partnership or association or body politic which is an adverse party, and interrogate him by leading questions and contradict and impeach him on material matters in all respects as if he had been called by the adverse party. The adverse party may be examined by his counsel upon the subject matter of his examination in chief under the rules applicable to direct examination, and may be cross-examined, contradicted, and impeached by any other party adversely affected by his testimony.

D. The record.

1. The 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. What the record shall contain. The record in a contested case shall contain:

a. All pleadings, motions and orders;

b. Evidence received or considered;

c. Offers of proof, objections and rulings thereon;

d. The Hearing Examiner's findings of fact, conclusions and recommendations;

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. The transcript. The verbatim record shall be transcribed if requested by ~~any person~~ the agency, a party 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~~ Administrative Hearings' Account in the State Treasury.

E. Continuances. A request for continuance shall be made in writing to the Hearing Examiner and shall be served upon all parties of record and the agency if it is not a party.

1. A request for continuance filed not less than five days prior to the hearing may, in the discretion of the Hearing Examiner, be granted upon a showing of good cause. Due regard shall be given to the ability of the party requesting a continuance to effectively proceed without a continuance.

2. A request for a continuance filed within five days of the hearing shall be denied unless good cause exists and the reason for the request could not have been earlier ascertained.

3. During a hearing, if it appears in the interest of justice that further testimony should be received, the Hearing Examiner, in his discretion, may continue the hearing to a future date and such oral notice on the record shall be sufficient.

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 pending motion or 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. 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; 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.

1. Hearing Examiner conduct. The Hearing Examiner shall not communicate, directly or indirectly, in connection with any issue of fact or law with any person or party including the agency concerning any pending case, except upon notice and opportunity for all parties to participate.

2. Conduct of the hearing. Unless the Hearing Examiner determines that the public interest will be equally served otherwise, the hearing shall be conducted substantially in the following manner:

a. After opening the hearing, the Hearing Examiner shall ~~indicate~~ ensure that the parties are aware of the procedural rules for the hearing including the following:

(1) All parties may present evidence and argument with respect to the issues and cross-examine witnesses. 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.

(2) All parties have a right to be represented by an attorney at the hearing.

(3) The rules of evidence as set forth in 9 MCAR § 2.217 C.1.

b. Any stipulations, settlement agreements or consent orders entered into by any of the parties prior to the hearing shall be entered into the record.

c. The party with the burden of proof may make an opening statement. All other parties may make such statements in a sequence determined by the Hearing Examiner.

d. After any opening statements, the party with the burden of proof shall begin the presentation of evidence. He shall be followed by the other parties in a sequence determined by the Hearing Examiner.

e. Cross-examination of witnesses shall be conducted in a sequence determined by the Hearing Examiner.

f. When all parties and witnesses have been heard, opportunity shall be offered to present final argument, in a sequence determined by the Hearing Examiner. Such final argument may, in the discretion of the Hearing Examiner, be in the form of written memoranda or oral argument, or both. Final argument need not be recorded, in the discretion of the Hearing Examiner. Written memoranda may, in the discretion of the Hearing Examiner, be submitted simultaneously or sequentially and within such time periods as the Hearing Examiner may prescribe.

g. After final argument, the hearing shall be closed or continued at the discretion of the Hearing Examiner. If continued, it shall be either (a) continued to a certain time and day, announced at the time of the hearing and made a part of the record, or (b) continued to a date to be determined later, which must be upon not less than five days' written notice to the parties.

h. The record of the ~~hearing~~ contested case proceeding shall be closed upon receipt of the final written memorandum, transcript, if any, or late filed exhibits ~~(if requested by the Examiner)~~ which the parties and the Hearing Examiner have agreed should be received into the record, whichever occurs latest.

3. Participation by agency head. An agency which is a party to a contested case may only participate in the hearing ~~by the giving of testimony and~~ through its designated representative or counsel. Where the agency is not a party and participates in the hearing in a neutral or quasi-judicial capacity, the agency head or a member of the governing body of the agency or his delegate may engage in such examination of witnesses as the Hearing Examiner deems appropriate.

H. Disruption of hearing.

1. Cameras. No televison, newsreel, motion picture, still or other camera, and no mechanical recording devices, other than those provided by the Office of ~~Hearing Examiners~~ Administrative Hearings or at its discretion, shall be operated in the hearing room during the course of the hearing unless permission is obtained from the Hearing Examiner prior to the opening of the hearing and then subject to such conditions as the Hearing Examiner may impose to avoid disruption of the hearing.

2. Other conduct. Pursuant to and in accordance with the provisions of Minn. Stat. § 624.72, no person shall interfere with the free, proper and lawful access to or egress from the hearing room. No person shall interfere with the conduct of, disrupt or threaten interference with or disruption of the hearing. In the event of such interference or disruption or threat thereof, the Hearing Examiner shall read this rule to those persons causing such interference or disruption and thereafter proceed as he deems appropriate.

9 MCAR § 2.218 The Hearing Examiner report and the agency decision.

A. Basis for the report and the decision.

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. 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. Hearing Examiner's report. Following the close of the record, the Hearing Examiner shall make his report pursuant to Minn. Stat. §§ 15.0412, subd. 4d, and 15.052, subd. 3, and, upon completion, a copy of said report shall be served upon all parties by personal service, by First Class mail or by depositing it with the Central Mailing Section, Publications Division, Department of Administration.

C. Agency decision. Following receipt of the Hearing Examiner's report, the agency shall proceed to make its final decision in accordance with Minn. Stat. §§ 15.0421 and 15.0422, and shall ~~send~~ serve a copy of ~~such~~ its final order ~~to the Office of Hearing Examiners~~ upon the Hearing Examiner by First Class mail.

9 MCAR § 2.219 Rehearing. An agency Notice of and Order for rehearing shall be served on all parties in the same manner prescribed for the Notice of and ~~o~~Order for ~~h~~Hearing provided that the Hearing Examiner may permit service of the Notice and Order for Rehearing less than 30 days prior to rehearing. The rehearing shall be conducted in the same manner prescribed for a hearing.

Exhibit No. [redacted]

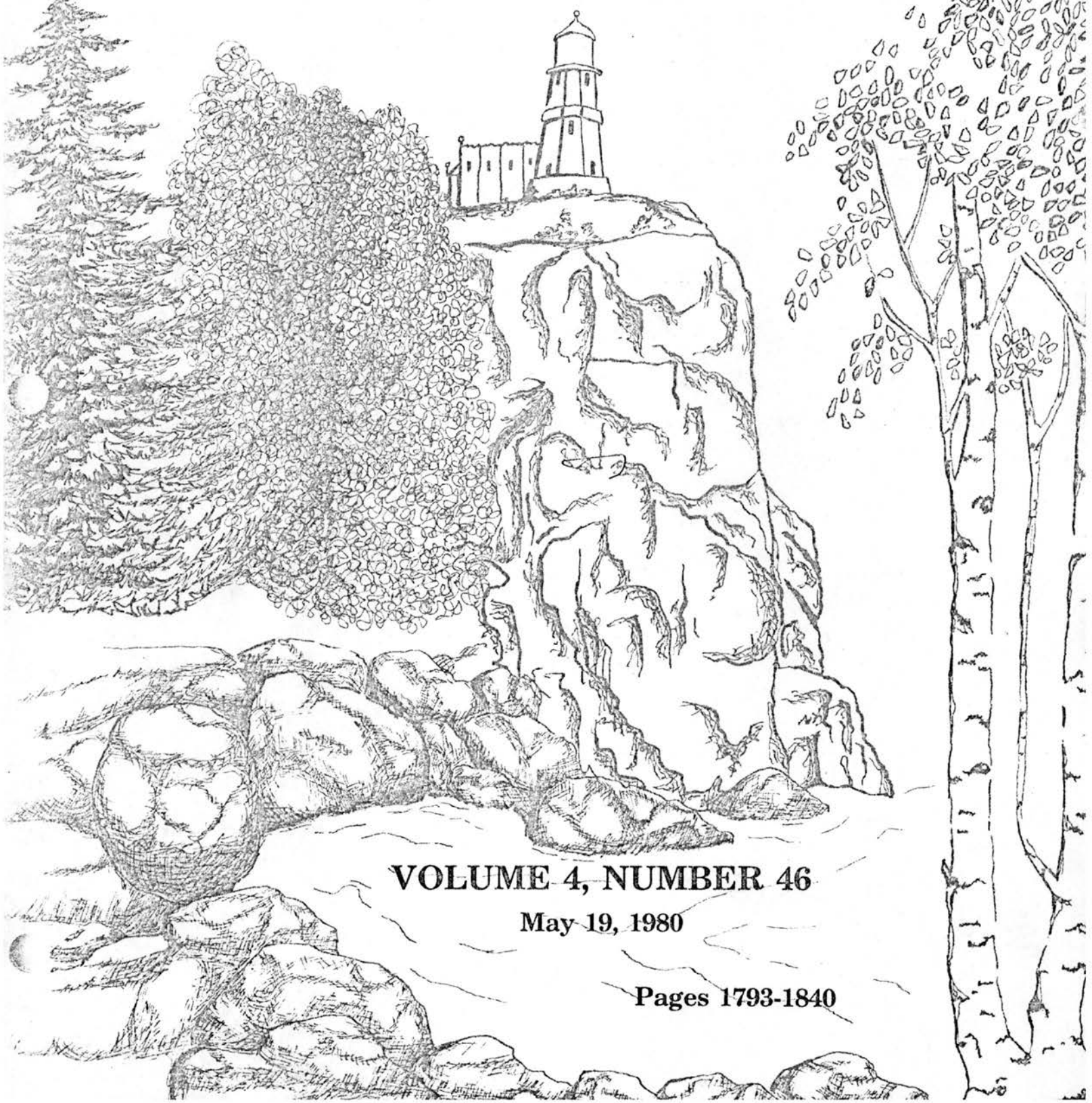
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Date [redacted]

STATE REGISTER

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OFFICE OF HEARING EXAMINERS

STATE OF MINNESOTA



VOLUME 4, NUMBER 46

May 19, 1980

Pages 1793-1840

(1) Direct costs for:

(a) Daily hospital services,

(b) Ancillary service,

(c) Non-revenue producing centers.

(2) Costs after allocation of non-revenue producing centers costs to:

(a) Daily hospital services,

(b) Ancillary service.

h. An acute care hospital statistical summary consisting of:

(1) Number of patient days (excluding nursery),

(2) Number of nursery days,

(3) Number of total patient days,

(4) Number of admissions,

(5) Average length of stay,

(6) Occupancy—licensed beds,

(7) Occupancy—staffed and set-up beds,

(8) Number of outpatient and emergency room visits.

i. An acute care hospital full time equivalent summary consisting of salary and numbers of full-time equivalent personnel for:

(1) Daily hospital services,

(2) Ancillary services,

(3) Non-revenue producing centers,

(4) Total hospital,

(5) Total institution.

j. An acute care bed summary consisting of:

(1) Number of licensed beds,

(2) Number of physically present beds,

(3) Number of staffed and set-up beds.

k. Depreciation fund.

(1) Beginning balance,

(2) Ending balance.

3. An abbreviated projected operating statement for hospitals in Set I, as described in 7 MCAR § 1.505 B.1.a., shall include all data elements found in 7 MCAR § 1.505 B.2.b., c., d., e., f., g., h., i., j., k.

4. The information provided on the abbreviated projected operating statement shall support the hospital's claim that it will achieve an increase in gross acute care charges less than that established by the Commissioner of Health pursuant to 7 MCAR § 1.505 B.

Office of Hearing Examiners

Proposed Amendments to Rules Relating to the Procedural Conduct of Rulemaking and Contested Case Hearings

Notice of Hearing

A public hearing concerning the proposed rule amendments will be held at the William Mitchell College of Law, Room 111, 875 Summit Avenue, Saint Paul, Minnesota, on Tuesday, June 24, 1980, commencing at 9:30 a.m. The proposed rule amendments may be modified as a result of the hearing process. Therefore, if you are affected in any manner by the proposed amendments, you are urged to participate in the rule hearing process.

Following the agency's presentation at the hearing, all interested (or affected persons will have an opportunity to ask questions and make comments. Statements may be made orally and written material may be submitted. In addition, whether or not an appearance is made at the hearing, written statements or material may be submitted to Melvin B. Goldberg, Hearing Examiner, Room 326, William Mitchell College of Law, 875 Summit Avenue, Saint Paul, Minnesota 55105, telephone (612) 227-9171, either before the hearing or within five working days after the close of the hearing. The hearing examiner may, at the hearing, order that the record be kept open for a longer period not to exceed 20 calendar days. The rule hearing procedure is governed by Minn. Stat. §§ 15.0411-15.0417 and 15.052, and by 9 MCAR §§ 2.101-2.112 (Minnesota Code of Agency Rules). If you have any questions about the procedure, call or write the hearing examiner.

Twenty-five days prior to the hearing, a Statement of Need and Reasonableness will be available for review at Hearing Examiner Goldberg's office 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 amendments. Copies of the Statement of Need and Reasonableness may be obtained from the Office of Hearing Examiners at a minimal charge.

The proposed rule amendments regarding rulemaking would modify and add to the content of the Notice of Hearing, would clarify the use of the Statement of Need and Reasonableness at the hearing, would clarify the agency's burden in regard to existing rules when amendments are proposed, would modify and add to the documents to be filed 25 days prior to hearing, would provide a disqualification procedure for hearing examiners, would modify registration at the hearing, would delete the

KEY: RULES SECTION — Underlining indicates additions to proposed rule language. ~~Strike outs~~ indicate deletions from proposed rule language. **PROPOSED RULES SECTION** — Underlining indicates additions to existing rule language. ~~Strike outs~~ indicate deletions from existing rule language. If a proposed rule is totally new, it is designated "all new material."

incorporation by reference rule effective July 1, 1981, would clarify the meaning of the phrase "recommended by the Hearing Examiner" in Minn. Laws 1980, ch. 615, § 6, subd. 4e, would outline a revised procedure for submission of a rule to the Chief Hearing Examiner, would clarify what rules are compared in determining a substantial change, and would make other housekeeping changes.

The proposed amendments regarding contested cases would authorize a summary disposition of cases, would allow prefiled testimony, would simplify Chief Hearing Examiner approval of shortened notice periods, would require a Notice of Appearance to be served upon all parties and in all hearings, would clarify when a default occurs, would permit consideration of the Rules of Civil Procedure, would conform the evidence rules to statutory changes, would clarify the burden of proof, would require hearing examiner orders and continuance requests to be served on a non-party agency, would clarify the meaning of "late filed exhibits," would permit a Notice of and Order for Rehearing to be served less than 30 days before the Rehearing, and would make other housekeeping changes.

The agency's authority to adopt the proposed rule amendments is contained in Minn. Stat. § 15.052, subd. 4 (1978). Several of the proposed amendments are required by the passage of Minn. Laws 1980, ch. 615.

The agency estimates that there will be no cost to local public bodies in the State to implement the amendments for the two years immediately following its adoption, within the meaning of Minn. Stat. § 15.0412, subd. 7 (1978).

Copies of the proposed rule amendments are now available and at least one free copy may be obtained by writing to Duane R. Harves, Chief Hearing Examiner, Room 300, 1745 University Avenue, Saint Paul, Minnesota 55104, telephone (612) 296-8100. Additional copies will be available at the hearing. If you have any questions on the content of the proposed rule amendments, contact Chief Hearing Examiner Harves.

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's submission or resubmission to the Attorney General.

Minn. Stat. ch. 10A requires each lobbyist to register with the State Ethical Practices Board within five days after he or she commences lobbying. A lobbyist is defined in Minn. Stat. § 10A.01, subd. 11 (1979 Supp.) as any individual:

(a) Engaged for pay or other consideration, or authorized by another individual or association to spend money, who spends more than five hours in any month or more than $250, not including *his own* travel expenses and membership dues, in any year, for the purpose of attempting to influence legislative or administrative action by communicating or urging others to communicate with public officials; or

(b) Who spends more than $250, not including *his own* traveling expenses and membership dues, in any year for the purpose of attempting to influence legislative or administrative action by communicating or urging others to communicate with public officials.

The statute provides certain exceptions. Questions should be directed to the Ethical Practices Board, 41 State Office Building, Saint Paul, Minnesota 55155, telephone (612) 296-5615.

May 1, 1980.

Duane R. Harves
Chief Hearing Examier
by George A. Beck
Hearing Examiner

Amendments as Proposed

9 MCAR § 2.102 Initiation of Hearing. Any agency desiring to initiate a rule hearing pursuant to Minn. Stat. §§ 15.0411 through ~~15.051~~ 15.0417 and § 15.052 shall first file with the Chief Hearing Examiner or his designee the following documents:

A. A copy of the proposed rule or rules.

B. ~~The~~ An Order for Hearing ~~proposed to be issued. The Order for Hearing~~ which must contain the following:

1. A proposed time, date and place for the hearing to be held.

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

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.

C. The Notice of Hearing proposed to be issued which must contain the following:

1. A proposed time, date and place for the hearing to be held.

2. A statement that all interested or affected persons will have an opportunity to participate.

3. A statement or a description of the subjects 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. A citation of the agency's statutory authority to promulgate the proposed rules.

5. A statement describing the manner in which interested persons may present their views and advising persons that

the proposed rule may be modified as a result of the hearing process.

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

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~~ and a statement that the comment period may be extended for a longer period not to exceed 20 calendar days if ordered by the Hearing Examiner at the hearing.

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's submission or resubmission to the Attorney General).

9. A separate paragraph which will 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~~ Administrative Hearings. This Statement of Need and Reasonableness will include a summary of all of the evidence and argument which is anticipated to ~~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~~ Administrative Hearings at a minimal charge.

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

11. A statement that the rule hearing procedure is governed by Minn. Stat. §§ 15.0411-15.0417 and 15.052 and by 9 MCAR §§ 2.101-2.113 (Minnesota Code of Agency Rules) and a statement that questions about procedure may be directed to the hearing examiner.

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.

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 and shall advise the agency as to whether or not the proposed Notice of Hearing is proper as required by Minn. Stat. § 15.052, subd. 3.

9 MCAR § 2.104 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 9 MCAR § 2.105. 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. To the extent that an agency is proposing amendments to existing rules, the agency need not demonstrate the need for and reasonableness of the existing rules not affected by the proposed amendments.

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,~~ and, provided that copies are available for review at the hearing, 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 or to

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briefly summarize all or a portion of the Statement of Need and Reasonableness if requested by the Hearing Examiner.

9 MCAR § 2.105 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~~ assigned to the hearing copies of the following documents:

~~A. The Order for Hearing.~~

A. ~~B.~~ The Notice of Hearing as mailed.

B. ~~C. The affidavit of receipt of the Secretary of State's list.~~ The agency's certification that the mailing list required by Minn. Stat. § 15.0412, subd. 4, which was used for this hearing, was accurate and complete.

C. ~~D.~~ An Affidavit of Mailing of the Notice to all persons on the ~~Secretary of State's~~ agency's list.

D. An Affidavit of Additional Notice if such discretionary notice was given pursuant to Minn. Stat. § 15.0412, subd. 4.

E. The Statement of Need and Reasonableness.

F. The petition requesting a rule hearing, if one has been filed pursuant to Minn. Stat. § 15.0415.

G. All materials received following a notice made pursuant to Minn. Stat. § 15.0412, subd. 6, together with a citation to said notice.

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

I. A copy of the *State Register* in which the notice and rules or rule amendments were published.

9 MCAR § 2.106 Disqualification. The hearing examiner shall withdraw from participation in a rulemaking proceeding to which he has been assigned if, at any time, he deems himself disqualified for any reason. Upon the filing in good faith by an affected person of an affidavit of prejudice against the hearing examiner, the Chief Hearing Examiner shall determine the matter as a part of the record provided that the affidavit shall be filed no later than five days prior to the date set for hearing.

9 MCAR § ~~2.186~~ 2.107 Conduct of hearings. All hearings held pursuant to Minn. Stat. § 15.0412 shall proceed substantially in the following manner:

A. All persons ~~intending to present evidence or questions, other than agency personnel previously disclosed to the Hearing Examiner under 9 MCAR § 2.105,~~ attending 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~~ shall 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. 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 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. The hearing examiner shall advise the persons present of the requirements of Minn. Stat. ch. 10A concerning the registration of lobbyists.

D. The agency representatives and any others who will be presenting the agency position at the hearing shall identify themselves for the record.

E. The agency shall make available copies of the proposed rule at the hearing.

F. The agency shall introduce its exhibits relevant to the proposed rule including written material received prior to the hearing.

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. Interested persons shall be given an opportunity to address questions to the agency representatives or witnesses.

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 statements are subject to questioning by representatives of the agency.

J. The hearing examiner may question all persons, including the agency representatives.

K. The agency may present any further evidence that it deems appropriate in response to statements made by interested persons. Upon such presentation by the agency, interested persons may respond thereto.

L. Consistent with law, the hearing examiner shall be authorized to do all things necessary and proper to the performance of the foregoing and to promote justice, fairness and economy, including but not limited to, the power to:

1. Preside at the hearing;

2. Administer oaths or affirmations when he deems it appropriate;

3. Hear and rule on objections and motions;

4. Question witnesses where he deems it necessary to make a complete record;

5. Rule on the admissibility of evidence and strike from the record objectionable evidence.

9 MCAR § ~~2.107~~ 2.108 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 9 MCAR § 2.105, 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~~ a court reporter has taken the proceedings. 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 for transcripts 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'~~ Administrative Hearings' account in the State Treasury. The agency and any other persons so requesting of the hearing examiner shall be notified of the date of the completion of the transcript.

9 MCAR § ~~2.108~~ 2.109 ~~Incorporation by reference.~~ ~~When an agency desires approval of the Chief Hearing Examiner to incorporate certain materials by reference in its rules, 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.~~

(Repealed effective 7-1-81 provided that Minn. Laws 1980, ch. 615 § 43 is not repealed or substantially amended prior to that time.)

9 MCAR § ~~2.109~~ 2.110 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 unless the approval of the Chief Hearing Examiner is required pursuant to Minn. Stat. § 15.0412, subd. 4d, 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~~ Administrative Hearings shall make a copy of said report available to any interested person upon request at a reasonable charge. The phrase "recommended by the Hearing Examiner" as used in Minn. Stat. § 15.0412, subd. 4e, shall mean those changes in the rule, if any, and based upon the record, which the hearing examiner concludes are required in order to make the rule needed and/or reasonable and which would not constitute a substantial change. Where the hearing examiner identifies more than one option from which the agency may choose, then each of the options is deemed to be "recommended by the Hearing Examiner" provided that the hearing examiner has found, based upon the record, that the option is needed and reasonable and that adoption of the option would not constitute a substantial change.

9 MCAR § ~~2.110~~ 2.111 Submission of rule to Chief Hearing Examiner.

A. If the Chief Hearing Examiner's approval of the hearing examiner's report is required pursuant to Minn. Stat. § 15.0412, subd. 4d, the hearing examiner shall submit the report and the record to the Chief Hearing Examiner prior to filing with the agency as required by 9 MCAR § 2.110.

B. Pursuant to Minn. Stat. § 15.0412, subd. 4e, ~~T~~the agency shall, if it proposes to adopt the rules with changes other than as recommended by the hearing examiner ~~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,~~ the complete hearing record and a copy of the rules as proposed to be adopted, showing the changes, 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~~.

C. The Chief Hearing Examiner shall complete his review and submit his report, along with the complete record, to the agency ~~on the issues of substantial changes in the rule and compliance with Minn. Stat. § 15.0412, subd. 4,~~ within ten calendar days. ~~The agency will be responsible for filing the rules with the Attorney General.~~

9 MCAR § ~~2.111~~ 2.112 Substantial change. ~~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. § 15.0412, subd. 4, 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 hearing examiner and the Chief Hearing Examiner shall consider the degree to which it:

A. Affects classes of persons not represented at the previous hearing; or

B. Goes to a new subject matter of significant substantive effect; or

C. Makes a major substantive change that was not raised by the original Notice of Hearing in such a way as to invite reaction at the hearing; or

D. Results in a rule fundamentally different from that contained in the Notice of Hearing.

KEY: RULES SECTION — Underlining indicates additions to proposed rule language. ~~Strike-outs~~ indicate deletions from proposed rule language. **PROPOSED RULES SECTION** — Underlining indicates additions to existing rule language. ~~Strike outs~~ indicate deletions from existing rule language. If a proposed rule is totally new, it is designated "all new material."

In making his substantial change determination pursuant to Minn. Stat. § 15.0412, subd. 4d, the hearing examiner shall compare the proposed rule or rule amendment as published in the *State Register* with the rule or rule amendment as last proposed by the agency prior to the close of the record. In making his substantial change determination pursuant to Minn. Stat. § 15.0412, subd. 4e, the Chief Hearing Examiner shall compare the rule or rule amendment as published in the *State* Register with the final rule or rule amendment as adopted by the agency.

9 MCAR § ~~2.112~~ 2.113 Effective date. These rules shall be effective for all rule proceedings initiated five working days after publication of these rules in the *State Register*.

9 MCAR §§ ~~2.113~~ 2.114-2.199 Reserved for future use.

9 MCAR § 2.201 Scope and purpose. The procedures contained herein shall govern all contested cases ~~held by any agency of state government as defined in Minn. Stat. § 15.0411, subd. 2.~~ required to be conducted by the Office of Administrative Hearings.

9 MCAR § 2.203 Hearing examiners.

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.

B. Assignment. Within ~~ten~~ 10 days of the receipt of a request pursuant to 9 MCAR § 2.203 A., the Chief Hearing Examiner shall 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. 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~~ including 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 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. Recommend a summary disposition of the case where there is no genuine issue as to any material fact or recommend dismissal where the case has become moot or for other reasons.

12. Require that testimony be prefiled in while or in part.

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

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

9 MCAR § 2.204 Commencement of a contested case. A contested case is commenced, subsequent to the assignment of a hearing examiner, by the 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 if not otherwise prohibited as the unauthorized practice of law.

6. A citation to these rules, ~~and~~ to any applicable procedural rules of the agency, and to the contested case provisions of Minn. Stat. ch. 15.

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 9 MCAR § 2.207 or discovery pursuant to 9 MCAR § 2.214.

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 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 issuance of the Notice of and Order for Hearing.

9. A statement advising 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 shorter time may be allowed, 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~~ persons are not likely to be prejudiced.

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.

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.

E. Alternative. 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 9 MCAR § 2.204 A.1.-9. above.

9 MCAR § 2.205 Notice of Appearance. Each party intending to appear at a contested case hearing ~~wherein the agency is a party~~ shall file with the hearing examiner and serve upon all other known parties 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 or other representative. The Notice of Appearance shall be filed with the hearing examiner 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~~ A Notice of Appearance form shall be included with the Notice of and Order for Hearing ~~in all applicable cases~~ for use by the party served.

9 MCAR § 2.208 Default. The agency may dispose of a contested case adverse to a party which defaults. Upon default, the allegations of or the issues set out in the Notice of and Order for Hearing or other pleading may be taken as true or deemed proved without further ~~proof~~ evidence. A default occurs when a party fails to appear at a hearing or fails to comply with any interlocutory orders of the hearing examiner.

9 MCAR § 2.213 Preharing procedures.

A. Prehearing conference.

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. Any final settlement shall be set forth in a settlement agreement or consent order and made a part of the record.

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.

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 for in these rules require a written notice, to all parties and to the agency, to be served five days prior to ~~their~~ the submission of the motion to the hearing examiner, except where impractical. The hearing examiner may, at his ~~discretion;~~ 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 the hearing, shall be in writing and shall be served upon all parties of record and the agency if it is not a party. In ruling on motions where these rules are silent, the hearing examiner may consider the Rules of Civil Procedure for the District Courts of the State of Minnesota to the extent that it is appropriate to do so.

9 MCAR § 2.217 The hearing.

A. Rights of parties. All parties shall have the right to present evidence, rebuttal testimony and argument with respect to the issues and to cross-examine witnesses.

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. 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.

1. General rules. The hearing examiner may admit all evidence which possesses probative value, including hearsay, if it is the type of evidence on which reasonable prudent persons

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are accustomed to rely in the conduct of their serious affairs. The hearing examiner shall give effect to the rules of privilege recognized by law. Evidence which is incompetent, irrelevant, immaterial or unduly repetitious may be excluded.

2. Evidence must be offered to be considered. All evidence to be considered in the case, including all records and documents ~~(except tax returns and tax reports)~~ in the possession of the agency or a true and accurate photocopy thereof, shall be offered and made a part of the record in the case. No other factual information or evidence ~~(except tax returns and tax reports)~~ shall be considered in the determination of the case.

3. Documentary evidence. Documentary evidence in the form of copies or excerpts may be received or incorporated by reference in the discretion of the hearing examiner or upon agreement of the parties.

4. Notice of facts. The hearing examiner may take notice of judicially cognizable facts but shall do so on the record and with the opportunity for any party to ~~rebut~~ contest the facts so noticed.

5. The burden of and standard of proof. The party ~~initiating the contested case~~ proposing that certain action be taken must prove the facts at issue by a preponderance of the evidence, unless the substantive law provides a different burden or standard.

6. Examination of adverse party. A party may call an adverse party or his managing agent or employees or an officer, director, managing agent or employee of the state or any political subdivision thereof or of a public or private corporation or of a partnership or association or body politic which is an adverse party, and interrogate him by leading questions and contradict and impeach him on material matters in all respects as if he had been called by the adverse party. The adverse party may be examined by his counsel upon the subject matter of his examination in chief under the rules applicable to direct examination, and may be cross-examined, contradicted, and impeached by any other party adversely affected by his testimony.

D. The record.

1. The 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. What the record shall contain. The record in a contested case shall contain:

a. All pleadings, motions and orders;

b. Evidence received or considered;

c. Offers of proof, objections and rulings thereon;

d. The hearing examiner's findings of fact, conclusions and recommendations;

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. The transcript. The verbatim record shall be transcribed if requested by ~~any person~~ the agency, a party 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~~ Administrative Hearings' Account in the State Treasury.

E. Continuances. A request for continuance shall be made in writing to the hearing examiner and shall be served upon all parties of record and the agency if it is not a party.

1. A request for continuance filed not less than five days prior to the hearing may, in the discretion of the hearing examiner, be granted upon a showing of good cause. Due regard shall be given to the ability of the party requesting a continuance to effectively proceed without a continuance.

2. A request for a continuance filed within five days of the hearing shall be denied unless good cause exists and the reason for the request could not have been earlier ascertained.

3. During a hearing, if it appears in the interest of justice that further testimony should be received, the hearing examiner, in his discretion, may continue the hearing to a future date and such oral notice on the record shall be sufficient.

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 pending motion or 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. 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; 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.

1. Hearing examiner conduct. The hearing examiner shall not communicate, directly or indirectly, in connection with

any issue of fact or law with any person or party including the agency concerning any pending case, except upon notice and opportunity for all parties to participate.

2. Conduct of the hearing. Unless the hearing examiner determines that the public interest will be equally served otherwise, the hearing shall be conducted substantially in the following manner:

a. After opening the hearing, the hearing examiner shall ~~indicate~~ ensure that the parties are aware of the procedural rules for the hearing including the following:

(1) All parties may present evidence and argument with respect to the issues and cross-examine witnesses. 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.

(2) All parties have a right to be represented by an attorney at the hearing.

(3) The rules of evidence as set forth in 9 MCAR § 2.217 C.1.

b. Any stipulations, settlement agreements or consent orders entered into by any of the parties prior to the hearing shall be entered into the record.

c. The party with the burden of proof may make an opening statement. All other parties may make such statements in a sequence determined by the hearing examiner.

d. After any opening statement, the party with the burden of proof shall begin the presentation of evidence. He shall be followed by the other parties in a sequence determined by the hearing examiner.

e. Cross-examination of witnesses shall be conducted in a sequence determined by the hearing examiner.

f. When all parties and witnesses have been heard, opportunity shall be offered to present final argument, in a sequence determined by the hearing examiner. Such final argument may, in the discretion of the hearing examiner, be in the form of written memoranda or oral argument, or both. Final argument need not be recorded, in the discretion of the hearing examiner. Written memoranda may, in the discretion of the hearing examiner, be submitted simultaneously or sequentially and within such time periods as the hearing examiner may prescribe.

g. After final argument, the hearing shall be closed or continued at the discretion of the hearing examiner. If continued, it shall be either (a) continued to a certain time and day, announced at the time of the hearing and made a part of the record, or (b) continued to a date to be determined later, which must be upon not less than five days' written notice to the parties.

h. The record of the ~~hearing~~ contested case proceeding shall be closed upon receipt of the final written memorandum, transcript, if any, or late filed exhibits ~~(if requested by the examiner)~~ which the parties and the hearing examiner have agreed should be received into the record, whichever occurs latest.

3. Participation by agency head. An agency which is a party to a contested case may only participate in the hearing ~~by the giving of testimony and~~ through its designated representative or counsel. Where the agency is not a party and participates in the hearing in a neutral or quasi-judicial capacity, the agency head or a member of the governing body of the agency or his delegate may engage in such examination of witnesses as the hearing examiner deems appropriate.

H. Disruption of hearing.

1. Cameras. No television, newsreel, motion picture, still or other camera, and no mechanical recording devices, other than those provided by the Office of ~~Hearing Examiners~~ Administrative Hearings or at its discretion, shall be operated in the hearing room during the course of the hearing unless permission is obtained from the hearing examiner prior to the opening of the hearing and then subject to such conditions as the hearing examiner may impose to avoid disruption of the hearing.

2. Other conduct. Pursuant to and in accordance with the provisions of Minn. Stat. § 624.72, no person shall interfere with the free, proper and lawful access to or egress from the hearing room. No person shall interfere with the conduct of, disrupt or threaten interference with or disruption of the hearing. In the event of such interference or disruption or threat thereof, the hearing examiner shall read this rule to those persons causing such interference or disruption and thereafter proceed as he deems appropriate.

9 MCAR § 2.218 The hearing examiner report and the agency decision.

A. Basis for the report and the decision.

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. 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. Hearing examiner's report. Following the close of the record, the hearing examiner shall make his report pursuant to

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Minn. Stat. §§ 15.0412, subd. 4d, and 15.052, subd. 3, and, upon completion, a copy of said report shall be served upon all parties by personal service, by First Class mail or by depositing it with the Central Mailing Section, Publications Division, Department of Administration.

C. Agency decision. Following receipt of the hearing examiner's report, the agency shall proceed to make it final decision in accordance with Minn. Stat. §§ 15.0421 and 15.0422, and shall ~~send~~ serve a copy of ~~such~~ its final order ~~to the Office of Hearing Examiners~~ upon the hearing examiner by First Class mail.

9 MCAR § 2.219 Rehearing. An agency Notice of and Order for Rehearing shall be served on all parties in the same manner prescribed for the Notice of and ~~o~~Order for ~~h~~Hearing provided that the hearing examiner may permit service of the Notice and Order for Rehearing less than 30 days prior to rehearing. The rehearing shall be conducted in the same manner prescribed for a hearing.

ADOPTED RULES

The adoption of a rule becomes effective after the requirements of Minn. Stat. § 15.0412, subd. 4, have been met and five working days after the rule is published in the *State Register*, unless a later date is required by statutes or specified in the rule.

If an adopted rule is identical to its proposed form as previously published, a notice of adoption and a citation to its previous *State Register* publication will be printed.

If an adopted rule differs from its proposed form, language which has been deleted will be printed with strike outs and new language will be underlined, and the rule's previous *State Register* publication will be cited.

A temporary rule becomes effective upon the approval of the Attorney General as specified in Minn. Stat. § 15.0412, subd. 5. Notice of his decision will be published as soon as practicable, and the adopted temporary rule will be published in the manner provided for adopted rules under subd. 4.

Department of Labor and Industry
Occupational Safety and Health Division

Adoption by Reference of Federal OSHA Standards

Pursuant to Minn. Stat. § 182.655 (1978), notice was duly published at *State Register*, Volume 4, Number 38, page 1530 (4 S.R. 1530), dated March 24, 1980, specifying the establishment and modification of certain Occupational Safety and Health Standards. No written comments or requests for hearing on objections have been received concerning the adoption of said standards.

Therefore, those occupational safety and health standards are hereby adopted and are identical in every respect to their proposed form.

Harry D. Peterson
Commissioner

Department of Labor and Industry
Prevailing Wage Division

Adopted Rules Governing Prevailing Wage Determinations as Amended

The rules proposed and published at *State Register*, Volume 4, Number 24, pp. 977-990, December 17, 1979 (4 S.R. 977) are now adopted with the following amendments.

Please note: 8 MCAR § 1.8016, although published at the proposed stage, was not amended, nor was it amended when this set of rules was adopted. It is reprinted here for clarity, and is designated "no change."

Rules As Amended

8 MCAR § 1.8001 Authority, scope and purpose.

~~A.~~ These rules are promulgated pursuant to the authority provided to the Minnesota Department of Labor and Industry by the provisions of Minn. Stat. § 175.171, subd. 2 ~~(1974)~~ and the requisites of Minn. Stat. § 15.0412, subd. 3 ~~(Supp. 1975)~~. Their

Miles

STATE OF MINNESOTA
OFFICE OF ADMINISTRATIVE HEARINGS

In the Matter of the Proposed Amendments to Rules Relating to the Procedural Conduct of Rulemaking and Contested Case Hearings.

ORDER ADOPTING RULES

The above-entitled matter came on for hearing on June 24, 1980, before Melvin B. Goldberg, serving as Hearing Examiner pursuant to the terms of a professional-technical consultant contract with the Minnesota Office of Administrative Hearings. Following the hearing, the record remained open until 4:30 p.m., July 1, 1980, to allow for the receipt of written comments and statements, after which the Hearing Examiner issued his Report on July 31, 1980.

Except as noted herein, the Chief Hearing Examiner adopts the Findings of Fact and Conclusions of the Hearing Examiner relating to the rules proposed for adoption or amendment. The exceptions are as follows:

1. In several Findings of Fact (see as examples Findings 9, 11 and 15), the Hearing Examiner found that the proposed rule or amendment was unreasonable as proposed on the basis of wording style, grammar, readability or like reasons. The findings then suggest new language, which, if adopted, would make the proposal reasonable. Wording style, grammar, readability or like reasons are not standards by which reasonableness is measured. Rather, it is specifically found that in those instances where the Hearing Examiner applied those standards alone in determining reasonableness, that the proposed language is reasonable but that the Hearing Examiner's proposed language makes the rule "more reasonable" and will be adopted.

2. In Finding 18, the Hearing Examiner finds that the language proposed for amendment to the third paragraph is unreasonable and instead, finds that his language must be adopted to make the rule reasonable. The Chief Hearing Examiner disagrees and specifically finds and concludes that the language as proposed is both needed and reasonable and is to be adopted.

The Hearing Examiner implies that the amendment would relegate the public "to the back of the room to ponder the Statement while the hearing surges on by stipulation of the agency and the Hearing Examiner". If this statement is correct, then the existing rule language could be interpreted as being even worse.

The language proposed by the Hearing Examiner would allow one person, acting alone, to greatly delay the rulemaking process by refusing to "waive" a right to a complete reading of the statement, a right the Hearing Examiner implies exists, but one which has never existed under these rules. A Hearing Examiner cannot compel an agency to read its Statement. Rather, it is the

responsibility of the agency to support its rule with an affirmative presentation of facts at the hearing. Failure of an agency to comply with a request to read its statement could result in an adverse finding by the Examiner, a risk the agency has the option of taking.

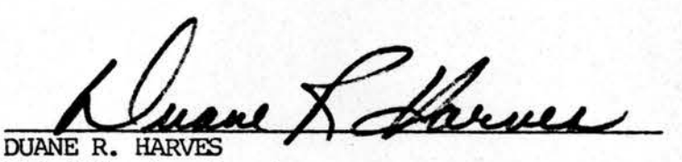
A careful reading of rule 9 MCAR § 2.104 in its entirety will show that the document need not contain the verbatim presentation by the agency but, if it does, and copies are available for review at the hearing, then and only then would this rule apply, as is the case under the existing rules. The entire rule is aimed at requiring the agency to "go public", 25 days before the hearing, with the evidence it intends to rely upon the hearing to support is proposal. This gives the public 25 days to prepare to rebut or support the agency "case".

In summary, the Chief Hearing Examiner finds that his original proposal is both needed and reasonable, and that the alternative proposed by the Hearing Examiner is not.

3. The Attorney General's Committee on Administrative Law submitted written comment during the time between issuance of the Hearing Examiner's Report and the issuance of this Order which supports the above findings (see, Exhibit Y). In response to the Committee's comments relative to the Hearing Examiner's discussion in Finding 7 on the question of "substantial change", the Chief Hearing Examiner cannot simply "delete" the Hearing Examiner's discussion. The Chief Hearing Examiner has chosen not to "pursue the issue" by simply not adopting the Committee proposals submitted at the June 24 hearing relating to its suggested new rules on ex parte communication and reconvening. However, to be sure that there is no confusion in anyone's minds, it is the opinion of the Chief Hearing Examiner that the adoption of rules on ex parte communications and reconvening, at this time, would each result in the adoption of rules going to a new subject matter of significant substantive effect, neither of which were raised by the original Notice of Hearing in such a way as to invite reaction at the hearing, thus constituting a "substantial change" within the meaning of the Administrative Procedure Act and existing rule 9 MCAR § 2.111.

NOW, THEREFORE, pursuant to the provisions of Minn. Stat. § 15.0412, subd. 4e, having considered all of the files, records and proceedings herein, including the Report of the Hearing Examiner, it is hereby ordered that the rules be adopted as recommended by the Hearing Examiner except as modified herein above.

Dated: August 12, 1980.



DUANE R. HARVES
Chief Hearing Examiner

STATE OF MINNESOTA
OFFICE OF ADMINISTRATIVE HEARING

IN THE MATTER OF THE PROPOSED)
AMENDMENTS TO RULES RELATING)
TO THE PROCEDURAL CONDUCT OF)
RULEMAKING AND CONTESTED CASE)
HEARINGS.)

AMENDMENT
TO
ORDER ADOPTING RULES

On August 12, 1980, the Chief Hearing Examiner issued an Order Adopting Rules which was the result of a hearing conducted on June 24, 1980, and the subsequent issuance of the report and recommendations of Hearing Examiner Melvin B. Goldberg on July 31, 1980.

On August 13, 1980, pursuant to the provisions of Minn. Stat. § 15.0412, subdivision 4f, the rules were filed with the Attorney General for review as to form and legality. On August 28, 1980, the Chief Hearing Examiner was informed of certain form and legality deficiencies in the rules as submitted. In order to correct these deficiencies, the Chief Hearing Examiner is issuing this amendment to the August 12, 1980, Order Adopting Rules.

1. In Finding of Fact number 4 of the hearing examiner's report of July 31, 1980, the hearing examiner finds that the Notice of Hearing was mailed on May 27, 1980, to all persons and associations who had registered their names with the Secretary of State to receive such notice. If that were the correct date of mailing, a violation of jurisdictional requirements of Minn. Stat. § 15.0412 would have occurred in that the Notice would have been mailed less than 30 days prior to the hearing. In matter of fact, the affidavits of mailing were signed and notarized on May 27, 1980, but the Notice of Hearing was mailed on May 22, 1980, and thus the hearing examiner's Finding number 4 is amended accordingly.

2. In Finding number 23, the hearing examiner found that the proposed repeal, effective July 1, 1981, of Rule 9 MCAR $ 2.109 was both needed and reasonable. In submitting the rules as adopted to the Attorney General, the rule was deleted showing only the parenthetical description that the rule would be repealed on July 1, 1981. The proper way to show this rule is to show it as it remains in existence and to merely add

the parenthetical description which was submitted in the rules as adopted. The proper form for this rule as adopted is thus submitted with this Amendment to the Order Adopting Rules.

3. In the submission of the rules as adopted, on page eight, two typographical errors exist. First, the number of the rule is shown as 9 MCAR § 2.2112. This is amended to read 9 MCAR § 2.112. In the fifth line of paragraph A, the word "proposed" is amended to read "proposes".

NOW, THEREFORE, with the amendments ennumerated above, it is hereby ordered that the rules be adopted as recommended by the hearing examiner except as modified by the Chief Hearing Examiner's Order Adopting Rules and this Amendment to Order Adopting Rules.

Dated this 28th day
of August, 1980.

DUANE R. HARVES
Chief Hearing Examiner

STATE OF MINNESOTA
OFFICE OF ADMINISTRATIVE HEARINGS

IN THE MATTER OF THE PROPOSED AMENDMENTS TO RULES RELATING TO THE PROCEDURAL CONDUCT OF RULEMAKING AND CONTESTED CASE HEARINGS.	AMENDMENT TO ORDER ADOPTING RULES

On August 12, 1980, the Chief Hearing Examiner issued an Order Adopting Rules in the above-entitled matter which Order was amended by Order of the Chief Hearing Examiner on August 28, 1980, both of which, together with the rules as proposed to be adopted, were filed with the Attorney General for review as to form and legality.

During the course of his review, the Attorney General has found that the last sentence in proposed Rule 9 MCAR § 2.110 A is in conflict with the provisions of Minn. Stat. § 15.0412, subds. 4d and 4e, and is thus illegal.

The Chief Hearing Examiner, having reviewed the ruling of the Attorney General, and being in total agreement with that ruling, hereby orders that the last sentence of Rule 9 MCAR § 2.110 A, as last proposed to be adopted, be deleted.

Dated this 8th day
of September, 1980.

DUANE R. HARVES
Chief Hearing Examiner

Exhibit No. G
File No.
Date

STATE OF MINNESOTA
OFFICE OF HEARING EXAMINERS

In the Matter of the Proposed Amendments to Rules Relating to the Procedural Conduct of Rulemaking and Contested Case Hearings.

STATEMENT OF NEED AND REASONABLENESS

Laws of Minnesota 1975, Chapter 380, Section 16, created the Minnesota Office of Hearing Examiners and, in subdivision 4, authorized the Chief Hearing Examiner to promulgate rules to govern the procedural conduct of all hearings, relating to both rule adoption, amendment, suspension or repeal hearings and contested case hearing. In 1975, hearings were conducted which led to the first adoption of the rules of the Office of Hearing Examiners relating to both rulemaking and contested case hearings. In 1977, the rules, more properly identified as Rules 9 MCAR §§ 2.101 through 2.222, were amended.

This hearing is being conducted for the purpose of amending the rules of procedure for both rulemaking and contested cases primarily as a direct result of legislative changes made during the 1980 legislative session and most particularly, Laws of Minnesota 1980, Chapter 615. On February 18, 1980, in anticipation of the 1980 legislative amendments, we caused to be published in 4 State Register 1309, a notice of intent to solicit information or opinions relating to amendments to these rules. Pursuant to that notice, correspondence was received from Robert F. Thimmesch, Director of the Dairy Practices Division of the Minnesota Department of Agriculture, Richard A. Wexler, Assistant Attorney General, and Jocelyn F. Olson, Special Assistant Attorney General, Acting Co-Chairpersons of the Attorney General's Administrative Law Committee, and Mr. A. W. Clapp, III, Special Assistant Attorney General assigned to the Department of Natural Resources. These comments have been made part of this record, and with respect to certain of the proposed amendments, are relied upon as additional evidence of need and reasonableness of certain of the proposals for amendment and in those instances, we adopt their comments as our evidence.

The statutory authority to adopt, amend, suspend or repeal these rules is found in Minn. Stat. § 15.052, subd. 4. Additionally, Minn. Stat. § 15.0412, subd. 3 requires each agency to adopt rules setting forth the nature and requirements of all formal and informal procedures related to the administration of official agency duties to the extent that those procedures directly affect the rights of or procedures available to the public. Lastly, a rule is defined by Minn. Stat. § 15.0411 as every agency's statement of general applicability and future effect, including the amendment, suspension, or repeal thereof, made to implement or make specific the law enforced or administered by it or to govern its organization or procedure.

The need for and reasonableness of each of the proposed amendments are:

9 MCAR § 2.102

The change in the statutory cite in this subsection is made to more accurately reflect those portions of Chapter 15 which relate specifically to rulemaking. A precise citation will enable users of the rule to find the appropriate statutory sections more quickly.

9 MCAR § 2.102 B.

A change is made to this subsection to make it clear that the original Order for Hearing that is submitted under Rule 102 is not a proposed order, but is, in fact, the actual document by which the agency head authorizes the commencement of a rule hearing procedure. The existing rule required a proposed order to be filed, but given the relative simplicity of the Order for Hearing, experience has shown that there is no need for it to be repeated. A final document is needed in order to advise the office that the person with authority to order the hearing has done so.

9 MCAR § 2.102 B.2.

The word "agency" is substituted for "Secretary of State" since Minn. Laws 1980, Ch. 615 places the responsibility for maintaining a mailing list with the agency.

9 MCAR § 2.102 C.

A grammatical change is made in the prefatory language to improve the clarity of the existing rule.

9 MCAR § 2.102 C.5.

A phrase is added to this rule subsection so that the Notice of Hearing must also advise the reader that the rule proposed may be modified during the hearing process. This statement is included by a number of agencies already in their Notice of Hearing. It is needed because people are often unaware that a rule may undergo nonsubstantial changes during the rule hearing process, and that, therefore, if they wish to have input into this change, they must participate in the rule hearing. The change was suggested by Special Assistant Attorney General A. W. Clapp, III in a memorandum submitted to the office on April 24, 1980.

9 MCAR § 2.102 C.6.

A change is made to this subsection in order to make it clear that the statutory definition of "lobbyist" need not be printed verbatim. The entire definition with exceptions is lengthy, and a summary serves to give adequate notice to those concerned.

9 MCAR § 2.102 C.7.

The change in wording in this subsection is intended to encourage a clearer and more accurate statement in the Notice of Hearing concerning the comment period. It is intended to clarify the fact that a person reading the

Notice of Hearing may not rely upon the record being open longer than five working days. The change also clarifies the fact that the Hearing Examiner must extend the comment period during the hearing. To do so after the hearing would not afford adequate notice to all persons concerned with the rule hearing procedure.

9 MCAR § 2.102 C.9.

The title of the office in this subsection is changed pursuant to Minn. Laws 1980, Ch. 615. A change is also made in the description of the Statement of Need and Reasonableness which conforms this description to the actual requirements of the existing rule 9 MCAR § 2.104. This change was recommended by the Administrative Law Committee of the Office of the Attorney General (hereinafter "A.G.'s Committee).

9 MCAR § 2.102 C.11.

Two requirements are added by this subsection to the items which must be included in the Notice of Hearing. The first requirement advises the reader of the notice of the statutory and rule provisions which will govern the conduct of the rule hearing, and therefore enable him to participate in an intelligent fashion. A requirement is also added that directs people with questions about the procedure to contact the Hearing Examiner. This is needed so that members of the public may contact a non-agency person in order to discuss their procedural participation in the rule hearing process.

9 MCAR § 2.102 D.

A phrase is proposed to be added to the last sentence of this subsection which recognizes the statutory requirement of the Hearing Examiner to advise the agency as to whether or not the Notice of Hearing is proper. This addition will conform the rule to existing practice within the office, and will give notice to the agencies and the public that this step must be accomplished at the time indicated. This amendment is one which, while not specifically discussed, is part of the curing of procedural defects which was suggested, in a much broader fashion, by the A.G.'s Committee.

9 MCAR § 2.104

It is proposed that a sentence be added to the first paragraph of this rule subsection which would clarify for agencies and the public what is the existing practice and what is believed to be the existing law that where an agency seeks to amend existing rules, it must demonstrate the need for and reasonableness of the proposed amendments only, and not for the rules which are not proposed to be amended. The rule is needed since there has been some confusion and inconsistency in regard to this in the past. This change was orally suggested to the Chief Hearing Examiner by several persons and was also suggested and is supported by the A.G.'s Committee.

Two changes are also proposed for the final paragraph of Rule 104. Accumulated experience has indicated that there is little demand for an agency to

read its Statement of Need and Reasonableness in full at the hearing. Likewise, there is no precise way for a determination to be made as to whether or not all persons appearing at the hearing have had "an opportunity to review" the statement. Accordingly, the proposed amendment will allow the agency to introduce the statement as an exhibit, provided that copies are available for review at the hearing. As a safeguard, the paragraph is further amended to provide that the Hearing Examiner may require the agency to briefly summarize all or a portion of the statement if requested to do so. It is believed that these amendments will conform the rule to evolved practice at rule hearings.

9 MCAR § 2.105

A change is made to clarify that the 25-day submission should be made to the Hearing Examiner assigned to the hearing, rather than with the Chief Hearing Examiner. This will avoid a delay in the Hearing Examiner's review of these documents, and will conform to existing practice. The requirement for filing the Order for Hearing as part of the Rule 105 submission is deleted since it has already been submitted under Rule 102, and this submission is merely a duplication.

9 MCAR § 2.105 B.

This section is amended since Minn. Laws 1980, Ch. 615 placed the mailing list with individual agencies instead of the Secretary of State. The proposed amendment would require a certification by the agency that the mailing list used was accurate and complete. This requirement is needed so that there is some evidence in the rule hearing record to ensure that the agency has kept an up-to-date and accurate mailing list.

9 MCAR § 2.105 D.

This proposed amendment recognizes the change made to Minn. Stat. § 15.0412, subd. 4, by Minn. Laws 1980, Ch. 615, § 6. The statutory amendment provides that "each agency may, at its own discretion, also contact persons not on its list and may give notice of its intention to hold a hearing in newsletters, newspapers or other publications or through other means of communication." The statutory change makes it clear that agencies do have authority to give notice beyond that mandated by the statute. It is appropriate, therefore, that these rules recognize that possibility and provide for an affidavit should additional notice be given so that the rule hearing record may properly reflect the effort made by the agency to publicize the rule hearing.

9 MCAR § 2.105 I.

The proposed amendment in this subsection adds a requirement of filing a copy of the State Register in which the rules were published to the 25-day filing. This is needed so that the Hearing Examiner may review the date of publication, and because persons in the course of the rule hearing process and especially at the hearing are often referring to the rule as cited in the State Register.

9 MCAR § 2.106

This proposed amendment is a new rule which adds a procedure for disqualification of the Hearing Examiner. The procedure is substantially similar to that provided in the contested case rules. Such a procedure is appropriate because, for various reasons, the Hearing Examiner may find himself biased. The amendment also allows an affected person to file an affidavit of prejudice against the Hearing Examiner. In light of the additional requirements imposed on the Hearing Examiner by Minn. Laws 1980, Ch. 615, it is increasingly important that there be a procedure to ensure that the Hearing Examiner is, in fact, impartial. The A.G.'s Committee also proposed that a disqualification rule be adopted although their proposal varies somewhat from this proposal.

9 MCAR § 2.107 A.

An amendment to this subsection would require all persons attending the hearing to register and would require that only one register be kept. This change is needed since it is important to agencies, to the Hearing Examiner, and often to the court reporter, to have a complete list of all persons attending the hearing whether or not they actually spoke. This allows the agency to determine what interest groups were present at the hearing, and, therefore, aware of the events taking place during the hearing. Experience has shown that one register is sufficient for all of the information required in the rule subsection.

9 MCAR § 2.108

The changes to this rule subsection are merely intended to clarify the meaning of the language and are not substantive.

9 MCAR § 2.109

It is proposed that this rule be deleted effective July 1, 1981, provided that Minn. Laws 1980, Ch. 615, § 43 is not repealed or substantially amended prior to that time. On that date, the Chief Hearing Examiner's function in regard to incorporation by reference will be assumed by the Revisor of Statutes.

9 MCAR § 2.110

A phrase is inserted in the first sentence in this rule which would conform the submission of the Hearing Examiner's report to the procedures set out in Minn. Laws 1980, Ch. 615, § 6, subd. 4d and subd. 4e. The language added at the end of this rule is necessary in order to clarify what is meant by the phrase "recommended by the Hearing Examiner" as it is used in Minn. Laws 1980, Ch. 615, § 6, subd. 4e. The explanation of this phrase is needed so that the Hearing Examiner, the public and the agency understands that the recommendations mentioned in this phrase are limited to the issue of need and reasonableness. This does not mean that the Hearing Examiner may not make other suggestions in regard to the proposed rule amendments; however, insofar as the procedural functioning of Subdivision 4d and 4e, the recommendation described

therein is limited to the issue of need and reasonableness. This would appear to be a reasonable interpretation of the statutory intent evidenced by the changes made to Section 15.0412, subd. 4. The last sentence of this proposed amendment makes it clear that where the rule hearing record supports more than one modification of the rule, then each of the options may be found to be needed and reasonable and, therefore, recommended by the Hearing Examiner.

9 MCAR § 2.111

The amendments to this rule merely make the changes required to conform the rule to the new statutory procedures set out in Minn. Laws 1980, Ch. 615, § 6. The changes recognize a potential need for approval by the Chief Hearing Examiner of certain findings by the Hearing Examiner. Part B. of the proposed amendment relates to the procedure to be followed after the Hearing Examiner's report has proceeded to the agency and they have then adopted rules which require the Chief Hearing Examiner to review the changes made. Previously, the entire record was not submitted unless the Chief Hearing Examiner requested it. The statute now requires that it be submitted.

9 MCAR § 2.112

This rule is also amended to reflect the new procedure established by the 1980 Legislature. Language is deleted which describes the former procedure. A paragraph is also added to the rule which specifies what rules are to be compared by both the Hearing Examiner and the Chief Hearing Examiner in making a determination as to whether or not a substantial change has been made. This language is needed in order to clarify for all persons the meaning of the statute in calling for this determination to be made. It is reasonable that the Hearing Examiner compare the rule published in the State Register with that last proposed by the agency prior to the close of the record since this last proposal will be the version closest to that which the agency will subsequently adopt as a final rule. Experience has shown that in some lengthy rulemaking proceedings, the agency has put forth a number of different versions of the rule at different points in the process. The last proposal might very well be made at the hearing, or could be made in the agency's written comments subsequent to the hearing, but prior to the close of the record.

9 MCAR § 2.201

A change is made to this rule since Chapter 15 has been applied to some governmental and quasi-governmental entities which are not technically agencies of state government, and, therefore, although they are by statute required to have their hearings conducted pursuant to Chapter 15 and these rules, the language of the existing rule would appear to exclude them.

9 MCAR § 2.203 C.2.

This change is merely a grammatical improvement.

9 MCAR § 2.203 C.11.

Language is added to this rule which would clarify that the Hearing

Examiner has authority to recommend the equivalent of a "summary judgment" in a case where there is no genuine issue as to any material fact. Experience has shown that there are a variety of situations where all parties are amenable to such a procedure. Often times parties want the examiner to rule on the basis of stipulated facts and then they need submit only legal argument. The amendment would also clarify that the Hearing Examiner may recommend a dismissal of the case to the agency head where it is appropriate to do so rather than proceed to a hearing. Although Hearing Examiners have made recommendations of this sort in the past, the rule is needed to alert parties to this possibility. This proposal was suggested and is thus supported by the A.G.'s Committee.

9 MCAR § 2.203 C.12.

This amendment is added to clarify that the prefiling of testimony is permissible in contested case hearings. The practice is currently used extensively by several agencies (often in lieu of discovery), and the addition of this language would recognize that practice. The amendment was suggested by the A.G.'s Committee.

9 MCAR § 2.204 A.6.

A change to this subsection would require that the Notice of Hearing also include a reference to the contested case provisions of the statute which are often equally as important as the procedural rules insofar as the conduct of the contested case is concerned.

9 MCAR § 2.204 A.8.

The deletion of language in this subsection is made because experience has shown that the Notice of Appearance is useful in cases where the agency is neutral and not a party since it serves not only to alert the Hearing Examiner, the agency and the parties that an appearance is intended, but also provides the name and address of both the party and his attorney. The deletion of the application of this section to only those cases wherein the agency is a party was suggested by the A.G.'s Committee.

9 MCAR § 2.204 B.

The intent of the amendment to this subsection is to alleviate what is perceived to be a very heavy burden to be shouldered by one who seeks to convince the Chief Hearing Examiner to shorten the notice time. The change would mean that it would not have to be shown that a shorter time is "required" and that "no" interested person will be adversely affected. The amendment would provide an easier burden, but one that is more reasonable and still provides an adequate safeguard against too short a notice period. This amendment was suggested by the A.G.'s Committee.

9 MCAR § 2.205

A change to this subsection requires that a Notice of Appearance be served upon all known parties so that they receive notice, as well as the Hearing

Examiner, of an intended appearance. The addition of the language "or other representative" conforms this rule to the language of existing rule Section 2.206. The change was suggested, in part, by the A.G.'s Committee. The amendment to the last sentence merely clarifies the intent of the existing language.

9 MCAR § 2.208

The addition of certain amending language to this rule conforms it to the existing language at 9 MCAR § 2.204 A.9. by mentioning "issues" in addition to "allegations". The proposed amendment also makes it clear that any other pleading such as a Statement of Charges which accompanies the Notice of and Order for Hearing may also be considered as a document containing allegations which may be taken as true upon default. The change is needed to ensure that there is no question about the status of a Statement of Charges, or similar document, which some agencies use in lieu of putting everything into the Order for and Notice of Hearing.

9 MCAR § 2.213 B.

Certain clarifying language is inserted into this rule subsection, and in addition, language is added which requires that orders be served upon all parties and the agency. This amendment is needed since agencies have, in the past, complained that they have received inadequate notice of the progress of a case when they are not a party to the proceedings. The last sentence proposed to be added to this subsection would clarify existing practice by Hearing Examiners in that it would recognize that the Rules of Civil Procedure for the District Courts may be looked to for guidance when the Rules of Procedure of the office are silent. This is a reasonable means of providing guidance on procedural questions such as potential third-party situations (which are not covered in the existing rules). It is also reasonable, however, that the Rules of Civil Procedure not be binding in administrative cases since, in many instances, they would not be consistent with administrative procedures. The application of the Rules of Civil Procedure was also suggested by the A.G.'s Committee.

9 MCAR § 2.217 C.1., 2. and 4.

The changes made in the rules of evidence by Minn. Laws 1980, Ch. 615, §§ 15 and 16 are reflected in these rules. We believe it is appropriate to repeat the statutory language because it is crucial for persons to be aware of these particular rules, especially persons who are not represented by an attorney. The A.G.'s Committee also suggested the change.

9 MCAR § 2.217 C.5.

This section is clarified to make it clear that it also deals with the standard of proof. The language concerning "initiating the contested case" is also replaced since in the past this language has proved confusing in interpreting the rule. The language might possibly be construed to place the burden on the agency in each case since it mechanically initiates the hearing

process. The language which is proposed to be substituted more accurately states the sense of the existing case law in the area. Generally, one who is making an application for a license, a permit, or a variance would have the burden of proof in the sense of having the burden of persuasion. Where an agency seeks to revoke a license or permit, it would then have the burden of proof. See, 1 Cooper, State Administrative Law, Ch. 12, § 1 (1965). The A.G.'s Committee also suggested this change.

9 MCAR § 2.217 D.1.

This change is needed to clarify the fact that many of the documents which are part of every record are "prepared" by persons other than the Hearing Examiner.

9 MCAR § 2.217 D.3.

The changes to this rule are needed to conform the rule to statute as amended by Minn. Laws 1980, Ch. 615.

9 MCAR § 2.217 E.

Language is added here which would require service of a request for continuance upon the agency when it is not a party so as to keep the agency advised of any changes in the hearing date.

9 MCAR § 2.217 F.

A phrase is added to the second paragraph of this rule subsection which would make it clear that a party may request before a motion is decided by the Hearing Examiner that it be certified to the agency for the reasons set out in the rule. This language would embody existing practice which is implicitly authorized by the first paragraph of this rule subsection.

9 MCAR § 2.217 G.2.a.

A change is made to this rule subsection so that the Hearing Examiner need not read verbatim each of the items set out in the subsection where it appears that it is unnecessary to do so. The amendment would simply require that the Hearing Examiner ascertain that the parties are aware of the rules of evidence, the right to counsel and the right to present evidence and argument and cross-examine.

9 MCAR § 2.217 G.2.h.

This rule is proposed for amendment in order to make it clear that a late-filed exhibit may not extend the close of the record unless it is an exhibit to which the parties have agreed. This avoids the inference which was present in the existing rule that evidence might come in after the hearing if requested by the Hearing Examiner, but without the approval of one of the parties. It requires that all parties must agree to the receipt of the exhibit which was suggested by the A.G.'s Committee.

9 MCAR § 2.218

All of the suggested amendments to this rule are of a housekeeping nature and merely conform the rule to the changes made by Minn. Laws 1980, Ch. 615.

9 MCAR § 2.219

An amendment is suggested to this rule which would permit service of a Notice and Order for Rehearing less than 30 days prior to the rehearing date. The rule as it exists seems to imply that a rehearing would have to follow the same procedure as the original hearing. It is reasonable that less than 30 days' notice may be given especially where the rehearing deals with a single issue which the agency would desire to have reheard and for which the parties would not require 30 days to prepare. The amendment was suggested by the A.G.'s Committee.

Dated: May 28, 1980.

DUANE R. HARVES
Chief Hearing Examiner

Miles

STATE OF MINNESOTA
OFFICE OF HEARING EXAMINERS

FOR THE OFFICE OF HEARING EXAMINERS

In the Matter of the Proposed Amendments to Rules Relating to the Procedural Conduct of Rulemaking and Contested Case Hearings.

REPORT OF THE HEARING EXAMINER

The above-entitled matter came on for hearing before Hearing Examiner Melvin B. Goldberg at 9:30 a.m. on Tuesday, June 24, 1980, in Room 111 of the William Mitchell College of Law Building, 875 Summit Avenue, St. Paul, Minnesota. The hearing was concluded at 12:00 p.m. on June 24, 1980.

This report is part of a rule hearing procedure held pursuant to Minn. Stat. secs. 15.0411 to 15.0417 and 15.052 to determine whether the proposed rules and rule amendments should be adopted. A copy of this Report may be obtained from the Office of Hearing Examiners for the cost of reproduction.

Members of the Office of Hearing Examiners panel appearing at the hearing included: Duane Harves, Chief Hearing Examiner; George Beck, Hearing Examiner; and Michael Miles, Special Assistant Attorney General, representing the Office of Hearing Examiners.

Twenty-four persons signed the hearing register. Four public witnesses appeared and spoke at the hearing. The Office of Hearing Examiners submitted thirteen written exhibits and fifteen timely written comments were received from members of the public. The record closed on July 1, 1980.

Pursuant to Minn. Stat. sec. 15.0412, subd. 4 (1978), this Report shall be available for review to all affected individuals upon request for at least five days. Thereafter, the Chief Hearing Examiner shall, if he proposes to adopt the rules as originally proposed or amended, submit a copy of the Order Adopting Rules, 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. sec. 15.052, subd. 4 (1978). 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 on the issues of substantial changes in the rule and compliance with Minn. Stat. sec. 15.0412 (1978) within ten calendar days. The Chief Hearing Examiner will be responsible for filing the rules with the Attorney General and for notifying persons who have indicated that they wish to be notified of such filing.

Based upon all the testimony, exhibits and written comments, the Hearing Examiner makes the following:

FINDINGS OF FACT

Procedural Requirements

1. On April 29, 1980, the Office of Hearing Examiners (hereinafter the "Office") filed the following documents with the Hearing Examiner:

(a) Order for Hearing.
(b) Proposed Notice of Hearing.
(c) Proposed rule amendments.
(d) Statement of expected number of persons and length of presentation.

2. On May 28, 1980, the Office of Administrative Hearings filed the following documents with the Hearing Examiner:

(a) Affidavits of mailings of the Notice of Hearings.
(b) Affidavit of Receipt of the Secretary of State's List.
(c) Notice of Hearing as mailed.
(d) Statement of Need and Reasonableness.
(e) Notice of Intent to Solicit Outside Opinion.
(f) Public Comments received pursuant to the Notice of Intent to Solicit.
(g) Certificate of the Secretary of State.
(h) State Register in which the Notice and rules were published.

3. On May 19, 1980, the Notice of Hearing and proposed amendments were published at 4 State Register 1807.

4. On May 27, 1980, the Notice of Hearing was mailed by the Office to all persons and associations who had registered their names with the Secretary of State to receive such notice, as well as to a supplementary list of persons and associations known by the Office to be interested in the proposed amendments.

5. The documents listed above were available for inspection at the Office from the date of filing to the date of the hearing.

6. The record remained open through July 1, 1980, for the receipt of written comments and statements.

Statutory Authority

7. The Office has cited as authority for the promulgation of the rule amendments Minn. Stat. secs. 15.0411 - 15.0417, 15.052, and 9 MCAR secs. 2.101 - 2.112 (Minnesota Code of Agency Rules). Additionally, several of the proposed amendments (identified infra) were promulgated in response to the passage of Minn. Laws 1980, Ch. 615. The pertinent authority as added by passage of Minn. Laws 1980, Ch. 615 will be cited where relevant. The proposed amendments will be discussed in numerical order based upon their MCAR section designation.

An additional prefatory remark is addressed to the Administrative Law Committee of the Attorney General's Office (hereinafter AG Committee) in response to the comments and supplemental comments regarding modifications in the rulemkaing rules which fall outside of the scope of the Hearing as set forth in the Statement of Need and Reasonableness.

The thrust of the AG Committee's comments was that a suggestion for modification of rules at the Hearing is not a substantial change merely because it would amend a section of the existing rules not proposed for amendment, or because it would add a new section. As support for that position, the Committee has cited secondary authority found in Professor Auerbach's article "Administrative Rulemaking in Minnesota," 63 Minn. L. Rev. 151.

The Hearing Examiner has reviewed Professor Auerbach's respected article on the Minnesota Administrative Procedure Act (MAPA). A close reading of the Auerbach article and the Minnesota Code of Agency Rules establishes that the AG Committee has misunderstood the "substantial change doctrine" as reflected in those authorities and as accepted in Minnesota.

The primary difficulty seems to lie in the AG Committee's perception of what a "proposed rule" is. The "proposed rule" does not include changes made subsequent to the Statement of Need and Reasonableness and prior to the close of the record. A proposed rule is that which is proposed and supported by the Statement of Need and Reasonableness. All other comments are proposed changes or amendments to the proposed rule, which are considered in the draft of the final rule and subjected to the substantial change test. There is a vast difference between proposed rules and

proposed amendments to the proposed rules, primarily because the proposed rules and the Statement of Need and Reasonableness are subjected to the statutory notice requirements. The substantial change doctrine comes into play after the close of the record and does incorporate public comments received prior to the close of the record. Substantial change, as a drafting standard, looks to the propriety of the final rule. Indeed, Auerbach himself states:

> The agency's final rule must be submitted to the Chief Hearing Examiner so that he may determine whether a new hearing is required because the final rule is "substantially different" from the proposed rule, or because the agency failed to comply with MAPA's rule-making procedures. (Auerbach, p. 153 supra, emphasis added.)

Additionally, Minn. Statutes 1978, section 15.0412 as amended by passage of Minn. Laws 1980, Ch. 615, reads, in part, at subdivision 4f as follows:

> If the rule as adopted does not differ from the proposed rule as published in the State Register, publication may be made by publishing notice in the state register that the rule has been adopted as proposed and by publishing a citation to the prior publication. (Emphasis Added)

Further support for the position that comments received prior to the close of the record can only be directed to the proposed rule is found at Minn. Statute 1978, section 15.0412 as amended by Minn. Laws 1980, Ch. 615 at subdivision 4c:

> At the public hearing, the agency shall make an affirmative presentation of facts establishing the need for and reasonableness of the rule proposed for adoption and fulfilling any relevant substantive or procedural requirements imposed on the agency by law or rule. The agency may, in addition to its affirmative presentation, rely on facts presented by others on the record during the rule proceeding to support the rule finally adopted. (emphasis added)

The policy underlying Minnesota's rulemaking procedure reflects a commitment to procedural notice and the opportunity of all interested persons to present their views on the subject of concern. Professor Auerbach noted that the goal of the Minnesota Legislature was to broaden the scope of such procedural due process requirements when he commented:

> . . .the 1975 amendments broadened the definition of "rule" to include "every agency statement of general applicability and future effect, including the amendment, suspension, or repeal thereof, made to implement or make specific the law enforced or administered by it or to govern its organization or procedure." (Auerbach, supra, at page 156)

Additionally, Professor Auerbach states:

> It is reasonable. . .to read the MAPA definition that a "rule" is a general statement "made to implement or make specific the law enforced or administered by it" as including every statement that, in the language of the Revised or Model Act and IAPA "implements, interprets, or prescribes law or policy." The reason for the latter, more specific definition is to ensure that every agency statement will be treated as a rule if it declares, recognizes, makes, promulgates, prescribes, implements, interprets, indicates, creates or authorizes law or policy of general applicability. This is also the purpose of the MAPA definition. (Auerbach, supra, at page 157)

The unmistakable position taken by the Minnesota Legislature and authorities like Professor Auerbach estabishes that the notice in the State Register must include the full text of the rule proposed for adoption, and that the comment period is designed to encourage public participation directed to the rules proposed for adoption. The substantial change test is then applied to insure an orderly progression in rule adoption. It is clear that any suggestion that would amend a section of existing rules not proposed for amendment, or which promulgates a new rule for which notice has not been given in the Statement of Need and Reasonableness becomes, by its nature, a substantial change to the proposed rule. Minn. Statutes 1978, section 15.052, subd. 3 as amended by Minn. Laws 1980, Ch. 615 states as one of the duties of the hearing examiner to "(2) conduct only hearings for which proper notice has been given." As such, the Hearing Examiner has properly deferred the AG Committee's constructive, but extraneous comments for consideration at a future rulemaking proceeding for which proper procedural requirements have been met.

8. 9 MCAR sec. 2.102.

The change in the statutory cite in this subsection is made to more accurately reflect those portions of Chapter 15 which relate specifically to rulemaking. A precise citation will enable users of the rule to find the appropriate statutory sections more quickly.

The Hearing Examiner finds this section to be needed and reasonable as proposed.

9. 9 MCAR sec. 2.102 B.

A public comment was received suggesting an improvement in the grammar and the legal language of this section as follows: "An Order for Hearing that shall contain the following:" The Hearing Examiner finds the rule as originally proposed to be unreasonable, and adopts this suggestion. With the new language, the rule is found to be both needed and reasonable.

complied p.1

10. 9 MCAR 2.102 B.2.

The Hearing Examiner finds this change is appropriate under Minn. Laws 1980, Ch. 615, and specifically, Minn. Stat. 1978, section 15.0412, subd. 4 as amended, and as such, the amendment is needed and reasonable as proposed.

11. 9 MCAR 2.102 C.

A change was proposed to improve the grammar and the legal language of this section as follows: "The Notice of Hearing proposed to be issued that shall contain the following:" The Hearing Examiner finds the rule as originally proposed to be unreasonable, but adopts this suggestion. With the new language, the rule is found to be both needed and reasonable.

complied p.2

12. 9 MCAR 2.102 C.5.

The AG Committee and the Office of Hearing Examiners submitted a constructive rationale for this change as putting the public on notice that the agency is considering the adoption of rules on a certain subject which is open to comments that go beyond the exact wording proposed. The Hearing Examiner finds this change to be needed and reasonable as proposed.

13. 9 MCAR 2.102 C.6.

The Broeker law firm proposed that the lobbyist registration statement be deleted in its entirety. In the interest of providing adequate notice to lobbyists while still encouraging a succinct Notice of Hearing, a compromise was proposed by David G. Moeller which would promote uniformity and compliance

by having the Office draft a model summary of the lobbyist registration statement to be included in the rule. The Office has accepted this proposal and the Hearing Examiner adopts this suggestion as needed and reasonable as amended.

complied p. 1, 2

14. 9 MCAR 2.102 C.7.

The Public Service Commission (now Public Utility Commission) suggested that agencies should have time, after the public comment period, to submit their comments. This would appear to be a substantial change to the amendment as proposed, and would likely require statutory change; therefore this suggestion is rejected by the Hearing Examiner.

Additionally, the Broeker law firm suggested that the language requiring a statement that the comment period may be extended as ordered by the Hearing Examiner at the hearing is unnecessary. In the interest of providing all affected parties an equal opportunity to submit additional comments, the Hearing Examiner finds that a public statement of the comment period extension at the hearing is needed and reasonable as proposed.

15. 9 MCAR 2.102 C.9.

Grammatically, the second sentence should be amended to read as follows: "This Statement of Need and Reasonbleness will include a summary of all the evidence and argument which the agency anticipates presenting at the hearing justifying both the need for the reasonableness of the proposed rule or rules." The Hearing Examiner finds that the rule as originally proposed is unreasonable, but that the language above would make it reasonable. If the proposed change is made, the Examiner finds this section needed and reasonable.

complied p. 2

16. 9 MCAR 2.102 C.11.

The AG Committee submitted a recommendation that this proposed rule be changed to allow procedural questions to be directed to the rulemaking agency as well as to the Hearing Examiner. The motive for the proposed rule goes beyond mere procedural control. Additional rational include:

> (1) Hearing Examiners are particularly experienced in rulemaking procedures, will in fact be conducting the hearing, are impartial as to the outcome of the

rule proceedings, and are, consequently, in the best position to field questions thereon.

(2) Agency personnel are often not as familiar with these procedures, and accordingly, may inadvertently mislead members of the public.

(3) Allowing persons to obtain advice only from the most knowledgeable source avoids confusion, promotes uniformity, and prevents the dissemination of conflicting advice.

Accordingly, the Hearing Examiner rejects the suggestions of the AG Committee and finds this amendment to be needed and reasonable as proposed.

17. 9 MCAR 2.102 D.

The Hearing Examiner finds this section to be needed and reasonable as proposed.

18. 9 MCAR 2.104.

The Hearing Examiner finds paragraphs one and two to be needed and reasonable as proposed.

Paragraph three, as amended, proposes a major departure from the traditional notice protections afforded the public at agency hearings. The amendment presumes that by handing a copy of the Statement of Need and Reasonableness to the public as they enter the hearing, they have been afforded an opportunity to participate in a meaningful fashion. Although prior familiarity with the Statement of Need and Reasonableness by all present would provide optimal efficiency, a public administrative hearing should at least provide the option for participants and observors to have the proposals as set forth in the Statement of Need and Reasonableness read orally. The proposed amendment gives this discretion solely to the agency and the Hearing Examiner.

The Statement of Need and Reasonableness justified this amendment by stating:

"Accumulated experience has indicated that there is little demand for an agency to read its Statement of Need and Reasonableness in full at the hearing. Likewise, there is no precise way for a determination to be made as to whether or not all persons appearing at the hearing have had an opportunity to review the statement."

It also appears that the public often acquires its first contact with the Statement of Need and Reasonableness when handed a copy at the hearing. It would therefore appear necessary to provide for additional safeguards to ensure meaningful public participation. The provision by the agency of a sufficient number of

copies so that persons attending could reasonably have an opportunity to inspect them is certainly a requisite in all events. However, the public should not be relegated to the back of the room to ponder the Statement while the hearing surges on by stipulation of the agency and the Hearing Examiner. Oral reading of the Statement, absent a consensus by all present that such reading be waived, may be the only way to ensure that the public has had the time and the opportunity to properly digest the Agency's position so as to enable the public to become a part of the hearing process. Administrative hearings are public hearings, and support of the administrative process by the public may well depend upon the efforts expended to make it a constructive and educational experience. Thus, every presumption should militate in favor of the broadest possible provisions for meaningful public participation, and the avoidance of even the appearance of impropriety.

For the foregoing reasons, the Hearing Examiner finds that the rule as proposed is unreasonable. In order to permit a finding of reasonableness, the Office must strike the deletion of the old language and amend the section to read as follows:

no change p. 3. 4 and see CHE pp 2

> "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 waive their right to a public reading of the Statement, it 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. The agency preparing the Statement of Need and Reasonableness shall, in all events, provide sufficient copies of the Statement so that persons attending the hearing may have a reasonable opportunity to examine them."

19. 9 MCAR 2.105.

Paragraphs A through H are accepted as needed and reasonable as proposed.

Several individuals proposed a modification to paragraph I which would require that only the pages in the State Register in which the notice and proposed rule action appears would be

submitted. Several factors militate against this modification.

(1) Submission of the entire State Register issue affords both the Hearing Examiner and members of the public accurate and complete documentation of the agency's notice publication.

(2) Retail cost of State Register copies is only $2.25, indicating that the rule as proposed does not place an undue burden on agencies. Indeed, given current personnel costs, in almost all circumstances the State Register will undoubtedly be the least expensive means of presenting the proposed rule.

For the foregoing reasons, the Hearing Examiner finds paragraph I to be needed and reasonable as proposed.

20. 9 MCAR 2.106.

The Hearing Examiner finds this section to be needed and reasonable as proposed.

21. 9 MCAR 2.107.

The Minnesota Association of Commerce and Industry and other public comments opposed requiring all people attending the hearing to register. The AG Committee felt that all people, except agency personnel, should register.

In its response, the Office stated that Minn. Stat. sec. 15.052, subd. 4 provides authority for adopting rules to regulate the conduct of rulemaking hearings in this regard. Additionally, it felt that several policy reasons justified the amendment, including: 1) Ensuring an orderly hearing process; 2) Providing a means for notice of subsequent proceedings to those attending the hearing; 3) Providing a barometer of the interest or concern by the public regarding the proposed rules; 4) Providing an accurate list of the names of those participating in the hearing.

The Hearing Examiner finds that only the latter justification would meet the need and reasonableness standard. There is no relationship of the register to an orderly hearing. Notice of subsequent proceedings to those attending may be accomplished by voluntary signing of the register, and by pre-addressing of envelopes as is the current practice. Additionally, using the register as a measure of public interest in the proceeding has

questionable probative value and is heavily outweighed by the potential chilling effect on freedom of assembly at public meetings. As an interesting caveat, one may consider a situation in which a member of the public refuses to sign the register. At that very moment, the justifications proposed for this amendment break down because there is no sanction provided for refusal to register, and indeed, the Hearing Examiner would have no authority to prevent admittance to the public hearing upon such refusal.

The rationale for requiring registration of those who wish to present evidence or testimony is founded upon the necessity of preserving a complete and accurate record. This is especially apparent where audio equipment provides the only record of the proceeding.

Accordingly, the Hearing Examiner finds the rule as proposed to be neither needed or unreasonable; in order to permit a finding of need and reasonableness, the office must incorporate the language proposed by the Minnesota Association of Commerce and Industry as follows:

> "All persons intending to present evidence or [ask] questions 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 register shall include a section in which 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."

complied p.4,5

22. 9 MCAR 2.108.

The Hearing Examiner finds this amendment to be needed and reasonable as proposed.

23. 9 MCAR 2.109.

This section is repealed effective 7-1-81, provided that Minn. Laws 1980, Ch. 615, sec. 43 is not repealed or substantially amended prior to that time. The applicable language of Ch. 615 reads as follows:

Subd. 4a. An agency may incorporate by reference into its rules text from the Minnesota Statutes, the United States Statutes at Large, the United States Code, the Laws of Minnesota, the Code of Federal Regulations, the Federal Register, and other publications which are determined by the revisor of statutes, after consultation with the chief hearing examiner, to be conveniently available to the public.

Accordingly, the Hearing Examiner finds the proposed repeal of the rule as of July 1, 1981, to be both needed and reasonable.

24. 9 MCAR 2.110, 2.111, 2.112.

The comments directed at these amendments emphasized the importance of improving their clarity and chronology. The Office indicated its willingness to redraft sections 2.110, 2.111, and 2.112, and solicited the advice and suggestions of the Hearing Examiner in this regard. Accordingly, the Hearing Examiner recommends the following as needed and reasonable:

9 MCAR 2.110 Report of the Hearing Examiner.

A. Subsequent to the close of the record, the Hearing Examiner shall make his or her report pursuant to Minn. Stat. sec. 15.052, subd. 3. If the report contains findings that the rules as last proposed by the agency prior to the close of the record are needed and reasonable and are not substantially changed from those which were published in the State Register, and that the agency has fulfilled the relevant substantive and procedural requirements imposed on the agency by rule or law, the Hearing Examiner 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 Administrative Hearings shall make a copy of said report available to any interested person upon request at a reasonable charge. Recommendations made in the Hearing Examiner's report, as provided in Minn. Stat. sec. 15.0412, subd. 4e, under the phrase "recommended by the Hearing Examiner," shall mean those changes in the rule, if any, and based upon the record which the Hearing Examiner concludes are required in order to make the rule needed and reasonable and which would not constitute a substantial change.

complied p. 6.

B. If the Hearing Examiner's report contains findings that the rules as last proposed by the agency prior to the close of the hearing are substantially changed from those which were published in the State Register, or that the agency has failed to demonstrate the need or reasonableness of the rules, or has not fulfilled the relevant substantive and procedural requirements imposed on the agency by rule or law, he or she shall submit the report, together with the complete record of the proceedings, to the Chief Hearing Examiner for review pursuant to Minn. Stat. sec. 15.0412, subd. 4d.

complied p. 7

C. Upon receipt of a report from the Hearing Examiner, the Chief Hearing Examiner shall complete his review and submit his report, along with the complete record and the report of the Hearing Examiner, to the agency within ten calendar days.

complied p.7

9 MCAR 2.111 Substantial Change. In determining whether the proposed rule is substantially different, the Hearing Examiner shall consider the degree to which it:

A. Affects classes of persons not represented at the previous hearing; or

B. Goes to a new subject matter of significant substantive effect; or

C. Makes a major substantive change that was not raised by the original Notice of Hearing in such a way as to invite reaction at the hearing or;

complied p.7

D. Results in a rule fundamentally different from that contained in the Notice of Hearing.

9 MCAR 2.112 Agency Adoption of Rules.

A. Upon receipt of a report directly from the Hearing Examiner, the agency shall, if it adopts the rules in accordance with the recommendations of the Hearing Examiner, submit the complete hearing record and a copy of the proposed rules to the Attorney General for a review as to form and legality, pursuant to Minn. Stat. 15.0412, subd. 4e. If the agency proposes to adopt the rules with changes other than as recommended by the Hearing Examiner, it shall, prior to submitting them to the Attorney General, submit the complete hearing record and a copy of the rules as proposed to be adopted, showing the changes, to the Chief Hearing Examiner for a determination as to substantial change between the final proposed rules and the proposed rules published in the State Register, pursuant to Minn. Stat. sec. 15.0412, subd. 4e.

complied p.8

B. Upon receipt of a report from the Chief Hearing Examiner, the agency shall, prior to submitting the proposed rules and the complete hearing record to the Attorney General, either take the actions prescribed by the Chief Hearing Examiner to correct any defects in the proposed rules, or proceed under the provisions of Minn. Stat. sec. 15.0412, subd. 4d.

complied p.8

The Hearing Examiner finds that duplication of statutory is crucial to the ability of affected persons to comprehend the rule.

25. 9 MCAR 2.113.

The AG Committee submitted testimony and written comments suggesting that the term "initiated" be clarified and that a specific date be selected on which the rule amendments would be effective. The Office pointed out that selection of a target effective date for the rule amendments would be confusing because

of the difficulty in coordinating statutory amendment effective dates with rule amendment effective dates. Moreover, the proposed amendment is merely clerical and the suggested change would constitute a substantive change. Accordingly, the Hearing Examiner finds this amendment needed and reasonable as proposed.

26. 9 MCAR 2.114 - 2.199.

This amendment is merely clerical and the Hearing Examiner finds it to be needed and reasonable as proposed.

27. 9 MCAR 2.201.

The Hearing Examiner finds this amendment to be needed and reasonable as proposed.

28. 9 MCAR 2.203 B.

The Hearing Examiner finds this amendment to be needed and reasonable as proposed.

29. 9 MCAR 2.203 C.2.

The PSC expressed concern that this amendment would limit their statutory right to take depositions pursuant to Minn. Stat. 216 A.07, subd. 4. The amendment proposed is designed only to clarify that depositions are one form of discovery. This rule does not abrogate any specific statutory authority to take depositions by the PSC. Accordingly, the Hearing Examiner finds this amendment to be needed and reasonable as proposed.

30. 9 MCAR 2.203 C.11.

The AG Committee recommended that this amendment include a provision for summary dispositions of a part of a case. The Office agreed to this addition at the hearing, and accordingly, the following suggested language is accepted as needed and reasonable as amended:

> "Recommend a summary disposition of the case or any part thereof where there is no genuine issue as to any material fact or recommend dismissal where the case or any part thereof has become moot or for other reasons."

complied p. 9

31. 9 MCAR 2.203 C.12.

Several public comments expressed concern as to the broad and mandatory authority conferred by this amendment to "require"

prefiling of testimony. The Office responded with a redrafted and improved version, and the Hearing Examiner finds this suggestion needed and reasonable as amended:

> 12. Permit testimony, upon the request of a party or upon his own motion, to be prefiled in whole or in part where the prefiling will expedite the conduct and disposition of the case without imposing an undue burden on any party.

complied P. 9

32. 9 MCAR 2.204 A.6, A.8, B.

The Hearing Examiner finds these amendments to be needed and reasonable as proposed.

33. 9 MCAR 2.205, 2.208.

The Hearing Examiner finds these amendments to be needed and reasonable as proposed.

34. 9 MCAR 2.213 B.

The AG Committee expressed objection to this amendment because it does not require the application of the Rules of Civil Procedure for the District Courts where the Office's rules are silent. The Minnesota Department of Human Rights, however, expressed a pursuasive rationale for maintaining a discretionary element to this amendment. It stated: ". . .the proposed amendment quite properly recognizes that a distinction exists between those two forums and that it would be inappropriate to burden the administrative process with the procedural weight of a district court trial."

The Hearing Examiner recognizes the desireableness of predictability in the hearing procedure; however, facilitating predictability must not detract from a setting where the public may participate meaningfully without a law degree. Flexibility has been a bulwark of the administrative hearing process, and regardless of the fact that an agency or an attorney may find an environment more comfortable where familiar rules govern the proceeding, the Hearing Examiner must have discretion in applying the Rules of Civil Procedure where to do so may be unfair to parties not represented by counsel. Accordingly, the Hearing Examiner accepts the suggestion for the last sentence as redrafted by the Office to be needed and reasonable as amended:

"In ruling on motions where these rules are silent, the Hearing Examiner shall apply the Rules of Civil Procedure for the District Courts for the State of Minnesota to the extent that he or she determines that it is appropriate to do so in order to promote a fair and expeditious proceeding."

complied p.12

35. 9 MCAR 2.217 C.1, C.2, C.4.

The Hearing Examiner finds Paragraph C.1, C.2, and C.4 to be needed and reasonable as proposed.

36. 9 MCAR 2.217 C.5.

The PSC expressed concern that this paragraph, as amended, would shift the burden of proof in utility rate cases. This, however, would not be the case since the amended rule indicates that where substantive law (i.e. Minn. Stat. sec. 216 B.16, subd. 4) provides a different burden or standard, it would be controlling. Accordingly, the Hearing Examiner finds this amendment to be needed and reasonable as proposed.

37. 9 MCAR 2.217 D.1, D.3, E, F.

The Hearing Examiner finds these amendments to be needed and reasonable as proposed.

38. 9 MCAR 2.217 G.2.a.

This paragraph was criticized by David G. Moeller as being vague and as posing a procedural due process problem. Especially in administrative proceedings, where parties are more likely not be represented by counsel, it seems critical that an oral statement of procedural rights be given.

The Office redrafted the amendment as follows:

"G.2.a. After opening the hearing, the Hearing Examiner shall, unless all parties are represented by counsel, state the procedural rules for the hearing including the following:"

complied p.15.

The Hearing Examiner accepts the suggested revised draft of G.2.a. as needed and reasonable as amended.

39. 9 MCAR 2.217 G.2.h.

The Hearing Examiner finds this paragraph needed and reasonable as proposed.

40. 9 MCAR 2.217 G.3.

As stated at the hearing, this amendment is withdrawn by the Office.

p.16

41. 9 MCAR 2.217 H.

The Hearing Examiner finds this amendment to be needed and reasonable as proposed.

42. 9 MCAR 2.218A., A.1., B.

The Hearing Examiner finds these amendments to be needed and reasonable as proposed.

43. 9 MCAR 2.218 C.

The Minnesota Department of Transportation asked that Interoffice Mail be allowed for service of the final order on the Hearing Examiner. As indicated by the Office, however, it appears that Minn. Stat. sec. 15.0422 as amended, requires first class mail. Accordingly, the Hearing Examiner finds this amendment to be needed and reasonable as proposed.

44. 9 MCAR 2.219.

The Hearing Examiner finds this amendment to be needed and reasonable as proposed.

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

CONCLUSIONS

1. That the Office gave proper notice of the promulgation of the proposed rules and rule amendments.

2. That the Office has statutory authority to promulgate the proposed rules and rule amendments.

3. That the Office has, with the exceptions noted above, fulfilled all relevant substantive and procedural requirements of law or rule.

4. That the Office has, with the exceptions noted above, demonstrated the need for and reasonableness of the proposed rule amendments by an affirmative presentation of facts in the record.

Based upon the foregoing conclusions, the Hearing Examiner makes the following:

RECOMMENDATIONS

1. It is recommended that the proposed rule amendments be adopted as modified by the Findings of Fact and Conclusions set out herein.

2. A finding of need and reasonableness or compliance with Chapter 15 in regard to any particular rule amendment should not preclude or discourage the Office from further modification of the language based upon an examination of the public comments, provided that no substantial change is made from the rules as originally proposed and provided that the rule finally adopted is based upon facts appearing in the record.

Melvin B. Goldberg
Hearing Examiner

Dated: July 31, 1980.

ADMIN 1000 (Rev. 1/78)
SF-00006-01

STATE OF MINNESOTA

DEPARTMENT ATTORNEY GENERAL

Office Memorandum

TO : **MIKE MILES**
Assistant Attorney General

DATE: **September 8, 1980**

FROM : JERRY S. ANDERSON
Special Assistant
Attorney General

PHONE: 296-1288

SUBJECT: Rules as Approved - **In the Matter of the Proposed Amendments to Rules Relating to the Procedural Conduct of Rulemaking and Contested Case Hearings**

Enclosed herewith are the rules you have submitted for approval. These 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.

Upon receipt and before transmittal to your agency, however, it is important that you recheck these rules as to:

1. Affixation of the stamps of the Attorney General and Secretary of State to the last page of the rules;

2. Coverage by these stamps of all rules submitted; and

3. Inclusion of all pages of the rules in the approved set.

Directly following the approved rules is a complete set of required documents and transcript which must be retained with the rules by you or your agency.

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

JSA/bw
Encl.
cc: Duane Harves
Susan Robertson

Our File #625

Permanent Rule X

Temporary Rule _____

RULES REVIEW CHECKLIST

DATE RULES RECEIVED 8/13 DUE DATE 9/2

Resubmitted and Received _____

a. Returned to Agency w/o Filing w/Secretary 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 ✓ 6.24.80
   Sufficiency ✓
6. Secretary of State's List _____ (one copy only)
7. Certificate of Acquisition of Secretary of State's List ✓
8. Secretary of State's Certification of Delivery of Secretary of State's List to Agency ✓
9. Affidavit of Mailing ✓
   At least 30 days prior to hearing ✓ 5.22.80
10. Publication in State Register ✓
    At least 30 days prior to hearing ✓ 5.19.80
11. Statement of Need and Evidence ✓
12. Hearing Examiner's Report ✓
13. Agency's Findings of Fact ✓ incorporated in #15 - Order Adopting
14. Certificate of Board's Resolution Adopting Rules, where applicable N/A
15. Order Adopting ✓
16. Report of Chief Hearing Examiner ✓
17. Order Approving Incorporation by Reference, where applicable N/A
18. Certificate of Compliance with Rulemaking Procedures ✓
19. Copy of Notice of Intent to Solicit Outside Opinion, where applicable ✓ 2.18.80
20. Petition by Public, where applicable N/A

ADMIN 1000 (Rev. 1/78)
SF-00006-01

STATE OF MINNESOTA

DEPARTMENT Attorney General

Office Memorandum

TO : Duane Harves
Chief Hearing Examiner
Office of Administrative Hearings
Attn: Mike Meles

DATE: September 8, 1980

FROM : Jerry S. Anderson
Special Assistant
Attorney General

PHONE: ~~296-1288~~

SUBJECT: In the Matter of the Proposed Amendments to Rules Relating to the Procedural Conduct of Rulemaking and Contested Case Hearings

The rules in the above-entitled matter have not been approved by this office for the following reason:

The definition of "recommended by the Hearing Examiner" in section 2.110 A. conflicts with the intent and framework of Act of Apr. 24, 1980, ch. 615, § 6, Subds. 4d-4e, 1980 Minn. Sess. Law Serv. 1340-41 (West). Therefore, the last sentence in § 2.110 A. must be deleted.

Upon resubmission of the original and at least two copies of both a corrected copy of the Rules as Adopted and the new Order Adopting, however, these rules will be approved and filed with the Secretary of State.

c.c. Susan Robertson

copy of said report available to any interested person upon request at a reasonable charge. ~~The phrase "recommended by the Hearing Examiner"~~ Recommendations made in the Hearing Examiner's report, as ~~used~~ provided in Minn. Stat. § 15.0412, subd. 4e, under the phrase "recommended by the Hearing Examiner," shall mean those changes in the rule, if any, and based upon the record, which the Hearing Examiner concludes are required in order to make the rule needed and/or reasonable and which would not constitute a substantial change. ~~Where the Hearing Examiner identifies more than one option from which the agency may choose, then each of the options is deemed to be "recommended by the Hearing Examiner" provided that the Hearing Examiner has found, based upon the record, that the option is needed and reasonable and that adoption of the option would not constitute a substantial change.~~

B. If the Hearing Examiner's report contains findings that the rules as last proposed by the agency prior to the close of the hearing are substantially changed from those which were published in the State Register, or that the agency has failed to demonstrate the need or reasonableness of the rules, or has not fulfilled the relevant substantive and procedural requirements imposed on the agency by rule or law, he or she shall submit the report, together with the complete record of the proceedings, to the Chief Hearing Examiner for review pursuant to Minn. Stat. § 15.0412, subd. 4d.

C. Upon receipt of a report from the Hearing Examiner, the Chief Hearing Examiner shall complete his review and submit his report, along with the complete record and the report of the Hearing Examiner, to the agency within 10 calendar days.

~~9 MCAR § 2.111 Submission of rule to Chief Hearing Examiner.~~

~~A. If the Chief Hearing Examiner's approval of the Hearing Examiner's report is required pursuant to Minn. Stat. § 15.0412, subd. 4d, the Hearing Examiner shall submit the report and the record to the Chief Hearing Examiner prior to filing with the agency as required by 9 MCAR § 2.110.~~

~~B. Pursuant to Minn. Stat. § 15.0412, subd. 4e, the agency shall, if it proposes to adopt the rules with changes other than as recommended by the Hearing Examiner, submit, the complete hearing record and a copy of the rules as proposed to be adopted, showing the changes, to the Chief Hearing Examiner.~~

~~C. The Chief Hearing Examiner shall complete his review and submit his report, along with the complete record, to the agency within ten calendar days.~~

9 MCAR § 2.111~~2~~ Substantial change. In determining whether the proposed final rule is substantially different, the Hearing Examiner ~~and the Chief Hearing Examiner~~ shall consider the degree to which it:

A. Affects classes of persons not represented at the previous hearing; or

B. Goes to a new subject matter of significant substantive effect; or

STATE OF MINNESOTA
OFFICE OF ADMINISTRATIVE HEARINGS

FOR THE OFFICE OF ADMINISTRATIVE HEARINGS

IN THE MATTER OF THE PROPOSED) AMENDMENTS TO RULES RELATING) TO THE PROCEDURAL CONDUCT OF) RULEMAKING AND CONTESTED CASE) HEARINGS.)

ORDER OF THE CHIEF HEARING EXAMINER

WHEREAS, a hearing was held on June 24, 1980, before Melvin B. Goldberg, a Hearing Examiner of the State Office of Hearing Examiners, on the above-entitled matter in compliance with Minn. Stat. § 15.0412, subd. 4; and

WHEREAS, the Report of the Hearing Examiner made pursuant to Minn. Stat. § 15.052, subd. 3, was issued to the Office of Administrative Hearings on July 31, 1980; and

WHEREAS, the Office of Administrative Hearings has now determined to adopt rules pursuant to Minn. Stat. § 15.0412, subd. 4; and

WHEREAS, the Office of Administrative Hearings has submitted said rules to the Chief Hearing Examiner for review pursuant to Minn. Stat. § 15.052, subd. 4, and Rule 9 MCAR § 2.110; and

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

NOW, THEREFORE, upon receipt of this Order, the Office of Administrative Hearings has the responsibility of submitting the complete hearing record and the rules as adopted by the Office to the Attorney General, notifying all persons who requested to be informed that the hearing record has been submitted to the Attorney General, and publishing in the State Register, all pursuant to Minn. Stat. § 15.0412, subd. 4.

Dated this 28th day of August, 1980.

Duane R. Harves

DUANE R. HARVES
Chief Hearing Examiner

STATE OF MINNESOTA
OFFICE OF HEARING EXAMINERS

Exhibit No. F
File No.
Date

In the Matter of the Proposed Amendments to Rules relating to the procedural conduct of rulemaking and contested case hearings.

NOTICE OF HEARING

A public hearing concerning the proposed rule amendments will be held at the William Mitchell College of Law, Room 111, 875 Summit Avenue, Saint Paul, Minnesota, on Tuesday, June 24, 1980, commencing at 9:30 a.m. The proposed rule amendments may be modified as a result of the hearing process. Therefore, if you are affected in any manner by the proposed amendments, you are urged to participate in the rule hearing process. 1

Following the agency's presentation at the hearing, all interested (or affected) persons will have an opportunity to ask questions and make comments. Statements may be made orally and written material may be submitted. In addition, whether or not an appearance is made at the hearing, written statements or material may be submitted to Melvin B. Goldberg, Hearing Examiner, Room 326, William Mitchell College of Law, 875 Summit Avenue, Saint Paul, Minnesota 55105, telephone (612)227-9171, either before the hearing or within five working days after the close of the hearing. The hearing examiner may, at the hearing, order that the record be kept open for a longer period not to exceed 20 calendar days. The rule hearing procedure is governed by Minn. Stat. §§ 15.0411 - 15.0417 and 15.052, and by 9 MCAR §§ 2.101 - 2.112 (Minnesota Code of Agency Rules). If you have any questions about the procedure, call or write the hearing examiner. 2 5 7

Twenty-five days prior to the hearing, a Statement of Need and Reasonableness will be available for review at Hearing Examiner Goldberg's office 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 amendments. Copies of the Statement of Need and Reasonableness may be obtained from the Office of Hearing Examiners at a minimal charge. 9

The proposed rule amendments regarding rulemaking would modify and add to the content of the Notice of Hearing, would clarify the use of the Statement of Need and Reasonableness at the hearing, would clarify the agency's burden in regard to existing rules when amendments are proposed, would modify and add to the documents to be filed 25 days prior to hearing, would provide a disqualification procedure for Hearing Examiners, would modify registration at the hearing, would delete the incorporation by reference rule effective July 1, 1981, would clarify the meaning of the phrase "recommended by the Hearing Examiner" in Minn. Laws 1980, Ch. 615, § 6, subd. 4e, would outline a revised procedure for submission of a rule to the Chief Hearing Examiner, would clarify what rules are compared in determining a substantial change, and would make other housekeeping changes. 3

The proposed amendments regarding contested cases would authorize a summary disposition of cases, would allow prefiled testimony, would simplify Chief Hearing Examiner approval of shortened notice periods, would require a Notice of Appearance to be served upon all parties and in all hearings, would clarify when a default occurs, would permit consideration of the Rules of Civil Procedure, would conform the evidence rules to statutory changes, would clarify the burden of proof, would require Hearing Examiner orders and continuance requests to be served on a non-party agency, would clarify the meaning of "late filed exhibits", would permit a Notice of and Order for Rehearing to be served less than 30 days before the Rehearing, and would make other housekeeping changes.

The agency's authority to adopt the proposed rule amendments is contained in Minn. Stat. § 15.052, subd. 4 (1978). Several of the proposed amendments are required by the passage of Minn. Laws 1980, Ch. 615. 4

The agency estimates that there will be no cost to local public bodies in the State to implement the amendments for the two years immediately following its adoption, within the meaning of Minn. Stat. § 15.0412, subd. 7 (1978). 10

Copies of the proposed rule amendments are now available and at least one free copy may be obtained by writing to Duane R. Harves, Chief Hearing Examiner, Room 300, 1745 University Avenue, Saint Paul, Minnesota 55104, telephone (612)296-8100. Additional copies will be available at the hearing. If you have any questions on the content of the proposed rule amendments, contact Chief Hearing Examiner Harves.

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's submission or resubmission to the Attorney General.

Minn. Stat. Ch. 10A requires each lobbyist to register with the State Ethical Practices Board within five days after he or she commences lobbying. A lobbyist is defined in Minn. Stat. § 10A.01, subd. 11 (1979 Supp.) as any individual:

(a) Engaged for pay or other consideration, or authorized by another individual or association to spend money, who spends more than five hours in any month or more than $250, not including his own travel expenses and membership dues, in any year, for the purpose of attempting to influence legislative or administrative action by communicating or urging others to communicate with public officials; or

(b) Who spends more than $250, not including his own traveling expenses and membership dues, in any year for the purpose of attempting to influence legislative or administrative action by communicating or urging others to communicate with public officials.

The statute provides certain exceptions. Questions should be directed to the Ethical Practices Board, 41 State Office Building, Saint Paul, Minnesota 55155, telephone (612)296-5615.

Dated: May 1, 1980.

DUANE R. HARVES
Chief Hearing Examiner

George A. Beck

by George A. Beck
Hearing Examiner

ADMIN 1000 (Rev. 1/78)

STATE OF MINNESOTA

DEPARTMENT ADMINISTRATIVE HEARINGS

Office Memorandum

TO : J. MICHAEL MILES
Assistant Attorney General

DATE: August 12, 1980

FROM : DUANE R. HARVES
Chief Hearing Examiner

PHONE: 6-8100

SUBJECT: RULES OF THE OFFICE OF ADMINISTRATIVE HEARINGS

Enclosed is the original record of our rule hearing including my Order. Also enclosed are two copies of the record except that the copies do not contain Attachment B of Exhibit W which is the Auerbach article. As it is very lengthy, unless absolutely necessary, we prefer not to copy it.

I have also enclosed two extra copies of the rules as proposed and as adopted. There is no transcript.

The foregoing should satisfy the requirements of the Attorney General's rules.

I am also enclosing copies of Mel's report and my Order for your personal file.

Please prepare whatever you must to complete and file for review.

DRH:sh
Encs.

STATEMENT OF COMPLIANCE WITH

MANUAL OF RULEMAKING PROCEDURES

I, Assistant Attorney General J. Michael Miles, do hereby declare that I have examined the proposed rules and all related documents and that, based on them and my personal familiarity with the applicable procedures, the Manual of Rulemaking Procedures has been followed. Any exceptions are noted below.

J. MICHAEL MILES
Assistant Attorney General

Date: 8/13/80

Office of Hearing Examiners

Notice of Intent to Solicit Information or Opinions Relating to Amendments to the Rules of the Office of Hearing Examiners Relating to Rulemaking and Contested Cases

Pursuant to Minn. Stat. § 15.0412, subd. 6, notice is hereby given that the Office of Hearing Examiners is soliciting information and opinions from sources outside of the agency for the purpose of preparing amendments to the existing procedural rules of the office relating to both rulemaking and contested cases.

Any persons desiring to submit data or views on the subjects may do so either orally or in writing. All written submissions will become part of the record in any subsequent hearing. Persons submitting proposals which are accepted by the office may be called upon to present oral or written testimony in support of the proposals at any subsequent hearing.

The office intends to proceed to hearing immediately following adjournment of the 1980 regular legislative session. Therefore, all submissions must be received by the office no later than 4:30 p.m., five working days after the legislature adjourns sine die.

Comments should be submitted to:

Duane R. Harves
Chief Hearing Examiner
Office of Hearing Examiner
Room 300
1745 University Avenue
St. Paul, Minnesota 55104
Telephone: (612) 296-8100

Department of Public Safety Driver and Vehicle Services Division

Notice of Intent to Solicit Outside Opinion Regarding Proposed Revisions to Rules on Driver Training, Vehicles, Instruction, Instructors and Schools

Notice is hereby given that the Department of Public Safety is seeking information, comments and opinions from sources outside the department in preparing to draft revisions to rules relating to commercial driver training schools. Such rules are authorized by Minn. Stat. §§ 171.33 and 171.34. The department is proposing to incorporate rules concerning truck driver training and to update the existing rules, Driver License 31-38.

All interested or affected persons or groups are invited to provide information on this subject until March 18, 1980 by contacting:

Mr. Rollis Odendahl
Driver Training Supervisor
314 Transportation Building
St. Paul, MN 55155

Written statements will be made part of the public hearing record.

Secretary of State

Notice of Vacancies in Multi-Member State Agency

Notice is hereby given to the public that vacancies have occurred in a multi-member state agency, pursuant to Minn. Stat. § 15.0597, subd. 4. Application forms may be obtained at the Office of the Secretary of State, 180 State Office Building, St. Paul 55155; (612) 296-2805. Application deadline is Tuesday, March 4, 1980.

Department of Economic Security Advisory Council has two vacancies open immediately: one for a public member and one for a labor representative. Members are appointed by the Commissioner of Economic Security. The council advises the commissioner on the policies and programs of the Department of Economic Security. Meetings are held monthly. Members receive $35 per diem. For specific information, contact Dave Newman, (612) 296-6073.

Department of Transportation Technical Services Division

Notice of Intent to Solicit Outside Opinions Concerning the Possible Adoption, Amendment, Suspension or Repeal of Rules Relating to Minn. Stat. chs. 161 and 162 (State-Aid Roadway Operations), 14 MCAR § 1.5032

Notice is hereby given that the Commissioner of Transportation is soliciting opinions and comments pertaining to the adoption, amendment, suspension or repeal of rules promulgated pursuant to or authorized by Minn. Stat., chs. 161 and 162 relating to State-Aid Roadway Operations.

Exhibit No. D

STATE OF MINNESOTA
OFFICE OF HEARING EXAMINERS

File No.

Date

In the Matter of the Proposed Amendments to Rules relating to the procedural conduct of rulemaking and contested case hearings.

AFFIDAVIT OF MAILING

State of Minnesota)
) ss.
County of Ramsey)

Jo Ann Barbato, being first duly sworn, deposes and says:

That on the 22nd day of May, 1980, at the City of Saint Paul, County of Ramsey, State of Minnesota, she served the attached Notice of Hearing by depositing in the United States mail at said City of Saint Paul, a true and correct copy thereof, properly enveloped, with postage prepaid, to all persons and associations at the addresses on the Secretary of State's list and to all persons on the attached supplementary notice list.

Jo Ann Barbato

Subscribed and sworn to before me this 27th day of May, 1980.

Sandra A. Haven

SANDRA A. HAVEN
NOTARY PUBLIC-MINNESOTA
RAMSEY COUNTY
My Comm. Expires July 29, 1983

Exhibit No. D-1

File No.

Date

STATE OF MINNESOTA)
(ss.
COUNTY OF RAMSEY)

AFFIDAVIT OF SERVICE

JoAnn Barbato, being first duly sworn, deposes and says that on the 22ND day of May, 1980, at the City of St. Paul, County of Ramsey, State of Minnesota, she served the attached Notice of Hearing

unstamped, by placing in the designated tray to be collected by messenger for delivery to the central mailing station as required by Minn. Stat. § 16.54 (1974), a true and correct copy thereof on all persons at the addresses shown on the attached mailing list.

JoAnn Barbato

Subscribed and sworn to before me this 27th day of May, 1980.

Sandra A. Haven

SANDRA A. HAVEN
NOTARY PUBLIC-MINNESOTA
RAMSEY COUNTY
My Comm. Expires July 29, 1983

Exhibit No. D-2

File No.

Date

STATE OF MINNESOTA
OFFICE OF HEARING EXAMINERS

IN THE MATTER OF THE PROPOSED)
AMENDMENTS TO RULES RELATING)
TO THE PROCEDURAL CONDUCT OF)
RULEMAKING AND CONTESTED CASE)
HEARINGS.)

AFFIDAVIT OF MAILING

STATE OF MINNESOTA)
)SS
COUNTY OF RAMSEY)

Sharon A. Schmidt, being first duly sworn, deposes and says:

That on the 23rd day of May, 1980, at the City of Saint Paul, County of Ramsey, State of Minnesota, she served the attached Notice of Hearing by depositing in the United States mail at said City of Saint Paul a true and correct copy thereof, properly enveloped, with postage prepaid, to all persons on the attached list.

Sharon A. Schmidt

Subscribed and sworn to
before me this 23rd
day of May, 1980.

Sandra A. Haven
Notary Public

SANDRA A. HAVEN
NOTARY PUBLIC-MINNESOTA
RAMSEY COUNTY
My Comm. Expires July 29, 1983

Exhibit No. D-3

File No.

Date

STATE OF MINNESOTA)
(ss.
COUNTY OF RAMSEY)

AFFIDAVIT OF SERVICE

Sandra A. Haven, being first duly sworn, deposes and says that on the 14th day of May, 1980, at the City of St. Paul, County of Ramsey, State of Minnesota, she served the attached Notice of Hearing

unstamped, by placing in the designated tray to be collected by messenger for delivery to the central mailing station as required by Minn. Stat. § 16.54 (1974), a true and correct copy thereof on all persons at the addresses shown on the attached mailing list.

Sandra A. Haven

Subscribed and sworn to before me this
23rd day of May, 1980.

Susan C. Wojcik

SUSAN C. WOJCIK
NOTARY PUBLIC-MINNESOTA
RAMSEY COUNTY
My Commission Expires April 26, 1986

Exhibit No. E

File No.

Date

STATE OF MINNESOTA
OFFICE OF HEARING EXAMINERS

IN THE MATTER OF THE PROPOSED AMENDMENTS TO RULES RELATING TO THE PROCEDURAL CONDUCT OF RULEMAKING AND CONTESTED CASE HEARINGS.

AFFIDAVIT OF RECEIPT OF THE SECRETARY OF STATE'S LIST

STATE OF MINNESOTA)
)SS
COUNTY OF RAMSEY)

George A. Beck, being first duly sworn, deposes and says:

1. That he is an employee of the Minnesota Office of Hearing Examiners.

2. That on the 15th day of May, 1980, he called the Minnesota Secretary of State's Office and requested a current list of all representatives of associations or other interested groups or persons who had registered their names with the Secretary of State for the purpose of obtaining notices of public hearings relating to the promulgation of rules or amendments thereto pursuant to Minn. Stat. § 15.0412, subd. 4 (1978).

3. That on the 16th day of May, 1980, in response to the above request, the Secretary of State provided him with such a list.

Further your affiant sayeth not.

George A. Beck

Subscribed and sworn to
before me this 16th day
of May, 1980.

Sandra A. Haven
Notary Public

SANDRA A. HAVEN
NOTARY PUBLIC-MINNESOTA
RAMSEY COUNTY
My Comm. Expires July 29, 1983

Exhibit No. 3

File No.

Date

RECEIVED

MAY 20 1980

OFFICE OF HEARING EXAMINERS

STATE OF MINNESOTA
OFFICE OF HEARING EXAMINERS

In the Matter of the Proposed Amendments to Rules relating to the procedural conduct of rulemaking and contested case hearings.

CERTIFICATE OF THE SECRETARY OF STATE

I hereby certify that the attached 349 labels and 1 page list constitutes the complete list of persons, associations and other interested groups who as of 12:37 o'clock p.m. this 16th day of May, 1980, have requested, pursuant to Minn. Stat. § 15.0412 (1978), that their names be placed on file with the Secretary of State for the purpose of receiving notice of public hearings on proposed rules and rule amendments on the subject captioned above.

Secretary of State
Joan Anderson Growe

Joan Anderson Growe

By Donna Scott

Exhibit No. A
File No.
Date

STATE OF MINNESOTA
OFFICE OF HEARING EXAMINERS

In the Matter of the Proposed Amendments to Rules relating to the procedural conduct of rulemaking and contested case hearings.

ORDER FOR HEARING

IT IS HEREBY ORDERED that a public hearing on the above captioned rule amendments will be held on June 24, 1980, in Room 111, William Mitchell College of Law, 875 Summit Avenue, Saint Paul, Minnesota, commencing at 9:30 a.m. and continuing until all persons (or representatives of associations or other interested groups) have had an opportunity to be heard.

IT IS FURTHER ORDERED that notice of said hearing be published in the State Register and be given to all persons (or representatives of associations or other interested groups) who have registered their names with the Secretary of State for that purpose.

Dated: April 29, 1980.

DUANE R. HARVES
Chief Hearing Examiner

by George A. Beck
Hearing Examiner