

STATE OF MINNESOTA
OFFICE OF ADMINISTRATIVE HEARINGS

FOR THE OFFICE OF ADMINISTRATIVE HEARINGS

in the matter of the Proposed
Adoption of Amendments of Rules
of the Office of Administrative
JUDGE
Hearings Governing Rulemaking and
Contested Case Proceedings.

REPORT OF THE
ACTING CHIEF ADMINISTRATIVE LAW

The above-entitled matter came on for review by Allan W. Klein, acting as the Chief Administrative law Judge for purposes of reviewing this case pursuant to Minn. Stat. SS 14.15, subd. 3; 14.16, subds. I and 2; and Minn. Rule 1400.1000. The Report of Administrative Law Judge Melvin B. Goldberg (hereinafter "ALJ's Report") was received on February 20, 1985.

Minn. Stat. S 14.15, subds. 3 and 4, provide:

Subd. 3. Finding of substantial change. If the [administrative law judge's) report contains a finding that a rule has been modified in a way which makes it substantially different from that which was originally proposed, or that the agency has not met the requirements of sections 14.131 to 14.18, it shall be submitted to the chief administrative law judge for approval. If the chief administrative-law judge approves the finding of the administrative law judge, the chief administrative law judge shall advise the agency and the revisor of statutes of actions which will correct the defects. 'The agency shall not adopt the rule until the chief administrative law judge determines that the defects have been corrected.

Subd. 4. Need or reasonableness not established. if the chief administrative law judge determines that the need for or reasonableness of the rule has not been established pursuant to section 14.14, subdivision 2, and if the agency does not elect to follow the suggested actions of the chief administrative law judge to correct that defect, then the agency shall submit the proposed rule to the legislative commission to review administrative rules for the commission's advice and comment The agency shall not adopt the rule until it has received and considered the advice of the commission. However, the agency is not required to delay adoption longer than 30 days after the commission has received the agency's submission. Advice of the commission shall not be binding on the agency.

Based upon a review of the record in this proceeding, the undersigned

hereby approves the Report of the Administrative Law Judge, except as specifically noted below.

1. Pages 28 through 31 of the ALJ's Report deal with the Office's proposed changes to Rule .0500, the rule relating to the Statement of Need and Reasonableness. At page 31, the ALJ finds that the Office's withdrawal of paragraphs A, B, and C of subpart 1 of the rule (commonly referred to as the "CBA" provisions) constitute a substantial change.

This finding raises the issue of when an agency's withdrawal of a proposed rule can constitute a substantial change. Minn. Stat. sec. 14.05, subd. 3 (1984), provides that an agency may withdraw a proposed rule "any time prior to filing it with the Secretary of State." But Minn. Stat. sec. 14.51 (1984) provides that the Office shall adopt rules for recessing and reconvening new hearings when "the proposed final rule of an agency is substantially different from that which was proposed at the public hearings."

Agencies ought to be allowed to "float ideas" in proposed rules, and then withdraw those ideas if the public response is negative, without violating the substantial change doctrine. However, there are exceptions and qualifications to that generalization. In some cases it becomes a matter of evaluating the degree to which the withdrawal affects other rules. In this case, there is both a statute and an existing rule which mandate the preparation of a Statement of Need and Reasonableness. Minn. Stat. sec. 14.131 (1984) and Mimi. Rule 1400.0500. As the ALJ's Report noted, the withdrawal of the CBA provisions essentially returns the rule to its existing form, a return to the status quo. In addition, the proposed CBA provisions do not affect any other rules or procedures in the rulemaking process. They are not so inextricably interwoven with others that the withdrawal constitutes a de facto amendment of other rules. Under these conditions, the undersigned finds that the withdrawal of the CBA provisions is not a substantial change. They may be withdrawn.

The interrelationship between the concept of withdraw and the concept of substantial change is one which ought to be further clarified in a rule. It

is not possible to do so at this stage in the process of these amendments, but the Office ought to consider, along with other interested parties, the advisability of adopting a rule to more clearly specify the relationship between withdrawal and substantial change.

2. At pages 48 through 54 of his Report, the ALJ dealt with a number of issues relating to the rulemaking record, and particularly the transcript of a rulemaking hearing. He noted that two rules, Rule .0900 and Rule .0950, should be considered together because they are related. The ALJ found that certain material proposed to be deleted from .0900 ought to have been included in .0950, and that the agency's failure to do so, coupled with its failure to make an affirmative showing of the necessity or reasonableness of the deletion, constituted a defect. The ALJ also found that the Office had agreed to make certain changes suggested by members of the public, but had failed to supply any specific language to implement that agreement. Finally, the ALJ stated that it would be "appropriate" to define the cost of a copy of the transcript obtained from the OAH after an original transcript has been prepared by the term "at the cost of reproduction, rather than "at a reasonable charge'. It is unclear from the ALJ's Report whether he is merely recommending that the Office consider this language change, or whether he finds that the proposed rule would be defective without it.

Specifically at issue is language proposed for deletion in Rule .0900 which states, essentially, that if a transcript has been prepared, a copy will be available to any person requesting it at a reasonable charge to be set by the Chief Administrative Law Judge.

In its Statement of Need and Reasonableness, the Office stated that the deletions to Rule .0900 relating to the provisions for court reporters and transcripts 'are covered by statute as well as by the new rule which follows (a reference to rule .0950). In its comments filed at the close of the 20-day period, the Office stated that Rule .0950 attempted to simplify the language of the rule by "deleting language now contained in the statute.' Ex. 37, at 4.

A review of SS 14.52 - 14.54 indicates that the statutes do cover some of the deleted material in Rule .0900, but not all. In particular, they do not cover the question of who pays for a copy after the original has been prepared, and how much must be paid. That issue is dealt with in the language proposed for deletion in Rule .0900. Since it is not dealt with in either the statutes or the new Rule .0950, the undersigned approves the finding of the ALJ that the Office has failed to demonstrate the need for or reasonableness of that part of the deletion.

In order to cure this defect, the Office must add language to the rules (logically it would be added to Rule .0950) to indicate that if a person requests a copy of the transcript after it has been ordered by someone else, how the copy may be obtained, and what the charge will be. Because the ALJ's Report did not clearly indicate that the substitution of "at the cost of reproduction" was a required change in order to cure a defect, the Office has the option of using either the existing language in the old rule or the substitute language which the ALJ found to be more appropriate.

3. The undersigned notes that there may be a typographical error in proposed Rule 1400.5500, in the last paragraph. The twelfth word presently reads 'from'. It would appear that it ought to read 'for'.

4. At page 83 of his Report, the ALJ finds that mediation in connection with rulemaking "is beyond the OAH's lawful authority and cannot be found to be reasonable'. It is unclear whether the ALJ intended to communicate one defect (lack of statutory authority) or two separate defects (statutory authority and unreasonableness). The undersigned approves the finding of lack of statutory authority. However, the undersigned does not approve a finding of unreasonableness.

With regard to reasonableness, the record contains a number of submissions discussing the use of negotiated rulemaking in other parts of the country. See, for example, Ex. 21, attachment from Environmental Science and Technology and Ex. 32. While there were some problems with the original version of the proposed rule which were pointed out by commentators, the ALJ found that the office had cured those problems. The undersigned can find no basis for concluding the rule to be unreasonable. However, since the statutory authority finding is approved, the rule must be redrafted to exclude the use of mediation in rulemaking cases.

5. At page 88 of his Report, the ALJ found certain proposed amendments to Rule .6200, dealing with intervention, to be unreasonable "unless reference is made to specific statutes authorizing public [interest) intervention or more specific criteria is used to define the rule*.

This language is essentially taken from Ex. 23, at p. 14. That comment points out that the Office's proposal, to allow intervention where "petitioner's participation is in the public interest", is vague.

An examination of the Statement of Need and Reasonableness and the office's post-hearing submission (Ex. 41) indicates that the intent of the Office in inserting the "public interest" language was far narrower than the language suggests. The intent was to recognize the fact that a number of statutes and court decisions have created a right of intervention.

The undersigned approves the finding of the ALJ. In order to cure the defect, the rule must be redrafted using narrower language. An example of such narrower language would be 'or that petitioner's participation is authorized by statute, rule or court decision'.

6. At page 104 of his Report, the ALJ finds that proposed Rule .7050, relating to sanctions in discrimination cases, contains one defect based on an statutory authority, and a second defect based on reasonableness.

The undersigned approves both findings.

In order to cure the statutory authority defect, the rule should be rewritten to allow sanctions to be imposed only upon 'any charging party or respondent'.

In order to cure the reasonableness defect, the provision in subpart 1.C. relating to "five working days" should be changed to "ten working days".

In order to correct the defects enumerated by the Administrative Law Judge, the Office shall either take the action recommended by the Administrative Law Judge or the undersigned, or reconvene the rule hearing if appropriate. If the Office chooses to reconvene the rule hearing, it shall do so as if it is initiating a new rule hearing, complying with all substantive and procedural requirements imposed by law or rule.

If the Office chooses to take the action recommended by the Administrative Law Judge or the undersigned, it shall submit to the undersigned a copy of the rules as initially published in the State Register, a copy of the rules as

proposed for final adoption in the form required by the State Register for final publication, and a copy of the Office's Findings of Fact and Order Adopting Rules. The undersigned will then make a determination as to whether the defects have been corrected and whether the modifications in the rules are substantial changes.

Should the Office make changes in the rules other than those recommended by the Administrative Law Judge or the undersigned, it shall also submit the complete record for a review on the issue of substantial change.

Dated: February 28th 1985.

ALIAN W. KLEIN
Acting Chief Administrative Law Judge