3-1900-10549-1

STATE OF MINNESOTA
OFFICE OF ADMINISTRATIVE HEARINGS
FOR THE DEPARTMENT OF LABOR AND INDUSTRY

In the Matter of Proposed Amendments to Rules Governing Prevailing Wage Determinations, Minn. Rules Part 5200.1000 to 5200.1120.	ORDER OF THE CHIEF ADMINISTRATIVE LAW JUDGE

A hearing was held on July 17, 1996, before Allen E. Giles, an Administrative Law Judge of the Office of Administrative Hearings, on the above-entitled matter in compliance with the rule-making provisions of Minn. Stat. Ch. 14.

The Report of Administrative Law Judge made pursuant to Minn. Stat. § 14.50, was issued to the Department of Labor and Industry on September 13, 1996.

The Report of the Chief Administrative Law Judge made on September 16th pursuant to Minn. Stat. § 14.15, subds. 3 and 4, affirmed the Report of the Administrative Law Judge.

The Department of Labor and Industry has requested reconsideration of the report issued in this matter on September 16, 1996.[1] The Chief Administrative Law Judge has determined to grant the reconsideration and make the following modifications to the Findings adopted by the Chief Administrative Law Judge:

Rule Promulgation Procedures: Findings 12 through 25.

Finding No. 12 and subsequent procedural findings of the Administrative Law Judge are not affirmed. Instead, they are modified to find that the rule promulgation procedures that apply to this rulemaking are those contained in Minn. Stat. § 14.14, subd. 1a (1994) and Minn. Rule pts. 1400.0200 to 1400.1200 (1994). The 1995 amendments to chapter 14 and the 1996 amendments to Minn. Rules pt. 1400 do not apply to any part of this proceeding.

All subsequent procedural findings are modified to reflect that the agency has complied with the procedural requirements of the 1994 law and rules with one exception. The Department failed to file the documents required under Minn. Rule pt. 1400.0600 (1994), which required that 25 days prior to the date of the

[1] Although the agency requested reconsideration under the new procedural rule, Minn. Rule, pt 1400.2240, subp. 4, which is not applicable to this proceeding, reconsideration is available pursuant to past practice under the old rules. See Office of Administrative Hearings, Statement of Need and Reasonableness for Rules Governing Rulemaking Procedure and Rule Review, Minnesota Rules, Parts 1400.2000 to 1400.2450, dated October 19, 1995, which describes the past practice of reconsideration by the Chief Administrative Law Judge.

hearing, the agency must file with the administrative law judge the documents required under that rule. However, the Chief Administrative Law Judge has determined that the failure of the agency to make the "25-day prefiling" did not deprive any person or entity of an opportunity to participate meaningfully in the rulemaking process and therefore, constitutes harmless error under Minn. Stat. § 14.15, subd. 5(1), (1994).

Fiscal note/Cost and Alternative Assessments in SONAR: Findings 26 through 38.

All references in Findings 26 through 38 that require the Department to comply with the new statutes and rules, Minn. Stat. § 14.131 (Supp. 1995) and the recommendations to correct the defect made in Finding No. 33, are not affirmed. Finding No. 34 is specifically modified to find that Department has met the requirements of Minn. Stat. § 14.11, subd. 1 (1994) and that a fiscal note is not required. See, Memorandum.

The Chief Administrative Law Judge finds that the final proposed rules are not substantially different from those at the public hearing.

The Chief Administrative Law Judge has determined that Conclusion No. 5 be withdrawn and Conclusion No. 2 be modified as follows:

> 2. That the Department has fulfilled the procedural requirements of Minn. Stat. §§ 14.14, subds. 1, 1a, and 14.14, subd. 2, (1994) and all other procedural requirements of law or rule, except for the failure of the agency to make the 25-day prefiling as required under Minn. Rule, pt. 1400.0600, which constitutes harmless error under Minn. Stat. § 14.15, subd. 5(1).

NOW, THEREFORE, upon receipt of this Order, the Department of Labor and Industry has the responsibility of filing the rules with the Secretary of State and publishing the adopted rules in the State Register in accordance with Minn. Stat. § 14.18.

Dated this _____ day of December, 1996.

KEVIN E. JOHNSON
Chief Administrative Law Judge

MEMORANDUM

In its November 18, 1996, submission to the Chief Administrative Law Judge, the Department of Labor and Industry (agency) requested reconsideration

of the Report issued September 16, 1996. The Chief Administrative Law Judge has reconsidered this matter and agrees that the report should be amended. As the report of the Administrative Law Judge concluded, the agency has documented the need for and reasonableness of its proposed rules and has demonstrated its statutory authority to adopt the rules. The request for reconsideration focuses upon the procedural requirements of the rule adoption process. The critical issue is whether the 1995 or 1996 procedural rules should govern this rule adoption process.

Rule Promulgation Procedures:

The Chief Administrative Law Judge has determined that the rules should have been reviewed according to the procedural requirements using the Chapter 14 laws and rules in effect in 1995. The Notice of Intent to Adopt Without a Public Hearing was published in November of 1995. The Department then received more than 25 requests for a hearing, and published a Notice of Hearing in June of 1996.

In late May of 1996, at the time the agency requested review of the Notice of Hearing it requested that it be allowed to proceed under the old rules. Because the Department published the original Notice of Intent to Adopt Rules in 1995, a decision was made by the Office of Administrative Hearings to allow the agency to proceed with the adoption of the rules using 1994 laws and rules. To clarify that the rule proceeding was going to be governed by the 1994 laws and rules, it was recommended by the Office that a “1994” reference be added to the statutory and rule cites in the Notice of Hearing to alert the public to the fact that the Department would be continuing to follow the 1994 rules in the adoption of the rule. The 1994 reference was added to the Notice of Hearing by the agency.

Because the agency was proceeding to adopt the rule under the old laws and rules, the agency should have made the 25 day prefiling under Minn. Rule pt. 1400.0600. Even though part 1400.0600 was repealed later, it would still apply to this rule proceeding. The agency cannot start the proceeding under the old laws and finish the proceeding under the new laws. It must be consistent. The laws and rules in effect when the proceeding was initiated with the Notice of Intent to Adopt a Rule Without a Public Hearing should apply throughout the whole rule proceeding, and the agency was so advised.

Therefore, any references to the new 1995 laws in the report are deleted and replaced with the references to the 1994 laws. Using the 1994 procedural laws and rules for review, the Chief Administrative Law Judge now determines that the agency has met all of the procedural requirements with one exception. The agency failed to file the documents required by Minn. R. 1400.0600 25 days before the hearing. This error has been determined to be a harmless error as it did not deprive any one of an opportunity to meaningfully participate in the hearing.

Fiscal Note:

Since, the 1994 laws govern this rule proceeding, the agency must comply with Minn. Stat. § 14.11 (1994). This statute 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 exceed $100,000 in either of the two years.

The agency determined that the net cost of the amendments would not exceed $100,000, and did not include a fiscal note in its Notice. The Administrative Law Judge determined that the cost would exceed $100,000, and found a defect in the failure to publish a fiscal note. The Chief Administrative Law Judge has reviewed the record and concludes that the agency had a rational basis for its determination of why the cost to local public bodies to implement the amendments would not exceed $100,000. The agency states that it estimated the cost to local units of government of changing from the system under the previous rules to the system under the proposed rules. The Chief Administrative Law Judge agrees with the agency that it is only required to provide a cost estimate based on the proposed amendments to the rules. The agency considered not only the administrative costs, but also the impact of the amendments on the construction contracts as well.

In its analysis, the agency estimates that the adoption of the rules may reduce costs for local public bodies rather than raise them. In its estimates, the agency considered the two major amendments to the proposed rule. One amendment changes wage determination to an area-wide basis instead of the county-by-county basis. The other amendment allows the wages paid to individual workers to be reported on a project basis rather than only once in each year, resulting in a wage survey from multiple projects and a larger pool of workers. The agency asserts that the new counting method should have a leveling or dampening effect on the "spiking" problem that artificially raised wage determinations, a complaint about the old rule noted by several commentators.

The statistical data (which was submitted <u>after</u> the 20 day comment period) analyzed the fiscal impact of the area-wide wage determination but it did not address what effect the new counting method would have on the overall construction wage. Therefore, the commentator's conclusion does not address the new rule amendments as a whole. There were no comments that fully addressed the fiscal impact of the rules as a whole. The comments regarding the fiscal impact of the rules were limited to the amendment dealing with the area-wide wage determination. The agency claims that the new counting method will have a positive fiscal impact on the cost of the rule and claims that the rule amendments, as a whole, will not have an increased cost to local public bodies.

The Chief Administrative Law Judge recognizes that since the counting method proposed by the rule is a new method, neither the agency nor the opponents have any hard data to quantify its impact. Therefore, it is difficult to measure the impact of that change against the impact of the other changes in the rule. In such a situation, it is appropriate to give weight to the experience and

expertise of the agency, which has been making prevailing wage determinations for some time. The agency's estimate is that the rule amendments as a whole will not increase the cost to local public bodies in excess of $100,000. The agency has demonstrated a rational basis for that estimate, and thus the agency has justified its not including a fiscal note.

Finally, the absence of hard data on the impact of the new counting method raises doubts about the value of a fiscal note even if one were to be required. Under the circumstances, the note would have to vague and uncertain about the costs. It could not be any more definite than the estimate already set forth in the Statement of Need and Reasonableness at pages five and six and the follow-up comments set forth in Agency Response to Comments Filed Before Hearing and Raised at Rules Hearing, dated August 6, 1996. Requiring the agency to publish such a note and then go through another hearing would likely be just a waste of the taxpayers' money.

KEJ