

STATE OF MINNESOTA  
OFFICE OF ADMINISTRATIVE HEARINGS

FOR THE MINNESOTA DEPARTMENT OF LABOR AND INDUSTRY

In the Matter of the Proposed  
Amendments to Rules  
Governing Prevailing Wage  
Determinations, Minn. Rules  
Part 5200.1000-5200.1120.

**REPORT OF THE**  
**ADMINISTRATIVE LAW JUDGE**

The above-entitled matter came on for hearing before Administrative Law Judge Allen E. Giles at 9:30 a.m. on July 17, 1996, at the Minnesota State Office Building in St. Paul, Minnesota. The hearing continued until all interested persons had been heard.

This Report is part of a rulemaking proceeding held pursuant to Minn. Stat. §§ 14.131 to 14.20, to hear public comment, to determine whether the Minnesota Department of Labor and Industry (the Department) has fulfilled all relevant substantive and procedural requirements of law applicable to the adoption of the rules, whether the proposed rules are needed and reasonable and whether or not any modifications to the rules proposed by the Department after initial publication are substantially different.

The Department's hearing panel consisted of Gail Blackstone, Assistant Commissioner; Greg Johnson, Labor Investigator and Erik Oelker, Labor Investigator; and William A. Bierman, Jr., Agency Counsel. Also included on the Agency panel were three employees of the Minnesota Department of Transportation: Charles Groshens, Labor Investigator; Catherine Peterson, Labor Investigator; and Wayne Murphy, State Highway Construction Engineer. Approximately 45 persons attended the hearing, 15 persons signed the hearing register and 8 persons spoke at the hearing. The hearing continued until all interested persons, groups or associations had an opportunity to be heard concerning the adoption of these rules.

The record remained open for the submission of written comments for twenty calendar days following the hearing, to August 6, 1996. Pursuant to Minn. Stat. § 14.15, subd. 1, five working days were allowed for the filing of responsive comments. At the close of business on August 13, 1996 the rulemaking record closed for all purposes. The Administrative Law Judge received written comments from interested persons during the comment period. The Department submitted written comments responding to matters discussed in written comments and at the hearing.

**NOTICE**

Pursuant to the provisions of Minn. Stat. § 14.15, subd. 3 and 4, this Report has been submitted to the Chief Administrative Law Judge for his approval. If the Chief Administrative Law Judge approves the adverse findings of this Report, he will advise the Commissioner of actions which will correct the defects and the Commissioner may not adopt the rules until the Chief Administrative Law Judge determines that the defects have been corrected. In those instances where the Chief Administrative Law Judge identifies defects which relate to the issues of need or reasonableness, the Commissioner can adopt the Chief Administrative Law Judge's suggested actions to cure the defects. An alternative is provided for in Minn. Stat. § 14.15, subd. 4, to allow agencies that choose not to adopt the suggested language, if the agency submits the proposed rule to the Legislative Commission to Review Administrative Rules (LCRAR) for the Commission's advice and comment. The LCRAR was abolished, effective July 1, 1996. See Laws of Minnesota 1995, Chapter 248, Art. 2, Sec. 6 (allowing only legislative commissions approved by the Legislative Coordinating Commission to continue in existence and providing that the statutory functions of an abolished Commission shall be performed as determined necessary by the Legislative Coordinating Commission).

If the Commissioner elects to adopt the suggested actions of the Chief Administrative Law Judge and makes no other changes and the Chief Administrative Law Judge determines that the defects have been corrected, then the Commissioner may proceed to adopt the rules and submit them to the Revisor of Statutes for a review of the form. If the Commissioner makes changes in the rules other than those suggested by the Administrative Law Judge and Chief Administrative Law Judge, then he shall submit the rules, with the complete hearing record, to the Chief Administrative Law Judge for a review of the changes before adopting them and submitting them to the Revisor of Statutes.

When the Commissioner files the rules with the Secretary of State, he shall give notice on the day of filing to all persons who requested that they be informed of the filing.

Based upon all the testimony, exhibits, and written comments, the Administrative Law Judge makes the following:

## **FINDINGS OF FACT**

### **Nature of the Proposed Rules**

1. Minnesota's Prevailing Wage Law, Minn. Stat. §§ 177.41-177.44 (1994), requires that persons employed on state-funded construction projects be paid the "prevailing wage". According to the legislative policy, workers on state-funded construction projects must be compensated according to the "real value of the services they perform." The legislative policy also requires that the wages paid must be "comparable to the wages paid for similar work in the community as a whole." Minn. Stat. § 177.41 (1994). All employers of workers on state-funded construction projects must pay the prevailing wage. All state agencies, county and municipal

agencies, and all local public bodies must honor the prevailing wage rate in their construction projects.

2. The Prevailing Wage Law invests the Department with authority to determine the prevailing wage rate for state-funded construction projects. The Department determines the minimum prevailing wage rate required on state-funded construction projects by conducting periodic surveys of employers. At the present time, the Department makes prevailing wage determinations according to Minn. Rules pt. 5200.1000-5200.1120 (1993) ("the Prevailing Wage Rules"). The rules proposed in this proceeding amend the Prevailing Wage Rules by altering the methods used for making prevailing wage rate determinations.

3. The Prevailing Wage Law and the Prevailing Wage Rules divide state-funded construction projects into two categories: (a) highway and heavy construction projects; and (b) commercial construction not involving highway. The Department enforces compliance with commercial construction projects and the Minnesota Department of Transportation enforces compliance with highway and heavy construction.

4. The purpose of the proposed amendments to the Prevailing Wage Rules is to make wage determinations that more accurately reflect the area wage standards, to reduce the rate fluctuations that occur in the wage determinations, and assure that wage rates be certified for all classes of labor employed on state-financed projects. Highlights of the proposed modifications include the following: a change in the criteria used for selection of projects and workers to be included in the wage survey; a provision which requires that prevailing wage rate be established for all classifications being used on a project; the determination of highway and heavy wage rates by multi-county areas.

#### Task Force

5. The entities and persons affected by these rules include skilled trades workers, construction workers (i.e., laborers, mechanics and equipment operators), building and commercial construction contractors, highway and heavy construction contractors, contractor associations, trade unions, architectural and engineering firms, state agencies, and local units of government (i.e., counties, cities and school districts). The Department established a task force that represented a cross-section of all the persons and entities involved in the construction industry. The task force evaluated the Prevailing Wage Rules, determined that changes were necessary and reached a consensus as to the appropriate changes for the Prevailing Wage Rules. The task force, also called the Prevailing Wage Committee, met from May 24, 1995 until August 16, 1995.

6. Representatives of Associations of City Engineers and County Engineers were invited to "passively participate" as "non-voting members". A very few local government entities were notified of the rulemaking proceeding, none was invited to become involved in the development of the proposed rules.

## Statutory Authority

7. The Department stated that it has both general and specific rulemaking authority to adopt the proposed amendments to the Prevailing Wage Rules. Minn. Stat. § 175.171(2) (1994) provides the Department general rulemaking authority. Specific statutory authority regarding prevailing wages is found in Minn. Stat. §§ 177.41 to 177.44 (1994). The cited statutory authority was not challenged. The Judge concludes that the Department has the general and specific authority to adopt the proposed rule amendments.

## Rulemaking Legal Standards

8. Under Minn. Stat. § 14.14, subd. 2, and Minn. Rule 1400.2100, one of the determinations which must be made in a rulemaking proceeding is whether the agency has established the need for and reasonableness of the proposed rule by an affirmative presentation of facts. In support of a rule, an agency may rely on legislative facts, namely general facts concerning questions of law, policy and discretion, or it may simply rely on interpretation of a statute, or stated policy preferences. Manufactured Housing Institute v. Pettersen, 347 N.W.2d 238, 244 (Minn. 1984); Mammenga v. Department of Human Services, 442 N.W.2d 786 (Minn. 1989). The Department prepared a Statement of Need and Reasonableness ("SONAR") in support of the repeal of the rule. At the hearing, the Department primarily relied upon the SONAR as its affirmative presentation of need and reasonableness for the repeal. The SONAR was supplemented by the comments made by the Department at the public hearing and in its written post-hearing comments.

9. The question of whether a rule has been shown to be reasonable focuses on whether it has been shown to have a rational basis, or whether it is arbitrary, based upon the rulemaking record. Minnesota case law has equated an unreasonable rule with an arbitrary rule. In re Hanson, 275 N.W.2d 790 (Minn. 1978); Hurley v. Chaffee, 231 Minn. 362, 367, 43 N.W.2d 281, 284 (1950). Arbitrary or unreasonable agency action is action without consideration and in disregard of the facts and circumstances of the case. Greenhill v. Bailey, 519 F.2d 5, 10 (8th Cir. 1975). A rule is generally found to be reasonable if it is rationally related to the end sought to be achieved by the governing statute. Mammenga v. Department of Human Services, 442 N.W.2d 786, 789-90 (Minn. 1989); Broen Memorial Home v. Minnesota Department of Human Services, 364 N.W.2d 436, 444 (Minn. Ct. App. 1985). The Minnesota Supreme Court has further defined the agency's burden in adopting rules by requiring it to "explain on what evidence it is relying and how the evidence connects rationally with the agency's choice of action to be taken." Manufactured Housing Institute, *supra*, 347 N.W.2d at 244. An agency is entitled to make choices between possible approaches as long as the choice it makes is rational. Generally, it is not the proper role of the Administrative Law Judge to determine which policy alternative presents the "best" approach since this would invade the policy-making discretion of the agency. The question is rather whether the choice made by the agency is one a

rational person could have made. Federal Security Administrator v. Quaker Oats Company, 318 U.S. 2, 233 (1943).

10. In addition to need and reasonableness, the Administrative Law Judge must assess whether the rule adoption procedure was complied with, whether the rule grants undue discretion, whether the agency has statutory authority to adopt the rule, whether the rule is unconstitutional or illegal, whether the rule constitutes an undue delegation of authority to another, or whether the proposed language is not a rule. Minn. Rule 1400.2100.

11. Where changes are made to the rule after publication in the State Register, the Administrative Law Judge must determine if the new language is substantially different from that which was proposed originally. Minn. Stat. § 14.15, subd. 3 (Supp. 1995). The standards to determine if the new language is substantially different are found in Minn. Stat. § 14.05, subd. 2 (Supp. 1995).

#### Rule Promulgation Procedures

12. The rule promulgation procedures that apply to this rulemaking are contained in Minn. Stat. § 14.14, subd. 1a (Supp. 1995) and Minn. Rules pt. 1400.2010 to 1400.2560.

13. On May 22, 1996, the Department filed the following documents with the Chief Administrative Law Judge:

- (a) a copy of the proposed rules, certified as to form by the Revisor of Statutes;
- (b) a proposed Notice of Hearing;
- (c) a proposed Order for Hearing;
- (d) a Statement of Need and Reasonableness (SONAR).

14. At the hearing on July 17, 1996, the Department filed the following documents with the Administrative Law Judge:

- (a) the Order for Hearing dated June 3, 1996;
- (b) the Notice of Solicitation of Outside Opinion published at 20 State Register 473, on September 11, 1995;
- (c) a copy of the proposed rules certified by the Revisor of Statutes;
- (d) the Statement of Need and Reasonableness (SONAR);
- (e) a copy of the Notification to the Legislative Commission to Review Administrative Rules;

(f) a copy of the Notice of Hearing as mailed to persons on the Department's mailing list and a cite to the previously published proposed rules;

(g) a copy of the State Register pages containing the Notice of Hearing a cite to the previously published proposed rules;

(h) the Certification of Mailing the Notice to all persons on the Board's mailing list;

(i) the Certification of mailing the corrected Notice of Hearing (correctly identifying the address and phone number of the Administrative Law Judge);

(j) a copy of the State Register pages containing the corrected Notice of Hearing;

(k) a copy of the State Register pages published November 13, 1995 (20 S.R. 1148) containing the Department's Notice of Intent to Adopt Rules Without a Public Hearing which includes a publication of the proposed amendments; and

(l) the requests for hearing and all the comments that the Department has received concerning the proposed rules.

Department's Exhibits A-K.

15. Because the Department's Notice of Intent to Adopt was published prior to January 1, 1996, the OAH reviewed the Department's Notice of Hearing according to rules of the OAH in effect before January 1, 1996. According to the "old rules", an agency is required to make a prehearing filing 20 days before the scheduled hearing pursuant to Minn. Rules pt. 1400.0600 (1993). When a "20-day" filing was not made by the Department, the Judge contacted the Department to encourage a filing at least before the hearing. At that time, the Judge was informed that the Agency did not intend to make a "20-day" filing.

16. The Department indicated that the reason it did not make a "20-day" filing is because Minn. Rule pt. 1400.0600 had been repealed. The Department further states that because the Notice of Hearing was published on June 17, 1996, OAH's new rules must apply to the promulgation of these proposed rules. The Judge agrees with the Department. A 20-day filing is not necessary in this case because the Notice of Hearing was published on June 17, 1996. It would be unreasonable to apply the old rules or the repealed rule to the filing. The Judge finds that it is reasonable to apply OAH's new rules to the promulgation of the proposed rules.

#### Defects in the Notice of Hearing

17. The Department's Notice of Hearing contains numerous defects. Except as otherwise discussed in this Report, the Judge does not believe that the defects contained in the Notice of Hearing have adversely affected the access and opportunity

to participate of interested persons. A summary of the reasons for this conclusion are discussed in the following paragraphs.

18. The first defect relates to the Notice of Hearing's citation of incorrect statutes and rules. The Department's Notice of Hearing erroneously states that repealed rules Minn. Rules pts. 1400.0200 to 1400.1200 govern the rule hearing procedure. The Department has failed to comply with Minn. Rules pt. 1400.2080 which requires that the Department's Notice of Hearing contain information that identifies the parts of Minnesota Statutes Chapter 14 and which OAH rules the Agency must follow to adopt the proposed rules. The Judge finds that these erroneous citations are technical errors that did not deprive any person or entity of an opportunity to participate meaningfully in the rulemaking process.

19. Minn. Stat. § 14.14, subd. 1a (Supp. 1995) requires that the Agency's Notice in the State Register "must include the proposed rule or an amended rule in the form required by the Revisor". The Department's Notice failed to meet this requirement. No rule was attached to the Notice in the State Register. Instead of including the rule with the Notice published in the State Register, the Department cited a previous publication of the State Register that contained the proposed rule. The Judge finds that the failure to include the proposed rules in the Notice of Hearing is a technical error that did not adversely affect access and opportunity to participate in the rule proceeding. Because persons were cited a previous publication of the State Register that contained the rule, the failure to publish the rule with the Notice of Hearing did not adversely affect opportunity to participate meaningfully in the rulemaking proceeding.

20. The Notice of Hearing erroneously states that "interested persons may respond in writing to any new information submitted within three business days after the comment period ends". This statement is contrary to Minn. Stat. § 14.15 (1994). This section authorizes a five-working-day period for interested persons to submit a written response to any new information submitted during the comment period. The Judge announced at the rulemaking hearing that interested persons would have five working days to respond in writing to any information submitted during the comment period. The Judge finds that the statement that only three business days would be allowed is a technical error that was in large part corrected by the Judge's statement at the rulemaking hearing. The technical error did not deprive any person or entity of an opportunity to participate meaningfully in the rulemaking process.

21. The Notice of Hearing incorrectly identifies the address and telephone number of the Judge assigned to the case. The Notice identified the following as the address of the Administrative Law Judge:

Allen E. Giles  
Administrative Law Judge  
Office of Administrative Hearings  
500 Flour Exchange Building  
310 Fourth Avenue South

Minneapolis, MN 55416  
Phone: (612) 349-2549

22. Many persons participate in rulemaking proceedings by submitting written comments. Because written comments must be submitted within a short timeframe, mailing the comments to the wrong address could result in the comments not being considered. The Department attempted to correct this error by publication in the State Register of the correct address of the Judge before the hearing. In addition, at the hearing the Judge brought calling cards and announced the correct address several times. The Judge finds that the error did not deprive any person or entity of an opportunity to participate meaningfully in the rulemaking proceeding.

23. Minn. Stat. § 14.14, subd. 1a(a) (Supp. 1995) requires that the Department's Notice contain a statement that "persons may register with the agency for the purpose of receiving notice of rule proceedings and notice that a rule has been adopted". A similar requirement is contained in Minn. Rules pt. 1400.2080, subp. 2G. The Department's Notice does not contain this required statement. The Judge finds that this technical defect in the Notice did not deprive any person or entity of an opportunity to participate meaningfully in the rulemaking process.

24. In addition to the errors identified in the preceding paragraphs, the Notice of Hearing also contains numerous other technical and minor errors that demonstrate that the Department has made no serious attempt to comply with the current OAH rules. Because of the number of errors involved, the Judge does not believe that the OAH would have approved the Department's Notice of Hearing as being in compliance with the current OAH rules. As previously stated, the OAH approved the Department's Notice of Hearing in accordance with the rules in effect before January 1, 1996. This occurred at least for the following reasons. The Department's Notice of Intent to Adopt was published in the State Register in November of 1995; the Department's Notice of Hearing cites statutes and rules that were in effect and appropriate for rulemaking proceedings occurring prior to January 1996; and finally, the Agency obviously has made no effort to comply with the OAH current rules.

25. Minn. Stat. § 14.15, subd. 5 (1994) authorizes the Judge to disregard any error or defect in a rulemaking proceeding due to an Agency's failure to satisfy any procedural requirement imposed by law or rule. Because the Judge has previously found that the defects identified in the preceding paragraphs are technical procedural errors that have not prevented any person or entity from meaningfully participating in the rulemaking proceeding, the Judge finds and concludes that it is reasonable to disregard each of the defects identified above.

#### Cost and Alternative Assessments in SONAR

26. Minn. Stat. § 14.131 (Supp. 1995) requires that before a state agency publishes a notice of hearing for a rulemaking, the agency must prepare and make available for public review a Statement of Need and Reasonableness. State agencies

proposing rules must identify classes of persons affected by the rule, including those incurring costs and those reaping benefits; the probable effect upon state agencies and state revenues; whether less costly or less intrusive means exist for achieving the rule's goals; what alternatives were considered and the reasons why any such alternatives were not chosen; the costs that will be incurred complying with the rule; and differences between the proposed rules and existing federal regulations.

27. Section 14.131 became effective January 1, 1996. Minn. Laws 1995, ch. 233, art. 2. The section applies to all rulemaking proceedings in which a notice of hearing is issued after January 1, 1996. The Department's Notice of Hearing was published in the State Register on June 17, 1996, approximately six months after the effective date of Section 14.131. Therefore, the Department must comply with the requirements of Section 14.131.

28. The Department has made no effort to comply with the cost and alternative assessments in its SONAR. Instead, the Department asserts that it is not required to comply with this provision because its SONAR was prepared and signed on November 13, 1995, before the cost and alternative assessment requirements became effective. Other than this claim, the Department has offered no other basis for its failure to comply. For the reasons contained in the following paragraphs, the Judge finds that the failure to include a cost and alternative assessment in the Department's SONAR constitutes a jurisdictional defect that requires disapproval of the proposed rules.

29. Unlike the procedural defects identified earlier that were found to be harmless, the assessment of costs and alternatives is a substantive, jurisdictional requirement. Cf. Lombardo v. Seydow-Weber, 529 N.W.2d 702, 704-05 (Minn. App. 1995). Section 14.131 creates a right and expectation of being informed in favor of persons or entities who will experience adverse effects such as increased costs as a result of a proposed rule. An agency is required to seek out and inform these persons or entities about the costs and assessments identified in this section. When the agency fails to identify potential stakeholders and discuss issues such as costs and assessment alternatives identified in this section, it has not satisfied this jurisdictional requirement.

30. County agencies and local public bodies oppose the proposed rules. They claim that prevailing wage rates, as determined by the Prevailing Wage Rules, increase the costs of state-funded construction projects in their localities. Several local public entities maintain that the proposed amendments to the Prevailing Wage Rules will require local governments to pay higher costs for state-funded projects. One local government commentator asserts that the increased cost to two counties in southwestern Minnesota (Lyon and Redwood) could be nearly \$1 million (based on a mathematics model explained by the commentator) in one construction season. There are many other counties and a total of approximately 1,600 local government jurisdictions in the State of Minnesota. Even a modest increase could have profound economic and fiscal consequences that have not been considered or evaluated by these rules. The Department summarily rejects all claims of increased costs to local

government entities as a result of the proposed rules. Instead, the Department asserts that local government entities will experience a reduction in expenses as a result of these proposed rules. While the commentator asserting substantial increases for Lyon and Redwood Counties has used a mathematics model to support his claims, the Department has set forth no mathematics methodology or analysis to support its conclusion that expenses to local governments will decrease.

31. Minn. Stat. § 14.131 requires the Department to identify persons or entities affected by the proposed rule and make special efforts to provide additional notice to those persons or entities. A review of the Department's mailing list certified in this proceeding shows that the Department has not made an effort to notify counties and other local public bodies that are directly affected by the proposed rules. In addition, upon review of the minutes of the Prevailing Wage Task Force meetings, local public entities were not given an active voice as a stakeholder in the rulemaking process. Representatives from Associations of City Engineers or County Engineers local public bodies were invited to participate as passive "nonvoting" associate members.

32. The Judge also believes that there is a substantial likelihood that another part of Section 14.131 applies to the proposed rules. Because the proposed rules are "setting" . . . "charges" for employment "services", there may also be a requirement that the Commissioner of Finance make comments and recommendations regarding the fiscal and policy concerns raised during the review process.

33. In order to correct the defect identified above, it will be necessary for the Department to republish the rule and their preparation of a SONAR that complies with the cost and alternative assessment requirements of Minn. Stat. § 14.131. In order to comply with Section 14.131, the Department should provide increased notification to local government entities and attempt to give local government entities a vote and active voice in the rulemaking process. Finally, the Department should consider whether the Commissioner of Finance should provide comments and recommendations regarding the fiscal and policy concerns raised regarding the proposed rules.

#### Fiscal Note

34. The Department maintains that because its SONAR was signed on November 13, 1995, before the effective date of Minn. Stat. § 14.131 (Supp. 1995), the cost and alternative assessments requirement does not apply to this rulemaking proceeding. If this section does not apply, the Department's SONAR must comply with the fiscal note requirements of Minn. Stat. § 14.11, subd. 1 (1994), which was in effect on the date that the Department's SONAR was signed. An analysis of the application of Minn. Stat. § 14.11, subd. 1 to this rulemaking proceeding demonstrates that a fiscal note would have been required. Therefore, the Department's SONAR failed to comply with this section because it did not contain a fiscal note.

35. Minn. Stat. § 14.11, subd. 1 requires a fiscal note if a proposed rule would require local public bodies to incur costs higher than \$100,000 in either of the two years immediately following the adoption of a rule. Minn. Stat. § 14.11, subd. 1 provides, in part, as follows:

If the adoption of a rule by an agency will require the expenditure of public money by local public bodies, the appropriate notice of the agency's intent to adopt a rule shall be accompanied by a written statement giving the agency's reasonable estimate of the total cost to all local public bodies in the state to implement the rule for the two years immediately following adoption of the rule if the estimated total cost exceeds \$100,000 in either of the two years.

36. The Department states in its SONAR that the proposed Prevailing Wage Rules will not require any additional expenditures by local public bodies. The Department asserts that the proposed amendments are more likely to have the effect of reducing expenses of local public bodies. In making these assertions, the Department is not considering the expense to public entities caused by having to include the cost of prevailing wage rates in their construction contracts. By implication, the Department argues that a legislative statute, the Prevailing Wage Law, requires local public entities to pay prevailing wage rates, not the Prevailing Wage Rules.

37. The issue presented is similar to that addressed in a rulemaking proceeding entitled In the Matter of the Proposed Adoption of Department of Employee Relations Rules Relating to Local Government Pay Equity Compliance, Minnesota Rules, Parts 3920.0100 to 3920.1300, Docket No. 3-1500-5878-1 (December 31, 1991). In response to claims that the proposed pay equity rules would increase costs to local governments, the Department of Employee Relations (DOER) maintained that the state statute itself, the Pay Equity Act, required that local governments pay additional sums to bring their compensation plans into compliance, not the proposed rules being promulgated by DOER. On that basis, DOER asserted that it was not required to prepare a fiscal note. The Judge rejected DOER's claim that the Pay Equity Law itself was the sole cause for the increased costs of local public bodies. Instead, the Judge concluded that a fiscal note was required with the rules, even though the Pay Equity Act mandated that the local public bodies achieve equitable compensation relationships. Minn. Stat. § 14.11, subd. 1 requires a fiscal note whenever the costs arising from the rules will exceed \$100,000 in either of the two years following adoption of the rule. The fact that an underlying statute also requires compliance is not an exception under the requirements of Section 14.11.

38. This reasoning applies with equal force in the present rulemaking. The Prevailing Wage Law requires that all local public bodies comply with the Prevailing Wage Law. However, the cost of compliance by local public bodies is based on the determinations of prevailing wage rates established in part by these proposed rules. Consistent with fundamental fairness and openness in government, the prevailing wage determinations must be subject to the fiscal and notice requirements of Minn. Stat. § 14.11, subd. 1 (1994).

## Impact on Farming Operations

39. Minn. Stat. § 14.111 (Supp. 1995), imposes an additional notice requirement when rules are proposed that affect farming operations. The proposed rules will not affect farming operations and no additional notice is required.

## Analysis of Proposed Rules

40. The following Findings are advisory only. The Judge is persuaded that major stakeholders who should have been involved in this rulemaking were not given a full opportunity to participate. Therefore, the Judge is certain that full discussion and argument is not contained in this record. For this reason, the Judge considers the following Findings as advisory only. The Findings only address those parts that received significant public commentary or for which changes have been made since publication in the State Register. The Administrative Law Judge finds that the Department has affirmatively established the need and reasonableness of each part of the proposed rule except as otherwise qualified or determined by the following Findings and Conclusions.

### Minn. Rules Part. 5200.1020, subps. 1 and 2

41. The Department added the language "public and private" to both of these subparts to clarify that prevailing wage determinations would be based on a comparison with wages paid on similar "public and private" construction projects. Several commentators objected to the addition of this language. They claimed that including public construction projects resulted in a self-fueling spiral, artificially escalating prevailing wage rate determinations.

42. The Department responded stating that the addition of the phrase "public and private" is a clarification that codifies the methodology used by the Department since 1973 when the Prevailing Wage Law was enacted. The Department asserts that there is no change in practice as a result of this proposed change. Further, the Department explains that Minn. Stat. § 177.42, subd. 6 (1994) defines the prevailing wage rate as the rate paid to the largest number of workers engaged in the same class of labor within the area. The statute does not exclude public contracts and makes no distinction between public and private contracts. If work covered by the Prevailing Wage Law is done within the area, the statute suggests that it should be included for purposes of determining the prevailing wage. Finally, the Department asserts that the United States Department of Labor also includes both public and private work in its determination process.

43. The Judge finds that the inclusion of the phrase "public and private" is reasonable and consistent with the statute. Inclusion of the language will not result in a departure from the customary practice as claimed by the commentators.

44. The Department also proposes to establish thresholds for determining when a project is eligible for inclusion in the Department's wage survey. The

proposed rule requires contractors to submit a wage report for a highway and heavy construction project only if it is valued at no less than \$25,000. A wage report for a commercial construction project is required only if the project is valued no less than \$2,500. These proposals basically track the statute, Minn. Stat. § 177.43, subd. 7. Under this statute, the prevailing wage standards do not apply to projects where the total cost is less than \$2,500 and only one trade or occupation is required to complete it (commercial), or where the total cost is less than \$25,000 and more than one trade or occupation is required to complete it (highway and heavy construction). The statute determines coverage based on dollar costs and the number of trades or occupations needed to complete the work, not based on the number of contractors.

45. The Judge finds that the inclusion of the proposed thresholds for determining when a project should be included in the wage survey are reasonable and consistent with the Prevailing Wage Law and should be adopted.

Minn. Rules Part 5200.1035, subp. 2, Projects To Be Surveyed, Criteria

46. The Department proposes to delete the word "selections" from this subpart. The Department explains that this word was an inadvertent error and that the subpart does not make sense with this word included. The Judge finds that deletion of the word "selections" is reasonable and will not result in a substantially different rule from that published in the State Register.

47. The Judge also notes that a portion of this subpart is awkwardly written and should be revised. At the present time the language reads as follows:

From information on file and submitted by interested persons, the determinations shall be made from projects on which construction work was done in the 12 months preceding the survey, which are located in the county or, if necessary, from adjacent counties, and where the estimated total cost of completing the project is \$2,500 or more.

48. The Judge recommends that the following language be substituted:

Determinations shall be made from projects which are located in the county or, if necessary, from adjacent counties. Determinations shall be based on survey information from construction projects located in the county in which the construction work was done in the 12 months preceding the survey and where the estimated total cost of completing the project is \$2,500 or more.

Minn. Rules Part 5200.1030, Basis for Highway and Heavy Determination

49. The most controversial change proposed by the rules is the proposal to use regional areas for determination of prevailing wage rates for highway and heavy construction projects. New language was added which requires that prevailing wage determinations for highway and heavy constructions projects be based on work

performed solely within ten "district areas". Many commentators opposed the change. They asserted that using regional areas to determine prevailing wage rates would result in importing "urbanized" higher wages to rural areas in greater Minnesota. This would occur because of the way the regional areas are configured. The previous method used surrounding counties for determining prevailing wage rates.

50. The Department argued that using counties resulted in many "gaps" where no rate could be certified for classes of labor and resulted in rate fluctuations where one job from any county could result in an anomalous rate. The Department explained that the construction of highway and heavy projects requires a large number of employees and labor classifications in order to complete work required by the contract. Under the current rule, frequently not all classifications needed to construct a highway and heavy project are reported in a county wage determination. Adjacent counties were used to fill in the missing labor classifications. The use of adjacent counties may still result in missing classifications, particularly outside of the metropolitan areas. Therefore, it is necessary to move to a broader area for highway and heavy wage determinations so as to increase the number of projects and employees surveyed in order to maximize the number of labor classifications and wages reported.

51. The Judge finds that the modification allowing the use of regional areas for determining wage rate determinations for highway and heavy construction projects is needed and reasonable. The Judge further finds that the proposal also is consistent with Minn. Stat. § 177.42, which defines the area for which wage rate determinations are made and specifically states that an area could include "the county or other locality from which labor or any project is normally secured".

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

### **CONCLUSIONS**

1. That the Minnesota Department of Labor and Industry gave proper notice of the hearing in this matter.
2. That the Department has fulfilled the procedural requirements of Minn. Stat. §§ 14.14, subds. 1, 1a and 14.14, subd. 2, and all other procedural requirements of law or rule, except as noted at Findings 26-38.
3. That the Department has demonstrated its statutory authority to adopt the proposed rules and has fulfilled all other substantive requirements of law or rule within the meaning of Minn. Stat. §§ 14.05, subd. 1, 14.15, subd. 3 and 14.50 (i)(ii).
4. That the Department has documented the need for and reasonableness of its proposed new rules with an affirmative presentation of facts in the record within the meaning of Minn. Stat. §§ 14.14, subd. 2 and 14.50 (iii).

5. That due to Conclusion 2, this Report has been submitted to the Chief Administrative Law Judge for his approval pursuant to Minn. Stat. § 14.15, subd. 3.

6. That any Findings which might properly be termed Conclusions and any Conclusions which might properly be termed Findings are hereby adopted as such.

Based upon the foregoing Conclusions, the Administrative Law Judge makes the following:

RECOMMENDATION

IT IS HEREBY RECOMMENDED: that the proposed rules be not approved.

Dated this 13th of September, 1996.

---

ALLEN E. GILES  
Administrative Law Judge