STATE OF MINNESOTA
OFFICE OF HEARING EXAMINERS

IN THE MATTER OF THE ADOPTION OF AMENDMENTS TO THE RULES OF THE OFFICE OF HEARING EXAMINERS RELATING TO RULEMAKING PROCEDURES AND CONTESTED CASES.	FINDINGS OF FACT, CONCLUSIONS AND ORDER ADOPTING RULES

The above-entitled matter came on for hearing before Hearing Examiner Allan W. Klein on October 11, 12, 13, 17, 19, and 20, 1977. The record was closed on November 9, 1977.

After affording all interested persons an opportunity to present written and oral data, statements and arguments, having heard all of the testimony, having carefully considered all of the evidence adduced and the Report of the Hearing Examiner dated April 28, 1978, and upon record, files and proceedings herein, the Chief hearing Examiner hereby occurs with, adopts and incorporates the attached Findings of Fact, Conclusions and Recommendations of the Hearing Examiner in this matter, except as specified in the following Findings and Conclusions:

1. HE 102 D.-and HE 103. The Hearing Examiners's recommendation regarding the "barrier free facility" portion of HE 102 D. has been adopted and the language stricken. The hearing Examiner found that the rest of the proposal could be adopted. However, because the rest of the proposed language drew such wide response, including some very excellent suggestions, it has been determined that the proposed last sentence of HE 102 D should be withdrawn as well as all mention of notice to persons other than the statutory requirements in HE 103 and that the issue should be the subject of additional hearings.

2. HE 104. The Hearing Examiner's findings and recommendations for this rule are adopted. Several suggestions for charges were recommended but left to the option of the Office of Hearing Examiners. The rule will be amended to read as follows and for the reasons stated in the Hearing Examiner's Report.

Statement of Need and Reasonableness. Each agency desiring to adopt rules shall prepare n Statement of Need and Reasonableness which shall be prefiled pursuant to HE 105. The Statement of Need End Reasonableness shall be a document containing, at the minimum, a summary of all of the evidence and argument which is anticipated to be presented by the agency at the hearing justifying both the need for

and the reasonableness of the proposed rule/rules, including citations to any statutes or case law to be relied upon, citations to any economic, scientific or other manuals or treatises to be utilized at the hearing, and a list of any expert witnesses to be called to testify on behalf of the agency, together with a brief summary of the expert opinion to be elicited. The statement need not contain evidence and argument in rebuttal of evidence and argument presented by the public,

The statement shall be prepared with sufficient specificity so that interested persons will be able to fully prepare any testimony or evidence in favor of or in opposition to the rule/rules as proposed. Presentation of evidence or testimony (other than bona fide rebuttal) not summarized in the Statement of Need and Reasonableness may result in the Fearing Examiner, upon proper motion made at the hearing by any interested person, recessing the hearing to a future date in order to allow all interested persons an opportunity to prepare testimony or evidence in opposition to such newly-presented evidence or testimony, which recessing shall he for a period not to exceed 25 calendar days, unless the 25th day is a Saturday, Sunday, or legal holiday, in which case, the next succeeding working day shall be the maximum date for the resumed hearing.

If the agency so desires, the Statement of Need and Reasonableness may contain the verbatim affirmative presentation by the agency which may then he either read at the hearing or, if all persons appearing at the hearing have had an opportunity to review the statement, nay be introduced as an exhibit into the record as though read. In such instance, agency personnel or other persons thoroughly familiar with the rules and the agency's statement shall he available at the hearing for questioning by the Hearing Examiner and other interested persons.

3. HE 105 H. For the reasons stated by the Hearing Examiner at page 15 of his report, this rule will be amended to read as follows:

The names of agency personnel who will represent the agency at the hearing together with the names

of any other witnesses solicited by the agency to
appear on its behalf.

4. HE 106 A. The Hearing Examiner's recommendation has been adopted. However, the DNR proposal for a separate register has merit and is found to be reasonable, needed and an insubstantial charge. The rule, as adopted, amends the proposed language accordingly.

5. HE 112. This rule relates to the effective Rate of the amendments to these rules. The Hearing Examiner's proposed amendment is herewith adopted with the addition of the words “of these rules" to be inserted so that the rule reads as follows:

These rules shall he effective for all rule proceedings
initiated five working days after publication of these
rules in the State Register.

Clarification is thought to be needed by the addition of the language in order that it he clear that it is publication of these rules and not publication of another agency's proposed rules which would "trigger" the effective date of these rules.

6. HE 202 B. The Hearing Examiner's recommendation of adding the words "by the agency in the Notice of and Order for Hearing" following the words "named as a party" is adopted so that the proposed rule, according to the Hearing Examiner, is reasonable.

7. HE 202 D. The Hearing Examiner found that allowing deposit of papers to be served with the Central Mailing Section, Publications Division, Department of Administration would delay delivery and recommended either deleting the amendment or adding a day to service in HE 209 B. It is found to be reasonable to allow state agencies to utilize Central Mailing but also that the Hearing Examiner is correct in his finding relating to slower service. Therefore, the rule as proposed will be adopted but HE 209 B. will be amended accordingly. As the proposed amendments relate to "Service", it is hereby found that amending HE 209 B., though not proposed originally, would not be a substantial change in that the subject of both rules relates to "service" and that the proposal obviously was raised in such a manner so as to invite reaction, and does not result in a rule substantially different from that proposed.

8. HE 203 C. 8. As reported by the Hearing Examiner, the proposed amendment to this rule was the subject of much comment. The comments and the Fearing Examiner recommended that limitations be placed on the ability of the Hearing Examiner to call witnesses. To amend the propose& amendment as recommended would, in the opinion of the Chief Hearing Examiner, result in a substantial change in the rule as proposed requiring new notice and hearing. As indicated in the Statement of Need, it is believed that the authority to call witnesses presently exists pursuant to the provisions of HE 203 C. 11. Therefore, the proposed amendment is hereby withdrawn and will be raised again when the office next proposes to amend its rules.

9. HE 204. This rule as proposed to be amended drew numerous comments. The Hearing Examiner's recommendations are adopted where specific. The Hearing Examiner has recommended several options necessitating additional findings. The term" service" will be substituted for the word "issuance" in the introductory paragraph for the reasons spelled out in the Hearing Examiner's report. The title of 204 A. will also be changed to "Notice and Order" as recommended. The Examiner, at page 30, recommends deleting the term "commencement" from the last sentence in 204 A. 8 and inserting the term "issuance". That alone would not be enough. The term "contested case" rust also be deleted and the words "Notice of and order for Hearing" inserted. In 204 A. 9, the Examiner's recommendation for deleting the word "the" and inserting the word "existing" in the first line is adopted. In 204B., the Examiner has given the Office a recommendation and an optional recommendation. In the first instance, adding the words "in addition" at the beginning of the second sentence as such would make no sense. instead, in order to answer the concerns of the Securities Division that they need not obtain permission to issue a Cease and Desist Order with a seven day notice (as provided by statute), the rule will be amended by making it into one sentence. Thus the entire rule will be prefaced by the words "unless otherwise provided by law". The period at the end of the first sentence will become a comma and the words "provided, however, that" will be inserted after the comma. The words "if not contrary to statutory requirements", no longer needed, will be deleted. The second, proposed by the Board of Nursing, is not adopted. The Examiner discusses the proposed deletion of existing rules 204 (c) and (d) (p. 32) and raises an excellent point relating to the existing rule allowing and seemingly encouraging agencies to order additional notice. The comments are well taken and, therefore, the proposal to delete existing 204 (d) is withdrawn as it is found that such additional notice should be encouraged rather than discouraged. The rule will be renumbered at 204 C and the remaining rules renumbered accordingly. Proposed rule 204 D. (to be renumbered 204 E.) will be amended as recommended by the Examiner (p. 34) by adding the words "prior written" to the rule.

10. HE 205. The Examiner recommended that any changes made in 204 A. 8 should also be reflected here. As no changes are being made in 204 A. 8 which would necessitate changes here, none are made. Although the Examiner has indicated that it might be "desirable" to insert certain language, as it was not recommended, it will not be adopted as he has found the original language both needed and reasonable.

11. HE 206. This rule will be modified, as recommended, to conform to the changes made at HE 204 A. 5.

12. HE 209 B. As a result of the amendments adopted in HE 202 D., it is necessary to amend this rule relating to computation of time for service by mail by adding the following sentence to the existing rule:

In the event an agency chooses to utilize the
Central Mailing Section, Publications Division,

Department of Administration, four days shall
be added to added to the prescribed period.

13. HE 210. Unless otherwise discussed herein, the Examiner's recommendations are adopted. In the proposed amendments to HE 210 E, the provision relating to presentation of evidence "with or without benefit of oath" is withdrawn for the reasons enumerated by the Examiner and due to his finding of a failure to justify the need and reasonableness (p. 39).

14. HE 211. The Examiner's recommendations on this rule are adopted. However, in reviewing the rule it appears to be internally inconsistent. The rule calls for motions for continuances to be determined by the Chief Hearing Examiner. However, the second time the term Hearing Examiner is used, the word "Chief" was inadvertently left out. The addition is found to be needed, reasonable and does not result in a substantial change.

15. HE 213. As the Examiner pointed out, several comments received merit attention. For the reasons previously given, the words "if the agency is not a party" will be stricken. For the reasons stated in the Examiner's report, the rule wills he adopted to read as follows:

B. Motions. Any application to the Fearing Examiner
for an order shall he by motion which, unless made
during a hearing, shall be made in writing, shall state
with particularity the grounds therefor, and shall set
forth the relief or order sought. Motions provided in
these rules require a written notice to all parties
and to the agency to he served five days prior to their
submission to the Hearing Examiner, except where imprac-
tical. The Hearing Examiner may, at his discretion,
require a hearing before an order on the notion will be
issued. All orders on such motions, other than those
made during the course of a hearing, shall be in writing.

It is found that it is necessary to include the words "other than those made during the course of a hearing" in order to insure that written orders are not requires during the hearing stage, a requirement which would lead to delay.

16. HE 214. Based on the Examiner's recommendation, HE214 C. will be amended to include the additional standards relating to discovery motions. Therefore, the second to last sentence will be amended to read as follows:

Upon the proper motion ... of a party's case, are not
for purposes of delay, and that the issues or amounts
in controversy are significant enough to warrant ex-
tensive discovery.

17. HE 217. The Office had proposed an entirely new rule relating to Offers of Proof at 217 C. 7. The proposal drew much comment As was stated at the hearing, Examiners have always allowed such offers in the past. The proposed rule would not alter that practice. It would, however, create a heavy burden to satisfy and would lead to lengthier transcripts by requiring that such offers be taken in full. Therefore, the rule is withdrawn in its entirety. The rest of the proposed amendments to HE 217 will be adopted as recommended by the Hearing Examiner, as is more fully described below.

In HE 217 F, the following new criteria will he added to the rule:

3. Whether or not the delay between the ruling and the motion to certify would adversely affect the prevailing party; or

4. Whether to wait until after the hearing would render the matter moot and impossible for the agency to reverse or for a reversal to have any meaning; or

5. Whether it is necessary to promote the development of the full record and avoid remanding-

ORDER

NOW, THEREFORE, it is hereby ordered that the rules as recommended for adoption by the Hearing Examiner, as modified herein, be adopted.

Dated this 10th day of May, 1978.

s/Duane R. Harves
DUANE R. HARVES
Chief Hearing Examiner