

Minnesota Attorney General: Administrative Rules Proceedings

Copyright Notice:

This material may be protected by copyright law (U.S. Code, Title 17). Researchers are liable for any infringement. For more information, visit www.mnhs.org/copyright.

Version 3
August 20, 2018

Our File No. 1240 05.0009, 0945

RULE REVIEW CHECKLIST

DATE RULE RECEIVED 7-22-86
DATE FOR REVIEW 7-31-86
DATE DUE 8-5-86

Adopted w/a hearing _____
Adopted w/o hearing _____
Temporary rule _____

Approved 8/5/86 Disapproved _____ Returned to Agency _____

Resubmitted _____ Due _____
Approved _____ Disapproved _____ Returned to Agency _____

Date filed w/Secretary of State 8-5-86 Revisor approved 7-23-86
disapproved _____

✓ Rule as Adopted

_____ Rule as Proposed See S. R.

✓ Order Adopting 7-14-86 Date combined w/FR

NA Notice of Intent to Solicit Outside Opinion

✓ Order for rulemaking
NA date of Hearing

NA Certificate of Board's Authorizing Resolution

✓ Notice of rulemaking small biz statement
✓ Sufficiency

✓ Affidavit of Mailing Notice or rulemaking
6-5-86 At least 30 days prior to ~~hearing/~~adoption

✓ Mailing list Certificate

✓ Publication in State Register
6-9-86 At least 30/20 days prior to ~~hearing/~~adoption

NA Hearing Examiner's Report

✓ Chief Hearing Examiner's Report(s)
_____ Approving H.E.'s Report
_____ Approving agency action

✓ Agency's Findings of Fact Combined w/ Order adopting

NA LCRAR Report or agency Affidavit

_____ Certificate of Board's Resolution Adopting Rules

✓ Order Approving Incorporation by Reference

✓ Statement of Need and Reasonableness

NA Petition for Adoption of a Rule

✓ Record (includes transcript or tape, exhibits, comments received by agency, requests for a hearing, and other relevant materials)

✓ Certificate of Compliance w/Rulemaking Procedures

NA Affidavit of Mailing Notice of Submission to Attorney General

✓ Notice of Submission to the Attorney General

SF-00006-03

STATE OF MINNESOTA

DEPARTMENT ATTORNEY GENERAL

Office Memorandum

TO: DUANE R. HARVES, Chief Administrative Law Judge
Office of Administrative Hearings

DATE: 8/7/86

ATTN: KATHLEEN MAHONEY
Special Assistant Attorney General

FROM: J. MICHAEL MILES JMM
Assistant Attorney General

PHONE: 296-6555

SUBJECT: In the Matter of the Proposed Amendments to Procedural Rules for Contested Case Hearings Relating to Procedures for Applications for Fees and Expenses

The above-referenced rule has been approved as to its legality by the Attorney General on August 5, 1986.

Enclosed is the agency's copy of the approved rule. This office has already filed two copies of the approved rule with the Secretary of State, who will forward one copy to the Revisor of Statutes. The fourth copy is being retained by this division of the Attorney General's Office for its records.

Also enclosed are any petitions, requests, submission or comments received by the agency and any extra copies of documents which the agency submitted to the Attorney General.

In order for a permanent rule without a hearing to become effective, your agency must publish a notice of adoption in the State Register in accordance with Minn. Stat. § 14.27. An emergency rule becomes effective five working days after approval by the Attorney General; however, the agency must publish a notice in the State Register in accordance with Minn. Stat. § 14.34.

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

JMM:pmf

Enclosures

cc: Maryanne Hruby
Executive Director
Legislative Commission to Review
Administrative Rules

Duane Harves
Chief Administrative Law Judge
Office of Administrative Hearings

RR1290

AG Copy

Office of Administrative Hearings

Adopted Rule Relating to Awards of Expenses and Fees in Contested Cases

Rule as Adopted

1400.8401 EXPENSES AND ATTORNEY FEES.

Subpart 1. **Authorization.** Pursuant to Minnesota Statutes, sections 3.761 to 3.765, expenses and attorney's fees may be awarded to a prevailing party, other than the state, in a contested case in which the position of the state is represented by counsel, but excluding a contested case conducted for the purpose of establishing or fixing a rate or for granting or ~~reviewing~~ renewing a license. Expenses and fees shall be awarded following compliance with this part if the prevailing party other than the state shows that the position of the state was not substantially justified, unless special circumstances make an award unjust.

Subp. 2. **Definitions.** For the purpose of this part, the following terms have the meanings given them in this subpart:

A. "Expenses" means the costs incurred by the party in the litigation, as defined in Minnesota Statutes, section 3.761, subdivision 4.

B. "Fees" means the reasonable attorney fees or other fees defined in Minnesota Statutes, section 3.761, subdivision 5.

C. "Party" means a person named or admitted as a party as defined in Minnesota Statutes, section 3.761, subdivision 6.

D. "State" means the state of Minnesota or any agency or official of the state of Minnesota acting in an official capacity.

E. "Substantially justified" is the statutory standard by which an administrative law judge determines whether a prevailing party is entitled to expenses or fees, and is as defined in Minnesota Statutes, section 3.761, subdivision 8.

APPROVED BY THE REVISOR OF STATUTES OFFICE BY:

Subp. 3. **Application.** A party seeking an award of expenses and attorney's fees shall, within 30 days of a final disposition in the contested case, submit to the judge an application that shows:

A. that the party is a prevailing party and is eligible to receive an award under this part;

B. the amount sought, including an itemized statement from any attorney, agent, or expert witness representing or appearing on behalf of the party stating the actual time expended, listing specific dates and the services performed on those dates and the rate at which fees and other expenses were computed;

C. a statement that explains with specificity how or why the position of the state agency was not substantially justified;

D. if the claim for attorney's fees exceeds $100 per hour, a statement of facts showing that the excess award qualifies under Minnesota Statutes, section 3.761, subdivision 5, paragraph (c); and

E. a proof of service showing that the state agency and all other parties have been served, either personally or by first class mail, with a copy of the application.

The application must be signed and sworn to by the party and the attorney or other agent or representative submitting the application on behalf of the party, showing the addresses and phone numbers of all persons signing the application.

The application must be received at the office no later than 4:30 p.m. on the ~~30th~~ 40th day following the date of issuance of the final disposition.

Subp. 4. **Response or objection to application.** The state agency or any other party may respond or object to all or any part of the application for expenses and fees. A response or objection must be sworn to and filed with the judge within 14 days following the service of the application and must show:

A. the name, address, and phone number of the party and the person submitting the response or objection on behalf of

APPROVED BY THE REVISOR OF STATUTES OFFICE BY:

the party;

B. a statement showing the parts of the application being responded or objected to showing specific reasons or facts to support the response or objection;

C. a proof of service showing that all other parties have been served, either personally or by first class mail, with a copy of the response or objection; and

D. if the state agency requests a hearing, the response or objection must include the request.

Subp. 5. **Hearing on application.** A hearing on the application will be conducted if the state agency requests a hearing or if the judge determines that a hearing is necessary to gather additional facts or evidence, or for a full and fair resolution of the issues arising from the application. The hearing shall take place on the first date available on the judge's calendar which is also agreeable to all parties. It shall be conducted pursuant to the procedures for conference contested cases, parts 1400.5100 to 1400.8300.

Subp. 6. **~~Stay of proceedings pending~~ Applications when appeal is filed.** In the event that an appeal from all or any part of the final agency decision in the contested case which gives rise to the application for expenses and attorney's fees has been taken to the appropriate court, ~~all proceedings under this part shall be stayed and all time limits imposed shall be tolled pending a final judicial determination~~ the application for fees and expenses shall be made to the court as provided by Minnesota Statutes, section 3.764, subdivisions 1 and 3.

Subp. 7. **Decision of the administrative law judge.** Within 30 days following the close of the record in the proceeding for the award of expenses and attorney's fees, the administrative law judge shall issue a written order which shall also contain findings and conclusions. The order shall be served on all parties and the state agency. The original order and the rest of the record of the proceedings shall be filed with the state agency at the time the order is served.

APPROVED IN THE REVISOR OF STATUTES OFFICE BY:

APPLICATION. Pursuant to the provisions of Laws of Minnesota 1986, chapter 377, section 7, part 1400.8401 applies to all contested cases that are pending on or commenced after August 1, 1986.

APPROVED BY THE REVISOR OF STATUTES OFFICE BY:

STATE OF MINNESOTA
DEPARTMENT OF STATE
FILED
AUG 7 1986
Joan Anderson Growe
Secretary of State 2:27 PM

APPROVED AS TO FORM AND LEGALITY
8/5 1986
HUBERT H. HUMPHREY, III
ATTORNEY GENERAL
BY _____
ASSISTANT ATTORNEY GENERAL

STATE OF MINNESOTA
OFFICE OF ADMINISTRATIVE HEARINGS

IN THE MATTER OF THE PROPOSED AMENDMENTS TO PROCEDURAL RULES FOR CONTESTED CASE HEARINGS RELATING TO PROCEDURES FOR APPLICATIONS FOR FEES AND EXPENSES.

FINDINGS OF FACT, CONCLUSIONS AND ORDER ADOPTING RULES

The above-entitled comes before the Chief Administrative Law Judge for a determination to adopt rules. A Notice of Intent to Adopt Rules Without a Public Hearing was published in the State Register on Monday, June 9, 1986, and was sent by United States mail to all persons on the list maintained by the agency pursuant to Minn. Stat. § 14.14, subd. 1, on June 5, 1986. After affording interested and affected persons an opportunity to submit comments for 30 days, receiving only one written request for a public hearing, that being from the Minnesota Department of Human Rights (see Exhibit A), after having reviewed and considered the written comments, and determining the need for and reasonableness of the above-captioned rules, the Chief Administrative Law Judge makes the following:

FINDINGS OF FACT

1. The Statement of Need and Reasonableness dated May 29, 1986, is incorporated by reference in these findings as it applies to the statutory authority to adopt the rules and the need for and reasonableness of the rules except as may be indicated in subsequent findings.

2. As a result of comments received from Ms. Barbara J. Blumer, Attorney at Law (see Exhibit C), proposed Rule 1400.8401 has been modified. Ms. Blumer found the word "reviewing" was different from the statutory language relating to licensure. The statutory language relates to the renewal of a license rather than the reviewal. It is specifically found that Ms. Blumer is absolutely correct in that the word "reviewing" should have been "renewing" and that the error was an error in typing by the Office of Administrative Hearings (OAH) when submitting the rules to the Revisor of Statutes for final drafting. As can be seen from the Statement of Need and Reasonableness, it is the intent of these rules to simply paraphrase the statute or cite to the statute. Therefore, it is found that the modification herein is for the purpose of correcting an error and makes the rules identical to the statute, which was the intent.

3. Ms. Blumer suggests that the rules be modified to include some criteria for determining when or whether an award of fees and expenses may be "unjust". The phrase used in the rules is a direct quote from the statute and repeats, in the rule, statutory language. As was stated in the notice, it is the intent of the office to adopt solely procedural rules at this time and to expand, through interpretive rules, many of the phrases which need to have further explanation or application in a subsequent proceeding. Therefore, the office has declined to further amend the rules as recommended by Ms. Blumer.

4. Comments from Daniel J. McInerney, Jr., Assistant Commissioner of the Minnesota Department of Health, relate to the specific exemption in Laws of 1986, Chapter 377, § 1, subd. 6(c), as that exemption relates to the Departments of Health or Human Services. The comment from Assistant Commissioner McInerney relates to subpart 1 of Rule 1400.8401. The modifications recommended by Assistant Commissioner McInerney are not adopted at this time. We would direct the readers' attention to a subsequent section of the rule, Rule 1400.8401, subpart 2.C., wherein the specific citation to Minnesota Statutes § 3.761, subd. 6, can be found. The subdivision of the statute referred to includes the specific exemption for the Minnesota Departments of Health and Human Services as discussed in Assistant Commissioner McInerney's letter. We do not believe any further modification is necessary at this particular point in time given the above-quoted definition of "party". The purpose of citing to the statute as opposed to enumerating exemptions was to avoid a problem with attempting to define or further clarify or amplify statutory language in this proceeding. It is found that the rule, as stated, is needed and reasonable and satisfies the problem raised by Assistant Commissioner McInerney.

5. The Minnesota Department of Human Rights commented on the scope of the rules (see Exhibit A). The department is concerned about the application of the rules to public hearings conducted pursuant to the Minnesota Human Rights Act, Minnesota Statutes, Chapter 363. The department's position is that those hearings would be exempt from the provisions of the Equal Access to Justice Act. It is found that modifying these rules, at this time in the proceedings, to identify an exemption which may very well require a legal interpretation could be a substantial change in the rules which would require a new notice and hearing. The argument of the department has substantial merit but the record in this proceeding is not adequate to come to a legal conclusion on the intent of the legislature in this regard. Until the office amends the rules, which is the intent of the office as previously stated in these proceedings, in the event application for expenses or fees is made in a case arising under Chapter 363, the issues will have to be presented in that proceeding to an Administrative Law Judge (ALJ) for a determination.

6. Andrew J. Tourville, Jr., Special Assistant Attorney General, submitted comments on behalf of the Administrative Law Committee of the Attorney General's office (Exhibit E). Those comments raise several points, each of which will be addressed separately.

a) The comments oppose the intent of the OAH to charge agencies for the costs of any proceedings before an ALJ to determine fees and expenses. The proposed rules do not address this point but the Statement of Need and Reasonableness makes it clear that the OAH intends to bill the agencies. Minn. Stat. § 14.53 (1984) mandates the assessment of the cost of services of the OAH to the agencies for the conduct of hearings. Thus, the OAH operates on a total revolving fund with no appropriation from the General Fund of the state. Minn. Laws 1986, Ch. 377, the Equal Access to Justice Act (EAJA) is silent on the question of who pays for any services required to be provided by the OAH under the Act.

Any costs incurred by the OAH which are not directly attributable to a specific case must be absorbed in the general operating costs of the office and are thus included in the determination of the hourly charge for services to all agencies. Several state agencies were successful in obtaining certain

exemptions from the EAJA. There are other agencies or programs within those agencies to which the provisions of the EAJA will never apply. It is clear that one of the reasons for the passage of the EAJA was to require agencies to think very hard before initiating some action against a small business or requiring a small business to initiate some action against the agency. Many agencies will undoubtedly do just that for many reasons including those relating to their budget. It would be unreasonable to require all agencies to pay the costs of EAJA proceedings caused by actions of other agencies.

When interpreting laws, Minn. Stat. § 645.17(1) guides the courts by indicating that the legislature does not intend a result that is absurd, impossible of execution, or unreasonable. The OAH has always believed that Minn. Stat. Ch. 645 is intended to also guide it in interpreting laws. Requiring all state agencies to pay the costs of services rendered as a result of a contested case proceeding, including an EAJA determination, would be unreasonable.

The committee discusses the fact that agencies were not given any appropriation for these proceedings. Could this be a "red herring"? The Minnesota Legislature frequently passes laws requiring agencies to pay for services rendered to them by another agency without the benefit of an appropriation. Have the committee members forgotten that services of the Attorney General's office rendered to state agencies are now charged to the agencies, none of which were given an appropriation for that purpose? It can be fairly correctly assumed that each agency, while presently preparing its FY 88-89 biennial budget, will include requests for funding to pay the costs imposed on it by the legislature.

As stated in the committee's comments, the proposed rules, being silent on this issue, should not be prevented from adoption for this reason.

The balance of the arguments raised by the committee on this issue were addressed in the Statement of Need and Reasonableness.

b) Apparently the committee believes that there is or could be confusion over the construction of language found in Rule 1400.8401, subp. 5. This is a question of grammar and punctuation. For the reasons stated in the comments (pp. 5 and 6), the comma after the word "evidence" is deleted. However, the balance of the sentence is retained as necessary to allow broader language, yet imposing a standard, for an exercise of discretion by the ALJ. Elimination of the language suggested by the committee would result in a very limited standard. In adopting rules, it is not necessary or reasonable that all potential circumstances be foreseen.

c) The committee raises the question of the OAH retaining jurisdiction to determine fees and expenses arising from the contested case once an appeal is taken to the courts. The OAH struggled with this same question when drafting these rules. The OAH came to the conclusion that it must make the determination because of various provisions in the Act which appear to allow for judicial review of the ALJ's decision. For instance, Minn. Laws 1986, Ch. 377, § 2(b), requires the decision of the ALJ to be made a part of the record "and must include written findings and conclusions". Section 4, subd. 1, mandates the Chief Administrative Law Judge, not the courts, to "...establish uniform procedures for the submission and

consideration of applications for an award of fees and expenses in a contested case proceeding." Yet, the balance of that section seems to imply that once an appeal is taken, only the courts have jurisdiction.

Apparently, given the language used in the committee's comments on this issue, it was also confusing to them. However, the "judicial economy" argument raised by the committee is well taken and greatly appreciated. In drafting the rules, the OAH proposed the provision from retaining jurisdiction believing that its withdrawal would not constitute a "substantial change" but that adding the provision following the receipt of comments would necessitate a republication because its addition would constitute a substantial change.

In order to correct this problem, subpart 3.E. is modified by deleting "30th" and inserting "40th". Appeals from contested cases can be taken within 30 days. Thus, the rule must be modified to allow additional time for a party to make an application once the appeal time has run. Otherwise, an application could be required to be filed at or prior to the expiration of the appeal time which would create an unreasonable burden on the party submitting the application.

Subpart 6 must be modified to correct the title and to clarify that once an appeal is taken to the courts, an application for fees and expenses is to be made to the court. The title is modified by deleting the proposed title and inserting "Applications when appeal is filed." The phrase "all proceedings under this part shall be stayed and all time limits imposed shall be tolled pending a final judicial determination" is deleted and instead, the following phrase is inserted: "...the application for fees and expenses shall be made to the court as provided by Minnesota Statutes, section 3.764, subds. 1 and 3".

Based upon the foregoing Findings of Fact, the Chief Administrative Law Judge makes the following:

CONCLUSIONS

1. That proper notice of this rulemaking proceeding has been given and that all other procedural and substantive requirements of law and rule have been complied with.

2. That the rules as modified herein are needed and reasonable and the Chief Administrative Law Judge has the statutory authority to adopt the rules.

Based upon the foregoing Findings of Fact and Conclusions, the Chief Administrative Law Judges makes the following:

ORDER

IT IS HEREBY ORDERED that the amends to the procedural rules for contested cases relating to the award of expenses and attorney's fees, as modified herein, are adopted this 14th day of July, 1986.

Duane R. Harves

DUANE R. HARVES
Chief Administrative Law Judge

STATE OF MINNESOTA
OFFICE OF ADMINISTRATIVE HEARINGS

In the Matter of the Proposed
Amendments to Procedural Rules
for Contested Case Hearings
Relating to Procedures for
Applications for Fees and Expenses.

ORDER FOR NOTICE OF INTENT
TO ADOPT RULES WITHOUT A
PUBLIC HEARING

IT IS HEREBY ORDERED this 22nd day of May, 1986, that a Notice of Intent to Adopt Rules Without a Public Hearing in the above-entitled matter be given to all persons who have registered their names with the Office of Administrative Hearings for that purpose, and that the same Notice be published in the State Register.

STATE OF MINNESOTA
OFFICE OF ADMINISTRATIVE HEARINGS

Duane R. Harves

DUANE R. HARVES
Chief Administrative Law Judge

STATE OF MINNESOTA
OFFICE OF ADMINISTRATIVE HEARINGS

In the Matter of the Proposed
Amendments to Procedural Rules
for Contested Case Hearings
Relating to Procedures for
Applications for Fees and Expenses.

NOTICE OF INTENT TO ADOPT
RULES WITHOUT A PUBLIC HEARING

Notice is hereby given that the Minnesota Office of Administrative Hearings ("Office") proposes to adopt the above-entitled rule without a public hearing following the procedures set forth in Minnesota Statutes, sections 14.22 to 14.28. The statutory authority for the Office to adopt rules generally is at Minnesota Statutes, section 14.51 and specific authority for this rule is also at Laws of Minnesota 1986, Chapter 377, section 4.

Persons interested in this rule shall have 30 days in which to submit comments in support of or in opposition to the proposed rule or any part or subpart of the rule. Comments are encouraged. Each comment should identify the portion of the proposed rule addressed, the reason for the comment, any change proposed, and the name and address of the person submitting the comment. Notice is hereby given that the proposed rule may be modified before final adoption if the modifications are supported by the data and views submitted in the comments and do not result in a substantial change in the proposed rule as noticed..

Persons should note that the proposed rule establishes procedures for submission and determination of fees and expenses and does not establish standards or criteria for determinations. Laws of Minnesota 1986, Chapter 377, is effective on August 1, 1986 and applies to all contested cases which have not had a final determination as of that date. The Office has determined that the adoption of substantive standards or criteria by which decisions will be made, while necessary, are sufficiently significant and potentially controversial that a public hearing will be necessary and that there is insufficient time prior to the effective date o the law to conduct a full hearing. Therefore, the Office is proposing this procedural rule now and will be soliciting input for additional rules to be adopted at a later date as amendment to the rule presently being proposed.

Any person may make a written request for a public hearing on the rule being proposed for adoption during the 30-day comment period. If 25 or more persons submit a written request for a public hearing within the 30-day comment period, a public hearing will be held. Any person requesting a public hearing should state his or her name and address, and is encouraged to identify the portion of the proposed rule addressed, the reason for the request, and any change proposed. If a public hearing is required, the Office will proceed pursuant to Minnesota Statutes, sections 14.131 to 14.20.

Persons who wish to submit written comments or a written request for a public hearing must submit the comments or requests to:

Duane R. Harves
Chief Administrative Law Judge
Minnesota Office of Administrative Hearings
400 Summit Bank Building
310 - 4th Avenue South
Minneapolis, Minnesota 55415
612/341-7640

If a hearing is not required, and the rules adopted, it will be submitted to the Attorney General for a review as to its legality. Notice of the date of submission of the proposed rule to the Attorney General for review will be mailed to any person making a request to the Chief Administrative Law Judge to receive the notice.

A copy of the proposed rule is attached to this notice.

A Statement of Need and Reasonableness that describes the need for and reasonableness of each provision of the proposed rule and identifies any data or information relied upon to support the proposed rule has been prepared and is available for review at the Office. Copies of the Statement of Need and Reasonableness may be obtained from the Office at the cost of reproduction.

Laws of Minnesota 1986, Chapter 377, is also known as the Equal Access to Justice Act which, by its definitions, applies specifically to small businesses only. This rule, therefore, implements a statute which aids small businesses in litigation with the State. Additionally, the rule allows for the submission of an application for fees and expenses in written form and, if a hearing is also necessary, provides that the hearing will be conducted pursuant to the less formal, more efficient and cost-effective conference contested case rules. The consideration given to the effect of the rule on small businesses is more fully documented and discussed in the Statement of Need and Reasonableness.

Dated: May 29th, 1986.

Duane R. Harves

DUANE R. HARVES
Chief Administrative Law Judge

Office of Administrative Hearings

Proposed Rule Relating to Awards of Expenses and Fees in Contested Cases

Rule as Proposed (all new material)

1400.8401 EXPENSES AND ATTORNEY FEES.

Subpart 1. **Authorization.** Pursuant to Minnesota Statutes, sections 3.761 to 3.765, expenses and attorney's fees may be awarded to a prevailing party, other than the state, in a contested case in which the position of the state is represented by counsel, but excluding a contested case conducted for the purpose of establishing or fixing a rate or for granting or reviewing a license. Expenses and fees shall be awarded following compliance with this part if the prevailing party other than the state shows that the position of the state was not substantially justified, unless special circumstances make an award unjust.

Subp. 2. **Definitions.** For the purpose of this part, the following terms have the meanings given them in this subpart:

A. "Expenses" means the costs incurred by the party in the litigation, as defined in Minnesota Statutes, section 3.761, subdivision 4.

B. "Fees" means the reasonable attorney fees or other fees defined in Minnesota Statutes, section 3.761, subdivision 5.

C. "Party" means a person named or admitted as a party as defined in Minnesota Statutes, section 3.761, subdivision 6.

D. "State" means the state of Minnesota or any agency or official of the state of Minnesota acting in an official capacity.

E. "Substantially justified" is the statutory standard by which an administrative law judge determines whether a prevailing party is entitled to expenses or fees, and is as defined in Minnesota Statutes, section 3.761, subdivision 8.

APPROVED IN THE REVISOR OF STATUTES OFFICE BY:

Subp. 3. **Application.** A party seeking an award of expenses and attorney's fees shall, within 30 days of a final disposition in the contested case, submit to the judge an application that shows:

A. that the party is a prevailing party and is eligible to receive an award under this part;

B. the amount sought, including an itemized statement from any attorney, agent, or expert witness representing or appearing on behalf of the party stating the actual time expended, listing specific dates and the services performed on those dates and the rate at which fees and other expenses were computed;

C. a statement that explains with specificity how or why the position of the state agency was not substantially justified;

D. if the claim for attorney's fees exceeds $100 per hour, a statement of facts showing that the excess award qualifies under Minnesota Statutes, section 3.761, subdivision 5, paragraph (c); and

E. a proof of service showing that the state agency and all other parties have been served, either personally or by first class mail, with a copy of the application.

The application must be signed and sworn to by the party and the attorney or other agent or representative submitting the application on behalf of the party, showing the addresses and phone numbers of all persons signing the application.

The application must be received at the office no later than 4:30 p.m. on the 30th day following the date of issuance of the final disposition.

Subp. 4. **Response or objection to application.** The state agency or any other party may respond or object to all or any part of the application for expenses and fees. A response or objection must be sworn to and filed with the judge within 14 days following the service of the application and must show:

A. the name, address, and phone number of the party and the person submitting the response or objection on behalf of

APPROVED BY THE REVISOR OF STATUTES OFFICE BY:

the party;

B. a statement showing the parts of the application being responded or objected to showing specific reasons or facts to support the response or objection;

C. a proof of service showing that all other parties have been served, either personally or by first class mail, with a copy of the response or objection; and

D. if the state agency requests a hearing, the response or objection must include the request.

Subp. 5. **Hearing on application.** A hearing on the application will be conducted if the state agency requests a hearing or if the judge determines that a hearing is necessary to gather additional facts or evidence, or for a full and fair resolution of the issues arising from the application. The hearing shall take place on the first date available on the judge's calendar which is also agreeable to all parties. It shall be conducted pursuant to the procedures for conference contested cases, parts 1400.5100 to 1400.8300.

Subp. 6. **Stay of proceedings pending appeal.** In the event that an appeal from all or any part of the final agency decision in the contested case which gives rise to the application for expenses and attorney's fees has been taken to the appropriate court, all proceedings under this part shall be stayed and all time limits imposed shall be tolled pending a final judicial determination.

Subp. 7. **Decision of the administrative law judge.** Within 30 days following the close of the record in the proceeding for the award of expenses and attorney's fees, the administrative law judge shall issue a written order which shall also contain findings and conclusions. The order shall be served on all parties and the state agency. The original order and the rest of the record of the proceedings shall be filed with the state agency at the time the order is served.

APPLICATION. Pursuant to the provisions of Laws of Minnesota 1986, chapter 377, section 7, part 1400.8401 applies

REVISOR OF STATUTES
OFFICE BY:

to all contested cases that are pending on or commenced after August 1, 1986.

APPROVED BY THE REVISOR OF STATUTES OFFICE BY:

STATE OF MINNESOTA
OFFICE OF ADMINISTRATIVE HEARINGS

In the Matter of the Proposed
Amendments to Procedural Rules
for Contested Case Hearings
Relating to Procedures for
Applications for Fees and Expenses.

AFFIDAVIT OF MAILING

State of Minnesota)
)ss
County of Hennepin)

Sandra A. Haven, being first duly sworn, deposes and says:

That on the 5th day of June, 1986, at the City of Minneapolis, County of Hennepin, State of Minnesota, she served the attached Notice of Intent to Adopt Rules Without a Public Hearing by depositing in the United States mail at said City of Minneapolis a copy thereof properly enveloped with postage prepaid to all persons and associations who have requested that their names be placed on file with the Minnesota Office of Administrative Hearings for the purpose of receiving notice of the proposed adoption of rules by this office.

Sandra A. Haven
Sandra A. Haven

Subscribed and sworn to before me
this 8th day of July, 1986.

Joan H. Bailey
Notary Public

Joan H. Bailey
NOTARY PUBLIC — MINNESOTA
HENNEPIN COUNTY
My commission expires Jan. 19, 1989

Minnesota Board on Aging
Ms. Pamela Parker
Long Term Care Ombudsman
204 Metro Square Building
St. Paul, Minnesota 55101

Anoka County Financial Services Dept.
Ms. Linda Ewen
Courthouse, Third Floor
Anoka, Minnesota 55303

Associated Builders & Contractors
Mr. Donald E. Montgomery
6300 Walker Street
Suite 109
Minneapolis, Minnesota 55416

Minnesota Association of Health
Care Facilities
Attn: Mr. Rick Carter
2850 Metro Drive, Suite 429
Minneapolis, Minnesota 55420

Broeker, Mihalchick & Blumer
2850 Metro Drive, Suite 800
Minneapolis, Minnesota 55420

City of Brooklyn Center
6301 Shingle Creek Parkway
Brooklyn Center, MN 55430
Attn: Brad Hoffman

Minnesota Dental Hygienist' Assoc.
Nancy Stokes, RDH
President-Elect
715 Carlton Avenue
Cloquet, Minnesota 55720

Mr. John T. Farmer
Executive Director
Minnesota Manufactured Housing Assn.
222 East Little Canada Road, Suite 222
Little Canada, Minnesota 55117

Frundt, Frundt & Johnson
Attorneys at Law
117 West 5th Street
Blue Earth, Minnesota 56013

Minnesota Gas Company
Legal Division
Miggie Cramblit, General Counsel
300 Peavey Building
Minneapolis, Minnesota 55402

The Minnesota Government Report
Jean Dawson, Editor
B-12, Press Room
State Capitol Building, St. Paul, MN 55155

Mr. Mark Groettum
Attorney at Law
Box 764
Hibbing, Minnesota 55746

C. Blaine Harstad
1036 Midland Bank Building
Minneapolis, Minnesota 55401

Hessian, McKasy & Soderberg
Mr. John A. Knapp
1500 Midwest Plaza Building
Minneapolis, Minnesota 55402

Mr. John G. Horner
Minnesota Multi Housing Association
3100 West Lake Street
Minneapolis, Minnesota 55416

Department of Human Rights
Bremer Tower, 5th Floor
7th Place & Minnesota Street
St. Paul, Minnesota 55101

Interstate Power Company
President
1000 Main Street
Dubuque, Iowa 52001

Larkin, Hoffman, Daily & Lindgren, Ltd.
1500 Northwestern Financial Center
7900 Xerxes Avenue South
Minneapolis, Minnesota 55431

Attn: Library

Minnesota League of Credit Unions
Richard D. Kothe, Manager
575 University Avenue
St. Paul, Minnesota 55103

Minnesota Medical Association
Lynn R. Gruber, Director
Dept of Med. Services & Research
Suite 400
2221 University Avenue SE.
Minneapolis, Minnesota 55414

Minnesota Public Interest Research Group
Mr. James Miller, Senior Attorney
2412 University Avenue S.E.
Minneapolis, Minnesota 55414

Minnesota Public Interest Research Group
Mr. Kenneth Peterson, Executive Director
2412 University Avenue S.E.
Minneapolis, Minnesota 55414

Minnesota Railroads Association
Mr. Gordon Forbes, Counsel
303 Hanover Building
480 Cedar Street
St. Paul, Minnesota 55101

Minnesota Retail Merchants Association
Ms. Wendy Borsheim, President
180 Metro Square Building
St. Paul, Minnesota 55101

Minnesota State Pharmaceutical Assn.
Mr. Donald A. Dee
2469 University Avenue
St. Paul, Minnesota 55114

Minnesota Transport Services Association
Mr. Abe Rosenthal, Executive Vice President
1821 University Avenue (N310)
St. Paul, Minnesota 55104

Minneapolis Tribune
Mr. Bob Franklin, City Editor
425 Portland Avenue
Minneapolis, Minnesota 55488

Nat'l Assoc. of Chain Drug Stores, Inc.
Mr. James M. Wilson
Director, State Government Affairs.
413 North Lee Street
Alexandria, Virginia 22314

Minnesota Board of Nursing
717 Delaware Street. S.E.
Minneapolis, Minnesota 55414

Olson, Gunn and Seran, Ltd.
Mr. Wayne H. Olson, Esq.
315 Peavey Building
730 Second Avenue South
Minneapolis, Minnesota 55402

Minnesota Board of Optometry
Executive Secretary
717 Delaware Street S.E.
Minneapolis, Minnesota 55440

The Honorable Peter S. Popovich
Chief Judge
Minnesota Court of Appeals
1300 Amhoist Tower
St. Paul, MN 55102

Executive Secretary
Minnesota Board of Pharmacy
717 Delaware Street S.E. #351
Minneapolis, Minnesota 55414

Phillips Legislative Service, Inc.
459 Rice Street
Saint Paul, Minnesota 55103

Pickands Mather & Co.
Mr. Philip D. Brick
Suite 811 - 200 West Superior Ave.
Duluth, Minnesota 55802

Pickands Mather & Co.
T. J. Manthey
1100 Superior Avenue N.E.
Cleveland, Ohio 44114

Executive Secretary
Minnesota Board of Psychology
717 Delaware Street S.E. #343
Minneapolis, Minnesota 55414

Mr. Thomas M. Polt
Attorney at Law
McCarthy Building
Eyota, Minnesota 55934

Rooks, Pitts, Fullagar and Poust
Mr. Jay A. Lipe, Attorney at Law
Xerox Center, Suite 1500
55 West Monroe Street
Chicago, Illinois 60603

St. Louis Park Medical Center
Attn: Vicki Larson, Business Office Mgr.
5000 West 39th Street
Minneapolis, Minnesota 55416

Ms. Mary Stanton, Staff Associate/Finance
State University System
407 Capitol Square Building
550 Cedar Street
St. Paul, Minnesota 55101

Mr. Dale G. Swanson
Suite 113
Professional Building
1068 South Lake Street
Forest Lake, Minnesota 55025

Department of Veterans Affairs
R. J. Lavell, Deputy Commissioner
Veterans Service Building
St. Paul, Minnesota 55155

Board of Veterinary Medicine
Dr. Glen H. Nelson, Executive Secretary
717 Delaware Street S.E. #337
Minneapolis, Minnesota 55414

Mr. John M. Broeker
2850 Metro Drive, Suite 800
Minneapolis, Minnesota 55420

Pierre N. Regnier
1850 Jefferson Avenue
St. Paul, Minnesota 55105

Horvei & Krueger
Attorneys at Law
Suite 204
3570 Lexington Avenue North
Shoreview, Minnesota 55112

STATE OF MINNESOTA
OFFICE OF ADMINISTRATIVE HEARINGS

In the Matter of the Proposed
Amendments to Procedural Rules
for Contested Case Hearings
Relating to Procedures for
Applications for Fees and Expenses.

CERTIFICATE

State of Minnesota)
)ss
County of Hennepin)

I hereby certify that the list of persons, associations and other interested groups who have requested, pursuant to Minn. Stat. § 14.14, subd. 1, that their names be placed on file with and maintained by the Minnesota Office of Administrative Hearings for the purpose of receiving notice of the proposed adoption of rules by this office is accurate and complete as of 8 o'clock A. m. this 5th day of June, 1986.

Sandra A. Haven
Sandra A. Haven

Subscribed and sworn to before me
this 8th day of July, 1986.

Joan H. Bailey
Notary Public

Joan H. Bailey
NOTARY PUBLIC — MINNESOTA
HENNEPIN COUNTY
My commission expires Jan. 19, 1989

STATE REGISTER

RECEIVED
JUN 10 1986
ADMINISTRATIVE

STATE OF MINNESOTA



VOLUME 10, NUMBER 50

Monday 9 June 1986

Pages 2441-2496

PROPOSED RULES

Pursuant to Minn. Stat. of 1982, §§ 14.22, an agency may propose to adopt, amend, suspend or repeal rules without first holding a public hearing, as long as the agency determines that the rules will be noncontroversial in nature. The agency must first publish a notice of intent to adopt rules without a public hearing, together with the proposed rules, in the *State Register*. The notice must advise the public:

1. that they have 30 days in which to submit comment on the proposed rules;
2. that no public hearing will be held unless 25 or more persons make a written request for a hearing within the 30-day comment period;
3. of the manner in which persons shall request a hearing on the proposed rules; and
4. that the rule may be modified if the modifications are supported by the data and views submitted.

If, during the 30-day comment period, 25 or more persons submit to the agency a written request for a hearing of the proposed rules, the agency must proceed under the provisions of §§ 14.14-14.20, which state that if an agency decides to hold a public hearing, it must publish a notice of intent in the *State Register*.

Pursuant to Minn. Stat. §§ 14.29 and 14.30, agencies may propose emergency rules under certain circumstances. Proposed emergency rules are published in the *State Register* and, for at least 25 days thereafter, interested persons may submit data and views in writing to the proposing agency.

Office of Administrative Hearings

Proposed Rule Relating to Awards of Expenses and Fees in Contested Cases

Notice is hereby given that the Minnesota Office of Administrative Hearings ("Office") proposes to adopt the above-entitled rule without a public hearing following the procedures set forth in Minnesota Statutes, sections 14.22 to 14.28. The statutory authority for the Office to adopt rules generally is at Minnesota Statutes, section 14.51 and specific authority for this rule is also at Laws of Minnesota 1986, Chapter 377, section 4.

Persons interested in this rule shall have 30 days in which to submit comments in support of or in opposition to the proposed rule or any part or subpart of the rule. Comments are encouraged. Each comment should identify the portion of the proposed rule addressed, the reason for the comment, any change proposed, and the name and address of the person submitting the comment. Notice is hereby given that the proposed rule may be modified before final adoption if the modifications are supported by the data and views submitted in the comments and do not result in a substantial change in the proposed rule as noticed.

Persons should note that the proposed rule establishes procedures for submission and determination of fees and expenses and does not establish standards or criteria for determinations. Laws of Minnesota 1986, Chapter 377, is effective on August 1, 1986 and applies to all contested cases which have not had a final determination as of that date. The Office has determined that the adoption of substantive standards or criteria by which decisions will be made, while necessary, are sufficiently significant and potentially controversial that a public hearing will be necessary and that there is insufficient time prior to the effective date of the law to conduct a full hearing. Therefore, the Office is proposing this procedural rule now and will be soliciting input for additional rules to be adopted at a later date as amendment to the rule presently being proposed.

Any person may make a written request for a public hearing on the rule being proposed for adoption during the 30-day comment period. If 25 or more persons submit a written request for a public hearing within the 30-day comment period, a public hearing will be held. Any person requesting a public hearing should state his or her name and address, and is encouraged to identify the portion of the proposed rule addressed, the reason for the request, and any change proposed. If a public hearing is required, the Office will proceed pursuant to Minnesota Statutes, sections 14.131 to 14.20.

Persons who wish to submit written comments or a written request for a public hearing must submit the comments or requests to:

Duane R. Harves
Chief Administrative Law Judge
Minnesota Office of Administrative Hearings
400 Summit Bank Building
310-4th Avenue South
Minneapolis, Minnesota 55415
612/341-7640

If a hearing is not required, and the rules adopted, it will be submitted to the Attorney General for a review as to its legality. Notice of the date of submission of the proposed rule to the Attorney General for review will be mailed to any person making a request to the Chief Administrative Law Judge to receive the notice.

A copy of the proposed rule is attached to this notice.

A Statement of Need and Reasonableness that describes the need for and reasonableness of each provision of the proposed rule and identifies any data or information relied upon to support the proposed rule has been prepared and is available for review at the Office. Copies of the Statement of Need and Reasonableness may be obtained from the Office at the cost of reproduction.

Laws of Minnesota 1986, Chapter 377, is also known as the Equal Access to Justice Act which, by its definitions, applies specifically to small businesses only. This rule, therefore, implements a statute which aids small businesses in litigation with the State. Additionally, the rule allows for the submission of an application for fees and expenses in written form and, if a hearing is also necessary, provides that the hearing will be conducted pursuant to the less formal, more efficient and cost-effective conference contested case rules. The consideration given to the effect of the rule on small businesses is more fully documented and discussed in the Statement of Need and Reasonableness.

Rule as Proposed (all new material)

1400.8401 EXPENSES AND ATTORNEY FEES.

Subpart 1. **Authorization.** Pursuant to Minnesota Statutes, sections 3.761 to 3.765, expenses and attorney's fees may be awarded to a prevailing party, other than the state, in a contested case in which the position of the state is represented by counsel, but excluding a contested case conducted for the purpose of establishing or fixing a rate or for granting or reviewing a license. Expenses and fees shall be awarded following compliance with this part if the prevailing party other than the state shows that the position of the state was not substantially justified, unless special circumstances make an award unjust.

Subp. 2. **Definitions.** For the purpose of this part, the following terms have the meanings given them in this subpart:

A. "Expenses" means the costs incurred by the party in the litigation, as defined in Minnesota Statutes, section 3.761, subdivision 4.

B. "Fees" means the reasonable attorney fees or other fees defined in Minnesota Statutes, section 3.761, subdivision 5.

C. "Party" means a person named or admitted as a party as defined in Minnesota Statutes, section 3.761, subdivision 6.

D. "State" means the state of Minnesota or any agency or official of the state of Minnesota acting in an official capacity.

E. "Substantially justified" is the statutory standard by which an administrative law judge determines whether a prevailing party is entitled to expenses or fees, and is as defined in Minnesota Statutes, section 3.761, subdivision 8.

Subp. 3. **Application.** A party seeking an award of expenses and attorney's fees shall, within 30 days of a final disposition in the contested case, submit to the judge an application that shows:

A. that the party is a prevailing party and is eligible to receive an award under this part;

B. the amount sought, including an itemized statement from any attorney, agent, or expert witness representing or appearing on behalf of the party stating the actual time expended, listing specific dates and the services performed on those dates and the rate at which fees and other expenses were computed;

C. a statement that explains with specificity how or why the position of the state agency was not substantially justified;

D. if the claim for attorney's fees exceeds $100 per hour, a statement of facts showing that the excess award qualifies under Minnesota Statutes, section 3.761, subdivision 5, paragraph (c); and

E. a proof of service showing that the state agency and all other parties have been served, either personally or by first class mail, with a copy of the application.

The application must be signed and sworn to by the party and the attorney or other agent or representative submitting the application on behalf of the party, showing the addresses and phone numbers of all persons signing the application.

The application must be received at the office no later than 4:30 p.m. on the 30th day following the date of issuance of the final disposition.

Subp. 4. **Response or objection to application.** The state agency or any other party may respond or object to all or any part of the application for expenses and fees. A response or objection must be sworn to and filed with the judge within 14 days following the service of the application and must show:

A. the name, address, and phone number of the party and the person submitting the response or objection on behalf of the party;

KEY: 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." ADOPTED RULES SECTION — Underlining indicates additions to proposed rule language. ~~Strike outs~~ indicate deletions from proposed rule language.

B. a statement showing the parts of the application being responded or objected to showing specific reasons or facts to support the response or objection;

C. a proof of service showing that all other parties have been served, either personally or by first class mail, with a copy of the response or objection; and

D. if the state agency requests a hearing, the response or objection must include the request.

Subp. 5. **Hearing on application.** A hearing on the application will be conducted if the state agency requests a hearing or if the judge determines that a hearing is necessary to gather additional facts or evidence, or for a full and fair resolution of the issues arising from the application. The hearing shall take place on the first date available on the judge's calendar which is also agreeable to all parties. It shall be conducted pursuant to the procedures for conference contested cases, parts 1400.5100 to 1400.8300.

Subp. 6. **Stay of proceedings pending appeal.** In the event that an appeal from all or any part of the final agency decision in the contested case which gives rise to the application for expenses and attorney's fees has been taken to the appropriate court, all proceedings under this part shall be stayed and all time limits imposed shall be tolled pending a final judicial determination.

Subp. 7. **Decision of the administrative law judge.** Within 30 days following the close of the record in the proceeding for the award of expenses and attorney's fees, the administrative law judge shall issue a written order which shall also contain findings and conclusions. The order shall be served on all parties and the state agency. The original order and the rest of the record of the proceedings shall be filed with the state agency at the time the order is served.

APPLICATION. Pursuant to the provisions of Laws of Minnesota 1986, chapter 377, section 7, part 1400.8401 applies to all contested cases that are pending on or commenced after August 1, 1986.

Department of Commerce

Proposed Rules Relating to Cancellation of Commercial Policies

Notice of Intent to Adopt Rules without a Public Hearing

Notice is hereby given that the Department of Commerce proposes to adopt the above-entitled rules without a public hearing. The Commissioner of Commerce has determined that the proposed adoption of these rules will be noncontroversial in nature and has elected to follow the procedures set forth in Minnesota Statutes, Section 14.21.

Persons interested in these rules shall have 30 days to submit comments in support of or in opposition to the rules. Each comment should identify the portion of the proposed rule addressed, the reason for the comment, and any change proposed. The proposed rules may be modified if the modifications are supported by the data and views submitted to the Department and does not result in a substantial change.

No public hearing will be held unless twenty-five (25) or more persons make a written request for a hearing within the 30 day comment period. In the event a public hearing is required, the agency will proceed according to the provisions of Minnesota Statutes, Section 14.14, subd. 1.

Persons who wish to submit comments or a written request for a public hearing should submit them to Richard G. Gomsrud, Department Counsel, Department of Commerce, 500 Metro Square Building, St. Paul, MN 55101 telephone (612) 296-5689. Any person requesting a public hearing should state her or his name and address and is encouraged to identify the portion of the proposed rule addressed, the reason for the request and any change proposed and send this information to the above address.

Authority for the adoption of these rules is contained in Minnesota Statutes, Sections 45.023 and 61A.03. Additionally a Statement of Need and Reasonableness of each provision and identifying the data and information relied upon to support the proposed rules has been prepared and is available upon request.

Pursuant to Minnesota Laws 1983, chapter 188 codified as Minnesota Statute Section 14.115, subdivision 2, the impact on small business has been considered in the promulgation of the rules. Anyone wishing to present evidence or argument as to the rules' effect on small business may do so. The Department's position regarding the impact of the rules on small business is set forth in the Statement of Need and Reasonableness.

Upon adoption of the final rules without a public hearing, the proposed rules, this Notice, the Statement of Need and Reasonableness, all written comments received, and the final Rules as Adopted will be delivered to the Attorney General for review as to form and legality, including the issue of substantial change. Persons who wish to be advised of the submission of this material to the Attorney General, or who wish to receive a copy of the final rules as proposed for adoption, should submit a written statement of such request to Richard G. Gomsrud, Department Counsel, Department of Commerce, 500 Metro Square Bldg., St. Paul, MN 55101.

STATE OF MINNESOTA
OFFICE OF ADMINISTRATIVE HEARINGS

In the Matter of the Proposed
Amendments to Procedural Rules
for Contested Case Hearings
Relating to Procedures for
Applications for Fees and Expenses.

STATEMENT OF NEED
AND REASONABLENESS

INTRODUCTION AND STATUTORY AUTHORITY

Minnesota Statutes, § 14.51, authorizes the Chief Administrative Law Judge to adopt rules to govern the procedural conduct of all hearings, relating to both rule adoption, amendment, suspension, or repeal hearings, contested case hearings, and workers' compensation hearings, and to govern the conduct of all voluntary mediation sessions for rulemaking and contested cases other than those within the jurisdiction of the Bureau of Mediation Services. To that end, over the past years, the Office of Administrative Hearings has adopted procedural rules relating to contested case hearings which are found at Minnesota Rules Parts 1400.5100 through 1400.8613.

During the 1986 Legislative Session, the Minnesota Legislature passed a bill which was subsequently signed by the Governor and has become law, which has been referred to as the "Equal Access to Justice Act". That Act is found at Laws of Minnesota 1986, Chapter 377. That Act authorizes the awarding of attorney's fees and expenses to prevailing parties in certain contested case hearings. At § 4 of that Act, at subdivision 1, the Chief Administrative Law Judge is required to establish uniform procedures for the submission and consideration of applications for an award of fees and expenses in a contested case proceeding. The procedures are to be adopted by rule.

Because the newly-enacted law involves and requires procedures for a process not contemplated at the time of the original adoption and subsequent amendment of the contested case rules, it is thus generally necessary to amend the existing procedural rules to establish a procedure for the awarding of these fees and expenses.

The provisions of Minnesota Laws 1986, Chapter 377, become effective on August 1, 1986, and apply to any contested case which is pending on or commenced on or after that date. Thus, contested case hearings which are presently pending in the Office of Administrative Hearings may come within the provisions of the 1986 legislation if the State agency for which the hearing is conducted has not yet issued a final order. Thus, there is a very short amount of time allowable to have rules adopted prior to the effective date of the law. It has therefore been determined that it is necessary to adopt some extremely basic procedural rules in order that any controversy regarding the procedures to be established will be avoided, thus allowing these rules to be adopted using the notice and comment provisions of the Minnesota Administrative Procedure Act (APA). At the same time, it is anticipated that the Office of Administrative Hearings will be subsequently adopting additional amendments which will make these procedural rules more comprehensive. It is the present intent of the Office of Administrative Hearings to propose more comprehensive rules but, because of their potential controversial nature, they will likely go directly to a rulemaking hearing.

IMPACT ON SMALL BUSINESSES

Minn. Stat. § 14.115 requires all State agencies to consider the impact of new rules or amendments to existing rules on small businesses as defined in that section. The definition of "small business" in Minn. Stat. § 14.115 is almost identical to the definition of "party" found at Laws of Minnesota 1986, Chapter 377, § 1, subd. 6. The entire purpose of adopting the "Equal Access to Justice Act" was to aid small businesses. Thus, the Act and therefore by implication these rules will impact on small businesses. They will reap the benefits of the Act and any procedures adopted to implement the provisions of the Act by allowing them a process to recoup fees and expenses from contested case hearings. Therefore, there can be no differentiation in the rules themselves between small businesses and large businesses because they only impact on small businesses. Therefore, the requirements of Minn. Stat. § 14.115, subd. 2, do not really apply. As an example, the Office can hardly exempt small businesses from the requirements of the rules since they are the only ones who will obtain the benefits from the rule. Likewise, the "less stringent requirement" parts of that statute are inapplicable. In lieu of those requirements, as will be seen by an examination of the rules, the procedures being proposed are an attempt to be as simple as possible and to allow a process which can be concluded very quickly and cost-effectively, and to create as little a burden as possible on those seeking to utilize the Act.

Additionally, in the Notice of Intent to Adopt Rules Without a Public Hearing we have included a statement that the rules will have a direct impact on small businesses. Additionally, the agency will be giving a direct notice to the Minnesota Association of Commerce and Industry, the National Federation of Independent Businesses, and to the Small Business Assistance Section of the Minnesota Department of Energy and Economic Development.

In terms of an impact on small businesses, it is to the advantage of small business to have procedural rules in effect because without them, there will be no well-defined process by which they can obtain reimbursement of attorney's fees and expenses necessarily expended by them in actions wherein the State agency was represented by an attorney. Thus, the impact on small businesses is "positive" as opposed to "negative".

SPECIFIC STATEMENT OF NEED AND REASONABLENESS

1400.8400, subpart 1. This subpart of the rule is a very general statement which describes the scope of the rules and discusses the types of cases for which this rule part applies. It is necessary to have a general "scope and purpose" type of section at the start of any rule so that interested persons will know whether or not they fall within the provisions of the rule without having to read further. The language in this subpart is virtually identical to the statute. The language in this subpart does not in any way expand or narrow the scope of the language of the statute. It is reasonable to paraphrase the statute in this rule because the various requirements of the statute are spread among a number of subdivisions. The gathering of the requirements and placing them in a short initial statement in these rules allows a person to be able to make a determination, almost immediately, as to whether or not the rule will apply to them. It also allows the reader the opportunity to make a determination without the necessity of having to look up the statute, which they might not otherwise have available to them at the time they are attempting to make an initial determination of

the applicability of the rule. The use of the discretionary word "may" in the first sentence in this subpart is identical to the language used in the statute and is necessary because persons must be aware that just because they are a party to a case and they have somehow prevailed against the State, does not necessarily mean that they will receive reimbursement of their fees and expenses. Rather, additional requirements of the law must be met which are discussed, very briefly, in the second sentence which then uses the mandatory word "shall". Thus, the use of the word "may" in the first sentence is necessary to point out these facts to the reader, because it is also duplicative of statutory language, and is reasonable because it is then made mandatory by use of the word "shall" in the second sentence wherein the statutory standards and criteria are quoted.

1400.8400, subp. 2 [Definitions.] This subpart of the rule lists certain terms and indicates their meaning or allows the reader the opportunity to know where they can go to find the specific definition. Laws of Minnesota 1986, Chapter 377, has an extensive definitional section found at § 1, subd. 6. The definitions in subpart 2 of the rule do not create new definitions. The words defined are the same words as are defined in the definitional part of the statute or in other parts of the statute. It is necessary to list these terms and to direct the reader to the appropriate definitions so that the reader of the rule will have an opportunity of looking to the exact language of the statute to determine whether or not they or their case fall within the purview of the statutory language. While some might argue that the terms should be fully defined in the rule so that persons need not refer back to the statute, experience of the Office of Administrative Hearings over the past ten-and-one-half years shows that the legislature, once it has passed a law, tends to modify the terms of the statute quite regularly. By citing the reader to the statute, the rules will not have to be amended each time the legislature changes a definition. Additionally, the APA at § 14.07, subd. 3(1), directs the Revisor of Statutes to minimize duplication of statutory language. Based on the foregoing, it is reasonable that a list of terms be given with citations to the appropriate statutes so that the parties will be able to make intelligent decisions relating to the applicability of this rule to their particular case.

1400.8400, subp. 3 [Application]. This subpart establishes the procedure by which a party seeking an award of expenses and attorney's fees may file an application and contains a listing of the items which must be included in any application together with time deadlines for their submission. In other words, this is the first section which goes directly to the procedures to be followed by a party once they have determined that they meet the other statutory requirements.

In the prefatory language as well as in the last sentence of this subpart, parties are required to file their application within 30 days of the final disposition in the contested case. The time limit of 30 days was selected for several reasons. First of all, it is identical to the time allowed a person aggrieved by a final decision in a contested case to seek judicial review of the agency decision. Thus, another new time deadline is not established which it easier for parties to remember. Secondly, up to 30 calendar days should be more than sufficient time for a prevailing party to put together their application and obtain all of the information necessary to include within the application. Finally, it is necessary to establish a deadline so that an agency can bring a final closure to a proceeding. Again, the 30-day deadline

for appeal was thought to be appropriate, for under present law, if no appeal was taken within 30 days, the agency can close its file for both internal procedures and for budgetary reasons. The budgetary reasoning is important because State agencies must pay the Office of Administrative Hearings for the conduct of contested case hearings. Once a contested case is initiated, the agency must open an encumbrance account to pay the Office of Administrative Hearings. It is necessary for agencies to close the specific encumbrances as soon as possible. Until an encumbrance is closed, the agency may not use any of the unused portion of the open encumbrance. In times of fiscal constraints, agencies must have the ability to utilize all available funding to pay for the programs which are mandated by the legislature. In order to avoid questions being raised concerning when the 30-day deadline commences and when it terminates, this subpart provides that the 30 days begins to run on the date of issuance of the final disposition and terminates on the 30th day following the date of issuance, by receipt of the application at the Office rather than by placing the application in the U. S. mail on the 30th day. This avoids the problems which occur when parties claim the rules are vague in provisions relating to deadlines. Also, if a party unilaterally chooses to utilize the United States mail for filing its application, that party will be required to suffer the consequences of any failure of the application to be received at the Office of Administrative Hearings within the 30-day time frame established. In short, it establishes a jurisdictional time frame without any discretion in the Administrative Law Judge to grant extensions.

It is the intent of this rule that most, if not all, of these applications will be determined without the necessity of a hearing. Thus, it is necessary that the application show that the party is the prevailing party and is eligible to receive an award under this party. This requirement is reasonable because it will cause the person filing the application to stop and think about the law, to read the various sections, knowing that they will have to present a sufficient statement which shows that they are qualified.

In order to carry out the intent of issuing these awards without a hearing, it is necessary that the application state, with some specificity, how much is being requested in the award and that it include an itemization in certain areas. By requiring an itemization, the Administrative Law Judge will be better able to determine the nature and extent of the services performed by the attorney or a witness, the date the services were performed, the relevance to the issues, and how the rates or fees were calculated. The amount of fees or expenses have a limitation imposed by statute and thus it is necessary to have a total itemization so that the proper calculations can be made by the Administrative Law Judge.

One of the crucial issues to be determined by the Administrative Law Judge in these cases is whether or not the position of the State agency in the hearing was substantially justified using the definition of that term as found in the statute. Thus, the applicant must state and show their reasoning in order that the Administrative Law Judge can make the proper determination.

Finally, a Proof of Service is required. This is necessary so that the Administrative Law Judge can determine that all other parties have had an opportunity to receive the application in order that they may prepare a response or objection as is allowed by a later part of the rule. This portion of the rule also requires that the application be signed and sworn to by the party and the attorney or other agency representative submitting the

application on behalf of the party, showing the address and phone number of all persons signing the application. Remembering that the intent of the rule is to allow for a determination without a hearing, the requirement that both the party and the attorney or other agent or representative actually preparing the document swear to the truth of its contents will assist in having parties submit true facts given the various implications of submitting false, sworn statements in administrative hearings. The proper address and phone number of the party is important so that any documents mailed by the Administrative Law Judge or other parties can be sent to the correct address. In order to expedite any problems which may arise by way of telephone conferences, it is necessary that the phone numbers of all parties be included.

1400.8400, subp. 4 [Response or objection to application.] This subpart allows a State agency or any other party to respond to an application or to object to all or any part of the application. This response must be in writing and for the same reasons given above must be sworn to by the person submitting the response or objection. By requiring the response or objection to be filed "with the judge" imposes the burden on the party submitting the response or objection to have it received within the 14 days, to be considered. The response includes much of the same information required by the application, including specifically pointing to the portions of the application being responded to or objected to and the specific reasons or facts to support the response or objection. In this way, general objections are not allowed, but rather, sufficient facts and reasons must be given. Again, this will allow the Administrative Law Judge to make a determination without the necessity of additional evidence or facts.

However, in this instance, the State agency is allowed to request a hearing. If a hearing is requested, the response or objection must include the hearing request. If a hearing is requested, like any other contested case, the State agency bears the responsibility of paying the costs of the Office of Administrative Hearings for the hearing. The agency must make a determination, up front, on whether the issues or amounts in controversy are sufficient to require the additional expenditure of State funds for a hearing. It is reasonable to require the hearing request to be included with the response or objection in order that the matter will not be delayed and may proceed as expeditiously as possible.

1400.8400, subp. 5 [Hearing on application.] This subpart requires a hearing on the application if requested by the State agency. Thus, there is no discretion in the Administrative Law Judge if the State agency has made an initial determination that it desires a hearing. However, the rule gives the judge discretion to order a hearing if the judge determines, after reviewing the application and response or objection, that a hearing is necessary to gather additional facts or evidence, or for a full and fair resolution of the issues arising from the application. In other words, if the parties have been less than sufficiently specific in the application and/or response and objection, and the judge is in doubt, the judge will have the discretion to call for a hearing but that decision will be based solely on the standards and criteria listed in the rule. It is reasonable to allow the judge discretion in this regard because none of the parties would want a judge to make a determination if the judge is in doubt or if sufficient facts have not been presented. The determination by the judge in this instance must be based upon the record before the judge. It is this record which parties will subsequently utilize if an appeal is taken from the award of costs and fees or expenses, or a determination to deny an award.

In order that there will be no further delays, this subpart mandates that if a hearing is to be conducted it is to take place on the first available date on the judge's calendar which is also agreeable to all parties. After ten-and-one-half years of experience in unilaterally setting hearing dates and being faced with requests for continuances for good and valid reasons, the Office has discovered that when setting a hearing it saves a lot of time, and thus expense, if the judge contacts the parties, usually by conference telephone call, to establish a mutually agreeable date for the hearing. At the same conference, the judge is usually able to determine the length of time which will be necessary for the presentation of the case by both parties and can set aside sufficient time for the hearing. This past practice has shown to be very effective and has resulted in the virtual elimination of requests for continuances except in exceptional circumstances.

Finally, this subpart requires that any hearings conducted under this rule shall utilize the procedures for conference contested case hearings. The conference contested case rules, Minnesota Rules Parts 1400.8510 to 1400.8613, establish a procedure for the conduct of hearings much like the procedural rules for small claims court in the various county courts across the state. They provide for the minimum due process requirements but also provide for an expedited hearing process. Again, past experience with these procedural rules has shown that their utilization has saved a considerable amount of hearing time which translates into expenses for all parties. Thus, under the authority of establishing procedures for the submission and consideration of applications under this new act, and to lessen any impact on the small businesses, which are the only ones directly affected by this rule, it is necessary to have the fastest and least expensive hearing process.

1400.8400, subp. 6 [Stay of proceedings pending appeal.] It is assumed that in many instances an appeal will be taken from an agency determination. In many instances an agency will make a final disposition adverse to a party. If the party is successful in overturning the agency determination in the courts, the final judicial determination will become a final disposition and the person would appear to be entitled, under the law, to submit an application for an award of costs, fees and expenses for the contested case as well as court expenses obtained from the court. It is necessary to establish a rule which stays all proceedings under the rule pending a final determination by the courts and to toll the running of any jurisdictional time limits imposed by the rule. This subpart accomplishes that process. It would be extremely counterproductive to require a party to file an application for an award of fees and expenses when the case is on appeal to the appropriate court. In many instances, unless the court reverses the agency determination, a person would probably not meet the definition of "prevailing party". Thus, it would not be able to show eligibility for an award under this rule until after a judicial determination. Additionally, there are other instances wherein the "final disposition" is the decision of the Administrative Law Judge. Such examples include determinations under the Minnesota Human Rights Act and determinations made under the Occupational Safety and Health Act. In both instances, the position of the State agency is represented by counsel. A party may receive a favorable determination against the State from the Administrative Law Judge and the State may be the appealing party. In those instances, it is reasonable to allow the requirements of this rule to be tolled when the State agency is the party appealing to the courts.

1400.8400, subp. 7 [Decision of the Administrative Law Judge.] From the inception of the Office of Administrative Hearings, it has been the policy of the Office that all decisions will be issued within 30 days of the close of the hearing record. The Minnesota Legislature adopted this policy for rulemaking proceeding. This subpart establishes a mandatory 30-day deadline for the issuance of the Administrative Law Judge's decision. It is necessary and reasonable to establish a deadline by which the Administrative Law Judge will complete the work on the case so that there will be the earliest possible resolution of the issues between the parties. On the one hand, it will facilitate the agency's closure of its file and open encumbrances as discussed previously. On the other hand, it will give certainty to the parties and, if they are to receive an award, will assist in recouping expenses incurred in the administrative process as soon as possible. In this way, it will add to the carrying out of the intent of the legislature to allow small businesses the opportunity to participate in the hearing process and to recoup, as soon as possible, its expenses, costs and fees, where appropriate. This subpart requires the Administrative Law Judge to issue a written "order". Laws of Minnesota 1986, Chapter 377, § 2(a) states: "If a prevailing party other than the state, in a civil action or contested case proceeding other than a tort action, brought by or against the state, shows that the position of the state was not substantially justified, the court or administrative law judge shall award fees and other expenses to the party unless special circumstances make an award unjust." Thus, it is clearly the intent of the legislature that the determination of the Administrative Law Judge in this position be a final determination and that jurisdiction for the awarding of fees be vested in the Administrative Law Judge and not the agency, even though in the contested case itself the Administrative Law Judge may have made only a recommendation to the agency. Further support can be found in § 2(b) of the same law, which states: "The decision of the administrative law judge under this section must be made a part of the record containing the final decision of the agency and must include written findings and conclusions." Thus, it is reasonable that the rule require the issuance of an "order" instead of a recommendation.

1400.8400 [Effective date.] This section is an effective date of these rules. The APA requires an effective date of five days after publication of the adopted rules in the State Register. However, it is anticipated that these rules will be published prior to that time so that they can be implemented on August 1, which is required by statute. The language if this subpart indicates that the rule applies to all contested cases which are pending on or commenced after August 1, 1986, which is an exact duplication of statutory language.

Generally. Throughout the rule, the implication is that the application and all of the documents are filed with the Administrative Law Judge. While the rule has not specifically so stated, it is obvious that the judge who issued a determination in the contested case which gives rise to the application is the judge who makes the determination on the application for costs, fees and expenses. This is to carry out the specified intent of the legislature. The legislature has used virtually identical language. It appears clear from the wording of the statute that the legislature intended that the Administrative Law Judge determining an application under this rule be the same judge who heard the case. It is also reasonable that the same judge make the subsequent determination because that judge is most familiar with the record and will be better able to determine the issues relevant to the application called for by this law and rule.

Dated: May 29, 1986.

Duane R. Harves

DUANE R. HARVES
Chief Administrative Law Judge

STATE OF MINNESOTA
OFFICE OF ADMINISTRATIVE HEARINGS

In the Matter of the Proposed
Amendments to Procedural Rules
for Contested Case Hearings
Relating to Procedures for
Applications for Fees and Expenses.

STATEMENT OF COMPLIANCE
WITH RULEMAKING PROCEDURES

I, Kathleen Mahoney, do hereby declare that I have examined the rules and all related documents and that, based on my examination and my personal familiarity with the applicable procedures, the Administrative Procedure Act, the rules of the Office of Administrative Hearings, and the rules of the Attorney General have been followed. Any exceptions are noted below.

Dated this 22nd day of July, 1986.

Kathleen M. Mahoney
KATHLEEN MAHONEY
Special Assistant Attorney General

To: Mike
From: Paula

Order Adopting:
- no cite to statutory authority to promulgate

HUBERT H. HUMPHREY, III
ATTORNEY GENERAL

STATE OF MINNESOTA
OFFICE OF THE ATTORNEY GENERAL
ST. PAUL 55155

ADDRESS REPLY TO:
200 FORD BLDG.
117 UNIVERSITY AVE.
ST. PAUL, MN 55155
TELEPHONE: (612) 296-7575

July 22, 1986

HAND-DELIVERED

Martha J. Casserly
Special Assistant Attorney General
Second Floor, Administration Building
50 Sherburne Avenue
Saint Paul, Minnesota 55155

Re: Office of Administrative Hearings Rule 1400.8401, relating to awards of expenses and fees in contested cases

Dear Marty:

Enclosed for review by the Attorney General, please find the OAH's adopted rule 1400.8401 with the necessary documents required by Minn. R. 2000.0400. Please note that there is not enclosed an affidavit of mailing notice of submission to the Attorney General because no requests for such notice were received by the OAH.

Should you have any questions concerning this submission, please do not hesitate to contact me at the number listed below.

Very truly yours,

Kathy

KATHLEEN M. MAHONEY
Special Assistant
Attorney General

Antitrust Division
Telephone: (612) 296-2619

KMM:mfc
Enclosure

cc: Duane R. Harves