

Minnesota Attorney General: Administrative Rules Proceedings

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MJC

RULE REVIEW CHECKLIST

File No. 1765
DATE RECEIVED 11-30-90
REVIEW DATE 12-9-90 12-10-90
DUE DATE 12-14-90
(DIS)APPROVED 12.14.90
WITHDRAWN _____

Docket No. 05.0009.0445
ADOPTED W/O HEARING _____
EMERGENCY RULE _____
TO REVISOR ON 12-5-90
REVISOR (DIS)APPROVED _____
FILED W/SEC. OF STATE 12-18-90
RETURNED TO AGENCY _____

✓ Rule as adopted (4 copies)

✓ Notice to Solicit Outside Information/Opinion (if applicable)
Feb 12, 1990 Date published in State Register
_____ Comments

_____ ~~Petition for~~ Adoption of a Rule

_____ Board's Authorizing Resolution
_____ Date adopted

✓ Proposed Rule
✓ Revisor's Certificate

✓ Notice of Intent to Adopt Rule
14.5 (1988) 116C.66 Statutory Authority
_____ Small Business Statement
_____ Expenditure of public money statement
July 24, 1990 Signature

✓ Statement of Need and Reasonableness (if applicable)
NA Small Business Statement
NA Fees - § 16A.128

✓ Affidavit of Mailing Notice of Intent to Adopt Rule
August 7, 1990 Dated 30/25 days before adoption
_____ Notice attached indicates it is attached
_____ Copy of rule or summary attached

✓ Publication in State Register missing
August 13, 1990 Date 30/25 days before adoption

✓ ✓ 180-day deadline from:
✓ Effective date of law requiring rule (14.12) (both rules) amendments don't apply
_____ ~~end of comment period (§ 14.26)~~ (rules without hearing)
_____ effective date of statutory authority (§ 14.29) (emergency rules)

_____ Resolution Adopting
_____ ~~Date adopted~~

✓ Findings of Fact, Conclusions & Order Adopting
November 21, 1990 Date

✓ Written Requests, Submissions or Comments

✓ Declaration of Attorney
Tom Pursell Name of SAAG representing agency

_____ Notice of Submission to Attorney General (if applicable)

_____ Affidavit of Mailing Notice to Attorney General (if applicable)

(F)

STATE OF MINNESOTA
OFFICE OF ADMINISTRATIVE HEARINGS

In the Matter of the Proposed Amendments to Rules Governing Administrative Rulemaking Hearings, Contested Case Hearings, Revenue Recapture Act Hearings, Power Plant Siting and Power Line Routing Hearings, Minn. Rules Chapters 1400 and 1405.

STATEMENT OF NEED AND REASONABLENESS

I. INTRODUCTION

The Office of Administrative Hearings proposes to amend a number of its existing rules. These amendments affect one or more rules in each of the major sets of rules governing the Office's work: rulemaking, contested case, Revenue Recapture Act, and power plants/power lines. None of these amendments affect workers' compensation hearings. As explained more fully below, these changes are primarily housekeeping. They are, for the most part, an attempt to update the Office's existing rules to remove obsolete references, changed addresses, and inaccurate citations. There are a handful of substantive amendments, however, so interested persons are advised to look through all of the proposed amendments.

The Office published a Notice of Solicitation of Outside Opinion on February 12, 1990, at 14 S.R. 2012.

The Office is still open to suggestions for improvements on these proposals. Readers are urged to submit their ideas for improving these amendments at anytime until the end of the comment period.

II. STATUTORY AUTHORITY

The Office's statutory authority to adopt these amendments is set forth in Minn. Stat. §§ 3.764, 14.51 and 116C.66 (1988). The main source of authority, section 14.51, provides, in pertinent part:

> The chief administrative law judge shall 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 voluntary mediation sessions for rulemaking and contested cases other than those within the jurisdiction of the Bureau of Mediation Services. . . . The procedural rules for hearings shall be binding upon all agencies and shall supersede any other agency procedural rules with which they may be in conflict.

Authority to adopt and amend rules relating to power plant siting and power line routing (hereinafter "power plants/power lines") is contained in Minn. Stat. § 116C.66 (1988). Authority for the attorney's fees rule amendment is in Minn. Stat. § 3.764.

III. NEED AND REASONABLENESS FOR EACH AMENDMENT

Each of the amendments is discussed below, with the exception of those which are self-explanatory because they constitute nothing more than renumbering or other housekeeping matters.

Rulemaking Hearings

Proposed Rule 1400.0250, subp. 2 allows documents to be filed by facsimile transmission under certain conditions. When a statute or rule requires that a document be served upon the judge or upon the Office, there is currently no provision for the use of facsimile transmission. The purpose of this rule is to add facsimile transmission as a method of filing with the Office or a judge.

The Office acquired a facsimile transmission machine in April of 1989, and it has been in continuous use since then. It has proven to be a valuable tool for the receipt and transmission of time-sensitive documents. More importantly, it has been entirely reliable. The Office is unaware of any instances in which a person claims to have sent something to us which was not received. Similarly, there have been no reports of persons who have not received documents which a judge has sent to them. We believe that the use of facsimile transmission will only increase, and that it is important to recognize it in the Office's rules.

The Rules of Civil Procedure for the District Courts were amended, effective January 1, 1989, to allow persons to file documents with the district courts by facsimile transmission, so long as certain conditions were met. This followed an experimental trial period that began in September of 1987 in selected judicial districts. The experiment proved to be a success, and so the Supreme Court amended the rules to allow it on a statewide basis. The court required that within five days after receipt of a facsimile transmission, the party filing the document must forward a $5.00 transmission fee and the original signed document to the court. Assuming that that is done, however, filings are deemed complete at the time that the fax transmission is received by the court. The filed facsimile is given the same force and effect as the original. The Office of Administrative Hearings considered this court rule carefully, and determined that there was no reason to impose any sort of transmission fee, at least at the current time. Otherwise, it was followed.

Existing Part 1400.0300, subp. 1a(C)(6) requires agencies to include, in their notice of hearing, a statement advising interested persons that lobbyists must register with the State Ethical Practices Board. The rule goes on to require the inclusion of the definition of a lobbyist as it existed some years ago. The statutory definition has since been amended, and the definition is now different. There is obviously a need to deal with the change in the statute. The Office has chosen to deal with it by deleting the statutory language entirely, and leaving only a warning and the address and telephone number where persons can seek additional information.

This choice is reasonable because it avoids the problem of future statutory changes, and it also follows the Legislature's directive to minimize duplication

of statutory language (Minn. Stat. § 14.07, subd. 3). In addition, the current statute is substantially longer, in length, than the old one and the burden on agencies publishing notices, and readers reading them, outweighs the benefit, particularly where there is a much easier alternative available.

Requiring agencies to determine the current address and telephone number of the Ethical Practices Board, and include them in the notice, is not unduly burdensome to the agencies. The Office could have specified, in the rule itself, the current address and telephone number of the Board, but that alternative was rejected in order to avoid making the rule obsolete when the Ethical Practices Board moves, or its telephone number changes again.

Existing Rule 1400.0300, subp. 1a(C)(7) requires that the notice of hearing contain a paragraph advising persons that written materials may be submitted into the hearing record after the public hearing is concluded. It is proposed to amend it to specify that written materials must be received at the Office of Administrative Hearings no later than 4:30 p.m. on the final day of the comment period.

This rule is needed because experience has shown an unfortunate number of cases where commentators mailed their comments on the last day of the comment period. These comments would then be received a day or two later, and would be late. It is believed that this has happened because persons assume that so long as their submissions were postmarked by the last day, they would be valid. In fact, that has never been the practice of the Office. There is a need to specify this, so that persons who desire to have their comments considered are aware of the specific deadlines involved.

Requiring this warning in the notice of hearing will assure that it appears not only in the State Register, but also in the notices which are mailed to interested persons. While the Office is proposing to adopt a separate rule stating that all comments must be received by 4:30 p.m. on the final day in order to be considered (see below), that separate rule will not necessarily provide meaningful notice to the public. Inserting it in the notice will make it more likely that commentators will become aware of the requirement and avoid the problems of late-filed comments, yet it will not substantially increase any burdens on an agency or persons who read these notices.

Proposed Rule 1400.0500, subp. 1a(G) requires any agency setting or changing fees through the rulemaking process to file a statement, together with the Notice of Hearing, that the agency has complied with Minn. Stat. § 16A.128, subd. 2a. Requiring this statement will serve to notify agencies engaged in rulemaking of the requirements of the statute. Since many agencies use the Notice of Hearing requirements as a "checklist" of the actions required prior to publication of the Notice of Intent to Adopt Rules, including this provision at this point in the Office's rules will notify agencies of the statutory requirement in a timely fashion. The only instance in recent rulemakings where Minn. Stat. 16A.128, subd. 2a applied, the agency was unaware of the requirements of that statute. Although the failure to comply was not found to be a defect in that instance, the proposed item is needed to assure prospective compliance with the statute. Since the effect of the proposed item is merely to require a statement from the agency that it has complied with the statute, there will be no substantial increase in the burden carried by agencies in their rulemaking processes.

Existing Rule 1400.0500, subp. 1 is being amended for the same reasons as Proposed Rule 1400.0300, subp. 1a(G). No substantive change is intended.

Existing Rule 1400.0500, subp. 3 is being amended solely to improve the grammar of the first sentence. No substantive change is intended.

Existing Rule 1400.0850 is being amended in a manner to parallel the "must be received at the Office by 4:30 p.m." amendment discussed in connection with the notice of hearing. It is appropriate to include that requirement in this rule as well as in the notice, so that persons looking in the rules to determine the deadline would find it in a logical place.

The requirement that documents be received by the close of business on the final comment day has been the practice of the Office since it opened for business in 1976. Hearing examiners and administrative law judges have always attempted to mention this policy in their oral opening statements at the start of a rulemaking hearing, and it has always been included in the Office's handout distributed at each rulemaking hearing. Nonetheless, it makes sense that it be set forth in this rule so that there is no debate about enforcibility, and so that somebody looking for it will find it easily.

Contested Cases

Existing Rule 1400.5100, subps. 4 and 5, have created confusion. They define two types of contested cases: "conference contested cases" and "formal contested cases". They appear in the rules only because of an historical accident. There is only one place in the entire contested case rules where the terms are used. Yet their definitions, placed as they are at the start of the contested case rules has caused many people to seek (in vain) for the operative rules where they would make a difference.

During the 1984 revision of the contested case rules, the Office proposed that a number of the existing rules be modified to reflect a less formal approach to contested cases. These less formal procedures were to be used in "conference contested cases". However, during that proceeding, the ALJ ruled that the Office did not have authority to classify cases, and participants were unable to agree to any voluntary classification system. Therefore, the Office withdrew its proposed procedural rules for "conference contested cases". But the definitions were left in place. In a later proceeding, relating to rules to implement the Equal Access to Justice Act, the term "conference contested case" was used, once. However, the retention of these definitions at the start of the contested case rules has caused a great deal of confusion and wasted time. Persons call the Office with some frequency to inquire about where they can find the "conference contested case rules". They report that they have searched in vain through the existing rules and have not been able to find them. These definitions need to be removed. The only rule where they matter (part 1400.8401, subp. 5b) is being proposed for amendment in this proceeding, so there will no longer be any need for the definitions.

Existing Rule 1400.5100, subp. 9 defines "service" and "serve". It deals with personal service, service by mail or overnight express mail service, service upon people confined to institutions, and similar matters. What is missing from it, however, is a recognition of the growing use of electronic facsimile transmission devices or "fax machines". When a statute or rule requires that a document be served upon the judge or upon the Office, there is

currently no provision for the use of facsimile transmission. The purpose of this rule is to add facsimile transmission as a method of perfecting service upon the Office or upon the judge. The Office considered, but rejected, the idea of adopting a rule which would permit facsimile transmission as a way for one party to serve another. It was felt that there were too many problems with such a rule at the current time, and that it would be better for the Office to wait before legislating in that area.

The Office acquired a facsimile transmission machine in April of 1989, and it has been in continuous use since then. It has proven to be a valuable tool for the receipt and transmission of time-sensitive documents. More importantly, it has been entirely reliable. The Office is unaware of any instances in which a person claims to have sent something to us which was not received. Similarly, there have been no reports of persons who have not received documents which a judge has sent to them. We believe that the use of facsimile transmission will only increase, and that it is important to recognize it in the Office's rules.

The Rules of Civil Procedure for the District Courts were amended, effective January 1, 1989, to allow persons to file documents with the district courts by facsimile transmission, so long as certain conditions were met. This followed an experimental trial period that began in September of 1987 in selected judicial districts. The experiment proved to be a success, and so the Supreme Court amended the rules to allow it on a statewide basis. The court required that within five days after receipt of a facsimile transmission, the party filing the document must forward a $5.00 transmission fee and the original signed document to the court. Assuming that that is done, however, filings are deemed complete at the time that the fax transmission is received by the court. The filed facsimile is given the same force and effect as the original. The Office of Administrative Hearings considered this court rule carefully, and determined that there was no reason to impose any sort of transmission fee, at least at the current time. Otherwise, it was followed.

Existing Rule 1400.5600, subp. 2(D.) is changed to correct a minor wording error in the current rule.

Existing Rule 1400.5700 provides for the filing of a notice of appearance. The first sentence of the rule requires that a notice be filed with the judge and served upon all other known parties. The second sentence indicates the filing must be within 20 days of the date of service of the notice of and order for hearing, but suggests by its wording that the notice only has to be filed with the judge, not the other parties. Some individuals have focused upon this second sentence, ignored the first sentence, and failed to file with the other parties. This creates wasted time, and occasional surprise. Therefore, the Office is proposing to amend the second sentence to make it clear that the filing must be both with the judge and with the other known parties.

The notice of appearance serves a number of purposes, one of which is to facilitate communication between parties and counsel. It is important for all parties to have an up-to-date service list and knowledge of representation of other parties. It is reasonable, therefore, to make this addition to the rule to make it clear that the notice of appearance must be served upon both the judge and all other known parties.

Existing Rule 1400.5900, subp. 2(C.) deals with the initiation of mediation. It currently provides that no matter shall be ordered for mediation if the agency or any party is opposed to mediation. It is proposed to be amended to provide that mediation may be initiated so long as at least two parties, including the agency, have agreed to mediation.

This rule was initially proposed in 1984, and adopted in 1985. The Office's experience with formal mediation under this rule is still limited. However, enough experience has been garnered to justify making changes to this rule.

In two-party cases, it is impossible to mediate a dispute without both parties involved. However, in multi-party cases, it is possible to have a successful mediation without all of the parties agreeing to its outcome. In a multi-party mediation setting, the participation of some parties is essential, while the participation of others is not essential. The Office has had situations occur where all but one of the parties in a multi-party dispute wanted to at least try a mediation. In that particular case, the objecting party was essential to the process, so mediation was not initiated. But what if all of the essential parties want to mediate a matter, but one minor party does not. Should that prohibit the use of mediation? The Office believes it should not if the judge, the agency and the remaining parties believe it would be fruitful to attempt mediation, even in the absence of the objecting party. The Office has chosen to amend this rule to allow the chief judge to initiate mediation. If the mediation is successful, the objecting party may decide to adopt the result, or may not. The law has mechanisms for dealing with that decision.

Existing Rule 1400.5950, subp. 5 provides that a mediation process terminates when any party, any directly affected person, or the agency announces its unwillingness to continue. The Office has been lucky enough to avoid the actual termination of a mediation process as a result of this rule, but judges within the Office who conduct mediations have, on a few occasions, raised concerns that literal application of this rule could result in an unfortunate termination of mediation.

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In two-party cases, it is impossible to continue a mediation without both parties involved. However, in multi-party cases, it is possible to have a successful mediation without all of the parties agreeing to its outcome. In a multi-party mediation setting, the participation of some parties is essential, while the participation of others is not essential. The Office has had situations occur where all but one of the parties wanted to continue an ADR process. The one party determined it had greater political leverage by making a dramatic withdrawal from the process and holding a press conference to condemn it. Should a mediation process automatically terminate in such a case? The Office believes it should not if the judge, the agency and the remaining parties believe it would be fruitful to continue the process, even in the absence of the withdrawing party. The Office has chosen to amend this rule to allow the remaining parties to determine whether or not the mediation ought to continue. If the mediation is successful, the withdrawing party may decide

to adopt the result, or may not. The law has mechanisms for dealing with that decision.

Existing Rule Part 1400.5950, subps. 3 and 5 both include the concept of a "directly affected person". A review of the rulemaking record at the time this rule was adopted illustrates that this concept was introduced into the rule in order to allow the rule to be used for both contested cases and rulemaking. As originally proposed back in 1984, the rule applied to both contested cases and rulemaking. In that proceeding, it was concluded that the Office had authority to adopt the rule for contested cases, but that the Office lacked statutory authority to adopt the rule for rulemaking proceedings. Therefore, the rule was modified by deleting most of the language which applied to rulemaking proceedings. In rulemaking proceedings, there are no "parties" as such. In order to have a mediation in a rulemaking proceeding, it was felt necessary to include, as participants in the mediation, interested persons. These were defined as "directly affected persons". When the rules were modified after the hearing to delete the references to rulemaking proceedings, not all the references to "directly affected persons" were deleted. This was either an oversight, or a mistake of judgment. Whichever it was, it is appropriate to correct it at this time. The Office has been asked to involve itself in a number of environmental mediations, for example, where the number of directly affected people is very large. There is no need for the concept of "directly affected person" in the rule when it applies only to contested cases.

Existing Rule 1400.6000 deals with defaults. It defines what constitutes a default, and sets forth the consequences of default. The Office is proposing that the rule specify that a default occurs not only when a party fails to appear at a hearing, but also when a party fails to appear at a prehearing conference or settlement conference without the prior consent of the administrative law judge.

Existing Rule 1400.6700, subp. 1(A) deals with discovery, and provides that each party must disclose the names and addresses of all witnesses that it intends to call upon demand by another party. The proposed amendment would require that the disclosure also contain a brief summary of the testimony of the witness.

Individual judges have received complaints suggesting that the wording of the existing rule creates unnecessary paperwork when a party is given merely a list of the names and addresses of proposed witnesses, without any indication of their employment affiliation or other "clues" regarding the topic of their testimony. In order to be safe, parties are often forced to use another discovery tool to determine what the witness is going to testify about. The frequency of complaints is low, but it is better to eliminate them than to have a rule which forces unnecessary paperwork.

There are a number of options for solving the problem. One option is that chosen above, requiring a brief summary of testimony. Another option would be to require disclosure of the employment affiliation of the witness. Yet another option would be to require disclosure of the subject matter of the testimony and the substance of the facts and/or opinions to be elicited. There are advantages and disadvantages of each. The Office chose to require a brief summary of the testimony because it appeared to represent the most reasonable balance between providing a meaningful idea of who the witnesses were and what they were going to say on the one hand, and, on the other hand, the burden upon the party who must answer the discovery request.

Existing Rule 1400.7100, subp. 2 deals with necessary preparation, and requires a party to have all evidence be presented, both oral and written, available on the date set for hearing. A problem which has arisen in the past, and has resulted in interruptions of hearings and wasted time, occurs when parties do not have adequate copies of their exhibits available for other counsel. At present, there is no rule requiring this, and while most attorneys are prepared with adequate copies, not all are, nor are many pro se persons who are unfamiliar with common lawyering practice. When there are an insufficient number of copies, either some parties go without one, or, more commonly, the hearing is interrupted while adequate copies are made. This interruption could be avoided if there were wider knowledge of the practice of having adequate copies available at the hearing.

The approach chosen by the Office is a reasonable one because it attempts to solve the problem without putting undue burden on parties. The Office considered adopting a rule requiring the parties to supply all other parties with a copy of each and every exhibit offered, regardless of size or need. That, however, was rejected as excessive. Consideration was also given to adopting a procedure similar to that proposed in the Minnesota Civil Trialbook, whereby each party is required to prepare a list of exhibits to be offered, and exchange the list with other counsel, and then, prior to the commencement of trial, make all documents on the list available by the proponent for examination and copying by the other parties. That was rejected as being unduly burdensome for simple cases. The Office also considered some of the local rules adopted by various judicial districts around the State. While they vary, generally they require that all exhibits be made available for inspection by opposing counsel prior to trial. Some require that exhibits be made available for examination and copying no less than 14 days prior to the date the case is scheduled to be called for trial. The local rules clearly anticipate that the identification, inspection and copying of exhibits will take place before a trial, rather than during it.

The Office has chosen not to focus upon prehearing disclosure and production, but instead has elected to require that copies be supplied at the hearing. In larger cases where experienced attorneys are involved, it is expected that discovery (either formal or informal) will be the mode for document production and copying. Distribution of copies at the hearing will be unnecessary in those cases. The proposed rule makes provision for that. In smaller cases, however, where discovery is not used or attorneys are not involved, the rule will come into play. The rule is not intended to foreclose discovery or prehearing production of documents, but in cases where that has not occurred, the rule will require copies.

Existing Rule 1400.7400, subp. 1 provides that the official record of each contested case shall be sent to the agency upon issuance of the judge's final report, except for the audiomagnetic recordings of the hearing. The recordings are kept by the Office. Nowhere in statute or rule is it specified how long the audiomagnetic (hereinafter "tape") recording should be maintained by the Office. The proposed amendment fills that gap by specifying a retention time.

At the present time, the Office is maintaining all tapes until a decision is made on this rule. This has resulted in the retention of a very large number of tapes. They consume space, and, more importantly, they represent assets which are tied up and unavailable for reuse. The Office has experimented with

a variety of ways to solve this problem. In the past, the Office has routinely sent out letters approximately three years after the end of a hearing, asking the Special Assistant Attorney General who participated in the hearing or the agency head whether or not the tapes could be erased. This proved to be quite burdensome, both for the Office and the persons who replied to the letters. The Office believes that a uniform retention time, with provisions for exceptions, would be less burdensome.

Five years was selected as a reasonable time to maintain tapes based upon the Office's experience when it was sending out those inquiries. There were only a few situation in which there has been a request to keep tapes of hearings longer than that. It is not necessary to set an absolute maximum, however, because the rule allows an agency to request that tapes be maintained for a longer period, so long as they make their request on a case-by-case basis. It is not anticipated that agencies will file "blanket" requests. However, in the unusual case that an agency would desire to have a record maintained for longer than that, the rule allows them to do so.

Existing Rule 1400.7500 provides for continuances, and set forth standards for determining what constitutes "good cause" for a continuance. One of the bases for granting a continuance is that the parties have agreed to a settlement of the case. There is no mention in the rule of a situation where the parties need more time to reach a settlement. The existing rule contemplates that settlement talks will have been completed prior to requesting a continuance. Experience has shown to the contrary: that oftentimes, settlement talks have not been completed, but are far enough along to suggest that there is a reasonable likelihood of settlement if the parties are given more time. Clearly, settlements are to be encouraged. This amendment will allow for continuances to allow for the completion of settlement talks.

The existing rule takes a "hard line" on continuances. When it was adopted, the Office made a showing that continuances waste time and money for all participants when they are granted too liberally. That is still true. However, given the judicial (and societal) attitude encouraging settlement of civil matters, the existing rule has been frequently waived by ALJs who have granted continuances when it appeared to them that settlement talks were serious, and reasonably likely to result in a settlement. This amendment will permit that to continue. It contains sufficient safeguards to avoid abuse, yet should allow parties an opportunity to complete serious settlement talks.

Existing Rule 1400.8300 provides that in those cases (such as Human Rights and OSHA) where the judge's decision is binding on the agency, a petition for reconsideration or rehearing shall be filed with the judge. The rule is silent as to what standards the judge should use in granting or denying such a petition. Judges have often looked to the Rules of Civil Procedure for the District Courts when the Office's rules are silent, but the absence of any rule for administrative proceedings leaves doubts in the mind of attorneys, parties and judges as to exactly what standards should be used. It is appropriate for there to be a rule that specifies the standards, in order to eliminate that confusion and to also eliminate the risk of inconsistencies between judges.

The standards selected are taken from the Rules of Civil Procedure, both Rule 59 and Rule 60. Rule 59 contains the grounds for the granting of a new trial, while Rule 60 contains the grounds for granting relief from a decision. The Office considered using only one or the other, but in the interest of having a complete rule, it was thought best to select provisions from both.

It is reasonable to use standards from the Rules of Civil Procedure, as they have been interpreted over the years by courts, and guidance is available in attempting to determine whether or not a particular standard applies in a particular case. It is important, however, to recognize that administrative proceedings are different from court proceedings in a number of ways relevant to this rule. For one thing, an agency is being billed for every hour spent deciding a motion and for every hour spent in rehearing all or part of a proceeding. That expense must be weighed against the severity of the grounds alleged in the petition, so that agencies are not burdened with unnecessary costs. On the other hand, if there is a serious error in the initial proceedings, it is important to all parties that the error be corrected as quickly and cheaply as possible. The Office considered a procedure whereby all such requests would be forwarded to the agency required to pay for any rehearing, but rejected that option because it gave too much power to the agency and because the ALJ who heard the case is in a far better position to evaluate the merits of the petition. The use of the standard "inconsistent with substantial justice" is designed to prevent rehearings or reconsideration for harmless errors or immaterial matters.

The limitation of time, based upon the time for appeal of the underlying action, is based upon a balancing of (a) a moving party's right to obtain complete justice and (b) a nonmoving party's right to freedom from seemingly endless litigation. Presumably, the appeal periods contained in statute and rule represent an appropriate balancing of those interests. Moreover, they areeasily ascertainable and have been interpreted so as to provide guidance to judges faced with questions.

Existing Rule 1400.8401, subp. 3 is part of the contested case rule relating to the payment of expenses and attorney's fees pursuant to the Equal Access to Justice Act, Minn. Stat. §§ 3.761 to 3.765. The law directs the Chief Administrative Law Judge to adopt rules to "establish uniform procedures for the submission and consideration of applications for an award of fees and expenses in a contested case". Pursuant to that directive, the Office did, in 1987, adopt this rule. The rule provides that a party seeking an award must submit an application "within 40 days of a final disposition in the contested case". The rule makes it clear that the application must be received at the Office no later than 4:30 p.m. on the 40th day.

The 40-day limit for filing an application does not comport with the decision of the Court of Appeals in the case of Leisure Hills of Grand Rapids v. Levine, 366 N.W.2d 302, rev. denied (Minn. App. 1985). The gist of that case is that when the Legislature has not placed a limit on an agency's jurisdiction to review a matter after a given time period, an agency cannot limit its jurisdiction by adopting a rule setting a time limit. The Leisure Hills rule has been reaffirmed in Matter of Emmanuel Nursing Home, 411 N.W.2d 511 (Minn. App. 1987), rev. denied (Minn. 1987).

In one of the few cases brought to date under the Equal Access to Justice Act, an application for fees was filed more than 40 days after the agency's final decision. In reviewing the facts of that case, and applying the rule of Leisure Hills, the Administrative Law Judge determined that the 40-day rule was invalid, and could not bar the claim. In the Matter of the Occupational License of Jack Haymes, OAH Docket No. RACE-87-003-AK, 6-2600-1000-2, reversed on other grounds, 427 N.W.2d 248 (Minn. App. 1988), reversed on other grounds, 444 N.W.2d 257 (Minn. 1989). Neither of the appellate decisions addressed the Leisure Hills issue.

While public policy favors having a reasonable limitation on filing of claims, Leisure Hills requires that limitation to be imposed by the Legislature, not the Office. Therefore, the Office is proposing to repeal the references to 40 days which currently exist in Part 1400.8401.

Existing Rule 1400.8401, subp. 5b (C) contains a reference to "the procedural rules governing conference contested cases". As explained above, in connection with the amendment proposed for existing Rule 1400.5100, subp. 4, there are no rules for "conference contested cases". Retaining this reference only creates unnecessary confusion and wasted time. It is appropriate, therefore, to change the reference to refer the reader to the rules for the Revenue Recapture Act hearings, which are Parts 1400.8510 through 1400.8612. Those are the rules which currently apply. This is not a substantive change, but rather only changes the reference to an existing version of the rules. The amendment also clears the way to delete the definition of "conference contested case", which, as explained above, has been troublesome for the public and practitioners.

Existing Rule 1400.8402 provides that the Equal Access to Justice Act rules apply to contested cases pending on or commenced after August 1, 1986. The rule is no long needed, and it is reasonable to repeal it in the interest of efficiency. No substantive change is intended by this repeal.

Revenue Recapture Act Hearings

Existing Rule 1400.8510, subp. 4 contains a definition of "service" or "serve". For exactly the same reasons as were given for amendment to 1400.5100, subp. 9 relating to allowing the use of fax machines for service or filing upon the Office or an administrative law judge, the Office is proposing exactly the same language for this provision. The discussion in this Statement relating to that rule is hereby adopted as the justification for this rule as well.

Existing Rule 1400.8560 relates to defaults. It is being amended so that it conforms to the proposed rule on defaults in contested cases. The substance of the change is to provide that a default occurs when a party fails to appear, without the consent of the administrative law judge, at a prehearing conference or a settlement conference. The reasoning set forth as justifying the change in the contested case rules is equally applicable here, and is incorporated at this point.

Existing Rule 1400.8601, subp. 2 provides for witness fees in Revenue Recapture Act cases. It refers to the fee applicable to district courts pursuant to Minn. Stat. § 357.22 as being $10.00 per day and $.12 per mile. In fact, that statute now provides for witness fees of $10.00 per day and $.24 per mile. The purpose of the change proposed for this rule is to refer to the statute, without explicitly detailing the dollar amounts. This is being done in order to avoid having to amend these rules every time the statute is amended. Consistency with the statute is important, to avoid confusion.

Existing Rule 1400.8604, subp. 1 deals with preparation for a Revenue Recapture Act hearing, and requires parties to have all evidence available on the dates set for hearing. It is proposed for amendment to conform it to the contested case rule being amended in this proceeding so that both of

them require that parties have an adequate number of copies of exhibits available for use at the hearing. The reasons given for the change in contested case rules are the reasons which the Office uses to justify this change as well.

Existing Rule 1400.8609, subp. 1 relates to the record being sent back to the agency, except for the tape recordings, which will be maintained at the Office. The Office is now proposing to amend that rule in the same way as it is proposing to amend the contested case rules -- that the Office is required to keep the tapes for five years, unless the agency specifically requests a longer retention period on a case-by-case basis. The justification given for the contested case rules is the same justification that applies here.

Existing Rule 1400.8613 is a severability clause. The most recent version of the Minnesota Rules Drafting Manual, published by the Office of the Revisor of Statutes, suggests that such a clause is unnecessary under normal circumstances. The Office is, therefore, proposing to repeal it as unnecessary. The Office has no intent to change the substance of the rule by this action, and is doing so in reliance upon Minn. Stat. § 645.20, which makes the provisions of all laws severable, which is, in turn, applicable to rules as a result of Minn. Stat. § 645.001.

Power Plant Siting/Power Line Routing Rules

Existing Rule 1405.0200, subp. 6 defines "service" and "serve". The Office is proposing to amend this rule to provide for facsimile transmission on the Office. The language proposed here is the same language proposed for the contested case rule, Part 1400.5100, subp. 9, and the justification for its need and reasonableness in this instance is the same as there.

Existing Rule 1405.0300 sets forth the scope and applicability of these rules. It currently provides that the rules apply to the siting of large electric generating plants, the routing of high voltage transmission lines, and the route exemption process contained in Minn. Stat. § 116C.57, subd. 5. In 1989, the Legislature enacted Laws of Minnesota 1989, ch. 346, § 1, which adds an exemption process for certain large electric generating plant sites similar to the process for certain routes. This exemption process allows the Board to exempt a site for a proposed plant with a capacity of between 50 and 80 megawatts from the requirements of the Power Plant Siting Act. In order to ensure that there is no question about the applicability of these rules to the new site exemption process, it is necessary to add a provision to these rules that specifies that they apply to the site exemption process. It is appropriate that these rules do apply to those sites because the Board's proposed rules state that for both site and route exemptions the Board may, pursuant to Minn. Stat. 116C.06, order a public hearing as prescribed in these rules to determine if the proposed facility will cause significant human or environmental impact.

Existing Rule 1405.1400 is proposed for amendment as a result of proposed changes to the rules of the Environmental Quality Board in its Environmental Review Rules (Minn. Rules, chapter 4410) relating to large electric generating plants and high voltage transmission lines and in its Power Plant Siting Rules (Minn. Rules, chapter 4400). The Board is proposing that the environmental

impact statement process requirements for large electric power facilities now in the Environmental Review Rules be incorporated into the Power Plant Siting Rules as an alternative form of environmental review pursuant to Minn. Rule part 4410.3600. An environmental impact assessment is a component of the alternative review and is prepared in place of the draft and final environmental impact statement. The existing Office rule requires that the record remain open so long as it is necessary to receive the final environmental impact statement. Because of the changes proposed by the Board, it is necessary to amend this rule so the at the record will remain open for the sole purpose of receiving the Board's responses to relevant comments received on the environmental impact assessment. This change will make the rule consistent with the procedures defined in the Board's proposed rules. This change assumes that the Board's changes will, in fact, be adopted. If the Board's proposed rules are not adopted, then the Office will withdraw this proposed change and leave the existing rule intact.

Existing Rule 1405.1800, subp. 3 provides for the tape recording of hearings unless the Chief Administrative Law Judge determines that a court reporter is more appropriate. It says nothing about how long the tapes should be retained after the record is returned to the agency. For the same reasons set forth in connection with the change to the contested case rule, the Office is proposing the same change here -- that the tapes be maintained for five years from the date that the record is returned to the agency, unless the agency requests a longer retention period on a case-by-case basis.

Existing Rule 1405.1800, subp. 5 relates to draft environmental impact statement being entered into the record of the hearing process, along with comments and responses. As explained under "Existing Rule 1405.1400", the Environmental Quality Board has proposed changes in its rules to require that an environmental impact assessment be prepared as a component of alternative review for large electric power facilities in place of a draft environmental impact statement. It is therefore necessary to amend the Office's rule to require that the environmental impact assessment be entered into the hearing record at a point during the hearing process which will allow all persons an opportunity to review and comment on the material. This change will make the Office's rule consistent with the procedures of the Board's proposed amendments to the Power Plant Siting and Environmental Review rules. This change assumes that the Board's proposed changes will, in fact, be adopted. If the Board's proposed rules are not adopted, then the Office will withdraw this proposed change and leave the existing rule intact.

Existing Rule 1405.2800 is a severability clause, and it is proposed for repeal, for the same reasons as given above in connection with existing Rule Part 1400.8613. No substantive change is intended.

IV. CONCLUSION

Most of the amendments proposed are expected to be noncontroversial because they are housekeeping matters of no substance. A few of the proposed changes are substantive. The Office is open to suggestions for improvements in all of these proposals, and hopes that readers will come forward with ideas for improvements. The Office believes it has justified its proposal as both needed and reasonable, but recognizes that there may be even better ways to solve the problems it has identified. Readers are urged to submit their ideas.

(H)

Proposed Rules

Pursuant to Minn. Stat. §§ 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 Permanent Rules Relating to Rulemaking, Contested Case, and Revenue Recapture Act Hearings

Notice of Intent to Adopt Rules Without a Public Hearing

NOTICE IS HEREBY GIVEN that the Minnesota Office of Administrative Hearings (hereinafter the "Office") intends to adopt the above-entitled rule amendments without a public hearing following the procedures set forth in the Administrative Procedure Act for adopting rules without a public hearing in *Minnesota Statutes*, sections 14.22 to 14.28. The statutory authority to make the proposed rule amendments is *Minnesota Statutes*, sections 14.51 (1988) and 116C.66 (1988).

All persons have 30 days in which to submit comment in support of or in opposition to the proposed rule amendments or any part or subpart of the rule. Comment is encouraged. Each comment should identify the portion of the proposed rule amendment addressed, the reason for the comment, and any change proposed. All comments must be **RECEIVED** at the Office of Administrative Hearings before 4:30 p.m. on Monday, September 17, 1990, in order to be considered.

Any person may make a written request for a public hearing on the proposed rule amendments within the comment period. If 25 or more persons submit a written request for a public hearing within the comment period, a public hearing will be held unless a sufficient number withdraw their requests in writing. 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 amendments 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.

Comments or written requests for a public hearing must be submitted to:

William G. Brown, Chief Administrative Law Judge
Minnesota Office of Administrative Hearings
Fifth Floor Flour Exchange Building
310 Fourth Avenue South
Minneapolis, Minnesota 55415

The proposed rule amendments may be modified if the modifications are supported by the data and views submitted to the Office and do not result in a substantial change in the proposed rule amendments as noticed.

A copy of the proposed amendments is attached to this notice. Most of these amendments constitute nonsubstantive updates and housekeeping changes. The rule regarding facsimile transmissions is a substantive change which affects the rights and obligations of parties and the public who participate in administrative hearings. The purpose of making these amendments at this time is to eliminate confusion resulting from outdated citations, outdated address and telephone numbers, and similar changes. In addition, experience in conducting several hundred hearings each year since the rules were last amended has suggested substantive improvements in a few of the rule provisions. The rule regarding facsimile transmission is proposed to incorporate available technology into the hearing process. The rules relating to plant siting are being modified to conform to changes being made by the Environmental Quality Board. Those changes will only be enacted if the Environmental Quality Board carries out its proposed rule changes. One free copy of the amendments to the rules of the Office of Administrative Hearings is available from Louise Cooper at the address above, or by calling her at (612) 349-2682.

A STATEMENT OF NEED AND REASONABLENESS that describes the need for and reasonableness of each provision of the proposed amendments and identifies the data and information relied upon to support the rule amendments has been prepared and is available from Ms. Cooper upon request.

The proposed rule amendments do not impose requirements on small businesses within the meaning of *Minnesota Statutes* § 14.115 (1989 Supp.). The proposed rule amendments will not require the expenditure of public money by local public bodies, nor will they affect agricultural lands. Therefore, *Minnesota Statutes* § 14.11 (1988) does not apply to these rule amendments.

If no hearing is required, upon adoption of the amendments, the amendments and the required supporting documents will be submitted to the Attorney General for review as to legality and form to the extent the form relates to legality. Any person may request notification of the date of submission to the Attorney General. 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 amendments as adopted, should submit a written request to Ms. Cooper at the address above.

Dated: 24 July 1990

William G. Brown
Chief Administrative Law Judge

Rules as Proposed

1400.0250 ~~SIZE~~ FILING OF MATERIALS.

Subpart 1. **Size.** All materials submitted to the administrative law judge or chief administrative law judge in a rulemaking proceeding, except the draft of the proposed or adopted rules prepared by the revisor of statutes, handwritten comments from members of the public and exhibits, must be on standard size 8-1/2-inch by 11-inch paper.

Subp. 2. **Facsimile transmission.** Any paper relating to hearings conducted by an administrative law judge under *Minnesota Statutes*, chapter 14, may be filed with or served on the office by facsimile transmission. The person filing the document must forward the original signed document within five days. Filings or service shall be effective at the time that the facsimile transmission is received by the office. The filing or service of a facsimile shall have the same force and effect as the filing or service of the original document.

1400.0300 INITIATION OF HEARING.

[For text of subpart 1, see M.R.]

Subp. 1a. **Filing documents.** Prior to giving notice of the hearing, the agency shall file with the chief administrative law judge, or the administrative law judge who will preside over the proceeding, the following documents:

[For text of items A and B, see M.R.]

C. The notice of hearing proposed to be issued that shall contain the following:

[For text of subitems (1) to (5), see M.R.]

(6) A statement advising interested persons that lobbyists must register with the state Ethical Practices Board, ~~which statement shall read as follows:~~ that questions should be directed to the board, and the board's current address and telephone number.

~~*Minnesota Statutes*, chapter 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 *Minnesota Statutes*, section 10A.01, subdivision 11 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 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 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, a statement that the comment period may be extended for a longer period not to exceed 20 calendar days if ordered by the administrative law judge at the hearing, a statement that the comments received during the comment period shall be available for review at the office of administrative hearings, and a statement that the agency and interested persons may respond in writing

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within three business days after the submission period ends to any new information submitted, and a statement that any written material or responses submitted must be received at the office no later than 4:30 p.m. on the final day. No additional evidence may be submitted during the three-day period.

[For text of subitems (8) to (14), see M.R.]

[For text of items D to F, see M.R.]

G. If required by *Minnesota Statutes*, section 16A.128, subdivision 2a, a statement that the agency submitted a copy of the notice and the proposed rules to the chairs of the house appropriations committee and senate finance committee prior to publishing the notice of intent to adopt rules in the *State Register*.

[For text of subp 2, see M.R.]

1400.0500 STATEMENT OF NEED AND REASONABLENESS.

Subpart 1. **Contents.** Each agency desiring to adopt rules shall prepare a statement of need and reasonableness which shall be prefiled pursuant to part 1400.0300, subpart 1 1a. The statement of need and reasonableness must contain 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 rules, including citations to any statutes or case law anticipated to be relied upon, citations to any economic, scientific, or other manuals or treatises anticipated to be utilized at the hearing or included in the record, and a list of any witnesses to be called by the agency to testify on its behalf, together with a summary of the testimony to be elicited from witnesses solicited to testify on behalf of the agency. The statement need not contain evidence and argument in rebuttal of evidence and argument presented by the public.

The statement of need and reasonableness must also contain the following:

A. If applicable, a statement complying with:

(1) *Minnesota Statutes*, section 14.115;

(2) *Minnesota Statutes*, sections 14.11, subdivision 2, and 17.80 to 17.84;

(3) *Minnesota Statutes*, sections 115.43, subdivision 1, and 116.07, subdivision 6;

(4) *Minnesota Statutes*, section 144A.29, subdivision 4;

B. if required by *Minnesota Statutes*, section 16A.128, ~~subdivision~~ subdivisions 1 and 2a, the approval of the commissioner of finance and notice to the chairs of the house appropriations committee and the senate finance committee if the proposed rules establish or modify a fee charged; and

C. a statement complying with the requirements of any other law or rule prescribing in any manner the matters to be included in the statement of need and reasonableness or which the agency is required by law or rule to consider in the adoption of a rule.

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.

[For text of subp 2, see M.R.]

Subp. 3. **Verbatim agency presentation.** If the agency desires, the statement of need and reasonableness may contain the verbatim affirmative presentation by the agency, provided that copies are available for review at the hearing, and 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 proposed rules and the agency's statement shall be available at the hearing for questioning by the administrative law judge and other interested persons or to briefly summarize all or a portion of the statement of need and reasonableness if requested by the administrative law judge.

1400.0800 CONDUCT OF HEARINGS.

[For text of subps 1 to 6, see M.R.]

Subp. 7. **Exhibits.** The agency shall introduce as exhibits the documents required to be filed with the administrative law judge or the chief administrative law judge pursuant to parts 1400.0300, subpart 1 1a, items A, B, and E; and 1400.0600.

[For text of subps 8 to 13, see M.R.]

1400.0850 RECEIPT OF WRITTEN MATERIALS.

The administrative law judge shall allow written materials to be submitted and recorded in the hearing record for a period of five working days after the public hearing ends, or for a longer period not to exceed 20 calendar days if he or she so orders. The written materials must be received at the Office of Administrative Hearings no later than 4:30 p.m. on the last day for submission of written materials. The agency and all interested persons must be allowed to review the comments received during the comment period and must be allowed three business days after the submission period ends to respond in writing to any new information submitted. The

responses must be received at the office no later than 4:30 p.m. on the third business day. During this three-day period, the agency may also indicate in writing whether there are amendments suggested by other persons which the agency is willing to adopt. Additional evidence may not be submitted during the three-day period. The written responses must be included in the rulemaking record.

1400.0900 RULEMAKING RECORD.

The hearing record shall be closed upon the last date for receipt of written responses filed pursuant to *Minnesota Statutes*, section 14.15, subdivision 1.

The rulemaking record shall include:

A. all documents enumerated in parts 1400.0300, subpart 1 1a, and 1400.0600;

[For text of items B to J, see M.R.]

1400.5100 DEFINITIONS.

[For text of subps 1 to 3, see M.R.]

Subp. 4. [See Repealer.]

Subp. 5. [See Repealer.]

[For text of subps 6 to 8, see M.R.]

Subp. 9. **Service; serve.** "Service" or "serve" means personal service or, unless otherwise provided by law, service by first class United States mail or a licensed overnight express mail service, postage prepaid and addressed to the party at his or her last known address. An affidavit of service shall be made by the person making the service. Service by mail or licensed overnight express mail service is complete upon placing the item to be served in the mail or delivering it to the authorized agent of the express mail service. Personal service may be accomplished by either delivering a document to the person or by leaving a document at the person's home or place of business with someone of suitable age and discretion who resides in the same house or who is located at the same business address of the person to be served.

If a person is confined to a federal or state institution, a copy of the document must also be served upon the chief executive officer of the institution.

Postage shall be prepaid. Mail to a person other than a state agency shall be addressed to the last known address of the person. Agencies of the state of Minnesota may also deposit the document with the Central Mailing Section, Publications Division, Department of Administration, addressed as above.

Any paper relating to hearings conducted by an administrative law judge under *Minnesota Statutes*, chapter 14, may be filed with or served on the office by facsimile transmission. The person filing the document shall forward the original signed document within five days. Filings or service shall be effective at the time that the facsimile transmission is received by the office. The filing or service of a facsimile shall have the same force and effect as the filing or service of the original document.

1400.5200 SCOPE; CONVERSION OF CONTESTED CASE.

The procedures in parts 1400.5100 to 1400.8400 shall govern all contested cases required to be conducted by the office under *Minnesota Statutes*, chapter 14. The procedures in parts 1400.8510 to ~~1400.8613~~ 1400.8612 shall govern all cases conducted pursuant to the Revenue Recapture Act, *Minnesota Statutes*, sections 270A.01 to 270A.12 and shall also be utilized in those cases where the parties agree to use them.

1400.5600 NOTICE AND ORDER FOR HEARING.

[For text of subpart 1, see M.R.]

Subp. 2. **Contents of 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:

[For text of items A to C, see M.R.]

D. A statement of the allegations or issues to be determined together with a citation to the relevant statutes or rules allegedly violated or which control the outcome of ~~one~~ the case;

[For text of items E to M, see M.R.]

[For text of subps 3 to 7, see M.R.]

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1400.5700 NOTICE OF APPEARANCE.

Each party intending to appear at a contested case hearing shall file with the judge and serve upon all other known parties a notice of appearance which shall advise the judge 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 judge~~ and served 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 and serve a notice may, in the discretion of the judge, 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.

1400.5950 MEDIATION.

[For text of subps 1 and 2, see M.R.]

Subp. 3. **Initiating mediation.** Mediation may be initiated in the following ways:

[For text of items A and B, see M.R.]

C. Upon receipt of a request for mediation, the chief judge or designee shall contact, either orally or in writing, the agency and all parties ~~or directly affected persons~~ to determine whether they are willing to participate in mediation. No matter shall be ordered for mediation if the agency~~, any party, or directly affected person~~ is opposed.

D. If the chief judge determines that ~~no party, directly affected person, or the agency is opposed~~ at least two parties, including the agency, have agreed to mediation, the chief judge shall appoint a mediator and issue an order for mediation, which shall set forth:

(1) the name, address, and telephone number of the mediator; and

(2) a date by which the mediator must initiate the mediation proceedings.

The order shall be served upon the agency, the parties, ~~or directly affected persons,~~ and the judge assigned to the contested case ~~or rulemaking proceeding~~, if any.

E. The mediator must initiate the mediation proceedings by contacting the agency and each party ~~or directly affected person~~ no later than the date set forth in the order for mediation.

[For text of subp 4, see M.R.]

Subp. 5. **Termination.** The mediation process shall terminate when ~~any party, any directly affected person,~~ all parties are, or the agency ~~announces its unwillingness~~ is, unwilling to continue mediation; or ~~the parties and the agency sign~~ a settlement agreement is signed setting forth the resolution of the disputed issues.

Upon termination, the mediator shall either forward the signed settlement agreement to the agency or the judge, if applicable, for appropriate action; or inform the agency or the judge, if applicable, that the mediation has been terminated without agreement.

[For text of subps 6 and 7, see M.R.]

1400.6000 DEFAULT.

The agency or the judge, where authorized, 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 without the prior consent of the judge at a prehearing conference, settlement conference, or a hearing or fails to comply with any interlocutory orders of the judge.

1400.6700 DISCOVERY.

Subpart 1. **Witnesses; statement by parties or witnesses.** Each party shall, within ten days of a demand by another party, disclose the following:

A. The names and addresses of all witnesses that a party intends to call at the hearing, along with a brief summary of each witness' testimony. All witnesses unknown at the time of said disclosure shall be disclosed as soon as they become known.

[For text of item B, see M.R.]

[For text of subps 2 to 5, see M.R.]

~~THE HEARING~~

1400.7100 RIGHTS AND RESPONSIBILITIES OF PARTIES.

[For text of subpart 1, see M.R.]

Subp. 2. **Necessary preparation.** A party shall have all evidence to be presented, both oral and written, available on the date for hearing. Requests for subpoenas, depositions, or continuances shall be made within a reasonable time after their need becomes evident

to the requesting party. In cases where the hearing time is expected to exceed one day, the parties shall be prepared to present their evidence at the date and time ordered by the judge or as agreed upon at a prehearing conference. Parties shall have enough copies of exhibits so that they can provide a copy to each other party at the time the exhibit is introduced, unless that other party has already obtained a copy through discovery.

[For text of subps 3 to 5, see M.R.]

1400.7400 HEARING RECORD.

Subpart 1. **Content.** The judge shall maintain the official record in each contested case until the issuance of the judge's final report, at which time the record, except for the audiomagnetic recordings of the hearing, shall be sent to the agency. The audiomagnetic recordings shall be retained by the office for five years from the date that the record is returned to the agency. Unless an agency requests a longer retention period for a specific case, the recordings may be erased or otherwise destroyed at the end of the five-year period.

The record in a contested case shall contain all pleadings, motions, and orders; evidence offered or considered; offers of proof, objections, and rulings thereon; the judge's findings of fact, conclusions, and recommendations; all memoranda or data submitted by any party in connection with the case; and the transcript of the hearing, if one was prepared.

[For text of subp 2, see M.R.]

1400.7500 CONTINUANCES.

Requests for a continuance of a hearing shall be granted upon a showing of good cause. Unless time does not permit, a request for continuance of the hearing shall be made in writing to the judge and shall be served upon all parties of record and the agency if it is not a party. In determining whether good cause exists, due regard shall be given to the ability of the party requesting a continuance to effectively proceed without a continuance. A request for a continuance filed within five business days of the hearing shall be denied unless the reason for the request could not have been earlier ascertained.

"Good cause" shall include: death or incapacitating illness of a party, representative, or attorney of a party; a court order requiring a continuance; lack of proper notice of the hearing; a substitution of the representative or attorney of a party if the substitution is shown to be required; a change in the parties or pleadings requiring postponement; and agreement for a continuance by all parties provided that it is shown that more time is clearly necessary to complete authorized discovery or other mandatory preparation for the case and the parties and the judge have agreed to a new hearing date, or, the parties are engaged in serious settlement negotiations or have agreed to a settlement of the case which has been or will likely be approved by the final decision maker.

"Good cause" shall not include: intentional delay; unavailability of counsel or other representative due to engagement in another judicial or administrative proceeding unless all other members of the attorney's or representative's firm familiar with the case are similarly engaged, or if the notice of the other proceeding was received subsequent to the notice of the hearing for which the continuance is sought; unavailability of a witness if the witness' testimony can be taken by deposition; and failure of the attorney or representative to properly utilize the statutory notice period to prepare for the hearing.

During a hearing, if it appears in the interest of justice that further testimony should be received and sufficient time does not remain to conclude the testimony, the judge shall either order the additional testimony be taken by deposition or continue the hearing to a future date and oral notice on the record shall be sufficient.

A continuance shall not be granted when to do so would prevent the case from being concluded within any statutory deadline.

1400.8300 RECONSIDERATION OR REHEARING.

Once a judge has issued a report, unless that report is binding on the agency, the judge loses jurisdiction to amend the report except for clerical or mathematical errors. Unless the report is a final order, binding on the agency, petitions for reconsideration or rehearing must be filed with the agency. Where the judge's decision is binding on the agency, a petition for reconsideration or rehearing shall be filed with the judge. The petition may be filed at any time until the time for appeal has elapsed or until an appeal is taken. A 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 judge 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.

In ruling on a motion for reconsideration or rehearing in cases where the judge's decision is binding on the agency, the judge shall grant reconsideration or rehearing if it appears that to deny it would be inconsistent with substantial justice and any one of the following has occurred:

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A. irregularity in the proceedings whereby the moving party was deprived of a fair hearing;

B. accident or surprise that could not have been prevented by ordinary prudence;

C. material evidence newly discovered that with reasonable diligence could not have been found and produced at hearing; or

D. fraud upon the hearing process.

The rehearing shall be conducted in the same manner prescribed for a hearing.

1400.8401 EXPENSES AND ATTORNEY FEES.

[For text of subps 1 and 2, see M.R.]

Subp. 3. **Application.** A party seeking an award of expenses and attorney's fees shall~~, within 40 days of a final disposition in the contested case,~~ submit to the judge an application that shows:

[For text of items A to D, see M.R.]

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 40th day following the date of issuance of the final disposition.~~

[For text of subps 4 and 5a, see M.R.]

Subp. 5b. **Extensions of time and further proceedings.**

[For text of items A and B, see M.R.]

C. In the event that an evidentiary hearing is required or permitted by the judge, the hearing and any related filings or other action required or permitted shall be conducted under ~~the procedural rules governing conference contested cases~~ parts 1400.8510 to 1400.8612.

[For text of subps 6 and 7, see M.R.]

1400.8510 DEFINITIONS.

[For text of subps 1 to 3, see M.R.]

Subp. 4. **Service, serve.** "Service" or "serve" may be accomplished by either delivering a document to an individual in person, or by leaving a document at his/her home with some person of suitable age and discretion who resides in the same house, or by mailing the document to the person by first class United States mail.

If a person is confined to a federal or state institution, a copy of the document must also be served upon the chief executive officer of the institution.

Postage shall be prepaid. Mail to a person other than a state agency shall be addressed to the last known address of the person. Agencies of the state of Minnesota may also deposit the document with the Central Mailing Section, Publications Division, Department of Administration, addressed as above.

Any paper relating to hearings conducted by an administrative law judge under *Minnesota Statutes*, chapter 14, may be filed with or served on the office by facsimile transmission. The person filing the document shall forward the original signed document within five days. Filings or service shall be effective at the time that the facsimile transmission is received by the office. The filing or service of a facsimile shall have the same force and effect as the filing or service of the original document.

1400.8560 DEFAULT.

A default occurs when a party fails to appear without the prior consent of the judge at a prehearing conference, settlement conference, or a hearing. If the claimant agency appears at a hearing but the debtor does not, the allegations in the notice of hearing shall be taken as true and deemed proved without further evidence. If the debtor appears at a hearing, but the claimant agency fails to appear, the administrative law judge shall recommend that the hearing be dismissed with prejudice. If neither the claimant party nor the debtor appear at a hearing, the administrative law judge shall recommend that the case be dismissed with prejudice.

1400.8601 SUBPOENAS.

[For text of subpart 1, see M.R.]

Subp. 2. **Service.** Subpoenas shall be served personally in the manner provided in part 1400.8510, subpart 4, item A. They shall not be served by mail. The witness fees applicable in the district courts pursuant to *Minnesota Statutes*, section 357.22 shall apply and shall be paid to the potential witness at the time of service. ~~Such fees are $10 per day for each day of attendance plus 12 cents~~

~~per mile for travel going to and returning from the place attendance. to be estimated from the witness' residence.~~

[For text of subp 3, see M.R.]

1400.8604 RESPONSIBILITIES AND RIGHTS OF PARTIES.

Subpart 1. **Necessary preparation.** A party shall have all evidence to be presented, both oral and written, available on the date for hearing. Requests for subpoenas, depositions, or continuances shall be made within a reasonable time after their need becomes evident to the requesting party. Parties shall have enough copies of exhibits so that they can provide a copy to each other party at the time the exhibit is introduced, unless that other party has already obtained a copy through discovery.

[For text of subps 2 to 4, see M.R.]

1400.8609 HEARING RECORD.

Subpart 1. **Maintaining.** The administrative law judge shall maintain the official record in each case until the issuance of the report, at which time the record, except for the audiomagnetic recordings thereof, shall be sent to the agency. The audiomagnetic recordings shall be retained by the office for five years from the date that the record is returned to the agency. Unless an agency requests a longer retention period for a specific case, the recordings may be erased or otherwise destroyed at the end of the five-year period.

[For text of subps 2 to 4, see M.R.]

1405.0200 DEFINITIONS.

[For text of subps 1 to 5, see M.R.]

Subp. 6. **Service; serve.** Unless otherwise provided by law, "service" or "serve" means service by first class United States mail, postage prepaid, and addressed to the person to be served at his last known address. An affidavit of service shall be made by the person making such service. Service by mail is complete upon the placing of the item to be served in the mail. Service may also be made personally.

Any paper relating to hearings conducted by an administrative law judge under *Minnesota Statutes*, chapter 14, may be filed with or served on the office by facsimile transmission. The person filing the document shall forward the original signed document within five days. Filings or service shall be effective at the time that the facsimile transmission is received by the office. The filing or service of a facsimile shall have the same force and effect as the filing or service of the original document.

1405.0300 SCOPE AND PURPOSE.

The procedures contained herein shall govern the conduct of all hearings conducted for the Environmental Quality Board involving the siting of large electric power generating plants, the routing of high voltage transmission lines, and to the site and route exemption ~~process~~ processes contained in *Minnesota Statutes*, section 116C.57, ~~subdivision~~ subdivisions 5 and 5a, provided, however, that the procedures for hearing concerning the revocation or suspension of a site certificate or construction permit shall be those contained in parts 1400.5100 to ~~1400.8500~~ 1400.8401, as are the hearings conducted pursuant to *Minnesota Statutes*, section 116C.57, subdivision 3, relating to the determination of emergencies. See part 1405.2700.

1405.1400 CONDUCT OF HEARING.

The proceedings shall be conducted substantially in the following manner. After opening the hearing, the administrative law judge shall indicate the procedural rules for the hearing including, but not limited to, the following:

A. all persons may present evidence and argument with respect to the issues and cross-examine witnesses;

B. all persons may be represented by legal counsel, but such representation is not required; and

C. the rules of evidence as set forth in part 1405.1700, subparts 3 to 8.

Cross-examination shall be conducted in a sequence determined by the administrative law judge. The record of the hearing shall be closed at a date to be set by the administrative law judge. Such date will correspond to a specific number of calendar days beyond the close of the last hearing date, computed pursuant to part 1405.0700, subpart 1. Written comment will be accepted if postmarked no later than the date set by the administrative law judge. However, the record shall remain open beyond that date for the sole purpose of receiving ~~the final environmental impact statement~~ board responses to relevant comments received on the environmental impact assessment.

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.

1405.1800 HEARING RECORD.

[For text of subps 1 and 2, see M.R.]

Subp. 3. **Recorder or reporter.** Unless the chief administrative law judge determines that the use of a court reporter is more appropriate, an audiomagnetic recording device shall be used to keep a record at any hearing which takes place under parts 1405.0200 to 1405.2800.

The audiomagnetic recordings shall be retained by the office for five years from the date that the record is returned to the agency. Unless an agency requests a longer retention period for a specific case, the recordings may be erased or otherwise destroyed at the end of the five-year period.

[For text of subp 4, see M.R.]

Subp. 5. **Environmental documents.** ~~Any draft environmental impact statement (in the case of routes) or any draft environmental report (in the case of sites) required to be prepared by rules of the board~~ The environmental impact assessment prepared pursuant to parts 4400.1210 and 4400.3210 shall be entered into the record at a point during the hearing process which will allow all persons an opportunity to review and comment on the material. In addition, all comments and responses to comments which the board desires to consider shall be entered into the record promptly after they are received.

REPEALER. *Minnesota Rules*, parts 1400.1300; 1400.5100, subparts 4 and 5; 1400.8402; 1400.8613; and 1405.2800 are repealed.

Minnesota Housing Finance Agency

Proposed Permanent Rules Relating to Publicly-Owned Transitional Housing

Notice of Intent to Adopt a Rule Without a Public Hearing

NOTICE IS HEREBY GIVEN that the Minnesota Housing Finance Agency intends to adopt the above rule without a public hearing following the procedures set forth in the Administrative Procedure Act for adopting rules without a public hearing in *Minnesota Statutes* sections 14.22 to 14.28. The statutory authority to adopt the rule is *Minnesota Statutes* 462A.06, subd. 4 and 11.

All persons have 30 days in which to submit comment in support of or in opposition to the proposed rule or any part or subpart of the rule. Comment is encouraged. Each comment should identify the portion of the proposed rule addressed, the reason for the comment, and any change proposed.

Any person may make a written request for a public hearing on the rule within 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 unless a sufficient number withdraw their request in writing. 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 agency will proceed pursuant to *Minnesota Statutes*, sections 14.131 to 14.20.

Comments or written requests for a public hearing must be submitted to:

Susan K. Noren, Legal Division
Minnesota Housing Finance Agency
400 Sibley St., Suite 300
St. Paul, MN 55101-1998
Telephone: 612/296-9794

The proposed rule may be modified if the modifications are supported by data and views submitted to the agency and do not result in a substantial change in the proposed rule as noticed.

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 the data and information relied upon to support the proposed rule has been prepared and is available from Susan K. Noren upon request.

If no hearing is required, upon adoption of the rule, the rule and the required supporting documents will be submitted to the Attorney General for review as to legality and form to the extent the form relates to legality. Any person may request notification of the date of submission to the Attorney General. 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 adopted rule must submit the written request to Susan K. Noren.

Dated: 10 August 1990

James J. Solem
Commissioner

Office of Administrative Hearings

Adopted Permanent Rules Relating to Rulemaking, Contested Case, and Revenue Recapture Act Hearings

Rules as Adopted

1400.0250 FILING OF MATERIALS.

Subpart 1. **Size.** All materials submitted to the administrative law judge or chief administrative law judge in a rulemaking proceeding, except the draft of the proposed or adopted rules prepared by the revisor of statutes, handwritten comments from members of the public and exhibits, must be on standard size 8-1/2-inch by 11-inch paper.

Subp. 2. **Facsimile transmission.** Any paper relating to hearings conducted by an administrative law judge under Minnesota Statutes, chapter 14, may be filed with or served on the office by facsimile transmission. The person filing the document must forward the original signed document within five days. Filings or service shall be effective at the time that the facsimile transmission is received by the office. A transmission which is commenced prior to 4:30 p.m. shall be deemed to have been timely filed. The filing or service of a facsimile shall have the same force and effect as the filing or service of the original document.

1400.0300 INITIATION OF HEARING.

[For text of subpart 1, see M.R.]

Subp. 1a. **Filing documents.** Prior to giving notice of the hearing, the agency shall file with the chief administrative law judge, or the administrative law judge who will preside over the proceeding, the following documents:

[For text of items A and B, see M.R.]

C. The notice of hearing proposed to be issued that shall contain the following:

[For text of subitems (1) to (5), see M.R.]

(6) A statement advising interested persons that

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lobbyists must register with the state Ethical Practices Board, that questions should be directed to the board, and the board's current address and telephone number.

(7) A statement that written material may be submitted and recorded in the hearing record for five working days after the public hearing ends, a statement that the comment period may be extended for a longer period not to exceed 20 calendar days if ordered by the administrative law judge at the hearing, a statement that the comments received during the comment period shall be available for review at the office of administrative hearings, and a statement that the agency and interested persons may respond in writing within three business days after the submission period ends to any new information submitted, and a statement that any written material or responses submitted must be received at the office no later than 4:30 p.m. on the final day. No additional evidence may be submitted during the three-day period.

[For text of subitems (8) to (14), see M.R.]

[For text of items D to F, see M.R.]

G. If required by Minnesota Statutes, section 16A.128, subdivision 2a, a statement that the agency submitted a copy of the notice and the proposed rules to the chairs of the house appropriations committee and senate finance committee prior to publishing the notice of intent to adopt rules in the State Register.

[For text of subp 2, see M.R.]

1400.0500 STATEMENT OF NEED AND REASONABLENESS.

Subpart 1. **Contents.** Each agency desiring to adopt rules shall prepare a statement of need and reasonableness which shall be prefiled pursuant to part 1400.0300, subpart 1a. The statement of need and reasonableness must contain 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 rules, including citations to any statutes or case law anticipated to be relied

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upon, citations to any economic, scientific, or other manuals or treatises anticipated to be utilized at the hearing or included in the record, and a list of any witnesses to be called by the agency to testify on its behalf, together with a summary of the testimony to be elicited from witnesses solicited to testify on behalf of the agency. The statement need not contain evidence and argument in rebuttal of evidence and argument presented by the public.

The statement of need and reasonableness must also contain the following:

A. If applicable, a statement complying with:

(1) Minnesota Statutes, section 14.115;

(2) Minnesota Statutes, sections 14.11, subdivision 2, and 17.80 to 17.84;

(3) Minnesota Statutes, sections 115.43, subdivision 1, and 116.07, subdivision 6;

(4) Minnesota Statutes, section 144A.29, subdivision 4;

B. if required by Minnesota Statutes, section 16A.128, subdivisions 1 and 2a, the approval of the commissioner of finance and notice to the chairs of the house appropriations committee and the senate finance committee if the proposed rules establish or modify a fee charged; and

C. a statement complying with the requirements of any other law or rule prescribing in any manner the matters to be included in the statement of need and reasonableness or which the agency is required by law or rule to consider in the adoption of a rule.

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.

[For text of subp 2, see M.R.]

Subp. 3. **Verbatim agency presentation.** If the agency desires, the statement of need and reasonableness may contain the verbatim affirmative presentation by the agency, provided

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that copies are available for review at the hearing, and 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 proposed rules and the agency's statement shall be available at the hearing for questioning by the administrative law judge and other interested persons or to briefly summarize all or a portion of the statement of need and reasonableness if requested by the administrative law judge.

1400.0800 CONDUCT OF HEARINGS.

[For text of subps 1 to 6, see M.R.]

Subp. 7. **Exhibits.** The agency shall introduce as exhibits the documents required to be filed with the administrative law judge or the chief administrative law judge pursuant to parts 1400.0300, subpart 1a, items A, B, and E; and 1400.0600.

[For text of subps 8 to 13, see M.R.]

1400.0850 RECEIPT OF WRITTEN MATERIALS.

The administrative law judge shall allow written materials to be submitted and recorded in the hearing record for a period of five working days after the public hearing ends, or for a longer period not to exceed 20 calendar days if he or she so orders. The written materials must be received at the Office of Administrative Hearings no later than 4:30 p.m. on the last day for submission of written materials. The agency and all interested persons must be allowed to review the comments received during the comment period and must be allowed three business days after the submission period ends to respond in writing to any new information submitted. The responses must be received at the office no later than 4:30 p.m. on the third business day. During this three-day period, the agency may also indicate in writing whether there are amendments suggested by other persons which the agency is willing to adopt. Additional evidence may not be submitted during the three-day period. The written responses must be included in the rulemaking record.

1400.0900 RULEMAKING RECORD.

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The hearing record shall be closed upon the last date for receipt of written responses filed pursuant to Minnesota Statutes, section 14.15, subdivision 1.

The rulemaking record shall include:

A. all documents enumerated in parts 1400.0300, subpart 1a, and 1400.0600;

[For text of items B to J, see M.R.]

1400.5100 DEFINITIONS.

[For text of subps 1 to 3, see M.R.]

Subp. 4. [See Repealer.]

Subp. 5. [See Repealer.]

[For text of subps 6 to 8, see M.R.]

Subp. 9. **Service; serve.** "Service" or "serve" means personal service or, unless otherwise provided by law, service by first class United States mail or a licensed overnight express mail service, postage prepaid and addressed to the party at his or her last known address. An affidavit of service shall be made by the person making the service. Service by mail or licensed overnight express mail service is complete upon placing the item to be served in the mail or delivering it to the authorized agent of the express mail service. Personal service may be accomplished by either delivering a document to the person or by leaving a document at the person's home or place of business with someone of suitable age and discretion who resides in the same house or who is located at the same business address of the person to be served.

If a person is confined to a federal or state institution, a copy of the document must also be served upon the chief executive officer of the institution.

Postage shall be prepaid. Mail to a person other than a state agency shall be addressed to the last known address of the person. Agencies of the state of Minnesota may also deposit the document with the Central Mailing Section, Publications Division, Department of Administration, addressed as above.

Any paper relating to hearings conducted by an

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administrative law judge under Minnesota Statutes, chapter 14, may be filed with or served on the office by facsimile transmission. The person filing the document shall forward the original signed document within five days. Filings or service shall be effective at the time that the facsimile transmission is received by the office. A transmission which is commenced prior to 4:30 p.m. shall be deemed to have been timely filed. The filing or service of a facsimile shall have the same force and effect as the filing or service of the original document.

1400.5200 SCOPE; CONVERSION OF CONTESTED CASE.

The procedures in parts 1400.5100 to 1400.8400 shall govern all contested cases required to be conducted by the office under Minnesota Statutes, chapter 14. The procedures in parts 1400.8510 to 1400.8612 shall govern all cases conducted pursuant to the Revenue Recapture Act, Minnesota Statutes, sections 270A.01 to 270A.12 and shall also be utilized in those cases where the parties agree to use them.

1400.5600 NOTICE AND ORDER FOR HEARING.

[For text of subpart 1, see M.R.]

Subp. 2. **Contents of 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:

[For text of items A to C, see M.R.]

D. A statement of the allegations or issues to be determined together with a citation to the relevant statutes or rules allegedly violated or which control the outcome of the case;

[For text of items E to M, see M.R.]

[For text of subps 3 to 7, see M.R.]

1400.5700 NOTICE OF APPEARANCE.

Each party intending to appear at a contested case hearing shall file with the judge and serve upon all other known parties a notice of appearance which shall advise the judge of the

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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 and served 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 and serve a notice may, in the discretion of the judge, 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.

1400.5950 MEDIATION.

[For text of subps 1 and 2, see M.R.]

Subp. 3. **Initiating mediation.** Mediation may be initiated in the following ways:

[For text of items A and B, see M.R.]

C. Upon receipt of a request for mediation, the chief judge or designee shall contact, either orally or in writing, the agency and all parties to determine whether they are willing to participate in mediation. No matter shall be ordered for mediation if the agency or any party is opposed.

D. If the chief judge determines that ~~at least two parties, including~~ no party or the agency, ~~have agreed~~ is opposed to mediation, the chief judge shall appoint a mediator and issue an order for mediation, which shall set forth:

(1) the name, address, and telephone number of the mediator; and

(2) a date by which the mediator must initiate the mediation proceedings.

The order shall be served upon the agency, the parties, and the judge assigned to the contested case, if any.

E. The mediator must initiate the mediation

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proceedings by contacting the agency and each party no later than the date set forth in the order for mediation.

[For text of subp 4, see M.R.]

Subp. 5. **Termination.** The mediation process shall terminate when all parties are, or the agency is, unwilling to continue mediation; or a settlement agreement is signed setting forth the resolution of the disputed issues.

Upon termination, the mediator shall either forward the signed settlement agreement to the agency or the judge, if applicable, for appropriate action; or inform the agency or the judge, if applicable, that the mediation has been terminated without agreement.

[For text of subps 6 and 7, see M.R.]

1400.6000 DEFAULT.

The agency or the judge, where authorized, 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 without the prior consent of the judge at a prehearing conference, settlement conference, or a hearing or fails to comply with any interlocutory orders of the judge.

1400.6700 DISCOVERY.

Subpart 1. **Witnesses; statement by parties or witnesses.** Each party shall, within ten days of a demand by another party, disclose the following:

A. The names and addresses of all witnesses that a party intends to call at the hearing, along with a brief summary of each witness' testimony. All witnesses unknown at the time of said disclosure shall be disclosed as soon as they become known.

[For text of item B, see M.R.]

[For text of subps 2 to 5, see M.R.]

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1400.7100 RIGHTS AND RESPONSIBILITIES OF PARTIES.

[For text of subpart 1, see M.R.]

Subp. 2. **Necessary preparation.** A party shall have all evidence to be presented, both oral and written, available on the date for hearing. Requests for subpoenas, depositions, or continuances shall be made within a reasonable time after their need becomes evident to the requesting party. In cases where the hearing time is expected to exceed one day, the parties shall be prepared to present their evidence at the date and time ordered by the judge or as agreed upon at a prehearing conference. Parties shall have enough copies of exhibits so that they can provide a copy to each other party at the time the exhibit is introduced, unless that other party has already obtained a copy through discovery.

[For text of subps 3 to 5, see M.R.]

1400.7400 HEARING RECORD.

Subpart 1. **Content.** The judge shall maintain the official record in each contested case until the issuance of the judge's final report, at which time the record, except for the audiomagnetic recordings of the hearing, shall be sent to the agency. The audiomagnetic recordings shall be retained by the office for five years from the date that the record is returned to the agency. Unless an agency requests a longer retention period for a specific case, the recordings may be erased or otherwise destroyed at the end of the five-year period.

The record in a contested case shall contain all pleadings, motions, and orders; evidence offered or considered; offers of proof, objections, and rulings thereon; the judge's findings of fact, conclusions, and recommendations; all memoranda or data submitted by any party in connection with the case; and the transcript of the hearing, if one was prepared.

[For text of subp 2, see M.R.]

1400.7500 CONTINUANCES.

Requests for a continuance of a hearing shall be granted upon a showing of good cause. Unless time does not permit, a

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request for continuance of the hearing shall be made in writing to the judge and shall be served upon all parties of record and the agency if it is not a party. In determining whether good cause exists, due regard shall be given to the ability of the party requesting a continuance to effectively proceed without a continuance. A request for a continuance filed within five business days of the hearing shall be denied unless the reason for the request could not have been earlier ascertained.

"Good cause" shall include: death or incapacitating illness of a party, representative, or attorney of a party; a court order requiring a continuance; lack of proper notice of the hearing; a substitution of the representative or attorney of a party if the substitution is shown to be required; a change in the parties or pleadings requiring postponement; and agreement for a continuance by all parties provided that it is shown that more time is clearly necessary to complete authorized discovery or other mandatory preparation for the case and the parties and the judge have agreed to a new hearing date, or, the parties are engaged in serious settlement negotiations or have agreed to a settlement of the case which has been or will likely be approved by the final decision maker.

"Good cause" shall not include: intentional delay; unavailability of counsel or other representative due to engagement in another judicial or administrative proceeding unless all other members of the attorney's or representative's firm familiar with the case are similarly engaged, or if the notice of the other proceeding was received subsequent to the notice of the hearing for which the continuance is sought; unavailability of a witness if the witness' testimony can be taken by deposition; and failure of the attorney or representative to properly utilize the statutory notice period to prepare for the hearing.

During a hearing, if it appears in the interest of justice that further testimony should be received and sufficient time does not remain to conclude the testimony, the judge shall either order the additional testimony be taken by deposition or

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continue the hearing to a future date and oral notice on the record shall be sufficient.

A continuance shall not be granted when to do so would prevent the case from being concluded within any statutory deadline.

1400.8300 RECONSIDERATION OR REHEARING.

Once a judge has issued a report, unless that report is binding on the agency, the judge loses jurisdiction to amend the report except for clerical or mathematical errors. Unless the report is a final order, binding on the agency, petitions for reconsideration or rehearing must be filed with the agency.

Where the judge's decision is binding on the agency, a petition for reconsideration or rehearing shall be filed with the judge. The petition ~~may~~ must be filed ~~at-any-time-until-the~~ within a reasonable time ~~for-appeal-has-elapsed-or-until~~ but not after an appeal is taken nor more than one year after the decision was issued. Pursuant to Minnesota Statutes, section 14.64, a petition for reconsideration must be filed within ten days after the decision in order to toll the time for appeal to the court of appeals. A 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 judge 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.

In ruling on a motion for reconsideration or rehearing in cases where the judge's decision is binding on the agency, the judge shall grant reconsideration or rehearing if it appears that to deny it would be inconsistent with substantial justice and any one of the following has occurred:

A. irregularity in the proceedings whereby the moving party was deprived of a fair hearing;

B. accident or surprise that could not have been prevented by ordinary prudence;

C. material evidence newly discovered that with

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reasonable diligence could not have been found and produced at hearing; ~~or~~

D. fraud upon the hearing process~~.~~

~~The rehearing shall be conducted in the same manner prescribed for a hearing.~~;

E. mistake, inadvertence, or excusable neglect; or

F. the decision is not justified by the evidence, or is contrary to law; but unless it be so expressly stated in the order granting rehearing, it shall not be presumed, on appeal, to have been made on the ground that the decision was not justified by the evidence.

1400.8401 EXPENSES AND ATTORNEY FEES.

[For text of subps 1 and 2, see M.R.]

Subp. 3. **Application.** A party seeking an award of expenses and attorney's fees shall submit to the judge an application that shows:

[For text of items A to D, see M.R.]

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.

[For text of subps 4 and 5a, see M.R.]

Subp. 5b. **Extensions of time and further proceedings.**

[For text of items A and B, see M.R.]

C. In the event that an evidentiary hearing is required or permitted by the judge, the hearing and any related filings or other action required or permitted shall be conducted under parts 1400.8510 to 1400.8612.

[For text of subps 6 and 7, see M.R.]

1400.8510 DEFINITIONS.

[For text of subps 1 to 3, see M.R.]

Subp. 4. **Service, serve.** "Service" or "serve" may be

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accomplished by either delivering a document to an individual in person, or by leaving a document at his/her home with some person of suitable age and discretion who resides in the same house, or by mailing the document to the person by first class United States mail.

If a person is confined to a federal or state institution, a copy of the document must also be served upon the chief executive officer of the institution.

Postage shall be prepaid. Mail to a person other than a state agency shall be addressed to the last known address of the person. Agencies of the state of Minnesota may also deposit the document with the Central Mailing Section, Publications Division, Department of Administration, addressed as above.

Any paper relating to hearings conducted by an administrative law judge under Minnesota Statutes, chapter 14, may be filed with or served on the office by facsimile transmission. A transmission which is commenced prior to 4:30 p.m. shall be deemed to have been timely filed. The person filing the document shall forward the original signed document within five days. Filings or service shall be effective at the time that the facsimile transmission is received by the office. The filing or service of a facsimile shall have the same force and effect as the filing or service of the original document.

1400.8560 DEFAULT.

A default occurs when a party fails to appear without the prior consent of the judge at a prehearing conference, settlement conference, or a hearing. If the claimant agency appears at a hearing but the debtor does not, the allegations in the notice of hearing shall be taken as true and deemed proved without further evidence. If the debtor appears at a hearing, but the claimant agency fails to appear, the administrative law judge shall recommend that the hearing be dismissed with prejudice. If neither the claimant party nor the debtor appear at a hearing, the administrative law judge shall recommend that the case be dismissed with prejudice.

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1400.8601 SUBPOENAS.

[For text of subpart 1, see M.R.]

Subp. 2. **Service.** Subpoenas shall be served personally in the manner provided in part 1400.8510, subpart 4, item A. They shall not be served by mail. The witness fees applicable in the district courts pursuant to Minnesota Statutes, section 357.22 shall apply and shall be paid to the potential witness at the time of service.

[For text of subp 3, see M.R.]

1400.8604 RESPONSIBILITIES AND RIGHTS OF PARTIES.

Subpart 1. **Necessary preparation.** A party shall have all evidence to be presented, both oral and written, available on the date for hearing. Requests for subpoenas, depositions, or continuances shall be made within a reasonable time after their need becomes evident to the requesting party. Parties shall have enough copies of exhibits so that they can provide a copy to each other party at the time the exhibit is introduced, unless that other party has already obtained a copy through discovery.

[For text of subps 2 to 4, see M.R.]

1400.8609 HEARING RECORD.

Subpart 1. **Maintaining.** The administrative law judge shall maintain the official record in each case until the issuance of the report, at which time the record, except for the audiomagnetic recordings thereof, shall be sent to the agency. The audiomagnetic recordings shall be retained by the office for five years from the date that the record is returned to the agency. Unless an agency requests a longer retention period for a specific case, the recordings may be erased or otherwise destroyed at the end of the five-year period.

[For text of subps 2 to 4, see M.R.]

1405.0200 DEFINITIONS.

[For text of subps 1 to 5, see M.R.]

Subp. 6. **Service; serve.** Unless otherwise provided by

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law, "service" or "serve" means service by first class United States mail, postage prepaid, and addressed to the person to be served at his last known address. An affidavit of service shall be made by the person making such service. Service by mail is complete upon the placing of the item to be served in the mail. Service may also be made personally.

Any paper relating to hearings conducted by an administrative law judge under Minnesota Statutes, chapter 14, may be filed with or served on the office by facsimile transmission. A transmission which is commenced by 4:30 p.m. shall be deemed to have been timely filed. The person filing the document shall forward the original signed document within five days. Filings or service shall be effective at the time that the facsimile transmission is received by the office. The filing or service of a facsimile shall have the same force and effect as the filing or service of the original document.

1405.0300 SCOPE AND PURPOSE.

The procedures contained herein shall govern the conduct of all hearings conducted for the Environmental Quality Board involving the siting of large electric power generating plants, the routing of high voltage transmission lines, and to the site and route exemption processes contained in Minnesota Statutes, section 116C.57, subdivisions 5 and 5a, provided, however, that the procedures for hearing concerning the revocation or suspension of a site certificate or construction permit shall be those contained in parts 1400.5100 to 1400.8401, as are the hearings conducted pursuant to Minnesota Statutes, section 116C.57, subdivision 3, relating to the determination of emergencies. See part 1405.2700.

1405.1400 CONDUCT OF HEARING.

The proceedings shall be conducted substantially in the following manner. After opening the hearing, the administrative law judge shall indicate the procedural rules for the hearing including, but not limited to, the following:

A. all persons may present evidence and argument with

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respect to the issues and cross-examine witnesses;

B. all persons may be represented by legal counsel, but such representation is not required; and

C. the rules of evidence as set forth in part 1405.1700, subparts 3 to 8.

Cross-examination shall be conducted in a sequence determined by the administrative law judge. The record of the hearing shall be closed at a date to be set by the administrative law judge. Such date will correspond to a specific number of calendar days beyond the close of the last hearing date, computed pursuant to part 1405.0700, subpart 1. Written comment will be accepted if postmarked no later than the date set by the administrative law judge. However, the record shall remain open beyond that date for the sole purpose of receiving board responses to relevant comments received on the environmental impact assessment.

1405.1800 HEARING RECORD.

[For text of subps 1 and 2, see M.R.]

Subp. 3. **Recorder or reporter.** Unless the chief administrative law judge determines that the use of a court reporter is more appropriate, an audiomagnetic recording device shall be used to keep a record at any hearing which takes place under parts 1405.0200 to 1405.2800.

The audiomagnetic recordings shall be retained by the office for five years from the date that the record is returned to the agency. Unless an agency requests a longer retention period for a specific case, the recordings may be erased or otherwise destroyed at the end of the five-year period.

[For text of subp 4, see M.R.]

Subp. 5. **Environmental documents.** The environmental impact assessment prepared pursuant to parts 4400.1210 and 4400.3210 shall be entered into the record at a point during the hearing process which will allow all persons an opportunity to review and comment on the material. In addition, all comments and responses to comments which the board desires to consider

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shall be entered into the record promptly after they are received.

REPEALER. Minnesota Rules, parts 1400.1300; 1400.5100, subparts 4 and 5; 1400.8402; 1400.8613; and 1405.2800 are repealed.

Approved by Revisor _____

APPROVED AS TO FORM AND LEGALITY
December 14 1990
HUBERT H. HUMPHREY, III
ATTORNEY GENERAL
BY MJ Cassedy
SPECIAL ASSISTANT ATTORNEY GENERAL

STATE OF MINNESOTA
DEPARTMENT OF STATE
FILED

DEC 18 1990

Joan Anderson Growe
Secretary of State
1:08 pm

DEPARTMENT: Office of the Attorney General **STATE OF MINNESOTA**

OFFICE MEMORANDUM

DATE: December 18, 1990

TO: WILLIAM G. BROWN
Chief Administrative Law Judge
Office of Administrative Hearings

FROM: MARTHA J. CASSERLY
Special Assistant
Attorney General

PHONE: 296-6839

SUBJECT: In the Matter of the Adopted Rule Relating to Rulemaking, Contested Case, and Revenue Recapture Act Hearings

The above-referenced rule has been approved as to its legality by the Attorney General on December 14, 1990.

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

Also enclosed are any petitions, requests, submissions or comments along with any extra copies of documents which you submitted to the Attorney General.

Your next step is to arrange for publication of the Notice of Adoption in the State Register. In a day or two, you should receive from the Revisor's Office three copies of the notice of adoption of your rule. You should submit two copies of the Notice of Adoption to the State Register for publication. A permanent rule without a hearing does not become effective until five days after a notice of adoption is published 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.

MJC:sc

cc: Tom Pursell
William Brown, Chief Judge
MaryAnn Hruby

STATE OF MINNESOTA

OFFICE OF ADMINISTRATIVE HEARINGS

FIFTH FLOOR, FLOUR EXCHANGE BUILDING
310 FOURTH AVENUE SOUTH
MINNEAPOLIS, MINNESOTA 55415
(612) 341-7600

Patricia S. Nolte
Office of the Attorney General
525 Park Street, Suite 500
St. Paul, MN 55155

Re: Adopted Permanent Rules Relating to Rulemaking, Contested Case, and Revenue Recapture Act Hearings

Dear Ms. Nolte:

The Office of Administrative Hearings is in the process of amending its existing rules. We elected to follow the noncontroversial rulemaking process. We received fewer than 25 requests for a hearing. We did, however, receive some comments which caused us to make changes in the proposed rules. We are now at the point of submitting the rules as adopted to you for review pursuant to Minn. Stat. § 14.26 and Minn. Rule pt. 2010.0300.

Attached hereto are the documents required by Minn. Rule pt. 2010.0300. Each document is marked with a single letter at the top, indicating which paragraph of the rule it relates to. This packet is intended to be our submission to the Attorney General pursuant to Minn. Rule pt. 2010.0500.

If there are any other documents which you would like to see, or if you have any questions, please call me at the number below.

Yours very truly,

Allan W. Klein

ALLAN W. KLEIN
Administrative Law Judge

Telephone: 612/341-7609

AWK:lr

Attachments

cc: William G. Brown

AN EQUAL OPPORTUNITY EMPLOYER

(K)

STATE OF MINNESOTA
OFFICE OF ADMINISTRATIVE HEARINGS

In the Matter of the Proposed Amendments to Rules Governing Administrative Rulemaking Hearings, Contested Case Hearings, Revenue Recapture Act Hearings, Power Plant Siting and Power Line Routing Hearings, Minn. Rules Chapters 1400 and 1405.

FINDINGS OF FACT, CONCLUSIONS AND ORDER ADOPTING RULES WITHOUT PUBLIC HEARING

(1) Notice of the Office's Intent to Adopt the above-entitled rule amendments was published in the State Register on August 13, 1990 and was sent by United States Mail to all persons on the list maintained by the Agency pursuant to Minnesota Statutes, Sections 14.14, subd. 1a and 14.22 on August 7, 1990. (2) The Statement of Need and Reasonableness was prepared before the Notice of Intent to Adopt a Rule without a Public Hearing was mailed to all persons on the rulemaking mailing list and published in the State Register and was available to the public.

(4) All persons were given the opportunity to submit comment on the rule for more than 30 days after notice of the proposed rulemaking. (5) The Office received one request for a public hearing. Therefore, the Office did not receive requests for a public hearing from 25 or more persons.

The Office did, however, receive a number of comments and suggestions for changes to the proposed rules.

Based on the comments and evidence in the record before the Office, I find the following:

(6) 1. That the proposed amendment to existing Rules 1400.0250, 1400.5100, 1400.8510 and 1405.0200 (the proposed amendment was the same in each case) could be improved. The proposed amendment merely specified that a document could be served upon the Office by facsimile transmission, and that filings or service would be effective at the time that the facsimile transmission was received by the Office. A comment was received from the Administrative Law Committee of the Office of the Attorney General. This comment urged that the rule be clarified to specify the fate of a document when the transmission is commenced before 4:30 p.m., but not completed until after 4:30 p.m. The comment urged that the proposal be amended to specify that if a transmission was commenced before 4:30 p.m., then the paper would be deemed to be filed on that date. This is a desirable addition to the proposed amendment because it will eliminate the potential for dispute. While the proposed amendment was needed and reasonable as originally drafted, adopting the Committee's proposal will improve the rule. Moreover, adopting the Committee's proposal will not constitute a substantial change. The classes of persons who would not be reasonably have been expected to comment on this change is the same as the class of persons who would not reasonably have been expected to comment on proposed rules as originally noticed -- the

persons affected are those who are interested in using facsimile transmission to submit things to the Office. Secondly, the proposed change does not introduce a new subject matter because the subject matter of facsimile transmission was clearly noticed in the rulemaking proceeding. Finally, it does not make a major substantive change that will catch people by surprise because it is only a minor clarification within the context of the rule as proposed.

2. The sole request for a hearing came from a person who was concerned about the mediation rule. The comment (from Otter Tail Power) raised two concerns. The Office is proposing to change the rule to satisfy one of those concerns, but has decided not to change the rule to meet the other. The proposed change will require that mediation be initiated only when neither the agency nor any party to a contested case is opposed to mediation in that contested case. If either the agency or any party is opposed to mediation, then it cannot be initiated. This is a return to the existing rule. Existing Rule 1400.5950, subp. 3C. and D. allows any party or the agency to have a veto power over the initiation of mediation. The Office had proposed an amendment which would have allowed mediation to be initiated despite the opposition of a party, if at least two parties, including the agency, had agreed to it. Otter Tail Power opposed this change, arguing that mediation can be effective only if all parties are willing to use it, and the proposed change could allow the agency and a party to "gang up" on other unwilling parties. The Office, after consideration, has decided that it is undesirable to attempt mediation in a case where any party is opposed to it because it has a high probability of being a waste of time. To avoid this, the Office has decided to withdraw its proposed amendment and allow the rule to remain in its existing form. This is not a substantial change because the class of persons affected are those interested in mediation, and they are the same class of persons who were affected by the initial change. Secondly, the subject matter of who must agree to mediation is the same as the subject matter raised by the proposed change. Finally, the proposed rule clearly invited reaction on the subject of who must agree to mediation, and thus this change is certainly within the scope of that proposal in connection with inviting reaction.

3. The final set of changes relates to the rule on reconsideration or rehearing. The changes logically break down into two separate items for discussion: what is the time limit for filing a petition for reconsideration or rehearing, and what are the standards to be used in granting or denying such a petition. Each will be dealt with separately below.

4. The rule which is currently in effect does not contain any provision relating to when a petition for reconsideration or rehearing must be filed. It is totally silent on the subject. The Office had originally proposed a rule which would have provided that the petition could be filed at any time until the time for appeal had elapsed or until an appeal were taken. This proposal drew criticism from the Attorney General's Administrative Law Committee and from Legal Services. The former opposed the rule because it established too short a period, while the latter (albeit for different reasons)

opposed the rule because it provided too long a time period. After analyzing the comments, and the Rules of Civil Procedure on which this proposed rule is based, the Office has determined to more closely follow the Rules of Civil Procedure, thereby satisfying the concern of the Attorney General's Committee. The Office is also adding a caveat to meet the concerns of Legal Services. The rule as now proposed allows the filing of a petition until an appeal is taken or until one year elapses. It avoids the "trap" of giving attorneys a long time to file such petitions, but allowing them to inadvertently waive the tolling of the appeal period by including a warning to alert them to the tolling problem. It is probably unrealistic to expect practitioners to be aware of differences between the Rules of Civil Procedure and the Office's rule in such an arcane area, and thus it is reasonable to warn them of such a difference that could substantially jeopardize their clients' rights to appeal.

5. The second group of changes to the rule on reconsideration and rehearing relates to the standards to be used in granting or denying a petition. The existing rule that is currently in effect does not contain any standards to guide the judge. To cure this problem, the Office had proposed that four enumerated standards be added. These four standards were taken from the Rules of Civil Procedure, Rules 59, 60 and 61. However, comments from the Attorney General's Committee and Legal Services both questioned why some of the criteria in the civil rules had been adopted, when others were rejected. Legal Services urged that Rule 59.01(g) should have been included, while the Attorney General's Committee urged that both Rule 59.01(g) and Rule 60.02(a) ought to be added. The Office looked at those provisions in the administrative context and determined that, in fact, it was appropriate to add them. They would allow for reconsideration or rehearing in situations where errors of law or mistakes had occurred. It is important to cure such problems as quickly and as cheaply as possible. Without allowing them to be cured at the administrative level, a party who was seriously prejudiced would be forced to go to the Court of Appeals, which is more costly, time consuming, and an unnecessary waste of the State's judicial resources. It is appropriate, therefore, to allow these problems to be cured at the trial level, in the same manner that the civil rules provide. By adding these two additional standards, the substantial change prohibition has not been violated. They do not affect classes of persons who could not reasonably have been expected to comment on the original four standards, as the classes of persons likely to comment on both are the same. Secondly, they are not a significant new subject matter which could not have been anticipated -- they are in the same subject area as the four standards initially proposed. Finally, they do not make a major substantive change in a manner not raised by the proposed rule. Adding these two standards is just not a "major substantive change".

Although the Office did receive the comments set forth above, it did not receive any requests for notice of submission of the adopted rule to the Attorney General.

(8) The above-captioned rule amendments are needed and reasonable, as amended.

(9)

NOW, THEREFORE, IT IS ORDERED that the rule amendments identified as "Adopted Permanent Rules Relating to Rulemaking, Contested Case, and Revenue Recapture Act Hearings, as modified, are adopted this 21st day of November, 1990, pursuant to the authority vested in me by Minnesota Statutes, Sections 3.764, 14.51 and 116C.66 (1988).

William G. Brown

WILLIAM G. BROWN
Chief Administrative Law Judge

(D)

Office of Administrative Hearings

Proposed Permanent Rules Relating to Rulemaking, Contested Case, and Revenue Recapture Act Hearings

Rules as Proposed

1400.0250 ~~SIZE~~ FILING OF MATERIALS.

Subpart 1. **Size.** All materials submitted to the administrative law judge or chief administrative law judge in a rulemaking proceeding, except the draft of the proposed or adopted rules prepared by the revisor of statutes, handwritten comments from members of the public and exhibits, must be on standard size 8-1/2-inch by 11-inch paper.

Subp. 2. **Facsimile transmission.** Any paper relating to hearings conducted by an administrative law judge under Minnesota Statutes, chapter 14, may be filed with or served on the office by facsimile transmission. The person filing the document must forward the original signed document within five days. Filings or service shall be effective at the time that the facsimile transmission is received by the office. The filing or service of a facsimile shall have the same force and effect as the filing or service of the original document.

1400.0300 INITIATION OF HEARING.

[For text of subpart 1, see M.R.]

Subp. 1a. **Filing documents.** Prior to giving notice of the hearing, the agency shall file with the chief administrative law judge, or the administrative law judge who will preside over the proceeding, the following documents:

[For text of items A and B, see M.R.]

C. The notice of hearing proposed to be issued that shall contain the following:

[For text of subitems (1) to (5), see M.R.]

(6) A statement advising interested persons that lobbyists must register with the state Ethical Practices Board, ~~which statement shall read as follows:~~ that questions should be

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directed to the board, and the board's current address and telephone number.

~~Minnesota-Statutes,-chapter-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 Minnesota-Statutes,-section-10A.01,-subdivision-11-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-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 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, a statement that the comment period may be extended for a longer period not to exceed 20 calendar days if ordered by the administrative law judge at the hearing, a statement that the comments received during the comment period shall be available for review at the office of administrative hearings, and a statement that the agency and interested persons may respond in writing within three business days after the submission period ends to any new information submitted, and a statement that any written material or responses submitted must be received at the office no later than 4:30 p.m. on the final day. No additional evidence may be submitted during the three-day period.

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[For text of subitems (8) to (14), see M.R.]

[For text of items D to F, see M.R.]

G. If required by Minnesota Statutes, section 16A.128, subdivision 2a, a statement that the agency submitted a copy of the notice and the proposed rules to the chairs of the house appropriations committee and senate finance committee prior to publishing the notice of intent to adopt rules in the State Register.

[For text of subp 2, see M.R.]

1400.0500 STATEMENT OF NEED AND REASONABLENESS.

Subpart 1. **Contents.** Each agency desiring to adopt rules shall prepare a statement of need and reasonableness which shall be prefiled pursuant to part 1400.0300, subpart ~~1~~ 1a. The statement of need and reasonableness must contain 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 rules, including citations to any statutes or case law anticipated to be relied upon, citations to any economic, scientific, or other manuals or treatises anticipated to be utilized at the hearing or included in the record, and a list of any witnesses to be called by the agency to testify on its behalf, together with a summary of the testimony to be elicited from witnesses solicited to testify on behalf of the agency. The statement need not contain evidence and argument in rebuttal of evidence and argument presented by the public.

The statement of need and reasonableness must also contain the following:

A. If applicable, a statement complying with:

(1) Minnesota Statutes, section 14.115;

(2) Minnesota Statutes, sections 14.11, subdivision 2, and 17.80 to 17.84;

(3) Minnesota Statutes, sections 115.43, subdivision 1, and 116.07, subdivision 6;

(4) Minnesota Statutes, section 144A.29,

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subdivision 4;

B. if required by Minnesota Statutes, section 16A.128, ~~subdivision~~ subdivisions 1 and 2a, the approval of the commissioner of finance and notice to the chairs of the house appropriations committee and the senate finance committee if the proposed rules establish or modify a fee charged; and

C. a statement complying with the requirements of any other law or rule prescribing in any manner the matters to be included in the statement of need and reasonableness or which the agency is required by law or rule to consider in the adoption of a rule.

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.

[For text of subp 2, see M.R.]

Subp. 3. **Verbatim agency presentation.** If the agency desires, the statement of need and reasonableness may contain the verbatim affirmative presentation by the agency, provided that copies are available for review at the hearing, and 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 proposed rules and the agency's statement shall be available at the hearing for questioning by the administrative law judge and other interested persons or to briefly summarize all or a portion of the statement of need and reasonableness if requested by the administrative law judge.

1400.0800 CONDUCT OF HEARINGS.

[For text of subps 1 to 6, see M.R.]

Subp. 7. **Exhibits.** The agency shall introduce as exhibits the documents required to be filed with the administrative law judge or the chief administrative law judge pursuant to parts 1400.0300, subpart ~~1~~ 1a, items A, B, and E; and 1400.0600.

[For text of subps 8 to 13, see M.R.]

1400.0850 RECEIPT OF WRITTEN MATERIALS.

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The administrative law judge shall allow written materials to be submitted and recorded in the hearing record for a period of five working days after the public hearing ends, or for a longer period not to exceed 20 calendar days if he or she so orders. The written materials must be received at the Office of Administrative Hearings no later than 4:30 p.m. on the last day for submission of written materials. The agency and all interested persons must be allowed to review the comments received during the comment period and must be allowed three business days after the submission period ends to respond in writing to any new information submitted. The responses must be received at the office no later than 4:30 p.m. on the third business day. During this three-day period, the agency may also indicate in writing whether there are amendments suggested by other persons which the agency is willing to adopt. Additional evidence may not be submitted during the three-day period. The written responses must be included in the rulemaking record.

1400.0900 RULEMAKING RECORD.

The hearing record shall be closed upon the last date for receipt of written responses filed pursuant to Minnesota Statutes, section 14.15, subdivision 1.

The rulemaking record shall include:

A. all documents enumerated in parts 1400.0300, subpart ~~1~~ 1a, and 1400.0600;

[For text of items B to J, see M.R.]

1400.5100 DEFINITIONS.

[For text of subps 1 to 3, see M.R.]

Subp. 4. [See Repealer.]

Subp. 5. [See Repealer.]

[For text of subps 6 to 8, see M.R.]

Subp. 9. **Service; serve.** "Service" or "serve" means personal service or, unless otherwise provided by law, service by first class United States mail or a licensed overnight express mail service, postage prepaid and addressed to the party at his or her last known address. An affidavit of service shall

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be made by the person making the service. Service by mail or licensed overnight express mail service is complete upon placing the item to be served in the mail or delivering it to the authorized agent of the express mail service. Personal service may be accomplished by either delivering a document to the person or by leaving a document at the person's home or place of business with someone of suitable age and discretion who resides in the same house or who is located at the same business address of the person to be served.

If a person is confined to a federal or state institution, a copy of the document must also be served upon the chief executive officer of the institution.

Postage shall be prepaid. Mail to a person other than a state agency shall be addressed to the last known address of the person. Agencies of the state of Minnesota may also deposit the document with the Central Mailing Section, Publications Division, Department of Administration, addressed as above.

Any paper relating to hearings conducted by an administrative law judge under Minnesota Statutes, chapter 14, may be filed with or served on the office by facsimile transmission. The person filing the document shall forward the original signed document within five days. Filings or service shall be effective at the time that the facsimile transmission is received by the office. The filing or service of a facsimile shall have the same force and effect as the filing or service of the original document.

1400.5200 SCOPE; CONVERSION OF CONTESTED CASE.

The procedures in parts 1400.5100 to 1400.8400 shall govern all contested cases required to be conducted by the office under Minnesota Statutes, chapter 14. The procedures in parts 1400.8510 to ~~1400.8613~~ 1400.8612 shall govern all cases conducted pursuant to the Revenue Recapture Act, Minnesota Statutes, sections 270A.01 to 270A.12 and shall also be utilized in those cases where the parties agree to use them.

1400.5600 NOTICE AND ORDER FOR HEARING.

Approved
by Revisor _____

[For text of subpart 1, see M.R.]

Subp. 2. **Contents of 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:

[For text of items A to C, see M.R.]

D. A statement of the allegations or issues to be determined together with a citation to the relevant statutes or rules allegedly violated or which control the outcome of ~~one~~ the case;

[For text of items E to M, see M.R.]

[For text of subps 3 to 7, see M.R.]

1400.5700 NOTICE OF APPEARANCE.

Each party intending to appear at a contested case hearing shall file with the judge and serve upon all other known parties a notice of appearance which shall advise the judge 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 judge~~ and served 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 and serve a notice may, in the discretion of the judge, 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.

1400.5950 MEDIATION.

[For text of subps 1 and 2, see M.R.]

Subp. 3. **Initiating mediation.** Mediation may be initiated in the following ways:

[For text of items A and B, see M.R.]

Approved by Revisor _____

C. Upon receipt of a request for mediation, the chief judge or designee shall contact, either orally or in writing, the agency and all parties ~~or directly affected persons~~ to determine whether they are willing to participate in mediation. No matter shall be ordered for mediation if the agency~~, any party, or directly affected person~~ is opposed.

D. If the chief judge determines that ~~no party, directly affected person, or the agency is opposed~~ at least two parties, including the agency, have agreed to mediation, the chief judge shall appoint a mediator and issue an order for mediation, which shall set forth:

(1) the name, address, and telephone number of the mediator; and

(2) a date by which the mediator must initiate the mediation proceedings.

The order shall be served upon the agency, the parties, ~~or directly affected persons,~~ and the judge assigned to the contested case ~~or rulemaking proceeding~~, if any.

E. The mediator must initiate the mediation proceedings by contacting the agency and each party ~~or directly affected person~~ no later than the date set forth in the order for mediation.

[For text of subp 4, see M.R.]

Subp. 5. **Termination.** The mediation process shall terminate when ~~any party, any directly affected person,~~ all parties are, or the agency ~~announces its unwillingness~~ is, unwilling to continue mediation; or ~~the parties and the agency sign~~ a settlement agreement is signed setting forth the resolution of the disputed issues.

Upon termination, the mediator shall either forward the signed settlement agreement to the agency or the judge, if applicable, for appropriate action; or inform the agency or the judge, if applicable, that the mediation has been terminated without agreement.

[For text of subps 6 and 7, see M.R.]

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by Revisor _____

1400.6000 DEFAULT.

The agency or the judge, where authorized, 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 without the prior consent of the judge at a prehearing conference, settlement conference, or a hearing or fails to comply with any interlocutory orders of the judge.

1400.6700 DISCOVERY.

Subpart 1. **Witnesses; statement by parties or witnesses.** Each party shall, within ten days of a demand by another party, disclose the following:

A. The names and addresses of all witnesses that a party intends to call at the hearing, along with a brief summary of each witness' testimony. All witnesses unknown at the time of said disclosure shall be disclosed as soon as they become known.

[For text of item B, see M.R.]

[For text of subps 2 to 5, see M.R.]

~~THE HEARING~~

1400.7100 RIGHTS AND RESPONSIBILITIES OF PARTIES.

[For text of subpart 1, see M.R.]

Subp. 2. **Necessary preparation.** A party shall have all evidence to be presented, both oral and written, available on the date for hearing. Requests for subpoenas, depositions, or continuances shall be made within a reasonable time after their need becomes evident to the requesting party. In cases where the hearing time is expected to exceed one day, the parties shall be prepared to present their evidence at the date and time ordered by the judge or as agreed upon at a prehearing conference. Parties shall have enough copies of exhibits so that they can provide a copy to each other party at the time the exhibit is introduced, unless that other party has already obtained a copy through discovery.

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[For text of subps 3 to 5, see M.R.]

1400.7400 HEARING RECORD.

Subpart 1. **Content.** The judge shall maintain the official record in each contested case until the issuance of the judge's final report, at which time the record, except for the audiomagnetic recordings of the hearing, shall be sent to the agency. The audiomagnetic recordings shall be retained by the office for five years from the date that the record is returned to the agency. Unless an agency requests a longer retention period for a specific case, the recordings may be erased or otherwise destroyed at the end of the five-year period.

The record in a contested case shall contain all pleadings, motions, and orders; evidence offered or considered; offers of proof, objections, and rulings thereon; the judge's findings of fact, conclusions, and recommendations; all memoranda or data submitted by any party in connection with the case; and the transcript of the hearing, if one was prepared.

[For text of subp 2, see M.R.]

1400.7500 CONTINUANCES.

Requests for a continuance of a hearing shall be granted upon a showing of good cause. Unless time does not permit, a request for continuance of the hearing shall be made in writing to the judge and shall be served upon all parties of record and the agency if it is not a party. In determining whether good cause exists, due regard shall be given to the ability of the party requesting a continuance to effectively proceed without a continuance. A request for a continuance filed within five business days of the hearing shall be denied unless the reason for the request could not have been earlier ascertained.

"Good cause" shall include: death or incapacitating illness of a party, representative, or attorney of a party; a court order requiring a continuance; lack of proper notice of the hearing; a substitution of the representative or attorney of a party if the substitution is shown to be required; a change in the parties or pleadings requiring postponement; and agreement

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for a continuance by all parties provided that it is shown that more time is clearly necessary to complete authorized discovery or other mandatory preparation for the case and the parties and the judge have agreed to a new hearing date, or, the parties are engaged in serious settlement negotiations or have agreed to a settlement of the case which has been or will likely be approved by the final decision maker.

"Good cause" shall not include: intentional delay; unavailability of counsel or other representative due to engagement in another judicial or administrative proceeding unless all other members of the attorney's or representative's firm familiar with the case are similarly engaged, or if the notice of the other proceeding was received subsequent to the notice of the hearing for which the continuance is sought; unavailability of a witness if the witness' testimony can be taken by deposition; and failure of the attorney or representative to properly utilize the statutory notice period to prepare for the hearing.

During a hearing, if it appears in the interest of justice that further testimony should be received and sufficient time does not remain to conclude the testimony, the judge shall either order the additional testimony be taken by deposition or continue the hearing to a future date and oral notice on the record shall be sufficient.

A continuance shall not be granted when to do so would prevent the case from being concluded within any statutory deadline.

1400.8300 RECONSIDERATION OR REHEARING.

Once a judge has issued a report, unless that report is binding on the agency, the judge loses jurisdiction to amend the report except for clerical or mathematical errors. Unless the report is a final order, binding on the agency, petitions for reconsideration or rehearing must be filed with the agency. Where the judge's decision is binding on the agency, a petition for reconsideration or rehearing shall be filed with the judge.

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The petition may be filed at any time until the time for appeal has elapsed or until an appeal is taken. A 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 judge 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.

In ruling on a motion for reconsideration or rehearing in cases where the judge's decision is binding on the agency, the judge shall grant reconsideration or rehearing if it appears that to deny it would be inconsistent with substantial justice and any one of the following has occurred:

A. irregularity in the proceedings whereby the moving party was deprived of a fair hearing;

B. accident or surprise that could not have been prevented by ordinary prudence;

C. material evidence newly discovered that with reasonable diligence could not have been found and produced at hearing; or

D. fraud upon the hearing process.

The rehearing shall be conducted in the same manner prescribed for a hearing.

1400.8401 EXPENSES AND ATTORNEY FEES.

[For text of subps 1 and 2, see M.R.]

Subp. 3. **Application.** A party seeking an award of expenses and attorney's fees shall~~, within 40 days of a final disposition in the contested case,~~ submit to the judge an application that shows:

[For text of items A to D, see M.R.]

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

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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 40th day following the date of issuance of the final disposition.~~

[For text of subps 4 and 5a, see M.R.]

Subp. 5b. **Extensions of time and further proceedings.**

[For text of items A and B, see M.R.]

C. In the event that an evidentiary hearing is required or permitted by the judge, the hearing and any related filings or other action required or permitted shall be conducted under ~~the procedural rules governing conference contested cases~~ parts 1400.8510 to 1400.8612.

[For text of subps 6 and 7, see M.R.]

1400.8510 DEFINITIONS.

[For text of subps 1 to 3, see M.R.]

Subp. 4. **Service, serve.** "Service" or "serve" may be accomplished by either delivering a document to an individual in person, or by leaving a document at his/her home with some person of suitable age and discretion who resides in the same house, or by mailing the document to the person by first class United States mail.

If a person is confined to a federal or state institution, a copy of the document must also be served upon the chief executive officer of the institution.

Postage shall be prepaid. Mail to a person other than a state agency shall be addressed to the last known address of the person. Agencies of the state of Minnesota may also deposit the document with the Central Mailing Section, Publications Division, Department of Administration, addressed as above.

Any paper relating to hearings conducted by an administrative law judge under Minnesota Statutes, chapter 14, may be filed with or served on the office by facsimile transmission. The person filing the document shall forward the original signed document within five days. Filings or service shall be effective at the time that the facsimile transmission

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is received by the office. The filing or service of a facsimile shall have the same force and effect as the filing or service of the original document.

1400.8560 DEFAULT.

A default occurs when a party fails to appear without the prior consent of the judge at a prehearing conference, settlement conference, or a hearing. If the claimant agency appears at a hearing but the debtor does not, the allegations in the notice of hearing shall be taken as true and deemed proved without further evidence. If the debtor appears at a hearing, but the claimant agency fails to appear, the administrative law judge shall recommend that the hearing be dismissed with prejudice. If neither the claimant party nor the debtor appear at a hearing, the administrative law judge shall recommend that the case be dismissed with prejudice.

1400.8601 SUBPOENAS.

[For text of subpart 1, see M.R.]

Subp. 2. **Service.** Subpoenas shall be served personally in the manner provided in part 1400.8510, subpart 4, item A. They shall not be served by mail. The witness fees applicable in the district courts pursuant to Minnesota Statutes, section 357.22 shall apply and shall be paid to the potential witness at the time of service. ~~Such fees are $10 per day for each day of attendance plus 12 cents per mile for travel going to and returning from the place attendance, to be estimated from the witness' residence.~~

[For text of subp 3, see M.R.]

1400.8604 RESPONSIBILITIES AND RIGHTS OF PARTIES.

Subpart 1. **Necessary preparation.** A party shall have all evidence to be presented, both oral and written, available on the date for hearing. Requests for subpoenas, depositions, or continuances shall be made within a reasonable time after their need becomes evident to the requesting party. Parties shall have enough copies of exhibits so that they can provide a copy

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to each other party at the time the exhibit is introduced, unless that other party has already obtained a copy through discovery.

[For text of subps 2 to 4, see M.R.]

1400.8609 HEARING RECORD.

Subpart 1. **Maintaining.** The administrative law judge shall maintain the official record in each case until the issuance of the report, at which time the record, except for the audiomagnetic recordings thereof, shall be sent to the agency. The audiomagnetic recordings shall be retained by the office for five years from the date that the record is returned to the agency. Unless an agency requests a longer retention period for a specific case, the recordings may be erased or otherwise destroyed at the end of the five-year period.

[For text of subps 2 to 4, see M.R.]

1405.0200 DEFINITIONS.

[For text of subps 1 to 5, see M.R.]

Subp. 6. **Service; serve.** Unless otherwise provided by law, "service" or "serve" means service by first class United States mail, postage prepaid, and addressed to the person to be served at his last known address. An affidavit of service shall be made by the person making such service. Service by mail is complete upon the placing of the item to be served in the mail. Service may also be made personally.

Any paper relating to hearings conducted by an administrative law judge under Minnesota Statutes, chapter 14, may be filed with or served on the office by facsimile transmission. The person filing the document shall forward the original signed document within five days. Filings or service shall be effective at the time that the facsimile transmission is received by the office. The filing or service of a facsimile shall have the same force and effect as the filing or service of the original document.

1405.0300 SCOPE AND PURPOSE.

Approved
by Revisor _____

The procedures contained herein shall govern the conduct of all hearings conducted for the Environmental Quality Board involving the siting of large electric power generating plants, the routing of high voltage transmission lines, and to the site and route exemption ~~process~~ processes contained in Minnesota Statutes, section 116C.57, ~~subdivision~~ subdivisions 5 and 5a, provided, however, that the procedures for hearing concerning the revocation or suspension of a site certificate or construction permit shall be those contained in parts 1400.5100 to ~~1400.8500~~ 1400.8401, as are the hearings conducted pursuant to Minnesota Statutes, section 116C.57, subdivision 3, relating to the determination of emergencies. See part 1405.2700.

1405.1400 CONDUCT OF HEARING.

The proceedings shall be conducted substantially in the following manner. After opening the hearing, the administrative law judge shall indicate the procedural rules for the hearing including, but not limited to, the following:

A. all persons may present evidence and argument with respect to the issues and cross-examine witnesses;

B. all persons may be represented by legal counsel, but such representation is not required; and

C. the rules of evidence as set forth in part 1405.1700, subparts 3 to 8.

Cross-examination shall be conducted in a sequence determined by the administrative law judge. The record of the hearing shall be closed at a date to be set by the administrative law judge. Such date will correspond to a specific number of calendar days beyond the close of the last hearing date, computed pursuant to part 1405.0700, subpart 1. Written comment will be accepted if postmarked no later than the date set by the administrative law judge. However, the record shall remain open beyond that date for the sole purpose of receiving ~~the final environmental impact statement~~ board responses to relevant comments received on the environmental impact assessment.

Approved
by Revisor _____

1405.1800 HEARING RECORD.

[For text of subps 1 and 2, see M.R.]

Subp. 3. **Recorder or reporter.** Unless the chief administrative law judge determines that the use of a court reporter is more appropriate, an audiomagnetic recording device shall be used to keep a record at any hearing which takes place under parts 1405.0200 to 1405.2800.

The audiomagnetic recordings shall be retained by the office for five years from the date that the record is returned to the agency. Unless an agency requests a longer retention period for a specific case, the recordings may be erased or otherwise destroyed at the end of the five-year period.

[For text of subp 4, see M.R.]

Subp. 5. **Environmental documents.** ~~Any draft environmental impact statement (in the case of routes) or any draft environmental report (in the case of sites) required to be prepared by rules of the board~~ The environmental impact assessment prepared pursuant to parts 4400.1210 and 4400.3210 shall be entered into the record at a point during the hearing process which will allow all persons an opportunity to review and comment on the material. In addition, all comments and responses to comments which the board desires to consider shall be entered into the record promptly after they are received.

REPEALER. Minnesota Rules, parts 1400.1300; 1400.5100, subparts 4 and 5; 1400.8402; 1400.8613; and 1405.2800 are repealed.

Approved
by Revisor _____

Office of the Revisor of Statutes

Administrative Rules

TITLE: Proposed Permanent Rules Relating to Rulemaking, Contested Case, and Revenue Recapture Act Hearings

AGENCY: Office of Administrative Hearings

MINNESOTA RULES: Chapters 1400 and 1405

The attached rules are approved for publication in the State Register

Paul M. Marinac
Assistant Deputy Revisor

Stat Authority 14.51

The chief administrative law judge shall adopt rules to govern the procedural conduct of all hearings

116C.66

The board, in order to give effect to the purposes of sections 116C.51 to 116C.69 shall prior to July 1, 1978, adopt rules consistant with sections 116C.51 to 116C.69 including promulgation of site and route designations...

End of comment period stated in Notice of Intent = September 17, 1990

Changes = Number 2 in findings of fact ~~Amendment~~ existing rule indicated that mediation can only be initiated if neither party to a contested case is opposed to mediation - change allowed mediation if a party disagreed with it.
they then changed it back to the orginal why

(L)

OFFICE OF ADMINISTRATIVE HEARINGS

TO: 1990 RULEMAKING FILE 10/23/90

FROM: ALLAN W. KLEIN 7609
Administrative Law Judge

RE: Comments on Mediation Rule

After receiving Kati Sasseville's letter of October 9, I asked Phyllis Reha to review the problems surrounding the mediation rule. She recommended the following resolutions:

1. That the "directly affected persons" language in subpart 3C be removed, and that the Chief Judge be directed to contact the agency and all parties to determine their interest, and that no matter be ordered for mediation if the agency or any party are opposed.

2. She recommended that subpart 3D be amended to provide that if no party or the agency is opposed, the Chief shall appoint a mediator. This is a return to our existing rule.

3. She recommended that a provision be added which would give the mediator (with the agreement of all parties and the agency) the discretion to permit any other "interested persons" to participate in the process. She cited the participation of the Audubon Society in the Seneca mediation, which she said was helpful to the process. She thought it might also be necessary to add a definition of "party" and "interested persons" in order to facilitate this proposal.

4. She favored leaving subpart 5 as proposed by the Office. She did not think the suggestion of attempting to create different classes of parties ("essential" v. "nonessential") would work, nor did she think it would be necessary. She believed that once everybody had signed onto the process, and a lot of time and effort had been expended in it (such as Seneca), no one party ought to be able to derail it by walking out. In the case of Seneca, which has taken a tremendous amount of time and effort on the part of a number of governmental units and private groups, it now appears that one minor party may be unwilling to go along with the final agreement. Even that party, however, does not believe that the agreement should be scrapped -- it just believes signing it would violate the group's principles. Phyllis argues that in such a case, mediation ought to be allowed to go forward to completion.

I am inclined to go along with all but one of Phyllis' suggestions. She has more experience than anyone else in the Office in this area. However, the final decision will be up to Bill Brown. But the one area where I disagree

with Phyllis is on the need to add a provision allowing the mediator discretion to allow other interested persons to participate in a mediation. It's not that I disagree with the idea. Instead, I don't think that a rule is needed to allow this to occur. Our existing rule does not really talk about the mechanics of how the mediation sessions are run. Instead, it focuses on initiation and termination. I think that parties to a mediation have a great deal of flexibility to agree on any number of procedural matters, including whether or not they can invite other people to join them for all or a part of the process. I don't think that a rule is necessary. What I can do is make an oblique reference to this in the Findings of Fact so that there is "legislative history" supporting her position if it is ever challenged.

AWK/lr

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ADMINISTRATIVE HEARINGS

BEFORE THE OFFICE OF ADMINISTRATIVE HEARINGS

RE: In the Matter of Proposed Permanent Rules Relating to Rulemaking, Contested Case, and Revenue Recapture Act Hearings

M. R. 1400, et seq.

COMMENTS OF OTTER TAIL POWER COMPANY AND REQUEST FOR HEARING

Otter Tail Power Company has reviewed the proposed procedural rules in the above-captioned docket and is concerned about the proposed mediation process. Proposed rule 1400.5950 constitutes a substantial and controversial change from the status quo and is inappropriately included in a set of non-controversial rules for adoption without a public hearing. For this reason Otter Tail Power Company objects to this rule and requests a public hearing.

More specifically, as proposed in rule 1400.5950 the administrative agency would have greatly increased authority over the availability of mediation to parties. Mediation, by its very nature, should be used, and can be effective, only if the mediating parties are willing to use this alternative process for dispute resolution. The agency's proposed changes appear to contravene this basic tenet. In extreme cases they offer a new route through which an agency and one or more parties to a case could force an unwilling party to accept an outcome that is not supported by substantial evidence on the record.

1400.5950 MEDIATION.

Subp. 3. **Initiating mediation.** Mediation may be initiated in the following ways:

> C. Upon receipt of a request for mediation, the chief judge or designee shall contact, either orally or in writing, the agency and all parties ~~or directly affected persons~~ to determine whether they are willing to participate in mediation. No matter shall be ordered for mediation if the agency~~, any party, or directly affected person~~ is opposed.

This change eliminates a party's substantive right to oppose and refuse the mediation process, and it gives the agency a new substantive right to compel mediation over the objection of one or more parties. Such a creation

and termination of substantive rights should not be adopted without public hearing even if it were in the public interest. It is not at all clear that any public interest is served by this change, however.

Of primary concern to Otter Tail in the mediation rules is the issue of the role of the agency as the determiner of fact, and as policy-maker. Where the agency is going to make the final decision, and is also involved as a party, as for example, in CIP hearings before the Department of Public Service, where several parties may side with the agency in opposition to a proposal of a utility, this rule presents the opportunity for much mischief.

> 1400.590 (3) D. If the chief judge determines that ~~no party, directly affected person, or the agency is opposed~~ at least two parties, including the agency, have agreed to mediation, the chief judge shall appoint a mediator and issue an order for mediation, which shall set forth: . . .

Similarly, the agency must agree to mediation and can preclude it even if all the parties (which may well include other state agencies) concur that mediation is the most practical and effective and least costly way to proceed. On the other hand, the agency, joined by one party, can require mediation despite the number of parties, or public interest, opposed to mediation. It is unclear why this change is proposed. If the experience has been that one recalcitrant, minor party is preventing desirable mediation; or if it has been that parties are forcing reluctant agencies to mediate, we are not aware of any such situations.

> 1400.590 (Subp. 5.) **Termination.** The mediation process shall terminate when ~~any party, any directly affected person,~~ all parties are, or the agency ~~announces its unwillingness~~ is, unwilling to continue mediation; or ~~the parties and the agency~~ sign a settlement agreement is signed setting forth the resolution of the disputed issues.

As stated above, this change gives the agency an inordinate degree of control over the mediation process to the detriment of the substantive rights of other parties.

For the above reasons proposed rule 1400.5950 should be withdrawn or substantially changed.

Respectfully submitted,

OTTER TAIL POWER COMPANY

Dated: Sept. 11, 1990

By Katherine E. Sasseville
Katherine E. Sasseville
General Counsel

(L)

STATE OF MINNESOTA

OFFICE OF ADMINISTRATIVE HEARINGS

FIFTH FLOOR, FLOUR EXCHANGE BUILDING
310 FOURTH AVENUE SOUTH
MINNEAPOLIS, MINNESOTA 55415
(612) 341-7600

September 18, 1990

Katherine E. Sasseville
General Counsel
Otter Tail Power Company
215 South Cascade Street
Box 496
Fergus Falls, MN 56537-2897

Re: Proposed Amendment to OAH Mediation Rule

Dear Ms. Sasseville:

We received your letter of objection to proposed changes to the mediation rule, and are responding in order to open up a dialogue; we are interested in trying to solve our problems without creating worse ones for you!

First of all, let me relate to you the incident that gave rise to this proposal. Phyllis Reha conducted a lengthy series of settlement negotiations in connection with the Flying Cloud Landfill contested case hearing. There were four major parties to that case, and an additional three parties. These three parties were, in fact, formal parties to the case, but did not attend all of the contested case hearings or all of the settlement meetings. One of them was Leslie Davis, of Earth Protector. He participated in only a few of the contested case hearings, and participated in some, but not all, of the settlement negotiations.

Settlement negotiations among the parties proceeded to a point where all four of the "major" parties had agreed to a tentative settlement, but Mr. Davis could not accept it. He walked out of the settlement negotiations and held a press conference to denounce the proposed settlement. Ultimately, the settlement was rejected by the Eden Prairie City Council, and the contested case hearings resumed.

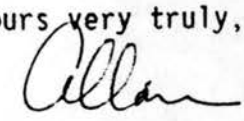
This experience occurred in the context of a settlement, not a mediation. But it pointed out a weakness in the mediation rule. That rule, as currently structured, provides that the mediation process will terminate when "any party, any directly affected person, or the agency" is unwilling to continue mediation. Aside from the obvious problem of "any directly affected person" being allowed to terminate a mediation, the current rule would allow Mr. Davis, or either of the other two sporadic parties, to terminate a mediation. We do not think that is appropriate.

When looking at the mediation rule, we also noted that a matter could not be ordered for mediation if the agency, any party, or any directly affected person were opposed to mediation. Again, aside from the problem created by any "directly affected person", would it be appropriate for Mr. Davis, or either of the other sporadic parties, to have a veto power over mediation?

We acknowledge the problem which you raise in your letter. It is not our intent to create a system where the agency and one or more parties are able to "gang up" on a utility company (or anyone else) and force it to mediate an issue againts its will. Neither is it our intent to create a system whereby the agency and the parties can force a mediated settlement down the throat of an unwilling party.

We are open to suggestions for language that would solve our problem, but not create a new one for you or anyone else. Do you have any ideas?

Yours very truly,



ALLAN W. KLEIN
Administrative Law Judge

Telephone: 612/341-7609

AWK:lr

(L)

Otter Tail
POWER COMPANY

215 S CASCADE ST
PO BOX 496
FERGUS FALLS MN 56538-0496
218-739-8200

October 9, 1990

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ADMINISTRATIVE
HEARINGS

Mr. Allan W. Klein
Administrative Law Judge
Office of Administrative Hearings
Fifth Floor, Flour Exchange Building
310 Fourth Avenue South
Minneapolis, MN 55415

Dear Allan:

I'm so sorry I have taken so long to respond to your letter. I was tremendously impressed that you are actually interested in resolving the issues raised by my comments. Too often I feel communications to agencies in rulemakings are futile because their minds are sealed.

Having raised the issue, I confess that I have no ready solution. The only approach that I have been able to come up with after a good bit of thought is that of designating intervenors as "necessary" or "important" or "essential" parties, and making the mediation process dependent on their joint willingness to mediate. Other parties ("non-essential", etc.) have an interest, but it does not seem to be such a critical public interest as to justify the ability to require or preclude a mediation in opposition to the position of the principal parties.

Perhaps defining, or at least articulating, the "public interest" standard would help in classifying the types of parties. It seems to me that an applicant and any state agencies required or authorized to intervene are clearly these "essential" parties. Private parties, for example, customers in a rate case, competitors in a motor carrier permit case, nearby residents in a siting case, are there for the primary purpose of advocating a private interest. In cases where a state agency is representing a statutory mandate to protect the public, those private interests do not rise to a level that reasonably justifies their ability to control the mediation process.

As interested parties, I would believe that if they were adversely affected by a mediated outcome, they would have the right to appeal. But except in very extraordinary cases it would seem to me that an appeal would not be taken because of the unlikelihood that a court would overturn a mediated agency decision supported by an applicant and an intervenor state agency.

Thank you again for the opportunity to comment and to elaborate on my thoughts. I hope that you are able to translate these ideas into language which will address our mutual concerns.

Yours very truly,

Kati

Katherine E. Sasseville
General Counsel

Barbara F. L. Penn, Esq.
President
Angie McCaffrey, Esq.
First Vice President
Kathy Bartz
Second Vice President
Daniel J. Cole, Esq.
Third Vice President
Gerald A. Regnier, Esq.
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Litigation Coordinator
Dennis Dorgan
Community Advocacy Coordinator
Michael Hagedorn
Support Counsel
Sylvia Lane
Comptroller
Janet C. Werness
Support Counsel

CENTRAL OFFICE
300 Minnesota Bldg.
St. Paul, MN 55101
(612) 222-5863

MANKATO AREA OFFICE
450 Nichols Office Center
Mankato, MN 56001
(507) 387-5588

MIGRANT LEGAL SERVICES
700 Minnesota Bldg.
St. Paul, MN 55101
(612) 291-2837

MIGRANT LEGAL SERVICES
722½ - 1st Avenue North
Fargo, ND 58102
(701) 232-8872

PRIOR LAKE OFFICE
16174 Main Avenue
Prior Lake, MN 55372
(612) 440-1040

SO. CENTRAL AREA OFFICE
Lea Center Bldg. Suite 243
139 East William
Albert Lea, MN 56007
(507) 377-2831

S.E. AREA OFFICE
66 Plaza East
Winona, MN 55987
(507) 454-6660

S.W. AREA OFFICE
926 5th Ave.
Worthington, MN 56187
(507) 372-7368

PROJECTS

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St. Paul, MN 55101
(612) 224-7301
450 Nichols Office Center
Mankato, MN 56001
(507) 388-8436
66 Plaza East
Winona, MN 55987
(507) 454-6660
16174 Main Avenue
Prior Lake, MN 55372
(612) 440-1040
926 5th Ave.
Worthington, MN 56187
(507) 372-7368
Lea Center Bldg. Suite 243
139 East William
Albert Lea, MN 56007
(507) 377-2831

LEGAL ADVOCACY PROJECT
300 Minnesota Bldg.
St. Paul, MN 55101
(612) 222-3749

IMMIGRATION REFORM PROJECT
179 E. Robie
St. Paul, MN 55107
(612) 291-0110

MINNESOTA FAMILY FARM LAW PROJECT
450 Nichols Office Center
Mankato, MN 56001
(507) 387-1211

FAMILY LAW PROJECT
66 Plaza East
Winona, MN 55987
(507) 454-6660

LAW OFFICES OF
SOUTHERN MINNESOTA
REGIONAL LEGAL SERVICES, INC.

Administrative/Program Support Office
700 Minnesota Building
(46 East Fourth Street)
Saint Paul, Minnesota 55101
(612) 228-9823

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October 29, 1990

Allan W. Klein
Administrative Law Judge
Office of Administrative Hearings
Fifth Floor, Flour Exchange Building
310 Fourth Avenue South
Minneapolis, Minnesota 55415

RE: Proposed Changes to OAH Rules

Dear Judge Klein,

Thank you for your letter of October 25, 1990 and the copy of the most recent draft of the modification to Rule 1400.8300.

The draft resolves both of the issues raised in my comment. With respect to the timing of motions, the one year limit permits the rule to function as a Rule 60 type motion, while the notice of the ten day provision in Minn. Stat. 14.64 removes the trap and should facilitate use of the rule for Rule 59/Rule 52.02 types of motions. The expansion of standards by the addition of subdivisions "E" and "F" assures completeness and is directly responsive to the concerns raised in my comment.

I think your modifications have improved the proposed rule. I am glad to have been of assistance.

Very truly yours,

Mark A. Bohnhorst

Mark A. Bohnhorst

United Way affiliated agency

(L)

STATE OF MINNESOTA

OFFICE OF THE ATTORNEY GENERAL

September 14, 1990

HUBERT H. HUMPHREY, III
ATTORNEY GENERAL

525 PARK STREET
SUITE 200
ST. PAUL, MN 55103
TELEPHONE: (612) 297-1050
FACSIMILE: (612) 297-1235

RECEIVED
90 SEP 17 AM 9: 15
ADMINISTRATIVE HEARINGS

William G. Brown
Chief Administrative Judge
Minnesota Office of Administrative Hearings
Fifth Floor, Flour Exchange Building
310 Fourth Avenue South
Minneapolis, MN 55415

Re: Proposed Permanent Rules Relating to Rulemaking, Contested Case, and Revenue Recapture Act Hearings, 15 S.R. 362 (August 13, 1990)

Dear Mr. Brown:

The members of the Administrative Law Committee (Committee) of the Office of the Attorney General has reviewed the proposed amendments to the rules of the Office of Administrative Hearings (OAH) relating to rulemaking, contested case, and Revenue Recapture Act hearings, published at 15 S.R. 362, on August 13, 1990. The Committee appreciates the opportunity to comment on the proposed rule amendments.

On the whole, the Committee supports the adoption of the proposed amendments. Any exceptions are noted in the discussion below. The Committee's comments on specific parts of the proposed amendments are set forth below.

Part 1400.0250 Filing of Materials, subp. 2, Facsimile Transmission

The OAH proposes to amend Part 1400.0250, subp. 2 to allow the filing of papers by facsimile transmission. The Committee is highly in favor of this proposal. As noted in the OAH's Statement of Need and Reasonableness (SONAR), this practice has been followed since April, 1989, and it has proved to be helpful and convenient to person filing papers with the OAH.

The Committee notes that the proposed rule is silent as to when a paper filed by facsimile transmission is "received." It is possible for a person to commence a facsimile transmission before 4:30 p.m. which is not complete until after 4:30 p.m. This may be either the result of the length of the document, or it may be through no fault of the transmitter but rather the result of the machine being out of paper or out of order. The Committee believes that it would be helpful for the rule to clarify when a facsimile transmission is considered "received" in light of these possible difficulties that could create an ambiguity as to the status of the document. The Committee recommends that the rule provide that if the transmission was commenced before 4:30 p.m., the paper is timely filed.

The above comments are also applicable to the other portions of the proposed rule amendments dealing with facsimile transmission, specifically Parts 1400.5100, 1400.8510 and 1405.0200.

Part 1400.8300, Reconsideration and Rehearing

The OAH proposes to amend the rule relating to reconsideration and rehearing in two respects: 1) to add a time limit for filing petitions for reconsideration and rehearing where the judge's decision is binding on the agency; and 2) to add standards for ruling on a motion for reconsideration and rehearing. The Committee's comments on these two proposals are discussed below.

A. Time Limit for Filing Petitions

The OAH proposes to add to the rule the following sentence: "The petition may be filed at any time until the time for appeal has elapsed or until an appeal is taken." The Committee believes that the need for and reasonableness of this rule amendment has not been demonstrated because the time limit imposed is not consistent with the proposed standards for ruling on a motion for reconsideration and is not consistent with the Minnesota Rules of Civil Procedure, on which the standards are modeled.

Assuming that most appeal periods applicable to administrative decisions are 30 days (see, e.g., Minn. Stat. § 14.63 (1988)), it may take much more time than that for newly discovered evidence to come to light or for fraud upon the hearing process to become known. Even Rule 60 of M.R.C.P., upon which the proposed standards are modeled, allows motions for relief from a final judgment or order "within a reasonable time, and for reasons (1) [mistake, inadvertence, surprise or excusable neglect], (2) [newly discovered evidence], and (3) [fraud, misrepresentation, or other misconduct of an adverse party] not more than a year after the judgment or order was entered."

The proposed time limit has the potential to create a situation where justice may not be served. For example, consider the hypothetical where an administrative law judge (ALJ) entered a final order based on a default, where it was learned much later that the defaulting person had been hospitalized in another jurisdiction and did not receive actual notice of the hearing. In district court, it would be possible to rehear that case; but under the proposed rule, it would not be possible before an ALJ. This result could be undesirable and contrary to the interests of justice.

For the reasons set forth above, the Committee recommends that the OAH delete the proposed language in paragraph 1 of the rule which states: "The petition may be filed at any time until the time for appeal has elapsed or until an appeal is taken."

B. Standards for Ruling on Motions for Reconsideration

The OAH proposes to add a new section to the rule which would establish standards for ruling on motions for reconsideration or rehearing in cases where the ALJ'S decision is binding on the agency. The proposed rule amendments provide:

In ruling on a motion for reconsideration or rehearing in cases where the judge's decision is binding on the agency, the judge shall grant reconsideration or rehearing if it appears that to deny it would be inconsistent with substantial justice and any one of the following has occurred:

A. irregularity in the proceedings whereby the moving party was deprived of a fair hearing;

B. accident or surprise that could not have been prevented by ordinary prudence;

C. material evidence newly discovered that with reasonable diligence could not have been found and produced at hearing; or

D. fraud upon the hearing process.

According to the SONAR at pages 9-10, these standards are based on Rules 59 and 60 of the Rules of Civil Procedure.

The Committee believes that these rule amendments as proposed are not reasonable because they are in some ways more stringent than Rules 59 and 60 and in other respects omit important aspects of Rules 59 and 60.

The rule amendments are more stringent than Rules 59 and 60 because they create a two-part test for a motion for reconsideration or rehearing:

1. Denial of the motion would be inconsistent with substantial justice; and

2. Any of the four reasons set out in Subparts A through D.

The SONAR at page 10 indicates that the first part of the test is necessary in order "to prevent rehearings or reconsideration for harmless errors or immaterial matters." However, a review of subparts A through D reveals that, with the possible exception of subpart B, any of the occurrences is more than harmless or immaterial and, if left unchanged, would result in substantial injustice to the affected party. Grafting the first test onto the tests in subparts A through D is therefore unnecessary. Moreover, it is confusing and likely to lead to needless arguments, with the concurrent expense to the agency that this rule is purportedly designed to avoid (see SONAR at 10). Arguments will center on the issue as to whether, having met the tests in subparts A through D, a moving party must

also meet the "inconsistent with substantial justice" standard. The proposed amendments should be changed so that the "inconsistent with substantial justice" test is eliminated as an additional test. It should either be made a part of subpart B or should exist as one of the standards on its own.

The second, and perhaps more compelling, reason why the proposed amendments are unreasonable is found not in what they do but what they do not do. The amendments make no provision for reconsideration or rehearing based upon mistake or upon error of law.[1] Both Minn. R. Civ. P. 59 and 60 on which these amendments are modeled incorporate the common sense recognition that clerical errors or mistakes of that type (Rule 60.02(a) and errors of law or fact (Rule 59.01(g)) are likely common errors that should be corrected in the first instance by the judge who heard the case. It is unreasonable for the amendments to fail to provide the same error correcting opportunities for the parties that are contained in Minn. R. Civ. P. 59.01(g) and 60.02(a).

The need for the "error of law" standard can be illustrated by an example from a recent contested case hearing. The ALJ in the case captioned "In the Matter of the WIC Application of White Earth Indian Reservation Tribal Council," OAH File No. 56-0900-4090-2, initially issued her report in which she made her recommendation to the Commissioner of the Department of Health. Two days later she issued an amended report in which she concluded that she had the final decision making authority and that her decision was binding on the agency. The Department filed a petition for reconsideration and in doing so brought to the ALJ's attention various statutes, rules, and other relevant documents. In granting the Department's petition, the ALJ noted that the additional legal authority submitted by the Department had clarified the issue and required her to conclude that her initial report on the merits of the case was not binding on the agency but that instead the agency was authorized to make the final decision. Under the standards and criteria proposed for Part 1400.8300, it is not at all clear that an ALJ could grant a reconsideration even to correct a very fundamental error of law. The proposed standards should not create a bar to an ALJ to correct rather obvious legal errors.

In the SONAR the OAH notes that it is important that "a serious error in the initial proceedings . . . be corrected as quickly and cheaply as possible." SONAR at 10. The mistakes and errors of law can be more quickly and more cheaply corrected by the ALJ than by the appellate court.

The Committee agrees with the OAH's goal of preventing frivolous motions. However, in Human Rights matters, one of two types of administrative hearings to which these amendments will apply, the parties are protected against frivolous motions for

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1 The first sentence of the existing rule, which is not proposed to be amended, provides that the ALJ does not lose jurisdiction to correct clerical or mathematical errors, but the standards do not allow the parties to raise such errors in a motion for reconsideration.

reconsideration or rehearing. Minn. Rules pt. 1400.7500, subp. 2 provides that if either side is engaging in intentional and frivolous delay, the ALJ can issue sanctions ranging from cease and desist orders to the payment of fees and costs to the injured party. While OSHA hearings are not governed by such a rule, Minn. Rules pt. 1400.6600 allows motions to be made to an ALJ that track those allowed by the Minnesota Rules of Civil Procedure. Minn. R. Civ. P. 11 may, therefore, serve as a safeguard in OSHA hearings against frivolous petitions for reconsideration and rehearing if the rules are amended to allow for reconsideration or rehearing based on mistake or on errors of law.

The Committee believes that, in order for the proposed amendments to be reasonable the OAH needs to make them consistent with Minn. R. Civ. P. 59 and 60 by allowing "mistake" and "error of law" to be grounds for a motion for reconsideration and rehearing. The Committee does not believe these modifications would be substantial changes, as they further the stated purpose of the OAH to allow for motions which are consistent with substantial justice.

CONCLUSION

For the reasons stated above, the Committee recommends that the proposed rule amendments be adopted with the following modifications

1. Clarify the following rules to indicate when a facsimile copy is "received" in the Office of Administrative Hearings: Part 1400.0250, subp. 2; Part 1400.5100; Part 1400.8510; and Part 1405.0200.

2. Delete the proposed language in paragraph 1 of Part 1400.8300 which states: "The petition may be filed at any time until the time for appeal has elapsed or until an appeal is taken."

3. Modify the first sentence of the second paragraph of Part 1400.8300 to eliminate the "inconsistent with substantial justice" as an additional test for determining a motion for reconsideration or rehearing. Either make the test a part of subpart B or make it a separate test on its own in a new subpart E.

4. Modify subparts A through D of Part 1400.8300 to make them consistent with Minn. R. Civ. P. 59 and 60 by allowing "mistake" and "error of law" to be grounds for a motion for reconsideration and rehearing.

The Committee does not believe that any of these modifications would constitute a substantial change.

Respectfully submitted,

Jocelyn F. Olson

JOCELYN F. OLSON
Assistant Attorney General
Chair, Administrative Law
Committee

Suite 200, 525 Park St.
St. Paul, Minnesota 55103
(612) 297-1223

Official Notices

Pursuant to the provisions of Minnesota Statutes §14.10, an agency, in preparing proposed rules, may seek information or opinion from sources outside the agency. Notices of intent to solicit outside opinion must be published in the *State Register* and all interested persons afforded the opportunity to submit data or views on the subject, either orally or in writing.

The *State Register* also publishes other official notices of state agencies, notices of meetings, and matters of public interest.

Office of Administrative Hearings

Notice of Solicitation of Outside Information or Opinions Regarding Proposed Rules Governing Rulemaking Proceedings, Contested Case Proceedings, Revenue Recapture Act Proceedings, and Power Plant/Power Line Proceedings

NOTICE IS HEREBY GIVEN that the Office of Administrative Hearings is seeking information or opinions from outside sources in preparing to propose amendments to its rules. The Office is authorized to adopt and amend rules by *Minnesota Statutes* §§ 3.764, 14.51 and 116C.66 (1988). The most important of these is section 14.51, which directs the Chief Administrative Law Judge to adopt rules to govern the procedural conduct of all hearings, including rulemaking and contested case hearings.

The amendments are intended to be primarily housekeeping in nature, but a few substantive changes will be proposed. They affect all of the rules governing hearings under the Administrative Procedure Act except for Workers' Compensation hearings.

A preliminary draft of the amendments currently proposed by the Office is available by calling Louise Cooper at 349-2682. This is not a final draft, and changes are likely in response to suggestions and comments. The Office hopes to keep these amendments noncontroversial, and does not expect to propose significant changes to the rules so as to generate substantial controversy.

The Office solicits information and opinions concerning these or similar amendments. Interested persons or groups may submit data or views in writing. Comments should be addressed to:

William G. Brown
Chief Administrative Law Judge
Office of Administrative Hearings
Fifth Floor Flour Exchange Building
310 Fourth Avenue South
Minneapolis, Minnesota 55415

Comments will be accepted until March 30, 1990. All written material received by the Office will become part of the rulemaking record, to be submitted to the Attorney General or Administrative Law Judge in the event that any of the amendments are adopted.

Dated: 1 February 1990

William G. Brown
Chief Administrative Law Judge

Board of Chiropractic Examiners

Notice of Solicitation of Outside Information or Opinions Regarding Proposed Rule Relating to Chiropractic License Fees

NOTICE IS HEREBY GIVEN that the Minnesota Board of Chiropractic Examiners is seeking information or opinions from sources outside the Board in preparing to propose the adoption of the rules relating to the amendment of Chiropractic License Fees. The adoption of the rules is authorized by *Minnesota Statutes* 148.08 Subdivision 3, which permits the Board to amend Chiropractic License Fees.

The Board requests information and opinions concerning the subject matter of the rule. Interested persons or groups may submit data or views on the subject matter of concern in writing or orally. Written statements should be addressed to:

Executive Director
2700 University Avenue West—Suite 20
St. Paul, MN 55114-1089

Oral statements will be received during regular business hours over the telephone at (612) 642-0591 and in person at the above address.

All statements of information and opinions shall be accepted until March 15, 1990. Any written material received by the Minnesota Board of Chiropractic Examiners shall become part of the rulemaking record to be submitted to the Attorney General or Administrative Law Judge in the event that a rule is adopted.

Dated: 30 January 1990

Executive Director
MN Board of Chiropractic Examiners

A

OFFICE OF ADMINISTRATIVE HEARINGS

NOTICE OF SOLICITATION OF OUTSIDE
INFORMATION OR OPINIONS REGARDING
PROPOSED RULES GOVERNING RULEMAKING
PROCEEDINGS, CONTESTED CASE PROCEEDINGS,
REVENUE RECAPTURE ACT PROCEEDINGS, AND
POWER PLANT/POWER LINE PROCEEDINGS.

NOTICE IS HEREBY GIVEN that the Office of Administrative Hearings is seeking information or opinions from outside sources in preparing to propose amendments to its rules. The Office is authorized to adopt and amend rules by Minn. Stat. §§ 3.764, 14.51 and 116C.66 (1988). The most important of these is section 14.51, which directs the Chief Administrative Law Judge to adopt rules to govern the procedural conduct of all hearings, including rulemaking and contested case hearings.

The amendments are intended to be primarily housekeeping in nature, but a few substantive changes will be proposed. They affect all of the rules governing hearings under the Administrative Procedure Act except for Workers' Compensation hearings.

A preliminary draft of the amendments currently proposed by the Office is available by calling Louise Cooper at 349-2682. This is not a final draft,

and changes are likely in response to suggestions and comments. The Office hopes to keep these amendments noncontroversial, and does not expect to propose significant changes to the rules so as to generate substantial controversy.

The Office solicits information and opinions concerning these or similar amendments. Interested persons or groups may submit data or views in writing. Comments should be addressed to:

William G. Brown
Chief Administrative Law Judge
Office of Administrative Hearings
Fifth Floor Flour Exchange Building
310 Fourth Avenue South
Minneapolis, Minnesota 55415

Comments will be accepted until March 30, 1990. All written material received by the Office will become part of the rulemaking record, to be submitted to the Attorney General or Administrative Law Judge in the event that any of the amendments are adopted.

Dated this 1st day of February, 1990.

William G. Brown

WILLIAM G. BROWN
Chief Administrative Law Judge

(E)

STATE OF MINNESOTA
OFFICE OF ADMINISTRATIVE HEARINGS

In the Matter of the Proposed Amendments to Rules Governing Administrative Rulemaking Hearings, Contested Case Hearings, Revenue Recapture Act Hearings, Power Plant Siting and Power Line Routing Hearings, Minn. Rules Chapters 1400 and 1405.

NOTICE OF INTENT TO ADOPT RULES WITHOUT A PUBLIC HEARING

(1) NOTICE IS HEREBY GIVEN that the Minnesota Office of Administrative Hearings (hereinafter the "Office") intends to adopt the above-entitled rule amendments without a public hearing following the procedures set forth in the Administrative Procedure Act for adopting rules without a public hearing in Minnesota Statutes, sections 14.22 to 14.28 . The statutory authority to make the proposed rule amendments is Minnesota Statutes, sections 14.51 (1988) and 116C.66 (1988).

(2) All persons have 30 days in which to submit comment in support of or in opposition to the proposed rule amendments or any part or subpart of the rule. Comment is encouraged. (3) Each comment should identify the portion of the proposed rule amendment addressed, the reason for the comment, and any change proposed. (4) All comments must be RECEIVED at the Office of Administrative Hearings before 4:30 p.m. on Monday, September 17, 1990, in order to be considered.

Any person may make a written request for a public hearing on the proposed rule amendments within the comment period. (4) If 25 or more persons submit a written request for a public hearing within the comment period, a public hearing will be held unless a sufficient number withdraw their requests in writing. (6) 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 amendments addressed, the reason for the request, and any change proposed. (7) If a public hearing is required, the Office will proceed pursuant to Minnesota Statutes, sections 14.131 to 14.20.

Comments or written requests for a public hearing must be submitted to:

(5)
William G. Brown, Chief Administrative Law Judge
Minnesota Office of Administrative Hearings
Fifth Floor Flour Exchange Building
310 Fourth Avenue South
Minneapolis, Minnesota 55415

(8) The proposed rule amendments may be modified if the modifications are supported by the data and views submitted to the Office and do not result in a substantial change in the proposed rule amendments as noticed.

(11) A copy of the proposed amendments is attached to this notice. Most of these amendments constitute nonsubstantive updates and housekeeping changes. The rule regarding facsimile transmissions is a substantive change which affects the rights and obligations of parties and the public who participate in administrative hearings. The purpose of making these amendments at this time is to eliminate confusion resulting from outdated citations, outdated address and telephone numbers, and similar changes. In addition, experience in conducting several hundred hearings each year since the rules were last amended has suggested substantive improvements in a few of the rule provisions. The rule regarding facsimile transmission is proposed to incorporate available technology into the hearing process. The rules relating to plant siting are being modified to conform to changes being made by the Environmental Quality Board. Those changes will only be enacted if the Environmental Quality Board carries out its proposed rule changes. One free copy of the amendments to the rules of the Office of Administrative Hearings is available from Louise Cooper at the address above, or by calling her at (612) 349-2682.

(12) A Statement of Need and Reasonableness that describes the need for and reasonableness of each provision of the proposed amendments and identifies the data and information relied upon to support the rule amendments has been prepared and is available from Ms. Cooper upon request.

(14) The proposed rule amendments do not impose requirements on small businesses within the meaning of Minn. Stat. § 14.115 (1989 Supp.). The proposed rule amendments will not require the expenditure of public money by local public bodies, nor will they affect agricultural lands. Therefore, Minn. Stat. § 14.11 (1988) does not apply to these rule amendments.

(9) If no hearing is required, upon adoption of the amendments, the amendments and the required supporting documents will be submitted to the Attorney General for review as to legality and form to the extent the form relates to legality. Any person may request notification of the date of submission to the Attorney General. 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 amendments as adopted, should submit a written request to Ms. Cooper at the address above.

Dated this 24th day of July, 1990.

William G. Brown

WILLIAM G. BROWN
Chief Administrative Law Judge

STATE OF MINNESOTA

OFFICE OF ADMINISTRATIVE HEARINGS

FIFTH FLOOR, FLOUR EXCHANGE BUILDING
310 FOURTH AVENUE SOUTH
MINNEAPOLIS, MINNESOTA 55415
(612) 341-7600

November 21, 1990

Thomas F. Pursell
Assistant Attorney General
200 Ford Building
117 University Avenue
St. Paul, MN 55155

Re: Proposed Amendments to OAH Rules

Dear Mr. Pursell:

The Office has gone through the noncontroversial rulemaking process, and is now at the point of preparing to submit its final proposed rules to the Attorney General's Rules Review Unit pursuant to Minn. Rule pt. 2010.0300. One of the requirements of that rule is that the Office obtain a declaration from you regarding compliance with the APA.

As we discussed by telephone on Friday, enclosed herewith is the rulemaking record. To the best of my knowledge and belief, it contains everything you need for your review. It is organized according to the paragraph designations in Rule 2010.0300. There are some materials which that rule does not require to be submitted to the Rules Review Unit, and so they are not included in this package. If there is anything you need or would like to see which is not included here, please call me and I will get it to you.

As always, if you have any questions, don't hesitate to call.

Yours very truly,

Allan W. Klein

ALLAN W. KLEIN
Administrative Law Judge

AWK/lr

Telephone: 612/341-7609

P. S. If you would be so kind as to deliver this to the Rules Review Unit (assuming you approve) it would be appreciated.

AN EQUAL OPPORTUNITY EMPLOYER

(G)

STATE OF MINNESOTA
OFFICE OF ADMINISTRATIVE HEARINGS

In the Matter of the Proposed Amendments to Rules Governing Administrative Rulemaking Hearings, Contested Case Hearings, Revenue Recapture Act Hearings, Power Plant Siting and Power Line Routing Hearings, Minn. Rules Chapters 1400 and 1405.

AFFIDAVIT OF MAILING

STATE OF MINNESOTA)
) ss.
COUNTY OF HENNEPIN)

Michael W. Lewis, being duly sworn, deposes and says:

That on the 7th day of August, 1990, at the City of Minneapolis, County of Hennepin, State of Minnesota, he served the attached "Notice of Intent to Adopt Rules Without a Public Hearing" by depositing in the United States Mail for first class mailing at said City of Minneapolis, a copy thereof, properly enveloped, with postage prepaid, on all persons and associations who have requested their names to be placed on file with the Minnesota Office of Administrative Hearings for the purpose of receiving notice of the proposed adoption of rules by the Office.

Subscribed and sworn to before me
this 21st day of November, 1990.

Paige L. Purcell

PAIGE L. PURCELL
NOTARY PUBLIC—MINNESOTA
RAMSEY COUNTY
MY COMMISSION EXPIRES 8-23-95

(G)

STATE OF MINNESOTA
OFFICE OF ADMINISTRATIVE HEARINGS

In the Matter of the Proposed Amendments to Rules Governing Administrative Rulemaking Hearings, Contested Case Hearings, Revenue Recapture Act Hearings, Power Plant Siting and Power Line Routing Hearings, Minn. Rules Chapters 1400 and 1405.

CERTIFICATE

I hereby certify that the list of persons, associations, and other interested groups who have requested, pursuant to Minn. Stat. § 14.14 (1988), 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 the Office was accurate and complete as of 9:00 a.m. on the 7th day of August, 1990.

Dated this 21st day of November, 1990.

Susan Schleisman

SUSAN SCHLEISMAN

Administrative Assistant

Subscribed and sworn to before me

this 21st day of November, 1990.

Paige L. Purcell

PAIGE L. PURCELL
NOTARY PUBLIC—MINNESOTA
RAMSEY COUNTY
MY COMMISSION EXPIRES 8-23-95

(L)

STATE OF MINNESOTA

OFFICE OF THE ATTORNEY GENERAL

HUBERT H. HUMPHREY, III
ATTORNEY GENERAL

BUSINESS REGULATION SECTION
1100 BREMER TOWER
SEVENTH PLACE & MINNESOTA ST.
ST. PAUL, MN 55101
TELEPHONE: (612) 296-9412
FACSIMILE: (612) 296-7438

March 19, 1990

Bill Brown
Chief Administrative Law Judge
Office of Administrative Hearings
Fifth Floor, Flour Exchange Building
310 Fourth Avenue South
Minneapolis, Minnesota 55415

RECEIVED
MAR 20 1990
ADMINISTRATIVE
HEARINGS

Re: In the Matter of the Proposed Amendments to Rules Governing Administrative Rulemaking Hearings, Contested Case Hearings, Revenue Recapture Act Hearings, Power Plant Siting and Power Line Routing Hearings, Minn. Rules Chapters 1400 and 1405

Dear Mr. Brown:

Thank you for sending me a copy of the draft amendments to the rules of the Office of Administrative Hearings (OAH), Minn. Rules Chapters 1400 and 1405.

I have shared the draft rule amendments with the members of the Administrative Law Committee of the Office of the Attorney General. The Committee met to discuss the draft amendments. The Committee is supportive of the amendments on the whole and, with the changes discussed below, favors their adoption.

The Committee's comments on the draft amendments are discussed below.

Part 1400.5600, Notice and Order for Hearing, subp. 5, Amendment

Amendments are proposed to this part which would establish a new procedure for amending notices of hearing. As discussed below, the Committee believes that the proposed amendment would make the rule inconsistent with Minn. Stat. § 14.58.

In its existing form, part 1400.5600, subp. 5, is consistent with Minn. Stat. § 14.58 (1988), as recognized by the draft Statement of Need and Reasonableness at page 4. Section 14.58 allows an agency to amend its notice in two circumstances: first, if the issues cannot be fully stated in advance of the hearing; and second, if subsequent amendment of the issues is necessary. Such amendments do not raise due process problems as long as the respondent understands the amendment and has an adequate opportunity to respond. Beck, Bakken, Muck, Minnesota

Administrative Procedure, § 5.2.2 (1987). Both the statute and the rule recognize that the agency is the entity that orders the hearing and determines what the issues are. Allowing the agency to amend its notice when necessary eliminates the need to issue new notices and orders for hearing on a case which is in the process of being tried.

The draft amendment takes the determination of the issues in the case out of the agency's hands after the commencement of the presentation of the evidence and gives it to the Administrative Law Judge (ALJ). While we understand that the OAH is trying to balance a respondent's right to respond with the agency's right to dispose of all allegations in one proceeding, the amendment gives an ALJ the discretion to limit the agency's case in a way that is inconsistent with the governing statutory language. Section 14.58 does not require an agency to show that it could not reasonably amended its notice prior to the presentation of evidence. It would seem therefore that the test in the draft amendment is without statutory authority.

Finally, the draft Statement of Need and Reasonableness indicates at page 5 that the current rule is not creating a large problem, but that "[O]n a few occasions, judges have observed situations . . . " If agencies are amending notices after the presentation of evidence in only a few of the large number of cases tried, perhaps no amendment is really necessary.

Part 1400.5950, Mediation

The Committee notes that the draft amendments to item C and D of this part are not consistent. Item C as amended appropriately allows mediation to proceed in a multiparty situation even though not all parties are willing to mediate. However, item D as amended provides that the chief judge will not appoint a mediator and issue an order for mediation unless all parties agree to mediation. This problem could be fixed by amending item D as follows (starting from the original text of the rule):

> D. If the chief judge determines that at least two parties, ~~no party, directly affected person, or~~ including the agency, have agreed ~~is opposed~~ to mediation, the chief judge shall appoint a mediator and issue an order for mediation, which shall set forth:
> . . .

Part 1400.6000, Default; Part 1400.8560, Default

The last sentence of both of these rules is proposed to be amended to read: "A default occurs when a party fails to appear without the consent of the judge at a prehearing conference, settlement conference or a hearing or fails to comply with any

interlocutory orders of the judge." The Committee supports the draft amendments but suggests that the amended language should require the prior consent of the judge.

Part 1400.6700, Discovery

The Committee supports the draft amendment to subpart A but believes that the meaning of the amendment would be more clearly stated if the amendment read as follows: "along with a brief summary of each witness' testimony."

Part 1400.8401, Expenses and Attorney Fees

The last line of the draft amended rule references Minn. Rules Parts 1400.8510 to 1400.8512. The latter reference should be 1400.8612.

The Committee is appreciative of this opportunity to provide early input into the draft rule amendments. If you have any questions concerning our comments, please do not hesitate to give me a call.

Sincerely,

Joculyn F. Olson

JOCELYN F. OLSON
Assistant Attorney General
Telephone: (612) 296-3701

.BL8

(L)

RECEIVED
MAR 30 1990
ADMINISTRATIVE HEARINGS

MARY MARTIN & ASSOCIATES
ATTORNEYS AT LAW
60 EAST MARIE AVENUE, SUITE 204
WEST ST. PAUL, MINNESOTA 55118-5910
(612) 450-9892
FAX (612) 450-7189

MARY K. MARTIN
JANET L. GOEHLE

cc: Dolgt
Alfa
& other original
Thanks
Bill

March 29, 1990

Honorable William Brown
Chief Administrative Law Judge
Office of Administrative Hearings
Flour Exchange Building
310 4th Avenue South
Minneapolis, Minnesota 55415

Re: Solicitation of Outside Opinion Regarding the Rules of the Office of Administrative Hearings

Dear Judge Brown:

I am writing in response to the notice of intent to solicit outside opinion which was published in the State Register on February 12, 1990.

I have comments in three major areas. While I realize that some of these issues are matters of statute and not rule, I have taken the liberty of providing a carbon copy of this letter to the Chairman of the Chairman of the Administrative Law Section of the Bar for consideration for possible amendments to the Administrative Procedure Act.

My first comment relates to commencement of contested cases. My experience practicing before administrative agencies has been before the Department of Human Services, Department of Health and the Professional Licensing Boards. While in professional discipline and licensing cases, I have experienced no difficulty in scheduling cases for hearing, there has been a greater difficulty in the area of provider rate appeals before the Department of Human Services. Prior to the mid 1980's, when a provider's rate was in dispute, the laws allowed for the providers to hold any monies in dispute until the dispute was resolved; for this reason, it made sense for the Department to request an administrative hearing since the Department was the party that sought recovery of the funds.

A change in the law in the mid 1980's shifted the holding of money in dispute to the Department of Human Services, without a corresponding change in the ability to request and administrative hearing. Therefore, under existing law, a provider files its rate appeal, the Department holds the money and the Department also has the discretion as to when an administrative hearing is requested. Whether in law or rule, the procedure needs to be amended so that the provider can request the administrative appeal. As the system currently exists, it is a legal system in which only the party that has no interest in a speedy resolution of the matter can petition for relief. Under current law the providers only remedy is to petition the Court for a Writ of Mandamus to compel the agency to request a contested case hearing. This procedure is expensive, cumbersome and time consuming. An administrative procedure should be available to request an administrative hearing.

The second item and the third item relate to rulemaking proceedings. My first comments are regarding the three day response period for administrative rules under Minnesota Statutes 14.15, Subd. 1. After the twenty day comment period closes, both sides have three calendar days in which to submit rebuttal comments. As an attorney who frequently represents statewide organizations and providers outside the Twin Cities, a period that is only three calendar days long is of little use since it is difficult, if not

impossible to pick up materials at 8:30 in the morning on day one and have disseminated those materials for comment, compose and submit a response by the end of the third calendar day. Therefore, I would ask that your office and the Administrative Law Section consider supporting an amendment to extend this period to two calendar weeks.

My third comment relates to seating arrangements at rule hearings. In a contested case proceeding it is common practice for the Judge to sit at the front of the room and the opposing sides to sit at the tables before the Judge in an ordinary courtroom. At rule hearings however, it is common practice for the Judge to sit at the front of the table along with the agency representative and witnesses at the same table, while the public remains in the audience, much in the style of a city council meeting. I know that your office has always prided itself on the appearance of impartiality and I believe it would be a good practice to promote that appearance to require agency representatives to sit at a separate table or in the audience during a rulemaking proceeding. At a recent hearing in which I was involved, the Judge and eight agency representatives sat at the head of the room with the public in the rear. Several clients and members of the public commented to me that this was an intimidating arrangement, and they inquired "whose side is the Judge on anyway?" A simple change in the seating arrangement at rule hearings could easily avoid questions of this kind.

I thank you for the opportunity to express my opinions and I thank you in advance for your consideration.

Sincerely,

MARY MARTIN & ASSOCIATES

Mary K. Martin

MKM/cvf

cc: Becky Comstock, Chairman
Administrative Law Section MSBA

(L)

STATE OF MINNESOTA

OFFICE OF THE ATTORNEY GENERAL

HUBERT H. HUMPHREY, III
ATTORNEY GENERAL

200 FORD BLDG.
117 UNIVERSITY AVE.
ST. PAUL, MN 55155
TELEPHONE: (612) 296-7575
FACSIMILE: (612) 297-4193

May 24, 1990

RECEIVED
90 MAY 25 AM 9:13
ADMINISTRATIVE
HEARINGS

Judge Allan Klein
Office of Administrative Hearings
5th Floor, Flour Exchange Building
310 Fourth Avenue South
Minneapolis, Minnesota 55415

Re: Proposed amendments to OAH Rules

Dear Judge Klein:

I have reviewed the proposed rules and statement of need which you sent to me on May 15, 1990. I have only two comments:

1) Proposed 1400.5950, subp. 5 -- "is unwilling" should be changed to "are unwilling" to agree with the plural noun.

2) 1400.7400, subpart 1 (and the parallel rules dealing with the disposition of hearing tapes) -- despite having been your counsel for lo these four years, I do not know whether you have a records retention policy which covers the disposition of hearing tapes. If you don't have a permanent policy approved by the Records Disposition Panel you also need to take into account the records disposition procedures of Minn. Stat. §§ 138.163-138.25 (1988), in particular 138.225 which prohibits the destruction of government records except as authorized by the Panel.

Please let me know if you have any questions or if there is any other way I can be of assistance.

Very truly yours,

THOMAS F. PURSELL
Assistant Attorney General

Antitrust Division
(612) 296-7575

TFP:cg

(L)

LCRAR

RECEIVED
90 JUN -4
ADMINISTRATIVE HEARINGS

Legislative Commission to

Review Administrative Rules

Senator Gene Waldorf
Chair

Representative Peter Rodosovich
Vice-Chair

Maryanne V. Hruby
Director

June 1, 1990

Allan W. Klein
Administrative Law Judge
Office of Administrative Hearings
Fifth Floor, Flour Exchange Building
310 Fourth Avenue South
Minneapolis, Minnesota 55415

Dear Allan:

Thank you for sending me the drafts of your proposed rules and the statement of need and reasonableness. Paul Marinac (LCRAR Counsel) and I have reviewed them and have no comments for you at this time. Your changes don't seem to raise any issues of concern to the Commission.

Good luck in your rulemaking, and if you have a hearing, I hope you have an understanding judge.

Sincerely,

Maryanne Hruby

MH:mms

55 State Office Building • St. Paul, Minnesota 55155-1201 • 612/296-1143

(L)

STATE OF MINNESOTA
State Planning Agency
300 Centennial Building
658 Cedar Street
St. Paul, Minnesota 55155
(612) 296-3985

FAX: 612/296-3698

FACSIMILE TRANSMISSION

TO: Allan Klein - ALJ

FAX#: 349-2665

FROM: Bob Cupit 6-2096

NUMBER OF PAGES 4
(INCLUDING THIS SHEET)

COMMENTS:

PROBLEMS OR QUESTIONS REGARDING THIS TRANSMISSION, PLEASE CALL 612/296-3985.

June 11, 1990

TO: Allan Klein
ALJ

FROM: Bob Cupit

SUBJECT: Rulemaking - Chapter 1405

As I noted in our recent conversation, we are in rulemaking on our Power Plant Siting rules, and are proposing a change in our rules which may necessitate a change in your special ALJ rules for power lines and plants (1405).

I am forwarding the section of our proposed rules to which I will refer. In effect, we are proposing to transfer the EIS preparation rules in chapter 4410 into the power plant siting rules (4400) to avoid the confusion we feel the public has in reviewing lines and plants under two separate process. In doing so we must distinguish between an EIS and the environmental document which will serve the same purpose in the blended siting process. We are calling it an "environmental impact assessment". It is designed to meet the intent and content requirements of Minnesota Statutes, chapter 116D. The preparation of an "EIA" is guided by new parts 4400.1210 for routes and 4400.3210 for plant sites. Note that there would no longer be a "draft" and "final" environmental document.

The ALJ hearing rules refer to an EIS in 1405.1400 and in 1405.1800, subp. 5. Possible changes which would be consistent with our rule amendments are as follows:

(B) 1405.1400 last sentence - However, the record shall remain open beyond that date for the sole purpose of receiving board responses to relevant comments received on the environmental impact assessment.

(C) 1405.1800 subp. 5 - Environmental documents. The environmental impact assessment prepared pursuant to parts 4400.1210 and 4400.3210 shall be entered into the record at a point during the hearing process which will allow all persons an opportunity to review and comment on the material. In addition, all comments and responses to comments which the board desires to consider shall be entered into the record promptly after they are received.

Relating to another area of the ALJ rules, we have added an exemption process for small power plants in our rules in compliance with a 1989 statutory amendment. A corresponding change in the ALJ rules would be as follows:

(A) 1405.0300 SCOPE AND PURPOSE. First sentence, ~~fourth~~ line - ...and to the site and ~~route exemption processes~~ contained in Minnesota Statutes, section 116C.57, subdivisions ~~5~~ and 5a ...

Regarding the proposed language you sent over, specific to 1405.0200 and 1405.1800, we have no furthur comment.

4400.1210 ENVIRONMENTAL IMPACT ASSESSMENT FOR HVTL.

Subpart 1. Record of hearings. An environmental impact assessment (EIA) must be prepared for inclusion in the record of the public hearing under Minnesota Statutes, section 116C.58.

Subp. 2. Contents. The EIA must contain:

A. a summary of the project description provided in the project proposer's application;

B. a summary of the certificate of need decision, if one was required and is available; the EIA must not consider need for the project and other issues determined by the Public Utilities Commission;

C. a description of the applicant's proposed routes and any alternative routes or route segments approved by the board for consideration at public hearings;

D. a description of feasible alternative designs;

E. an analysis of the potential human and natural environmental effects of each alternative route, route segment,

or design. The analysis must include those issues identified by the route advisory task force or by any interested person during the first public information meeting held under part 4400.1000;

F. a description of mitigative measures that could reasonably eliminate or minimize potential adverse effects;

G. a discussion of all known governmental permits and approvals required; and

H. an explanation of the board's routing process and how the public may participate, and specifically, how public comments on the EIA will be received for inclusion in the record of the public hearing.

Subp. 3. Notice of availability. The chair or the chair's designee shall provide notice of the availability of the EIA and how the public can participate in its review. The notice must be provided according to Minnesota Statutes, section 116C.58, and part 4400.3710, and may be provided in the notice of the hearing required. Notice must also be published in the EQB Monitor.

Subp. 4. **Distribution.** When notice of availability is provided under subpart 3, the EIA shall be distributed by certified mail to the persons receiving notice. At least one copy must be available for public review at the last public information meeting held before the public hearing and during the public hearing conducted under Minnesota Statutes, section 116C.58.

Subp. 5. **Comments.** The comment period begins when notice of availability of the EIA is published in the EQB Monitor and closes at the end of the oral portion of the public hearing. At least 30 days must be provided for comments. All comments become part of the hearing record as provided in part 1405.1800, subpart 5. The hearing record remains open until responses have been provided to all relevant comments that address deficiencies in the EIA pursuant to subpart 2. The date shall be set by the administrative law judge under part 1405.1400.

Subp. 6. **Adequacy.** Prior to designating a route and issuing a construction permit for an HVTL, the board shall make

a finding and conclusion that the EIA, comments on the EIA, and responses to comments:

A. have adequately addressed significant environmental issues identified by the route advisory task force and the public under parts 4400.0800 and 4400.1000; and

B. have been prepared in compliance with the requirements of this part.

Subp. 7. **Cooperative processes.** The chair or the chair's designee shall cooperate with federal agencies to the fullest extent possible to reduce duplication between Minnesota Statutes, chapter 116D, and the National Environmental Policy Act, United States Code, title 42, sections 4321 to 4361.

Subp. 8. **Costs.** The board shall assess the project proposer for its reasonable costs of preparing and distributing the EIA pursuant to part 4410.6000.

(L)

OFFICE OF ADMINISTRATIVE HEARINGS

TO: MIKE LEWIS 6/25/90

FROM: ALLAN KLEIN 7609

RE: Additional Change in Rulemaking Rules

I received a telephone call from Paul Marinac at the Revisor's Office. He was wondering when we were going to get our revised language on Chapter 1405 to him. I told him we would get it to him by the end of the week.

He said that he had one additional suggestion for the rules. He pointed out that Rule 1400.0500, subp. 1B. refers to the required approval of the Commissioner of Finance for some rules. The Legislature recently amended 16A.128 to add a new subdivision which requires notice to the chairs of certain committees for certain rules. Paul recommended that we add a reference to that provision in our rules. It strikes me this could be done by just adding a sentence to paragraph B, or adding a new paragraph C. Either way, I think it is a good idea, as it is something that agencies do overlook and to the extent agencies are using our rules as a checklist, then it would be appropriate to make mention of it in our rules. This is as good a place as any.

Would you please add that to the rule, and then ship the amended pages over to Paul Marinac. He needs the amended page for this change, as well as for the changes in Chapter 1405.

As soon as you have gotten it to him, please start working on the SONAR, so that by the time we publish in the State Register, we will have the SONAR finished. The only changes that I know of to the SONAR would be the changes to reflect this proposal, as well as the 1405 proposals. Bob Cupit has done a good job on the 1405 stuff, and I don't know that we have to do anything other than to just retype it. That is up to you, however.

Thank you.

Barbara F. L. Penn, Esq.
President
Angie McCaffrey, Esq.
First Vice President
Kathy Bartz
Second Vice President
Daniel J. Cole, Esq.
Third Vice President
Gerald A. Regnier, Esq.
Secretary
Florence Berg
Treasurer
Bruce A. Beneke
Executive Director
Mark A. Bohnhorst
Litigation Coordinator
Dennis Dorgan
Community Advocacy Coordinator
Michael Hagedorn
Support Counsel
Sylvia Lane
Comptroller
Janet C. Werness
Support Counsel

CENTRAL OFFICE
300 Minnesota Bldg.
St. Paul, MN 55101
(612) 222-5863

MANKATO AREA OFFICE
450 Nichols Office Center
Mankato, MN 56001
(507) 387-5588

MIGRANT LEGAL SERVICES
700 Minnesota Bldg.
St. Paul, MN 55101
(612) 291-2837

MIGRANT LEGAL SERVICES
722½ - 1st Avenue North
Fargo, ND 58102
(701) 232-8872

PRIOR LAKE OFFICE
16174 Main Avenue
Prior Lake, MN 55372
(612) 440-1040

SO. CENTRAL AREA OFFICE
Lea Center Bldg. Suite 243
139 East William
Albert Lea, MN 56007
(507) 377-2831

S.E. AREA OFFICE
66 Plaza East
Winona, MN 55987
(507) 454-6660

S.W. AREA OFFICE
926 5th Ave.
Worthington, MN 56187
(507) 372-7368

PROJECTS

LEGAL ADVOCACY FOR OLDER AMERICANS
300 Minnesota Bldg.
St. Paul, MN 55101
(612) 224-7301
450 Nichols Office Center
Mankato, MN 56001
(507) 388-8436
66 Plaza East
Winona, MN 55987
(507) 454-6660
16174 Main Avenue
Prior Lake, MN 55372
(612) 440-1040
926 5th Ave.
Worthington, MN 56187
(507) 372-7368
Lea Center Bldg. Suite 243
139 East William
Albert Lea, MN 56007
(507) 377-2831

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300 Minnesota Bldg.
St. Paul, MN 55101
(612) 222-3749

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66 Plaza East
Winona, MN 55987
(507) 454-6660

LAW OFFICES OF
SOUTHERN MINNESOTA
REGIONAL LEGAL SERVICES, INC.

Administrative/Program Support Office
700 Minnesota Building
(46 East Fourth Street)
Saint Paul, Minnesota 55101
(612) 228-9823

(L)

RECEIVED
SEP 13 1990
ADMINISTRATIVE
HEARINGS

September 12, 1990

Mr. William G. Brown
Chief Administrative Law Judge
Minnesota Office of Administrative Hearings
Fifth Floor Flour Exchange Bldg.
310 Fourth Ave. South
Minneapolis, MN 55415

Re: *Comment in Opposition to Proposed Amendment to Rule 1400.8300*

Dear Chief Judge Brown:

The proposed revision of Rule 1400.8300 was brought to my attention in connection with a motion now pending before Judge Lunde. By way of background, I am enclosing copies of the motion papers and arguments in that matter. This comment addresses both the standards and the time limits in the proposed rule.

I. STANDARDS

The statement of need and reasonableness, pp. 9 and 10, sets out several justifications for the revisions. I agree with *all* those justifications. It is appropriate that the rule specify standards, that the rule be complete, that the standards be taken from the Rules of Civil Procedure, and that the rule use an over-all standard of "inconsistent with substantial justice." That standard should be sufficient to protect agencies from being burdened with unnecessary costs.

The statement of need and reasonableness does not explain why a significant Rule 59 standard - Rule 59.01(g) - has been omitted. The proposed rule is not "complete" without this standard. The four standards the proposed rule adopts do not allow for motions which call the ALJ's attention to significant inconsistencies between or among the findings, conclusions and order. Parties who would like to resolve such matters

United Way
affiliated agency

expeditiously and cheaply at the ALJ level are left with the Hobson's choice of either filing an expensive appeal or enduring a possible injustice. While it is proper to consider the expense to the agencies, the added expense to the parties and the appellate courts (not to mention the agencies themselves) of forcing unnecessary appeals through an unnecessarily narrow rule must be considered as well. The significant policy considerations underlying Rule 59 should not be overlooked.

The proposed revisions are intended to apply a "substantial justice" standard. However, the narrowness of the proposed rule now leads the Commissioner of the Department of Human Rights to argue that the rule mandates summary dismissal of motions, regardless whether a substantial injustice has been done. September 5, 1990 letter, p. 2. As now drafted, the rule is unreasonably narrow and rigid, and the standards should be expanded to include Rule 59.01(g).

II. TIME LIMITS

The motion for reconsideration is essentially a Rule 59 motion. September 7, 1990 Reply Memorandum, pp. 1-2. To toll the running of the time to appeal, such motions must be filed very quickly - within 15 days. The time for filing such a motion is *different* from the 30 or 90 day appeal periods. Many a litigant has filed a motion similar to a Rule 59 motion but not within the 15 day period, had the motion denied, and then learned that the time to appeal had passed.

At least those unfortunate litigants were on notice from Rule 59 itself that they had to act within 15 days. Unlike Rule 59, the proposed rule sets a trap. The critical time period for bringing a motion is *not* the time to appeal, but the time within which a motion must be filed in order to extend the time to appeal. Under Minn. Stat. § 14.64, that period is ten (10) days. Since the new rule would extend the time for filing a motion to 30 days, many litigants are going to think they have 30 days to file a motion when, as a practical matter, they really have only 10 days. To be consistent with Rule 59 procedures and fair to all litigants, the proposed rule should be changed to specify that motions must be filed within 10 days. If a longer time period is deemed desirable, efforts should first be made to amend Minn. Stat. § 14.64.

Thank you for your consideration of these comments.

Very truly yours,

Mark A. Bohnhorst
Litigation Coordinator

MAB/bg

STATE OF MINNESOTA
OFFICE OF ADMINISTRATIVE HEARINGS

FOR THE MINNESOTA DEPARTMENT OF HUMAN SERVICES

State of Minnesota, by Stephen W. Cooper, Commissioner, Department of Human Services,

Complainant,

-vs-

City of St. Paul,

Respondent,

and

St. Paul Fire Fighters Local 21,

Intervenors,

and

Fowler v. Berry, (the certified class of minority persons in Fowler v. Berry),

Intervenors.

No. 8-1700-3224-2

PETITION FOR RECONSIDERATION

MOTION

Pursuant to Minn. Rules 1400.8300, the *Fowler v. Berry* intervenors hereby move that the court reconsider one phrase of its August 24, 1990 Findings of Fact, Conclusions and Order.

The single phrase which is the subject to this motion[1] is the highlighted portion of the following sentence:

> Any test developed by the City should be developed in consultation with other parties to this case, must be standardized and normed in a proper fashion, *and must be graded on a pass-fail basis unless the City can justify rank ordering*. Id., Order, ¶ 6, p. 35.

Intervenors request that the court clarify that none of the legal or factual issues regarding pass-fail grading has been decided by this order.

To: Complainant; Respondent City of St. Paul; and Intervenor St. Paul Fire Fighters Local 21:

PLEASE TAKE NOTICE that, should you wish to contest this motion, you must file a written response with the judge and serve copies on all parties within ten (10) working days after it is received.

ARGUMENT

INTRODUCTION

The last phrase of the first sentence of ¶ 6 of the Order is subject to two possible interpretations. First, if read in conjunction with the Conclusions and the Memorandum, the court in ¶ 6 of the Order is simply reserving the question of pass-fail grading until a new, valid examination is developed. Intervenors believe such an order is fully supported by the Findings, Conclusions and Memorandum and is the only fair disposition of the pass-fail issue at this time.

Second, however, read narrowly and in isolation the order may pre-determine a critical issue regarding pass-fail grading. The order seems to shift the burden of proof.

---

[1]We note one typographical error and one development. 1. On the top line of page 29, in context it appears the word "anaerobic" should be "aerobic." 2. On page 41, the appeal in *Zamlen* has been decided. *Zamlen v. City of Cleveland*, 906 F.2d 209 (6th Cir. 1990) (affirming the district court).

I.

RESERVING THE ISSUE OF PASS-FAIL GRADING IS APPROPRIATE.

The class intervenors believe that the proper interpretation of ¶ 6 is that all issues relating to pass-fail grading have been reserved. This interpretation seems to be compelled by the Conclusions of Law and Memorandum. Conclusion of Law No. 15 states:

> Because Phase II of the 1988 firefighters physical ability test is not content valid it is unnecessary and inappropriate to determine if a properly validated physical abilities test may be rank ordered.

This point is re-stated in the Memorandum at p. 49 under the heading *Rank Ordering*:

> It is not necessary to discuss in any detail the propriety of ranking scores on the 1988 firefighter physical ability test. Since Phase II of the test was not shown to be valid, ranking issues raised by the parties need not be addressed. Ranking raises difficult issues and the propriety of ranking the test results of a new test should be considered at the time that test is submitted for approval.

Clearly, questions relating to ranking and pass-fail grading have been reserved until the new test has been developed.

This same conclusion follows from the analysis of the law of adverse impact. The Memorandum at the bottom of page 39 correctly summarizes the law of adverse impact under the Minnesota Human Rights Act:

> Under the Act, therefore, Complainant has the burden of establishing a *prima facie* case by showing that the City's physical abilities test is responsible for a statistically significant adverse impact on women. To meet this burden the Complainant must identify the particular employment practice causing the adverse impact. This showing follows from the language of the Act, stating that a Complainant must show that the employment practice challenged "is responsible for" the adverse impact. If a *prima facie* showing is made, the Respondent must justify the test by demonstrating that it is manifestly related to the job or significantly furthers an important business purpose.

The particular employment practice which was found to have caused an adverse impact (pursuant to the admissions of the City and Union) was the test. There is no finding that rank ordering caused an adverse impact. In the absence of findings and conclusions that the particular

employment practice of rank ordering caused a statistically significant adverse impact, there is no basis for a substantive order effectively determining that a *prima facie* case has been established.[2] To reserve this issue was the proper course.

II.

THE ORDER ¶ 6 SHOULD BE CLARIFIED.

Although we believe the intent of the order is to do no more than reserve the issue of the appropriateness of pass-fail relief, the statement in ¶ 6, that the test "must be graded on a pass-fail basis unless the City can justify rank-ordering," appears to go beyond this. The Order is phrased in mandatory terms. The Order uses the burden-shifting language from the Memorandum, which states that after a specific employment practice has been shown to create an adverse impact, the burden shifts to respondent to "justify" the employment practice.

There are no findings to justify an implicit or *sub silentio* shifting of the burden as to pass-fail relief and rank ordering. "Rank ordering" applies to those who have passed examinations and occurs after preference points have been applied. Findings, ¶ 28, p. 8. No women passed, and women have not been rank ordered. The adverse impact in this case was caused by the test and the norming, not by rank ordering.

The ALJ has found that strength, anaerobic fitness and aerobic fitness are all important in firefighting. *E.g.*, Findings, ¶s 137, 138. Although *on average* women's performance levels

---

[2]As was explained in the June 12, 1990 Post-Hearing Order and Memorandum, p. 3:

> Hence, in this proceeding Complainant has the burden to establish. . .that the rank ordering has an adverse impact on women.

as to all three physiological characteristics are below men's, there is a degree of overlap. Findings ¶s 119, 120, p. 29. Many women have the aerobic capacity needed for firefighting. Findings, ¶ 123, p. 30. Those women who possess sufficient strength for firefighting will not be disadvantaged by a longer physical abilities test, such as the City will develop. Findings ¶ 132, p. 31. Given these findings, there is no basis for assuming that the "otherwise qualified" female applicants (i.e., those whose physical capabilities substantially overlap with males and who pass a new test) will suffer adverse impact from rank ordering.

We believe that the reach-out ordinance is more than sufficient to protect the interests of qualified female applicants. Shifting the burden on this issue may directly impair the interests of the class. The court should not decide issues which are "unnecessary and inappropriate to determine" (Conc. ¶ 15). Intervenors agree that these are "difficult issues", Memo. at 49, and the court has chosen not to address them, *Id.* The Order should be clarified to specify that the court has not done so.

III.

CONCLUSION.

The Findings, Conclusions and Memorandum concerning the 1988 test and norming are detailed, are fully supported by the record and represent a just resolution of those issues. In the entire 52 page document, only one phrase seems out of place. Unfortunately, that phrase can be read as shifting the burden on an issue of vital importance to minority applicants. Since this phrase is part of an appealable "final" order, it may be held to be the law of the case in future proceedings. The class has little choice but to request a clarification that the burden has not been shifted. If the court did intend to shift the burden, intervenors request that it reconsider

that decision. Enclosed with this Petition is a brief Proposed Order which provides the needed clarification.

Dated: August 31, 1990

Respectfully submitted,

Southern Minnesota Regional
Legal Services, Inc.

By: Mark A. Bohnhorst
Mark A. Bohnhorst

700 Minnesota Building
46 East Fourth Street
Saint Paul, Minnesota 55101
Telephone No. (612) 228-9823

ATTORNEYS FOR THE Fowler v. Berry Class

STATE OF MINNESOTA
OFFICE OF ADMINISTRATIVE HEARINGS

FOR THE MINNESOTA DEPARTMENT OF HUMAN SERVICES

- - - - - - - - - -

State of Minnesota, by Stephen W. Cooper, Commissioner, Department of Human Services,

Complainant,

-vs-

City of St. Paul,

Respondent,

and

St. Paul Fire Fighters Local 21,

Intervenors,

and

Fowler v. Berry, (the certified class of minority persons in Fowler v. Berry),

Intervenors.

No. 8-1700-3224-2

PROPOSED ORDER

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

The above-captioned matter is before the undersigned Administrative Law Judge on the *Fowler v. Berry* class intervenor's Petition for Reconsideration. The motion requests reconsideration of the portion of paragraph 6 of the August 24, 1990 Order which states that a new test must be graded on a pass-fail basis unless rank ordering can be justified. As stated in

the Conclusions of Law, ¶ 15, and in the Memorandum, p. 49, the August 24, 1990 the Order has not addressed the ranking issues raised by the parties. The Order has not decided issues of burden of proof, adverse impact, or any other matters insofar as they relate to rank ordering or the Complainant's request for pass-fail grading.

Dated this ____ day of _____, 1990.

_____
Jon L. Lunde
Administrative Law Judge

HUBERT H. HUMPHREY, III
ATTORNEY GENERAL

STATE OF MINNESOTA

OFFICE OF THE ATTORNEY GENERAL
September 5, 1990

BUSINESS REGULATION SECTION
1100 BREMER TOWER
SEVENTH PLACE & MINNESOTA ST.
ST. PAUL, MN 55101
TELEPHONE: (612) 296-9412
FACSIMILE: (612) 296-7438

The Honorable Jon L. Lunde
Administrative Law Judge
Office of Administrative Hearings
5th Floor, Flour Exchange Building
310 4th Avenue South
Minneapolis, Minnesota 55415

Re: State v. City of St. Paul
File No. 8-1700-3224-2

Dear Judge Lunde:

Complainant opposes the petition for reconsideration filed by the Fowler v. Berry intervenors. That petition requests reconsideration of the portion of the order which provides that any test developed by the City "must be graded on a pass-fail basis unless the City can justify rank ordering." Order, page 35, para (6).

The petition should be summarily denied because it fails to meet the Office of Administrative Hearing's standard for reconsideration. That standard is as follows:

> In ruling on a motion for reconsideration or rehearing in cases where the judge's decision is binding on the agency, the judge shall grant reconsideration or rehearing if it appears that to deny it would be inconsistent with substantial justice and any one of the following has occurred:
>
> A. irregularity in the proceedings whereby the moving party was deprived of a fair hearing;
>
> B. accident or surprise that could not have been prevented by ordinary prudence;
>
> C. material evidence newly discovered that with reasonable diligence could not have been found and produced at hearing; or
>
> D. fraud upon the hearing process.

State v. Hennepin County, 4-1700-4772-2, order dated August 20, 1990 (denying complainant's petition for reconsideration); Office of Administrative Hearing's proposed amendment to rule 1400.8300, 15 S.R. 367-368.

In the instant matter, denying the petition would be consistent with substantial justice. In fact, the Administrative Law Judge was correct in ruling that the revised test must be pass-fail unless the City can justify rank ordering. See complainant's initial brief, pages 79-85; complainant's reply brief, pages 59-64; Erica Jacobson's letter dated June 14, 1990 and Erica Jacobson's letter misdated June 14, 1990 and postmarked Aug. 2, 1990. See also 29 CFR § 1607.14(c)(9) (permitting rank ordering only if the employer can demonstrate that a higher score is likely to result in better job performance). The Administrative Law Judge's order does not foreclose the possibility of the City's seeking to justify rank ordering of a future test; it merely correctly warns the City that rank-ordering would need to be justified.

Even if the Administrative Law Judge's decision were wrong and inconsistent with substantial justice, the Office of Administrative Hearing's standards for reconsideration would still not be met. In the instant matter, none of the following conditions occurred: irregularity in the proceedings depriving Fowler and Berry intervenor of a fair hearing, accident or surprise, material evidence newly discovered, or fraud upon the hearing process. The proceedings were fair, evidence was presented and arguments were made, and the Judge issued his decision. It is now time to move forward on this case toward a resolution of the remaining issues. Accordingly, the petition should be summarily denied.

Sincerely,

Erica Jacobson

ERICA JACOBSON
Special Assistant
Attorney General

EJ:bam/el3
cc: Terry Sullivan
Tom Jensen
Mark Bohnhorst

STATE OF MINNESOTA
OFFICE OF ADMINISTRATIVE HEARINGS

FOR THE MINNESOTA DEPARTMENT OF HUMAN SERVICES

State of Minnesota, by Stephen W. Cooper, Commissioner, Department of Human Services,

Complainant,

-vs-

City of St. Paul,

Respondent,

and

St. Paul Fire Fighters Local 21,

Intervenors,

and

Fowler v. Berry, (the certified class of minority persons in Fowler v. Berry),

Intervenors.

No. 8-1700-3224-2

REPLY MEMORANDUM IN SUPPORT OF THE PETITION FOR RECONSIDERATION

The Commissioner has opposed intervenors' Petition for Reconsideration and has asked that it be "summarily denied" because it fails to meet proper standards for such a motion. In our view, Minnesota Rule 1400.8300 and Minn. Stats. § 14.64 (second paragraph), working in tandem, serve precisely the same function as Minnesota Rules of Civil Procedure Rule 59 (New

Trials) (*Cf.* Rule 52.02) and Minnesota Rules of Appellate Procedure Rule 103.03(d). The Rule 59 motion for a new trial is very highly favored by the courts. That rule promotes judicial efficiency and saves litigants great expense by permitting the trial court to review and correct errors which, if not corrected, might require an appeal. The procedure is quick and, since all parties and the court are familiar with the case, it is generally inexpensive. Because of the vital policy functions served by Rule 59, the appellate courts will not entertain a wide range of issues unless an opportunity is first granted for the trial court to reexamine the issue in the first instance. Rule 103 extends the time for appeal from any issue raised on such a motion until after the motion is determined, thus also assuring that unnecessary appeals need not be filed.

Rule 1400.8300 and Minn. Stat. § 14.64 operate in the same manner. Whereas a motion for a new trial must be brought within fifteen (15) days, a motion for reconsideration must be brought within ten (10) days, if the time for appeal is to be extended. Thus, the critical time for bringing a motion is short in both instances. Rule 1400.8300 sets forth no specific criteria. The motion serves the same function as Rule 59, however, and the existing law set forth in Minnesota Rules 1400.6600 requires that Rule 59 standards be applied if they promote "a fair and expeditious proceeding." Under the law as it now exists, intervenors are entitled to have those standards considered. To "summarily deny" the motion without even considering those standards is to violate Rule 1400.6600.

The decision in a single unreported case decided last month is not binding on intervenors or on the administrative law judge in this particular case. In addition, policy considerations which may be applicable to individual garden variety discrimination cases are immaterial here.

We are engaged in protracted litigation, and the current final order is only the first of what may be several final orders issued in this case. Under circumstances of continuing administrative law judge supervision of a complex situation, motions for clarification and reconsideration which are intended to spare all parties the expense of an unneeded appeal should be entertained for good cause under any circumstances, regardless whether they comply with the rigid conditions now proposed by the Office of Hearings and Appeals.

The comment period on the proposed rules does not close until September 17, 1990, 15 S.R. 362. After reviewing the statement of need and reasonableness, we anticipate we may file a comment in opposition to the proposed change insofar as the change restricts the scope of Rule 59. In addition, the sentence providing that a petition may be filed at any time until the time for appeal has elapsed is most unfortunate and creates a trap for the unwary. The time for appeal is extended only if the petition is filed within ten (10) days, although the appeal period itself is thirty (30) days. Relying on the rule alone and their general experience in civil practice (time for appeal extended until 30 days after Rule 59 motion decided), lawyers are likely to file requests for reconsideration 25 to 30 days after the decision, have those requests denied, and then learn that they no longer have the right to appeal. Like the motion for a new trial, the time to bring a motion for reconsideration should be short. Since the appeal time is extended only if the motion is made within ten (10) days, the rule should require that the motion must be made within ten (10) days. (Our motion was filed within ten (10) days.) For all these reasons the proposed revision of Rule 1400.8300 is substantive, may be misguided, and should be seriously reconsidered.

Pursuant to Rule 1400.6600, the standards of Rule 59.01 should be applied insofar as they promote a fair and expeditious proceeding. It is fair and expeditious that the order be clarified so as to avoid an unnecessary appeal and allow the parties to focus all their energies on resolution of the remaining issues.

Rule 59.01(g) authorizes motions for new trials on the ground that "the. . .decision. . .is not justified by the evidence, or is contrary to law. . ." Clearly, if the order shifts the burden of proof, it is not justified by the evidence because there is no showing of adverse impact from rank ordering and there is no finding of such adverse impact. It is also contrary to law because the law requires that there be a showing of adverse impact before the burden can be shifted. Therefore, reconsideration meets the standards of Rule 59.

The need for reconsideration is also apparent from Ms. Jacobson's September 5, 1990 letter, p. 2, first full paragraph. The concerns which prompted this motion are borne out in the first two sentences and the citations set forth in that paragraph. Essentially the Commissioner argues that the order has ruled in favor of the Commissioner with respect to issues briefed by the parties. It is predictable that in all future proceedings the Commissioner will argue likewise. If the current order stands unclarified and is not appealed, he will further argue that the order is the law of the case. Absent a clarification that the order has not decided issues of burden of proof and adverse impact, the intervenors have no choice but to appeal the order.

The proposed order does not provide that the August 24th Order be changed. Under the proposed order, the "warning" about rank ordering would stand. What is needed is a specification that no legal issue previously argued by the parties and apparently reserved by the

court has actually been decided by the order. With that clarification our concerns with respect to the doctrine of the law of the case are satisfied.

The argument that an order which is "inconsistent with substantial justice" should be allowed to stand unclarified and that an effort to correct it and avoid an unnecessary appeal should be "summarily denied" is contrary to all notions of substantive justice and proper procedure. That the Commissioner would even make such an argument should give the Office of Hearings and Appeals pause. The proposed revisions of Rule 1400.8300 should be reconsidered. The motion should be granted.

Dated this 7th day of September 1990.

Southern Minnesota Regional
Legal Services, Inc.

By: Mark A. Bohnhorst
Mark A. Bohnhorst

700 Minnesota Building
46 East Fourth Street
Saint Paul, Minnesota 55101
Telephone No. 612-228-9823

ATTORNEYS FOR INTERVENORS

In the Matter of the Adoption
of the Rules of the State Office
of Administrative Hearings
Governing Rulemaking Proceedings,
Contested Case Proceedings,
Revenue Recapture Act Proceedings, and
Power Plant/Power Line Proceedings

DECLARATION
OF COUNSEL

I, Thomas F. Pursell, Assistant Attorney General, do hereby declare that I have examined the above-captioned rule, and the supporting rulemaking record, and that, based on my examination, the Administrative Procedure Act and Minnesota Rules, ch. 2010, have been followed. Any exceptions are listed below. For Attorney General billing purposes, the four-digit docket client code is 0445.

Dated: 11-30-90

HUBERT H. HUMPHREY, III
Attorney General

Thomas F. Pursell

THOMAS F. PURSELL
Assistant Attorney General
Atty. Lic. #12168X

200 Ford Building
117 University Avenue
Saint Paul, Minnesota 55155
(612) 296-7575