1-0900-12266-1

STATE OF MINNESOTA
OFFICE OF ADMINISTRATIVE HEARINGS

FOR THE MINNESOTA DEPARTMENT OF HEALTH
AND THE MINNESOTA DEPARTMENT OF AGRICULTURE

In the Matter of the Proposed Rules Relating to the Certification of Food Managers. Minnesota Rules Chapter 4626.2000 to 4626.2025.

REPORT OF THE ADMINISTRATIVE LAW JUDGE

A hearing concerning the above rules was held by Administrative Law Judge George A. Beck at 9:30 a.m. on August 9, 1999, at the Minnesota Department of Health Service Center, 1645 Energy Park Drive, Saint Paul, Minnesota.

The hearing held on August 9 and this Report are part of a rulemaking process that must occur under the Minnesota Administrative Procedure Act[1] before an agency can adopt rules. The legislature has designed that process to ensure that state agencies have met all the requirements that Minnesota law specifies for adopting rules. Those requirements include assurances that the proposed rules are necessary and reasonable and that any modifications that the Agencies may have made after the proposed rules were initially published do not result in them being substantially different from what the Agencies originally proposed. The rulemaking process also includes a hearing, when a sufficient number of persons request such a hearing. The hearing is intended to allow the Agency and the Administrative Law Judge reviewing the proposed rules to hear public comment regarding the impact of the proposed rules and what changes might be appropriate.

Stephen Shakman, Assistant Attorney General, 445 Minnesota Street, St. Paul, Minnesota 55101-2127, appeared at the rule hearing on behalf of the Department of Health (Health) and the Department of Agriculture (Agriculture).[2] The members of the Agencies' hearing panel were Lorna Girard, Supervisor of the Dairy and Food Inspection Division (Agriculture); Theresa Dziuk, Food Standards Compliance Officer, Dairy and Food Inspection Division; Paul Allwood, Supervisor of the Environmental Health Division of the Environmental Health Section (Health); Gunilla Montgomery,

[1] Minn. Stat. §§ 14.131 through 14.20 (1998).
[2] Collectively, Health and Agriculture are referred to as "the Agencies."

Food Manager Certification Coordinator, Environmental Health Division; and Jeanne Eggleston, Rules Coordinator of the Environmental Health Division.

Approximately twenty-five persons attended the hearing. Twenty persons signed the hearing register. The hearing continued until all interested persons, groups or associations had an opportunity to be heard concerning the proposed amendments to these rules.

After the hearing ended, the Administrative Law Judge kept the administrative record open for ten calendar days, until August 19, 1999, to allow interested persons and the Agencies an opportunity to submit written comments. During this initial comment period the Administrative Law Judge received ten written comments from interested persons and the Agencies. Following the initial comment period, Minnesota law[3] required that the hearing record remain open for another five business days to allow interested parties and the Agencies to respond to any written comments. Several reply comments were received. The Agencies made comments in both periods and proposed changes to the rules. The hearing record closed for all purposes on August 26, 1999. One comment was received after the final closing of the record. That comment was not considered in the writing of this Report.

NOTICE

The Agencies must make this Report available for review by anyone who wishes to review it for at least five working days before the Agencies take any further action to adopt final rules or to modify or withdraw the proposed rules. During that time, this Report must be made available to interested persons upon request. After adopting the final version of the rules, the Agencies must then submit them to the Revisor of Statutes for a review of their form. After the Revisor of Statutes approves the form of the rules, the rules must be filed with the Secretary of State. On the day that the Commissioners of Health and Agriculture make that filing, they must give notice to everyone who requested to be informed of that filing.

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

FINDINGS OF FACT

Procedural Requirements

1. On July 1, 1996, Health published a Request for Comments on planned rule development of rules governing food manager certification and training standards. The notice indicated that a rulemaking taskforce representing a wide variety of food producers and distributors, hospitality industry members, academics, healthcare industry members, certified food managers, and sanitarians. The Request for Comments was published at 21 State Register 10. (Exhibit 1).

[3] Minn. Stat. § 14.15, subd. 1 (1998).

2. On December 28, 1998, Health and Agriculture jointly published a Request for Comments on the joint rules for food manager certification and training standards. The Request for Comments was published at 23 State Register 1465. (Exhibit 2).

3. On June 7, 1999, the Agencies requested the scheduling of a tentative hearing date and filed the following documents with the Chief Administrative Law Judge:

(a) a copy of the proposed rules certified by the Revisor of Statutes;

(b) the Dual Notice of Hearing proposed to be issued; and

(c) a draft of the Statement of Need and Reasonableness ("SONAR").

4. A notice plan was approved by the Administrative Law Judge on June 10, 1999.

5. On June 21, 1999, Agriculture mailed the Dual Notice of Hearing and a copy of the SONAR to the chairs of the legislative committees that oversee Agriculture matters, the legislators who were authors of the laws providing statutory authority for these proposed rules, and the persons who had registered their names with the agency for the purpose of receiving such notice. (Exhibit 8).

6. On June 23, 1999, Health mailed the Dual Notice of Hearing to all persons and associations who had registered their names with the agency for the purpose of receiving such notice and all persons identified in the Additional Notice plan. (Exhibit 7).

7. On June 25, 1999, the Agencies mailed a copy of the SONAR to the Legislative Reference Librarian, as required by law.[4] (Exhibit 5).

8. On June 28, 1999, a copy of the proposed rules and the Dual Notice of Hearing were published at 23 State Register 2393. (Exhibit 6).

9. The Agencies received over twenty-five signatures from persons requesting a hearing be held on this matter. On July 29, 1998, the Agencies mailed a notice to persons who requested a hearing that informed them that a hearing would be held on the proposed rules. (Exhibit 10).

10. On the day of the hearing, the Agencies placed the following documents into the record:

(a) the Request for Comments published at 21 State Register 10 (Exhibit 1);
(b) the Request for Comments published at 23 State Register 1465 (Exhibit 2);
(c) a copy of the proposed rule as certified by the Revisor of Statutes (Exhibit 3);

[4] Minn. Stat. § 14.131 and Minn. R. 1400.2220, subp. 1(E).

(d) the SONAR (Exhibit 4);
(e) a copy of the letter transmitting the SONAR to the Legislative Reference Librarian (Exhibit 5);
(f) the Notice of Hearing and copy of the proposed rules as mailed and published in the State Register (Exhibit 6);
(g) the Department of Health's Certificate of Mailing, certification of providing additional notice, certification of notifying legislators, and certification of the mailing list as accurate and complete (Exhibit 7);
(h) the Department of Agriculture's Certificate of Mailing and certification of the mailing list as accurate and complete (Exhibit 8);
(i) comments received during the thirty day period for requesting a hearing (Exhibit 9);
(j) the Certificate of Mailing and the Notice of Hearing sent to commentators who requested a hearing (Exhibit 10);
(k) a copy of the Agencies' introductory statement at the hearing (Exhibit 11);
(l) revisions to the proposed rule (Exhibit 12); and
(m) a list of the witnesses the Agencies intend to call at the hearing (Exhibit 13).

11. The Agencies have met all of the procedural requirements under the applicable statutes and rules.

Nature of the Proposed Rules

12. This rulemaking proceeding is a joint effort by the Minnesota Department of Health and the Minnesota Department of Agriculture (the Agencies) to adopt new rules governing the certification of food managers for food establishments. The Agencies recently adopted amendments to the Minnesota Food Code, also set out in Chapter 4626 of the Minnesota Rules. The proposed rules would require food establishments to have a staff member certified as a food manager present while in operation. The standards for certification are set out in the proposed rules. The proposed rules also set out the standards for qualifying as a certifying body.

13. Task forces were convened in 1993 and 1994 to examine food safety issues, including certification of managers. Both task forces concluded that food manager certification was needed.[5] The proposed rules, which were drafted with the assistance and input of an advisory committee, require employment of a certified food manager in food establishments, establish the application process for obtaining certification, set qualifications for persons seeking certification, and determine what examinations meet the standards for certification.

[5] SONAR, at 1-2.

Statutory Authority

14. Minn. Stat. § 157.011, subd. 2, sets out requirements for the Department of Health that state:

> Subd. 2. **Certification of food service managers.** The commissioner shall: (1) adopt rules for certification requirements for managers of food service operations; and (2) establish in rule, criteria for training and certification.

15. The Department of Agriculture is subject to the provisions of Minn. Stat. § 31.96, which states:

> The commissioner may require certification of retail food handlers in establishments licensed under section 28A.05, paragraph (a), for retail food preparation, handling, and service practices. A retail food handler licensed under section 28A.05, paragraph (a), shall comply with the requirements for the manager certification program under section 157.011, subdivision 2. An interagency agreement with the department of health must be established for the transfer of funds to the commissioner to cover the cost of administering the manager certification program

16. In addition to the express authority granted by Minn. Stat. § 157.011, subd. 2, the Department of Health is authorized by Minn. Stat. §§ 144.05, 144.122, and 157.011, to generally adopt rules to establish standards for food establishments and health safety. The Department of Agriculture is authorized, under Minn. Stat. §§ 31.11 and 31.101 to administer food law and adopt rules relating to food.

17. The primary purpose of the proposed rules is to protect public health by requiring certification of food managers and establishing standards for administering and obtaining that certification. The Administrative Law Judge finds that the Agencies have the statutory authority jointly to adopt the proposed rules.

Rulemaking Legal Standards

18. 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, the Agencies may rely on legislative facts, namely general facts concerning questions of law, policy and discretion, or they may simply rely on interpretation of a statute, or stated policy preferences.[6] The Agencies prepared a Statement of Need and Reasonableness ("SONAR") in support of the proposed rules. At the hearing, the Agencies primarily relied upon the SONAR as its affirmative presentation of need and reasonableness for the proposed amendments.

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[6] *Mammenga v. Department of Human Services*, 442 N.W.2d 786 (Minn. 1989); *Manufactured Housing Institute v. Pettersen*, 347 N.W.2d 238, 244 (Minn. 1984).

The SONAR was supplemented by comments made by Agency staff members at the public hearing and in written post-hearing submissions.

19. 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.[7] Arbitrary or unreasonable agency action is action without consideration and in disregard of the facts and circumstances of the case.[8] A rule is generally found to be reasonable if it is rationally related to the end sought to be achieved by the governing statute.[9] The Minnesota Supreme Court has further defined an 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."[10] An agency is entitled to make choices between possible approaches as long as the choice made 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 that a rational person could have made.[11]

20. In addition to need and reasonableness, the Administrative Law Judge must also assess whether the rule adoption procedure was complied with, whether the rule grants undue discretion, whether the Agencies have statutory authority to adopt the rule, whether the rule is unconstitutional or illegal, whether the rule constitutes an undue delegation of authority to another entity, or whether the proposed language is not a rule.[12] In this matter, the Agencies have proposed changes to the rule after publication of the rule language in the State Register. Because of this circumstance, the Administrative Law Judge must determine if the new language is substantially different from that which was originally proposed.[13]

21. The standards to determine if new language is substantially different are found in Minn. Stat. § 14.05, subd. 2 (1998). The statute specifies that a modification does not make a proposed rule substantially different if "the differences are within the scope of the matter announced . . . in the notice of hearing and are in character with the issues raised in that notice," the differences "are a logical outgrowth of the contents of the . . . notice of hearing and the comments submitted in response to the notice," and the notice of hearing "provided fair warning that the outcome of that rulemaking proceeding could be the rule in question." In determining whether modifications are substantially different, the Administrative Law Judge is to consider whether "persons

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[7] *In re Hanson*, 275 N.W.2d 790 (Minn. 1978); *Hurley v. Chaffee*, 231 Minn. 362, 367, 43 N.W.2d 281, 284 (1950).

[8] *Greenhill v. Bailey*, 519 F.2d 5, 19 (8th Cir. 1975).

[9] *Mammenga*, 442 N.W.2d at 789-90*; Broen Memorial Home v. Minnesota Department of Human Services,* 364 N.W.2d 436, 444 (Minn. Ct. App. 1985).

[10] *Manufactured Housing Institute*, 347 N.W.2d at 244.

[11] *Federal Security Administrator v. Quaker Oats Co.*, 318 U.S. 218, 233 (1943).

[12] Minn. R. 1400.2100.

[13] Minn. Stat. § 14.15, subd. 3 (1998).

who will be affected by the rule should have understood that the rulemaking proceeding . . . could affect their interests," whether "the subject matter of the rule or issues determined by the rule are different from the subject matter or issues contained in the . . . notice of hearing," and whether "the effects of the rule differ from the effects of the proposed rule contained in the . . . notice of hearing."[14]

Impact on Farming Operations

22. Minn. Stat. § 14.111, (1998), imposes an additional notice requirement when rules are proposed that affect farming operations. In essence, the statute requires that an agency must provide a copy of any such proposed rule change to the Commissioner of Agriculture at least thirty days prior to publishing the proposed rule in the State Register.

23. The proposed rules do not impose restrictions or have a direct impact on fundamental aspects of farming operations. The Administrative Law Judge finds that the proposed rule change will not affect farming operations in Minnesota, and thus finds that no additional notice is required. Were additional notice to be required, the participation of Agriculture in this rulemaking proceeding constitutes full compliance with Minn. Stat. § 14.111.

Cost and Alternative Assessments in the SONAR

24. Minn. Stat. § 14.131 requires an agency adopting rules to include in its SONAR:

> (1) a description of the classes of persons who probably will be affected by the proposed rule, including classes that will bear the costs of the proposed rule and classes that will benefit from the proposed rule;
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> (2) the probable costs to the agency and to any other agency of the implementation and enforcement of the proposed rule and any anticipated effect on state revenues;
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> (3) a determination of whether there are less costly methods or less intrusive methods for achieving the purpose of the proposed rule;
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> (4) a description of any alternative methods for achieving the purpose of the proposed rule that were seriously considered by the agency and the reasons why they were rejected in favor of the proposed rule;
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> (5) the probable costs of complying with the proposed rule; and

[14] Minn. Stat. § 14.05, subd. 2 (1998).

(6) an assessment of any differences between the proposed rule and existing federal regulations and a specific analysis of the need for and reasonableness of each difference.

25. The SONAR includes a discussion of the analysis that was performed by the Agencies to meet the requirements of this statute.[15] Those who will bear the costs of the rule requirement are the individuals seeking certification, establishments required to have certified food managers, providers of training, and providers of examinations.[16] The same classes of persons will be benefited by increased sales through improved customer confidence, decreased costs arising from improved food handling practices, and lower costs arising from fewer claims of liability for foodborne illnesses. In addition, the rule protects the health of persons who eat in food establishments that will be required to have a certified food manager present. While not required by the rules, the Agencies anticipate that the costs will be mostly borne by food establishments that are not explicitly exempted from the rules. Such establishments can incorporate the training costs into their ordinary costs of doing business. The Agencies expect that any additional costs incurred by training and examination providers will be offset by greater participation in those courses.[17]

26. The probable costs to the Agencies are anticipated to be offset by the $15.00 application fee proposed in the rules. The Agencies expect approximately 20,000 food managers to apply for certification. Administration of the program is estimated to need less than two full-time equivalent positions.[18] Other state agencies may be affected, to the extent that they operate food establishments. Those agencies will only be affected to the same degree as any private food establishment.

27. An agency proposing rules must determine whether there are less costly or less intrusive methods to achieve the purposes of the proposed rules. In this instance, statewide certification is required by Minn. Stat. § 157.011, subd. 2. The Agencies assessed voluntary certification, mandating local governments to conduct certification, an integration of statewide and local certification, and on-the-job (OTJ) assessment of food managers, as alternative methods of achieving the purposes of the proposed rules. Research has shown that voluntary certification is ineffective to assure participation.[19] The Agencies considered the variations inherent in the mandated and integrated systems to be problematic.[20] The administrative difficulty of assessing the OTJ qualifications of 20,000 applicants led the Agencies to conclude that such an approach was impractical.[21]

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15 *See* SONAR at 8-12.
16 SONAR at 9.
17 *Id*.
18 SONAR, at 10.
19 SONAR, at 11.
20 *Id*.
21 *Id*.

28. The Agencies surveyed the available training providers and concluded that initial food manager training courses range in cost from $65.00 to $250.00.[22] The same survey indicated tests range in cost from $30.00 to $75.00. Continuing education is available from a variety of sources and ranges in price from no cost to $50.00. There is no additional cost required of training and examination providers by the rules.

29. An agency adopting rules must assess any differences between the proposed rule and existing federal regulations. There is no current federal requirement for certification of food managers. There are no conflicts between federal regulations and the proposed rules.[23]

30. The Administrative Law Judge concludes that the Agencies have met the requirements set forth in Minn. Stat. § 14.131 for assessing the impact of the proposed rules.

31. Numerous comments were received in writing and through testimony at the public hearing. The commentators in this matter have suggested numerous changes to the rules and inquired into how the rules will affect existing regulation. This Report is limited to the discussion of the portions of the proposed rules that received significant critical comment or otherwise need to be examined. Accordingly, the Report will not discuss each comment or rule part. Persons or groups who do not find their particular comments referenced in this Report should know that each and every suggestion, including those made prior to the hearing, has been carefully read and considered. Moreover, because some sections of the proposed rules were not opposed and were adequately supported by the SONAR, a detailed discussion of each section of the proposed rules is unnecessary. The Administrative Law Judge specifically finds that the Agencies have demonstrated the need for and reasonableness of all rule provisions not specifically discussed in this Report by an affirmative presentation of facts. The Administrative Law Judge also finds that all provisions not specifically discussed are authorized by statute and there are no other problems that would prevent the adoption of the rules.

32. Where changes are made to the rules after publication in the State Register, the Administrative Law Judge must determine if the new language is substantially different from that which was originally proposed.[24] The standards to determine if the new language is substantially different from that which was originally proposed by the Agencies are found in Minn. Stat. § 14.05, subd. 2. Not all the suggestions and amendments will be discussed individually. The Administrative Law Judge finds that modifications made by the Agencies in punctuation or to correct a cross-reference or a typographical error are needed and reasonable, and that these changes do not result in a substantially different rule.

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[22] SONAR, at 12.
[23] *Id.*
[24] Minn. Stat § 14.05, subd. 3.

Approach to Certification in the Rules

33. The proposed rules implement the requirement in Minn. Stat. § 157.011, subd. 2, that a program of certifying food managers be established. The approach adopted by the Agencies to certify food managers is to require training and a passing score on an approved test. Dr. O. Peter Snyder of the Hospitality Institute of Technology and Management (HITM) objected to using written tests to determine whether an individual should be certified.[25] Rather, HITM suggested demonstrations of appropriate food handling in conjunction with quizzing owners or operators on their understanding of the Minnesota Food Code at the time they obtain their license to operate. Under this approach, training of employees is assessed by random questioning of employees at the food establishment.[26] The Agencies responded that the alternative approach suggested by HITM would not comply with the statutory requirement to certify food managers.[27] The Agencies indicated that pilot projects are underway to develop systems-based audits of food establishments to replace the current methods of inspection.[28]

34. The Agencies cited a number of studies, journal articles, and other jurisdictions' requirements to support the use of examinations as the primary tool for certification.[29] Sincere differences of opinion exist over the validity of written examinations in measuring the compliance of individuals where the knowledge is applied. But the existence and use of such examinations by other jurisdictions provides some assurance that the examinations have the effect of improving food-handling practices in food establishments. The Agencies are also entitled to rely upon the efficiency inherent in using examinations already established, rather than create examinations that require OTJ demonstration in the food establishment of the principles required of certified food managers. Such demonstrations were considered as an alternative means of implementing these rules and rejected.

35. HITM has taken a holistic view of how food safety is to be accomplished and suggested means by which procedures furthering that end will be widely disseminated. But the statute authorizing these rules does not authorize a reassessment of the entire food safety system of Minnesota. The statute requires the Agencies to adopt a program certifying food managers. HITM's approach would provide assurance that the employees present on the day the inspector arrives have knowledge of the Minnesota Food Code. That approach would not place an individual, certified in knowledge of the primary sources of foodborne illness, in each food establishment on a full-time basis. The Agencies' approach conforms to the direction of the Legislature to place certified food managers in food establishments. The Agencies' approach of requiring individuals to pass written examinations has been shown to be needed and reasonable.

4626.2000 – Definitions

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[25] Public Ex. 3, Recommended Modifications, at 7.
[26] *Id*. at 7-8.
[27] Agencies' Reply, at 11.
[28] *Id*. at 12.
[29] SONAR, at 3-6.

36. Proposed rule 4626.2000 sets definitions for terms used throughout the rules. Most of the definitions received no comment and will not be discussed in this Report. Those definitions are found to be needed and reasonable. The definitions that received comment will be discussed individually.

"Certified Food Manager"

37. Subpart 3 defines "certified food manager" as an individual with a valid certification under part 4626.2015. Roger H. Carlson, Principal Planner with the Community Health Department of Hennepin County (Hennepin County), objected to using the term "manager" in the definition because the person holding the certification may not hold any managerial responsibilities.[30] The duties of certified food managers are set out in proposed rule 4626.2010, subpart 5. Those duties include hazard identification, training, and employee direction. Proposed rule 4626.2010, subpart 2 expressly allows certified food managers to be responsible for a satellite location where "direct management authority" is exercised by the certified food manager. The term "certified food manager" has been shown to be needed and reasonable.

"Employ"

38. Hennepin County suggested that the definition of "employ" in subpart 8 allowed a variety of contractual situations that would not require the certified food manager to be present at the food establishment.[31] The standard for the certified food manager is located in proposed rule 4626.2010; it requires one certified food manager to be employed full-time for each food establishment. The lack of a requirement that the certified food manager be present at all times is consistent with the responsibilities of that individual for satellite locations. There has been no showing that the Agencies need to specify what contractual arrangement is entered into between owners and operators and the certified food managers that must be employed. The subpart is needed and reasonable as proposed.

4626.2005 – Scope

39. Proposed rule 4626.2005 clarifies that the food manager certification rules apply to food establishments regulated by Agriculture, Health, and local authorities, individuals who apply for certification, individuals providing training, and persons providing examinations. The rule is both needed and reasonable to ensure correct application of the food manager certification rule.

4626.2010 – Certified Food Manager Requirements for Food Establishments

40. Subpart 1 of proposed rule 4626.2010 requires the owner or operator of a food establishment to employ a certified food manager for each location, except for satellite locations or catered functions. Satellite locations are locations where food is served, reheated or cold, under the direct management of the owner or operator of a

[30] Public Ex. 7.
[31] Public Ex. 7.

food establishment. The Agencies described the intent of the rule as ensuring that a full-time employee capable of overseeing proper food preparation and training others in safe food handling, is present at each food establishment.[32] The actual length of time to be spent at a location is not specified in the rule.

41. Hennepin County suggested clarifying the status of the certified food manager in the hierarchy of food establishment management.[33] The Agencies responded that the proposed rules interact with the requirements of the Food Code to establish a hierarchy of owner or operator, certified food manager, and person in charge.[34] The owner and operator are ultimately responsible for the functioning of each food establishment and affiliated locations. The certified food manager is employed by the owner and operator to oversee the food handling of the establishment, including adequately training uncertified staff to fulfill the duties of the person in charge. The person in charge is a staff member, aware of the requirements of the Food Code, who is actually present whenever the food establishment is operating.[35] The functions of these positions are complimentary and needed and reasonable to ensure compliance with the standards of the Food Code.

42. Thomas Johnson, President of Diversified Products, Inc. (Diversified), objected to the limitations on the scope of the rule requiring certified food managers. Diversified suggested that "Elementary schools, day care facilities, senior congregate dining, long term and short term care, group home and like facilities" should each be required to employ a certified food manager, rather than rely on one certified food manager for a number of sites.[36] The Agencies responded that most of the facilities identified in his comment do not qualify as satellite locations and must employ certified food managers.[37] Furthermore, the certified food manager is responsible for procedures followed at the satellite locations. The reasons for the other limitations relate to other specific rules and will be discussed where applicable.

43. Subpart 2 describes satellite locations and catered feeding locations for which exemptions to the certified food manager requirement are applicable. The Agencies noted that the exemptions for these locations do not exclude the requirement that a certified food manager be responsible for food handling, only that the person may be employed as the certified food manager at the food establishment with direct managerial control over the satellite location. A further limitation is that the certified food manager for a food establishment may supervise only one satellite location. Exceptions to the one-to-one ratio are provided for schools, adult day care centers, childcare facilities, or senior nutrition programs, where a ten location to each certified food manager (ten-to-one) ratio is allowed.

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[32] SONAR, at 18.
[33] Public Ex. 7.
[34] Agencies' Reply, at 4.
[35] Nothing in the rule prevents two or all three of these roles from being met by the same individual.
[36] Public Ex. 10.
[37] Agencies' Reply, at 1.

44. In the SONAR, the Agencies suggest that allowing a ten-to-one ratio is supported by the lower employee turnover in the described facilities.[38] The Agencies also indicate that the risk of foodborne illness is minimal, since only limited food handling is allowed at satellite locations.[39] The Agencies modified the description of satellite food locations to read "a separate location where food is only reheated and served or served cold." The modification clarifies ambiguous language and is based on suggestions made by commentators made during the rulemaking proceeding. The Agencies have set forth a reasonable basis to allow a ten-to-one ratio for some food establishments and limit others to a one-to-one ratio. The subpart is needed and reasonable as modified. The new language does not make the rules substantially different from those originally published in the *State Register*.

45. Subpart 4 establishes exemptions from the certified food manager requirement. The exemptions are based on various standards. Item A identifies the food establishments exempted due to the foods such establishments prepare. For example, heating and serving precooked foods such as popcorn or frozen pizza does not trigger the certified food manager requirement. The Agencies set out a detailed listing of the types of food establishments exempted and why each type does not require a certified food manager.[40] Since the types of foods listed do not pose substantial threats of foodborne illness, exempting such food establishments is both needed and reasonable.

46. Item B exempts boarding establishments, bed and breakfasts, childcare facilities, and adult day care centers. The exemption only applies if the establishment serves eighteen or fewer people at mealtime. The Agencies modified the text of the rule to clarify that the eighteen-person limit applies to each of the food establishments (rather than the last one on the list). Hennepin County questioned how the eighteen-person limit was arrived at. The Agencies responded that the Model Food Code set the eighteen-person limit for exempting childcare, bed and breakfasts, and adult day care establishments.[41] While the eighteen-person exemption does not apply in the Minnesota Food Code,[42] the Agencies determined that the person in charge requirement was sufficient to protect against foodborne illness without the additional burden of employing a certified food manager.[43] The compromise in the proposed rule is both needed and reasonable.

47. Item C exempts food carts and other temporary food service locations regulated under Minn. Stat. § 157.15. Item D exempts retail food vehicles, portable structures, carts, and vending machines. The exemption for the establishments in item C is based primarily on the limited time (twenty-one days) such establishments are allowed to operate at one place.[44]. The item D exemptions are based on the limited

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38 SONAR, at 19.
39 *Id*.
40 SONAR, at 20-21.
41 Agencies' Comment, at 7.
42 *See* Minn. Rule 4626,0020, subp. 35.
43 Agencies' Comment, at 8.
44 SONAR, at 21-22.

menu offered by such establishments and the lack of staff to process the large number of certification applications that would be required by including such establishments.[45] Similarly, item E exempts food establishments serving no more than one meal per week and operated by an entity whose primary activity is not food service. The exemption in item E is intended to reach fraternal organizations, neighborhood organizations, and religious organizations that operate a kitchen for occasional functions.[46] Hennepin County and Petrona Lee, Manager of the Environmental Services Division for the City of Bloomington (Bloomington), objected to the exception in item E, since such facilities can serve large numbers of people on a single day, resulting in an annual total comparable to many full-time food establishments.[47]

48. The Agencies concluded that the burden of requiring a certified food manager for the temporary or infrequently used facilities listed in items C, D and E outweighed the benefit to be derived to the public. As with the other exemptions, the person in charge requirement of the Food Code applies to the food establishments exempted under these items. Hennepin County questioned who would train the person in charge for such facilities.[48] The owner or operator is obligated to designate the person in charge for a food establishment.[49] The individual designated as the person in charge is obligated to demonstrate detailed knowledge of the standards of the Food Code and the underlying relationship between food handling practices and food safety.[50] Reliance on the person in charge for oversight of temporary or infrequent food establishments has been shown to be needed and reasonable to prevent transmission of foodborne illnesses. The exemptions from the certified food manager requirement are needed and reasonable to avoid imposing an undue burden on limited food establishments.

49. Subpart 5 sets out the duties of a certified food manager. The Minnesota Grocers Association indicated that the wording of the subpart did not reflect the intended distribution of responsibility between the owner or operator and the certified food manager.[51] Hennepin County also indicated that the wording of the subpart reflected the duties of owners and operators, not certified food managers.[52] The Minnesota Grocers Association suggested language that conforms the rule to the Agencies' intent. The Agencies agreed that the subpart could use clarification and modified the rule accordingly.[53] As modified, subpart 5 is needed and reasonable to set out the duties of certified food managers. The new language meets the suggestion of a commentator prior to the hearing and is not substantially different from the language published in the *State Register*.

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45 *Id*.
46 SONAR, at 22.
47 Public Exs. 6 and 7.
48 Public Ex. 7, at 2.
49 Minn. Rule 4626.0025.
50 Minn. Rule 4626.0030.
51 Ex. 9, Comment 4, at 5.
52 Public Exhibit 7.
53 Agencies' Comment, at 9-10. The only language that differs from the Minnesota Grocers Association language comes from a suggestion by Hennepin County to retain the "developed and implemented" language regarding prevention of foodborne illness. Public Ex. 7, at 3.

50. As originally proposed, subpart 6 allots a newly commenced food establishment 45 days to identify an employee to train as a certified food manager and allotted Health 45 days to process that person's application. The subpart also required the food establishment have a certified food manager within 90 days. Hennepin County pointed out that the timeline in subpart 6 left no days for training or testing.[54] The Agencies acknowledged that the timeline would not function for the purpose intended and modified the rule to require that the food establishment have an individual apply for certification within 90 days. The modification cures the unreasonable language that had been originally proposed.

51. The other deadline set out in the rule is for a food establishment that "ceases to employ a certified food manager." The modification to subpart 6 adjusts the deadline for existing as well as newly commenced food establishments. Subpart 6 is needed and reasonable as modified. The new language is not substantially different from the rule as published in the *State Register*.

52. Subpart 7 proposed July 1, 2000, as the effective date for requirement that food establishments have certified food managers. The Minnesota Grocers Association and the Minnesota Retail Merchants Association objected to the date and suggested that the effective date be modified to one year from the date the rules are adopted.[55] The Minnesota Grocers Association indicated that modifications to the Serve-Safe course to address food establishment issues in the retail setting will not be ready until January, 2000.[56] Christopher Forslund, Environmental Health Specialist for the City of Crystal (Crystal), objected to any delay in implementation since the rule has been in development for three years with the participation of the affected food establishments.[57]

53. The Agencies responded that the July 1, 2000 date provided adequate time for food establishments to hire certified food managers (or train existing employees) and changing the effective date could cause more confusion than was already present regarding these requirements.[58] Providing a date certain for an effective date is less ambiguous than a "year after adoption" effective date. There has been no showing that any group of food establishments will be unable to meet deadlines triggered by the July 1, 2000 effective date. The Minnesota Grocers Association indicated that many of its members already have staff that have passed an exam on the approved list and will need only to file the appropriate application.[59] Health will be able to process applications as soon as the rule is finally adopted, since the application rule part

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[54] Public Exhibit 7, at 3.

[55] Ex. 9, Comment 4, at 5-6; Public Ex. 9

[56] Public Ex. 8.

[57] Public Ex. 5.

[58] Agencies' Comment, at 11. The Minnesota Grocers Association indicated that an enterprising training and examination provider had distributed information regarding these rules as requiring a certified food manager by the year 2000. *See* Public Ex. 2. While true, in a sense, the lack of actual date in the year 2000 created great anxiety among businesses that could be covered by the rules. The Agencies responded by publishing a fact sheet and providing a "hot line" for accurate information. Agencies' Comment, at 11.

[59] Public Ex. 8, at 2.

(4626.2015) is not subject to any delayed implementation date. Subpart 7 is needed and reasonable as proposed.

4626.2015 – Certified Food Manager Qualifications and Application

54. As originally proposed, subpart 1 of part 4626.2010 required persons seeking certification to complete a training course meeting the standards of part 4626.2020. This would have required completion of a twelve-hour course.[60] Prior to the hearing, Tom Day, Director of Communications for Hospitality Minnesota; the Minnesota Grocers Association; Ellen F. Hoyt and Betty J. Packer, City of Minneapolis; Kent A. Rees, Environmental Hygiene Officer of the University of Minnesota; Jim Farrell and Dennis Breamer of the Minnesota Licensed Beverage Association, Inc.; Rainbow Foods, Inc.; and the Minnesota Retail Merchants Association[61] objected to the twelve-hour minimum as unnecessary and unrelated to successfully mastering the knowledge required to become certified as a food manager. As a result of these comments, at the hearing the Agencies deleted all references to the training requirement. Crystal objected to the deletion of all training requirements as being contradictory to the outcome sought by the rules, that being the reduction of foodborne illnesses.[62]

55. In its posthearing comments, the Agencies reinstated the training requirements, but without any minimum time limit on the training. The modification also set the required content of the training as "safe food preparation and handling, sanitation, and the prevention of foodborne illness. The course must cover improper holding temperatures, inadequate cooking, contaminated equipment, food from unsafe source, and poor personal hygiene."[63] The specific areas that must be covered were identified by the U.S. Public Health Service, Centers for Disease Control and Prevention, as being major factors in the outbreak of foodborne illnesses.[64] The Agencies deleted the minimum of time requirement for courses because courses shorter than the originally proposed requirement have been shown to be successful.[65] The Agencies also indicated that the reliance on the testing, rather than course length, furthers the legislative policy of emphasizing "superior achievement" and "maximum flexibility" in rules.[66]

56. As discussed above, basing certification on testing has been shown to be needed and reasonable. Requiring applicants to complete a course addressing food safety is needed and reasonable. The commentators in this matter have demonstrated that existing courses, shorter than twelve hours, have been successful at preparing applicants for taking the tests the Agencies are requiring for certification.[67] The retention of the training requirement, without establishing a minimum length has been

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[60] Proposed rule 4626.2020, subp. 2.B.
[61] Exhibit 9, Comments 2, 3, 4, 6, 8, 10, 18 and 19.
[62] Public Ex. 5.
[63] Agencies' Reply, proposed rule 4626.2015, subp. 1.
[64] Agencies' Comment, at 4.
[65] Agencies' Comment, at 2.
[66] Minn. Stat. § 14.002.
[67] The requirement that the applicant pass the certification examination provides assurances that the course content and length will be adequate for the purpose of certification.

shown to be needed and reasonable. Identifying the areas to be addressed without prescribing the length of the course emphasizes superior achievement and maximum flexibility in the proposed rule. The new language in subpart 1 is not substantially different from the rule as published in the *State Register*.

57. Subpart 2 requires applicants to successfully complete an examination before certification. As originally proposed, the Agencies restricted qualifying courses to those taken within 36 months prior to the application for certification. The limitation was located in subpart 1. With the modifications to subpart 1, the 36-month limitation was moved to subpart 2 and applied to examinations. Subpart 2 as modified is needed and reasonable. The new language in subpart 2 alters the standards applied but not the effect of the rule as originally proposed. The rule is not substantially different from the rule as published in the *State Register*.

58. The applicant for certification must file documentation of the applicant's qualifications, complete an application form, and pay a $15.00 fee under subpart 3. The fee covers certification that lasts for three years. At the end of three years, an application for renewal must be filed. The renewal also requires the $15.00 fee and lasts for three years. Several commentators disagreed over the amount of the fee, some asserting that the importance of certification justifies a higher fee, and others asserting that the costs of the program do not support the fee charged. The fee amount was calculated by determining the anticipated costs of the program and dividing that amount by the anticipated number of applicants.[68] The Agencies followed the process set out in Minn. Stat. § 16A.1285 in establishing the fee amount. The application fee, amounting to $5.00 per year per applicant, has been shown to be needed and reasonable. There is no basis in the record of this proceeding to require a different fee.

59. The contents of the application form included the applicant's social security number. One commentator at the hearing questioned the need to require each applicant to provide that information on the application. The Agencies responded that Minn. Stat. § 270.72, subd. 4 requires that information for all licensing authorities and certification falls under the definition of licensing.[69] Requiring disclosure of the applicant's social security number is compelled by statute. The subpart is needed and reasonable as proposed.

60. Under subpart 6, certified food managers must complete four hours of continuing education as a condition of renewal. The four-hour standard is based on the recommendation of the Conference of Food Protection.[70] Requiring four hours of continuing education as a condition of renewal is needed and reasonable. Subpart 7 requires continuing education courses to be presented by qualified instructors. Hennepin County objected to the inclusion of persons with experience in the subject area but no other qualifications as instructors. The Agencies agreed with the suggestion and deleted the reference to persons with "experience working in the subject

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[68] SONAR, at 10; SONAR Attachment, July 10, 1998 Budget.
[69] Agencies' Comment, at 13.
[70] SONAR, at 30.

area."[71] The remaining qualifications are specialized training or experience teaching in the subject matter of the continuing education course. Removing the experience-only qualification provides some assurance that the continuing education instructor not only knows the information but can also teach that information to others. Subpart 7 as modified is needed and reasonable. Subpart 7 is not substantially different from the rule as published in the *State Register*.

4626.2020 – Permits for Training Courses

61. As originally proposed, part 4626.2020 established the standards for obtaining approval of courses to be taken by applicants for certification. With the modifications to part 4626.2015 deleting the limitations on training courses, approval of courses became unnecessary. The Agencies deleted the entire part. For the reasons discussed regarding subpart 1 of part 4626.2015, deleting part 4626.2020 is both needed and reasonable. Deleting this part does not result in a rule substantially different from the rule as published in the *State Register*.

4626.2025 – Recognized Examinations

62. The Agencies indicated that they lack the resources and expertise to thoroughly assess the validity of individual tests to be relied upon for food manager certification. Part 4626.2025[72] establishes the approved tests as those approved by the Conference for Food Protection. Since that approved list has not yet been published, five tests have been identified as approved, pending publication of that list. HITM indicated that any approved test will be a national test and will not test the specific requirements of the Minnesota Food Code. HITM concludes that this distinction will require applicants to learn a different food code to pass the examination or possibly fail the test because the applicant is answering the questions correctly for the Minnesota Food Code (and therefore wrong for national standards).

63. The examinations identified in the rule (including those to be listed upon approval) are assessed for validity in preventing foodborne illness.[73] The Agencies have concluded that the generic nature of the testing offered and the procedures followed in arriving at the test questions provide adequate assurances that the information tested will be applicable to food establishments in Minnesota. With Minnesota applicants taking the tests and certified food managers interacting with local regulatory authorities, differences between the national tests and the Minnesota Food Code will be discovered and resolved. The use of listed examinations pending publication of a listing of approved tests is needed and reasonable.

64. The only change proposed to the rule part is the deletion of the version of each individual test. Identifying specific versions of examinations conflicted with the modification to part 4626.2015, subpart 2. With the requirement that the applicant pass the examination within 36 months of the application, whatever version was being offered

[71] Agencies' Comment, at 14.
[72] Renumbered in the final proposal to 4626.2020.
[73] Agencies' Reply, at 3.

at the time is the appropriate version. The list of examinations is needed and reasonable. The rule part as finally proposed is not substantially different from the rule as published in the *State Register*.

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

CONCLUSIONS

1. The Minnesota Departments of Agriculture and Health gave proper notice in this matter.

2. The Agencies have fulfilled the procedural requirements of Minn. Stat. § 14.14 (1998) and all other procedural requirements of law or rule.

3. The Agencies have demonstrated their statutory authority to adopt the proposed rules, and have 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) and (ii) (1998).

4. The Agencies have demonstrated the need for and reasonableness of the proposed rules by an affirmative presentation of facts in the record within the meaning of Minn. Stat. §§ 14.14, subd. 4 and 14.50 (iii) (1998).

5. The additions and amendments to the proposed rules suggested by the Agencies after publication of the proposed rules in the State Register are not substantially different from the proposed rules as published in the State Register within the meaning of Minnesota Stat. §§ 14.05, subd. 2, and 14.15, subd. 3 (1998).

6. Any Findings that might properly be termed Conclusions and any Conclusions that might properly be termed Findings are hereby adopted as such.

7. A Finding or Conclusion of need and reasonableness in regard to any particular rule subsection does not preclude and should not discourage the Agencies from further modification of the proposed rules based upon an examination of the public comments, provided that the rule finally adopted is based upon facts as appearing in this rule hearing record.

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

RECOMMENDATION

IT IS HEREBY RECOMMENDED that the proposed amended rules be adopted.

Dated this 16th day of September, 1999.

GEORGE A. BECK
Administrative Law Judge