

STATE OF MINNESOTA
OFFICE OF ADMINISTRATIVE HEARINGS
FOR THE DEPARTMENT OF HEALTH

In the Matter of the Proposed Permanent
Rules of the Minnesota Department of
Health Relating to Clean Indoor Air,
Minnesota Rules, parts 4620.0050 to
4620.1450

**REPORT OF THE
ADMINISTRATIVE LAW JUDGE**

A hearing concerning the above rules was conducted by Administrative Law Judge George A. Beck beginning at 9:00 a.m. on January 30, 2002, at the Department of Health's Snelling Office Park Building at 1645 Energy Park Drive, St. Paul, Minnesota.

The hearing 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 this process to insure 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, that they are within statutory authority, and that any modifications of the rules made after their initial publication does not result in the rules being substantially different from those originally proposed.

The rulemaking process also includes a hearing, when a sufficient number of persons request a hearing. The hearing is intended to allow the agency and the Administrative Law Judge reviewing the proposed rules to hear public comment regarding impact of the proposed rules and what changes might be appropriate. The Administrative Law Judge is employed by the Office of Administrative Hearings, an agency independent of the Department.

The hearing panel for the Environmental Health Division of the Department of Health included Georg Fischer, Laura Oatman and Steve Shakman. Approximately 60 persons attended the hearing and 46 signed the hearing register. Twelve people spoke at the hearing. The hearing continued until all interested persons, groups or associations had an opportunity to be heard concerning the proposed rules and rule amendments.

There were a large number of public comments submitted prior to the hearing. After the hearing ended, the Administrative Law Judge kept the record open for the maximum 20 calendar days until February 19, 2002, to allow interested persons and the Department an opportunity to submit written comments. During this initial comment period the Administrative Law Judge received written comments from the Department

and six public comments. Following the initial comment period the Administrative Procedure Act requires that the hearing record remain open for another five business days to allow interested parties and the agency to respond to any written comments. The agency did respond as well as one other group. The hearing record closed for all purposes on February 26, 2002.

SUMMARY OF CONCLUSIONS

1. The 1999 legislation amending the Clean Indoor Air Act did not authorize rule amendments affecting establishments other than factories and warehouses; however, the Department has existing statutory authority under the Act to amend the rules relating to restaurants and other establishments.

2. The Department has failed to establish the reasonableness of adopting 30% as the minimum percentage for non-smoking seating in a restaurant.

3. The Department has failed to establish the reasonableness of using the term “smoke-free” to apply to ventilated non-smoking areas in a restaurant.

4. The Department has failed to establish the reasonableness of an exemption for existing restaurants.

5. The rules have otherwise been shown to be needed and reasonable.

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

FINDINGS OF FACT

Procedural Requirements

1. On July 19, 1999, the Department published a Request for Comments on Planned Amendment to Rules Relating to the Minnesota Clean Indoor Act in the State Register. The request indicated that the Department was considering rule changes that would affect factories, warehouses, office buildings, common areas, restaurants, health care facilities, retail stores, rental apartments, educational facilities, acceptable non-smoking areas and smoking permitted areas. The request announced the establishment of an advisory committee and solicited members. The Request for Comments was published at 24 State Register 128.^[2]

2. By a letter dated November 6, 2001, the Department requested that the Office of Administrative Hearings schedule a rule hearing and assign an Administrative Law Judge. The Department also filed a dual notice proposed to be issued, a copy of the proposed rules and a draft of the Statement of Need and Reasonableness (SONAR). The Department also asked for prior approval of its additional notice plan.

3. In a letter dated November 8, 2001, the Administrative Law Judge approved the dual notice and additional notice plan.^[3]

4. On November 30, 2001, the Department mailed the Notice of Intent to Adopt Rules and the proposed rules to all persons and associations who had registered their names with the agency for the purpose of receiving such notice and to all persons identified in the additional notice plan.^[4]

5. On November 29, 2001, the Department mailed a Notice of Intent to Adopt Rules to the legislators specified in Minn. Stat. § 14.116.^[5]

6. On November 29, 2001, the Department delivered a copy of the Statement of Need and Reasonableness to the legislative reference library.^[6]

7. On December 3, 2001, a copy of the proposed rules and rule amendments and the dual notice of hearing was published at 26 State Register 720.^[7]

8. The Department received more than 25 requests for a hearing in this matter. A Notice of Hearing was mailed on January 14, 2002 to all those who requested a hearing.^[8]

9. On the day of the hearing the Department placed the following documents in the record:

- (a) The Request for Comments published in the State Register.
- (b) A copy of the proposed rule as certified by the Revisor of Statutes.
- (c) The Statement of Need and Reasonableness.
- (d) The certificate of mailing the Statement of Need and Reasonableness to the legislative reference library.
- (e) Copies of the dual notice as mailed and as published in the State Register.
- (f) Certificates regarding the accuracy of the mailing list and of giving additional notice.
- (g) Certificate of mailing the Notice of Hearing to those who requested a hearing.
- (h) Comments received by the Minnesota Department of Health during the comment period.
- (i) A certificate of sending notice to legislators.
- (j) A copy of the OAH approval letter for the additional notice plan.
- (k) The proposed additional modifications to the rule.
- (l) The Department's prepared hearing remarks.

Nature of the Proposed Rules

10. These proposed rules relate to the application and enforcement of the Minnesota Clean Indoor Air Act. Some of the proposed amendments bring the rules into conformity with statutory changes made during the 1999 legislative session.^[9] The statutory changes specifically authorize the Commissioner to establish rules that restrict or prohibit smoking in factories, warehouses, and those places of work where the close proximity of workers or the inadequacy of ventilation causes smoke pollution detrimental to the health and comfort of nonsmoking employees.

11. Beyond those statutorily required amendments the Department is also proposing additional rule amendments that will affect all entities regulated under the Minnesota Clean Indoor Air Act. The additional changes relate to restaurants, health care facilities, common areas of public buildings, and all other public places where smoking is permitted. The Department states that the new proposals are based on increasingly strong evidence that environmental tobacco smoke (ETS) contains substances harmful to human health. The proposed rules therefore implement measures that are more protective of non-smokers.

Statutory Authority

12. The Minnesota Clean Indoor Air Act^[10] states the following in regard to statutory authority:

Subdivision 1. Rules. The state commissioner of health shall adopt rules necessary and reasonable to implement the provisions of sections 144.411 to 144.417, except as provided for in section 144.414.^[11]

(Minn. Stat. § 144.414 sets out complete prohibitions of non-smoking in public places, daycare premises and healthcare facilities and clinics.)

13. The Act states its public policy as follows:

The purpose of sections 144.411 to 144.417 is to protect the public health, comfort and environment by prohibiting smoking in areas where children or ill or injured persons are present, and by limiting smoking in public places and at public meetings to designated smoking areas.^[12]

The Commissioner of Health also has general rulemaking authority which authorizes her to “establish and enforce health standards for the protection and the promotion of the public’s health such as quality of health services, reporting of disease, regulation of health facilities, environmental health hazards and personnel;”^[13]

The Department has established its general statutory authority to adopt rules in this area. A specific challenge to its authority is considered beginning at Finding of Fact No. 24.

Regulatory Analysis

14. The Administrative Procedure Act requires an agency adopting rules to consider six factors in its Statement of Need and Reasonableness. The first factor requires:

(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;

The Department recognizes that a large number of people including employees, patrons and owners of factories, warehouses, office buildings, retail establishments, restaurants, health care facilities and lodging establishments will be affected by the proposed rule revisions. It notes that owners of existing facilities that are currently smoke free, or elect to be, as well as owners of existing restaurants (due to an exemption) will incur only minimal costs associated with updating signs. The same would be true for owners of health care facilities and public conveyances. However, if owners elect to establish or maintain smoking permitted areas there will be additional costs to effectively control movement of ETS from smoking permitted areas into smoke free areas. The Department sees the beneficiaries of the rule revisions as every person who works in or visits public places in Minnesota that have smoking permitted areas.

(2) The probable costs of the Agency and to any other agency of the implementation and enforcement of the proposed rule and any anticipated effect on state revenues.

The only cost identified by the Department is a one time minimal cost associated with the development and distribution of educational materials. There will be no effect on state revenues.

(3) The determination of whether there are less costly methods or less intrusive methods for achieving the purpose of the proposed rule.

The Department notes that banning smoking altogether would be more effective but observes that it does not have the authority under the current statute to do this. The Department believes it is necessary to change the rules due to the growing evidence of the dangers of ETS. In order to minimize the cost and intrusiveness of the rule revisions, a phase in of several years is established. The rule also includes an exemption for current owners of restaurants.

(4) A description of any alternative methods for achieving the purpose of the proposed rules that were seriously considered by the agency and the reasons why they were rejected in favor of the proposed rules.

The Department considered a number of options before proposing the rule changes. It felt that no action was not an option in light of complaints it has received and new evidence that ETS is harmful. It also rejected proceeding with rules for factories and warehouses but not for other public places since it would create a double standard. It also considered exempting all restaurants but determined that there was a need to minimize exposure to ETS for workers and members of the public wherever practicable. It considered requiring all public places to meet the more protective methods of controlling ETS. In fact this was the Department's preferred approach, but the Department states that discussions with the governor's office indicated this option was not politically feasible at the present time. The Department, as noted earlier, lacks authority to completely prohibit smoking in public places.

(5) The probable costs of complying with the proposed rules.

The Department notes that owners of establishments that elect to go smoke free will incur minimal costs. Existing restaurants are exempt from the new ventilation requirements, but would be subject to the rules if they are sold. The concern over economic impact is that establishments may lose clients if they go smoke free. This concern is discussed later in this report under "Cost Issues." The Department notes however, that there are studies indicating that this does not happen. The Department also notes a likely savings due to reduced risk of fires and cleaning expenses.

The Department does concede that those facilities that are required to comply with the new methods of controlling ETS will have a substantial economic impact. They will incur costs associated with renovating their current ventilation systems or installing new systems. It notes that OSHA estimated the average cost for retrofitting an HVAC system from \$4,000 for a 150 square foot room that could accommodate 10 smokers, to \$25,000 for a 1,000 square foot room that could accommodate 30 to 65 smokers. Maintenance costs for the system would also be incurred, as well as some additional energy costs.

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

Because the only federal rules that regulate smoking relate to federal buildings there will be no differences between federal and state smoking rules in public places. The Act does not regulate federal buildings.

The Department has satisfied the requirements of Minn. Stat. § 14.131 which requires it to ascertain the above information to the extent the agency can do so through reasonable effort.

Performance Based Rules

15. The Administrative Procedure Act^[14] also requires an agency to describe how it has considered and implemented the legislative policy supporting performance based regulatory systems. A performance based rule is one that emphasizes superior

achievement in meeting the agency's regulatory objectives and maximum flexibility for the regulated party and the agency in meeting those goals.^[15] The Department notes that it does not have specific statutory authority to determine acceptable concentrations of ETS or to set standards for acceptable concentrations of specific bio markers in body fluids. In its Statement of Need the Department describes the scientific and practical difficulties in either performance based approach. It concludes that true performance based rules are not feasible at the present time.

Additional Notice

16. As a part of this rulemaking process the Department convened a rulemaking advisory committee. The request for comments published on July 19, 1999 included an invitation to participate on the committee. All the nominations for membership were accepted. The final advisory committee included representatives from tobacco companies, restaurants and restaurant trade groups, local governments, anti-smoking advocates, the Minnesota Medical Association, and a company that designs and installs heating ventilation and air conditioning systems. The committee met a total of six times to discuss proposed changes to the rule.

17. In addition to the statutorily required mailed notice the Department also mailed notice to the rulemaking advisory committee, persons who expressed interest in revisions to the rules, Minnesota local governments, a public health e-mail listserv and recipients of a community health services mailbag newsletter. Several of the organizations represented on the advisory committee sent notice about the rulemaking to its members such as the Minnesota Retail Merchants Association and the Minnesota Medical Association.

Rulemaking Legal Standards

18. Under Minn. Stat. § 14.14, subd. 2, and Minn. Rule 1400.2100, a determination must be made in a rulemaking proceeding as to whether the agency has established the need for and reasonableness of the proposed rule by an affirmative presentation of facts. In support of a rule, an agency may rely on legislative facts, namely general facts concerning questions of law, policy and discretion, or they may simply rely on interpretation of a statute, or stated policy preferences.^[16] The Department prepared a Statement of Need and Reasonableness in support of the proposed rules. At the hearing, the Department primarily relied upon the SONAR as its affirmative presentation of need and reasonableness for the proposed amendments. The SONAR was supplemented by comments made by Department 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.^[17] Arbitrary or unreasonable agency action is action without consideration and in disregard of the facts and circumstances of the case.^[18] A rule is generally found to be reasonable if it is rationally related to the end sought to be

achieved by the governing statute.^[19] 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."^[20] 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.^[21]

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 Department has statutory authority to adopt the rule, whether the rule is unconstitutional or illegal, whether the rule constitutes an undue delegation of authority to another entity, or whether the proposed language is not a rule.^[22] In this matter, the Department has 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.^[23]

21. The standards to determine if new language is substantially different are found in Minn. Stat. § 14.05, subd. 2. 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 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."^[24] The Department suggested several modifications at the hearing.^[25] Most were definitional or grammatical corrections and not substantial. One change is discussed under ventilation.

22. This report is limited to the discussion of the portions of the proposed rules that received significant comment or otherwise need to be examined. Where rules were adequately supported by the SONAR or the Department's oral or written comments, a detailed discussion of the proposed rules is unnecessary. The agency has demonstrated the need for and reasonableness of all rule provisions not specifically discussed in this report by an affirmative presentation of facts. All provisions not specifically discussed are authorized by statute and there are no other problems that would prevent the adoption of the rules.

23. Most of the comments made in this rulemaking proceeding relate to general topics such as whether ETS is in fact a hazard, or what effect the proposed amendments will have on restaurants. The comments were therefore often directed to more than one rule part. This report, therefore, discusses comments and the agency's position by topic and cites specific rule provisions only where they are cited by commenters.

Statutory Authority and Legislative Intent

24. A number of commenters including Hospitality Minnesota, which represents nearly 4000 restaurants, hotels and other establishments, argued that the Department had exceeded its statutory authority and violated legislative intent by making changes in the rules beyond those affecting factories, warehouses and similar places of work that were specifically mentioned in the 1999 legislative changes.^[26] Tom Johnson argues that the proposed rules stretched the interpretation of factory or office to include restaurants and bars. State Representative Marty Seifert has introduced a bill in the current session requiring legislative approval of the proposed rules before they go into effect. He believes the rules have been extended much beyond the legislative intent. He included in the record a transcript of testimony in the Health and Human Services Committee of the House of Representatives on February 12, 2002. Representative Seifert expressed concern at the hearing about small town cafes that come under new ownership having to put in very expensive ventilation equipment when their business is already marginal. Representative Goodno commented during the hearing that he believed that the changes in the proposed rules go beyond that required by the 1999 legislation and should be done by the legislature.^[27]

25. The 1999 amendment to the Clean Indoor Air Act authorized the Commissioner of Health to establish rules "to restrict or prohibit smoking in factories, warehouses and those places of work where the close proximity of workers or the inadequacy of ventilation causes smoke pollution detrimental to the health and comfort of non-smoking employees."^[28] As noted by the commenters, this amendment does not authorize rulemaking in restaurants or bars.

26. The Department responds that its rulemaking authority in regard to restaurants and bars does not stem from the 1999 amendment, but rather from its rulemaking authority in the Clean Indoor Air Act to "adopt rules necessary and reasonable to implement the provisions of" the act.^[29] The Department states that it is proposing to amend rules that do not relate to factories and warehouses because the Clean Indoor Air Act rules have not been updated since 1994 and they include outdated citations and unclear language troublesome to local public health agencies. Additionally, the Department has received a large number of complaints related to smoking. It also believes that new evidence concerning the adverse health effects of ETS requires it to update the rules in order to protect the public health.

27. The Department's proposed amendments relating to businesses other than factories and warehouses result in stricter requirements that provide more protection to people affected by ETS in public places. However, it is clear that the proposed changes

may have a substantial economic impact on some businesses, most prominently restaurants that are sold. The changes proposed, however, while not authorized by the 1999 amendments, are within the Department's statutory authority, granted by the legislature, to adopt rules to implement the Clean Indoor Air Act. The proposed amendments do not regulate any new areas but merely impose stricter requirements, for example, more effective ventilation systems where an establishment designates a smoking area. The record contained some criticism of the Department for changing rules based on new scientific evidence without legislative approval. Generally, however, in adopting rules an agency "must be able to draw on its own internal sources of knowledge and experience" unless it clearly exceeds its statutory powers.^[30]

28. To the extent that the rulemaking process lacks sufficient democratic input, or an agency proceeds with regulation that the legislature deems inappropriate, there are a number of remedies.

(1) The Governor has authority to veto a rule adopted by an agency by submitting a notice to the State Register within 14 days of receiving a copy of the adopted rule.^[31]

(2) The Legislative Coordinating Commission has the power to object to rules. When the agency publishes the rule in the State Register it will indicate the existence of the objection.^[32] If the objection remains, the burden is then on the agency to defend its position in any proceeding for judicial review.

(3) Effective last year, a standing committee of both the House and Senate with jurisdiction over the subject matter of a proposed rule is authorized to advise an agency not to adopt a rule.^[33] The vote must occur prior to the adoption of the rule and the agency is then required to delay adoption until after the end of the next legislative session.

(4) The legislature, of course, is able to abolish any rule through legislation or to preempt rulemaking on a subject if it decides the legislature should make the decision. Should Representative Seifert's bill become law, the portions of this rule not dealing with factories and warehouses would not be effective until approved by the legislature.

29. Several commenters including the National Center for Tobacco Free Kids and the Minnesota Smoke-Free Coalition and the Hennepin County Environmental Health Department stated that the proposed rules fail to implement the statutory requirement to protect the public health from ETS because they do not completely prohibit smoking in all public places. They point to the Commissioner's general statutory authority to establish standards for the protection of environmental health hazards. Numerous public comments also supported the prohibition of smoking in all public places or in restaurants.

30. The Department responds that its rulemaking authority contained in the Clean Indoor Act is more specific than its broad authority to regulate environmental health hazards. The Clean Indoor Air Act limits the Commissioner's authority to prohibiting smoking in certain public places and work places and to limit smoking to designated areas in others. The legislature has clearly prohibited smoking in schools.^[34] If this were intended in all public places, the legislature would so state. Given the specific statutory authority granted by the legislature it seems clear that a complete prohibition would need to be adopted by the legislature rather than the Department.

Health Effects of Environmental Tobacco Smoke

31. The Department cites recently published literature in the SONAR which shows that exposure to environmental tobacco smoke is a public health threat. For example, the U.S. Environmental Protection Agency (EPA) classified ETS as a known human carcinogen in a 1992 report; the American Medical Association adopted a policy which supported classifying ETS as a known human carcinogen in 1994, and the National Institute of Health National Toxicology Program concluded that ETS is a human carcinogen in 2000. The Department also cites several studies which suggest ETS is related to heart disease. For example a 1999 California EPA report concludes that the collective evidence indicates that exposure to ETS has deleterious effects on the heart. A 1998 report from the United Kingdom's Department of Health concluded that exposure to ETS is a cause of heart disease and a substantial public health hazard. Other studies indicate that ETS is a respiratory system irritant that can worsen the condition of people who suffer with asthma. Positive associations have also been found between exposure to ETS and lower respiratory system illnesses in children such as croup, bronchitis and pneumonia.^[35]

32. Several commenters argued, however, that the health effects of ETS have not been proven. Daniel F. Hass, for example, described the 1992 EPA report as "worse than junk science." He stated that it was dismissed by a federal court in 1998.^[36] Citizens Lobbying Against Smoker Harassment argues that some studies have noted that ETS is only a weak risk factor for development of lung cancer and heart disease in non-smokers after regular long-term exposure.^[37]

33. A large number of other commenters including county health departments, the American Heart Association, the Minnesota Medical Association and the Minnesota Smoke-Free Coalition submitted comments and studies to support the Department's position that ETS is proven to cause adverse health effects. In fact, the Smoke-Free Coalition (which includes the American Lung Association, the American Cancer Society, Blue Cross and Blue Shield, Hazelden Foundation and Health Partners, among others) believes that the Department has understated the adverse health consequences of ETS and notes that the Surgeon General estimates that 65,000 deaths per year are attributable to second-hand smoke.^[38] Some criticized the proposed rules as deficient because they do not recognize that there are people in our society who have health problems that make it mandatory that they avoid second hand smoke totally.

Individuals also commented on the adverse effect that ETS has on asthma or allergies in themselves or their children.^[39]

34. The Minnesota Smoke-Free Coalition commented that second-hand smoke is a powerful carcinogen, a significant cause of cardiovascular disease and a major respiratory irritant, especially to children and people with asthma and other lung conditions. The Coalition believes that there is no legitimate science casting doubt on these findings or on the conclusions that there is no safe level of ETS exposure with respect to cancer risk.^[40] It submitted several studies concluding that ETS causes morbidity and mortality from cancer, heart disease and respiratory disease.^[41]

35. In a post-hearing submission the Department argued that the court decision dealing with 1992 EPA study did not invalidate its conclusions, but rather vacated that portion of the report concerned with lung cancer on procedural grounds and the judge's own evaluation of the scientific approach. The Department points to the conclusion of the Surgeon General in 1986 that environmental tobacco smoke causes lung cancer in adults and respiratory problems in children. It believes that subsequent studies and critical reviews of the evidence have added further credibility to that conclusion.^[42]

36. The Department has sustained its burden to make an affirmative presentation of facts in support of the adverse health effects of second hand smoke. The arguments, studies and citations to studies in this record, submitted by the Department and the Smoke-Free Coalition, clearly demonstrate the reasonableness of that conclusion. That is, it has explained the evidence it is relying on and how the evidence connects rationally with the agency's choice of action.^[43] The arguments to the contrary are not sufficient to demonstrate that stricter regulation of second-hand smoke is arbitrary.

Cost Issues

37. A large number of comments pointed out or objected to the costs associated with installing the required barriers or ventilation systems and the loss of business associated with going smoke-free (**4620.0450**). These included comments from restaurant owners and Hospitality Minnesota as well as the Minnesota Smoke-Free Coalition and other anti-smoking groups.^[44] A bar owner in Duluth testified that the Duluth ordinance, which is similar to the proposed rule, requires a restaurant or bar to spend \$25,000 to \$30,000 to build walls, install doors and redo the ventilation system.^[45] The anti-smoking groups cite the additional heating and cooling costs as unnecessary because they do not believe the ventilation provides adequate protection to patrons. The Duluth bar owner cited several small restaurants in Duluth that have seen a significant decline in business since the ordinance passed because they couldn't afford remodeling or their buildings couldn't be remodeled and they had to become "no smoking" restaurants.^[46] However, the record also contains evidence showing that restaurants without alcohol in Duluth showed no change in sales during Jan.-Nov. of 2001 and restaurants with alcohol had a 5% increase in sales.^[47] Additionally national

studies of the economic effect of smoking restrictions in restaurants and bars shows either no effect or some gain in sales.^[48]

38. The Department states that the issue of cost is addressed by providing delayed effective dates and an exemption for existing restaurants from the more protective methods of separating smoking areas from non-smoking areas. It acknowledges costs in connection with new or retrofitted ventilation systems but points out that there is no out of pocket cost to going completely smoke free. The record does indicate that additional ventilation costs will likely impact small businesses disproportionately. However, as the Department points out, going smoke-free is an option. Going smoke-free may be a problem for some small restaurants. But the exemption or a delayed effective date would seem to ameliorate this problem. Another option might be relocating. Overall, going smoke-free does not seem to adversely affect business according to the studies submitted. The cost issues have been carefully addressed by the Department and they do not make the proposed rule arbitrary.

Ventilation

39. A large number of comments were received from individuals, physicians, and groups such as the American Lung Association, the Smoke-Free Coalition and the Minnesota Medical Association concerning the efficacy of ventilation in controlling ETS **(4620.0450, subp. 1)**. The commenters stated that ventilation cannot remove all the hazardous materials present in second-hand smoke. The Minnesota Smoke-Free Coalition commented that there is no evidence that shows that the proposed methods of separating smoking permitted and non-smoking areas will be any more effective than the current methods of separation. They commented that the physical separation of smoking permitted areas from non-smoking areas by a continuous physical barrier is necessary.^[49] The Coalition states that the current scientific information presented shows that even the newest ventilation methods under ideal conditions are incapable of separating ETS and its toxic constituents from the air. The groups also suggest that the proposed rules do not meet the standards of the American Society of Heating, Refrigerating and Air Conditioning Engineers (ASHRE), the Occupational Safety and Health Administration (OSHA) or the U.S. Environmental Protection Agency (EPA). A professional engineer who works on ventilation for indoor air noted that ASHRAE standards require a continuous barrier and he stated that unidirectional air flow across an opening will not be effective.^[50] Another commenter expressed concern that these rules, with ineffective ventilation requirements, will discourage cities from passing effective smoke-free ordinances, as Duluth has done.^[51]

40. The Department acknowledges that currently no level of exposure to ETS can reasonably be assumed to be safe. It states that when the protective level of exposure is unknown, elimination or source removal is the first preference. When the source cannot be eliminated, it states that the most protective approach from a public health standpoint is to contain the source locally in order to prevent exposure. When the source cannot be controlled to prevent exposure the Department contends that the principle of minimizing exposure concentrations and duration, to be as low as reasonably achievable, is the next most protective operating principle. The proposed

methods are intended to reduce the concentration of ETS that is present in non-smoking areas, but cannot prevent exposure to ETS. The Department believes that a reduction in the amount of ETS in non-smoking areas should lead to a reduction in exposure for individuals and therefore a reduction in the risk of adverse health effects from that exposure. The Department states that the ASHRE, EPA and OSHA standards referenced by commenters are either in draft form, guidelines or proposed but no longer being considered. The main difference between the standards and the proposed rules is that the standards require a floor to ceiling wall whereas the proposed rules provide an option for either a floor to ceiling wall or unidirectional air flow. The Department believes that either option will help limit the drift of ETS from smoking permitted to non-smoking areas.

41. The Department's SONAR and exhibits provide adequate facts and arguments to support its contention that the new separation and ventilation proposals which it is making will likely have a positive impact on public health.^[52] It is an improvement over the present rule that relies on separation distances and the practice of mixing contaminated air with uncontaminated air, in a common area, to dilute the concentration of ETS. The Department acknowledges that this impact is not quantifiable, but it does expect a reduction in exposure to ETS. The SONAR and studies attached to the Department's post hearing comments demonstrate positive results from the pressure differential, direct localized exhaust, and directional airflow ventilation technology suggested by the Department. Additionally, a modification suggested by the Department at the hearing adds a verification requirement to 4620.0450, subp. 1B. to ensure that a smoking area is maintained at a negative pressure relative to adjacent non-smoking areas.^[53] The modification is not substantial.

42. The Smoke-Free Coalition argues that its proposed ventilation standard that requires meaningful separation between smoking and non-smoking areas is more protective of the public health and is within the Department's authority. While the Coalition's suggestions are likely more effective and may be more reasonable, given the evidence in the record, the measures proposed by the Department cannot be said to be arbitrary and have been demonstrated to be needed and reasonable.^[54]

43. Nonetheless, a number of comments submitted raise a doubt about how effective the Department's ventilation proposal will be. The Department should review the material submitted, and, with the cost issue in mind, decide whether the unidirectional airflow proposal provides sufficient benefit to justify its retention. The Department could strengthen the ventilation requirement, or delete 4620.0450, subp. 1E.(2) and require a continuous physical barrier, although a determination would need to be made as to whether this constituted a substantially different rule.^[55]

Restaurant Workers

44. The Association for Nonsmokers-Minnesota observed at the hearing that the proposal would do nothing to protect restaurant workers who must work four to ten hour shifts for five or six days in smoking areas. It submitted a study concluding that a smoke-free bar was associated with rapid improvements of respiratory health.^[56] The

Association believes the Department should amend 4620.1000 to prohibit smoking in restaurants. The Department replied that it can only prohibit smoking entirely if that is authorized in statute. Otherwise it has only authority to limit smoking to designated areas.^[57] The legislature would need to authorize the change suggested.

Effective Dates

45. A number of comments object to the proposed effective dates for various rule parts (**4620.0450, subp. 6**). Public health and smoke-free coalition groups suggested that the proposed amendments be effective immediately upon adoption or in a three to six month time frame. They favored the same effective date for all facilities. They argued that the record lacked facts to support delayed effective dates. The Department pointed out that the delayed effective dates are intended to allow owners of public places to budget for or make plans to adapt to the required changes. The individual effective dates are based on a variety of factors including the magnitude of the proposed changes, the 1999 legislative changes, and the difficulty of retrofitting an existing ventilation system vs. installing a new system during construction. Public conveyances, health care facilities and bars must be in compliance upon adoption since no significant changes are proposed. Offices, factories and warehouses have one year to comply since most have separate rooms available to designate as smoking permitted areas. Existing restaurants and public places built after rule adoption must be in compliance within two years. All others must be in compliance within three years. The Department believes that these time periods are reasonable to allow even small businesses to come into compliance. Argument, along with facts, can be sufficient support for a proposed rule. The Department has presented an adequate rationale for the proposed effective dates. While immediate compliance might be more reasonable on health grounds, the Department's proposal is not arbitrary.

Exemption for Existing Restaurants

46. Many commenters including individuals, public health departments, the Smoke-Free Coalition, the Minnesota Medical Association and individual physicians objected to the proposed exemption to the new methods of controlling ETS for existing restaurants (**4620.1010, subp. 6**). The exemption allows existing restaurants to avoid compliance with the new requirements until they are sold. They will only have to separate smoking and non-smoking areas by a four foot width or a 56 inch high barrier or a ventilation system (**4620.1010, subp. 6 B (3)**) The Coalition observed that restaurants are the main point of contact between most Minnesotans and the Clean Indoor Air Act. Due to the exemption there will be no immediate impact on most people. The Coalition states that this cannot be justified when owners have the zero cost option of going smoke-free.^[58]

The Minnesota Medical Association stated that:

In addition to our overall opposition to the rules, the MMA is deeply concerned about that portion of the rules, Part 4620.1010, Subpart 6, which creates an exemption for existing restaurants. The

statement of need and reasonableness acknowledged that an earlier draft of the rules did not include an exemption provision but noted that the Governor's office was concerned about the feasibility of that approach. The MMA, however, is deeply troubled that the health of workers and patrons in existing restaurants is apparently being dismissed because of the political risks. It is both unacceptable and confusing to have different clean indoor air standards for old and new restaurants, and for workers in new restaurants and workers in all other facilities.^[59]

An individual commented to the Department as follows:

I ask that you not relax the more effective regulation on restaurant smoking proposed in March. If I understand the Pioneer Press story today correctly, existing restaurants would not have to either install ventilation systems to disperse cigarette smoke or go smoke-free, but you now propose applying that rule only to new restaurants. As a person to whom second smoke is bothersome, I've suffered in some restaurants that theoretically separated smokers from non-smokers but the smoke drifts into my section. When I've asked restaurant managers about this, I've either gotten no response or shrugs and "we're in compliance with the law." Second-hand smoke not only is unappetizing and otherwise offensive, it is a health hazard. Please, stick to your guns.^[60]

One comment suggested that restaurants be in compliance after five years rather than be exempted. Others suggested one or two years.

47. The exemption was not contained in the Department's earlier drafts of the proposed rule, but was inserted after discussion with the Governor's office. It is an attempt to minimize the potential financial impacts that the proposed rule will have on existing restaurants, while bringing them into compliance over time. Agencies need only show that their proposals are reasonable or not arbitrary to survive a legal challenge. However, in this case the complete exemption until the sale of a restaurant is not supported by the record in light of the compelling evidence of the harmful effects of ETS (Findings of Fact Nos. 31-36). The agency acknowledges that it does not know how soon existing restaurants will have to comply. There is no evidence in the record that would allow an estimate of when compliance will be achieved. The Department has not demonstrated how the evidence in this record rationally connects with its choice of action.^[61] The extensive evidence establishing the harmful effects of ETS is not consistent with the exemption of restaurants until sale, which could apparently be decades.

48. Nor does the exemption appear to be rationally related to the end sought to be achieved by the statute.^[62] The public policy behind the Act is set out in Minn. Stat. § 144.412 which states:

The purpose of sections 144.411 to 144.417 is to protect the public health, comfort and environment by prohibiting smoking in areas where children or ill or injured persons are present, and by limiting smoking in public places and at public meetings to designated smoking areas.

An indefinite exemption for restaurants, where most non-smoking Minnesotans encounter second hand smoke, does not rationally connect with protection of the public health, especially of children or ill and injured persons.

49. In order to correct this defect, the Department could delete the exemption and create a delayed effective date as it has for other establishments. Or it could establish a delayed effective date and provide that the exemption ends if the restaurant is sold before the delayed effective date. A lengthy effective date would be more likely to meet the requirements of the substantial difference statute and rule.

Minimum Size Requirements for Non-Smoking Seating in Restaurants

50. A number of individuals, public health departments and groups such as the American Lung Association, the Coalition and the American Heart Association submitted comments regarding the percentage of non-smoking seating required in restaurants^[63] **(4620.1010, subp. 1)**. They suggested that the non-smoking seating should be 70% or 80% based upon the percentages of non-smokers in the Minnesota adult population.^[64] The Washington County Department of Public Health surveyed 1102 residents and found that for restaurants currently smoke-free, 96% agreed customers prefer a smoke-free area and for restaurants that are not smoke-free, 68% agreed that customers preferred a smoke-free area.^[65] The Centers for Disease Control year 2000 data shows that 19.5% of Minnesotans are smokers.^[66] Hospitality Minnesota indicated at the hearing that the restaurant industry generally designates a substantial majority of their seating as non-smoking at the present time.^[67] The proposed rules adopt the percentage of 30% as the minimum for non-smoking seating.^[68]

51. The Department replied that this subject was discussed in depth at a rule advisory committee meeting where the majority of committee members were opposed to changing the required percentage of non-smoking seating in restaurants. As the Smoke-Free Coalition points out, however, the Department is not bound by the advisory committee and did not in fact adopt some of its suggestions. The Coalition states that "it is common sense to require seating arrangements reflecting the population as a whole as an alternative to the current subjective and unenforceable standard (30%) which disadvantages a great majority of non-smoking Minnesotans."^[69]

52. The record lacks support for the 30% standard proposed. The reasonableness of the 30% requirement is not addressed in the SONAR.^[70] The only support for the percentage was the endorsement by the advisory committee. However,

a standard of this nature must be supported by facts or argument. It must be established as a rational choice. Based upon this record it is unreasonable. In order to correct this defect the Department could adopt a percentage closer to the percentage of non-smokers in the population as substantiated by the record. A 50% requirement, which would correspond to the current practice of Minnesota restaurants, might be more likely to comply with the substantial difference statute than would an 80% requirement.

“Smoke-Free”

53. Several commenters objected to the use of the words “smoke-free” when referring to areas that are separated from smoking permitted areas by the proposed methods of separation **(4620.0100, subp. 18 and 4620.0350, subp. 1)**.^[71] The Department acknowledges that its proposed methods will not create areas completely free of ETS. It acknowledges that the phrase “non-smoking area” may be more appropriate but this term is already been assigned a specific meaning in rule. The Department suggests that a different term was needed to avoid confusion and that “smoke free” was the closest fit. The Smoke-Free Coalition states that there is no evidence in the record that supports the Department’s labeling of designated areas a “smoke-free” and suggests that consumers relying on the Department for health guidance should have a more accurate term such as “reduced smoke area.”^[72]

54. The Department agrees that ventilated areas are not literally “smoke-free.” One commenter described this as false advertising or consumer fraud. In the case of a child or older person with asthma, emphysema or other breathing difficulties, the label might well be an unfortunate misnomer.^[73] The Department has not made an affirmative presentation of facts to support the reasonableness of the use of this term, except where smoking is prohibited entirely. In order to correct this defect it must replace “smoke-free” with a more accurate term that alerts a patron to the fact that some ETS will be present in a ventilated area or at least does not mislead a patron. The Coalition suggested “reduced smoke.” The Department might modify the rules so that “non-smoking area” could be used for ventilated areas, if feasible.

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

CONCLUSIONS

1. That the Department of Health gave proper notice of the hearing in this matter.
2. That the Department of Health has fulfilled the procedural requirements of Minn. Stat. §§ 14.14, subds. 1, 1a, 1b and 14.14, subds. 2 and 2a, and all other procedural requirements of law or rule.

3. That the Department has demonstrated its statutory authority to adopt the proposed rules and has fulfilled all other substantive requirements of law or rule within the meaning of Minn. Stat. §§ 14.05, subd. 1, 14.15, subd. 3 and 14.50 (i) and (ii).

4. That the Department has documented the need for and reasonableness of its proposed rules with an affirmative presentation of facts in the record within the meaning of Minn. Stat. §§ 14.14, subd. 2 and 14.50 (iii), except as noted at Findings of Fact Nos. 47, 48, 52, and 54.

5. That the amendments and additions to the proposed rules which were suggested by the Department of Health after publication of the proposed rules in the State Register do not result in rules which are substantially different from the proposed rules as published in the State Register within the meaning of Minn. Stat. §§ 14.05, subd. 2 and 14.15, subd. 3.

6. That the Administrative Law Judge has suggested action to correct the defects cited in Conclusion No. 4 as noted at Findings of Fact Nos. 49, 52 and 54.

7. That due to Conclusion No. 6, this Report has been submitted to the Chief Administrative Law Judge for his approval pursuant to Minn. Stat. § 14.15, subd. 3 or 4.

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

9. That a finding or conclusion of need and reasonableness in regard to any particular rule subsection does not preclude and should not discourage the Department of Health 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 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 rules be adopted except where specifically otherwise noted above.

Dated this 21st day of March 2002.

S/ George A. Beck

GEORGE A. BECK
Administrative Law Judge

Reported: Tape Recorded, Two Tapes,

No Transcript Prepared.

NOTICE

The Commissioner must wait at least five working days before taking any final action on the rules. During that period, this Report must be made available to all interested persons upon request.

Pursuant to the provisions of Minnesota Rules, part 1400.2100 and Minnesota Statutes, section 14.15, subdivisions 3 and 4, this Report has been submitted to the Chief Administrative Law Judge for his approval. If the Chief Administrative Law Judge approves the adverse findings of this Report, he will advise the Commissioner of actions which will correct the defects. If the Commissioner elects to make any changes to the rule, he must resubmit the rule to the Chief Administrative Law Judge for a review of those changes before adopting the rule.

However, in those instances where the Chief Administrative Law Judge identifies defects which relate to the issues of need or reasonableness, the Commissioner may either follow the Chief Administrative Law Judge's suggested actions to cure the defects or, in the alternative, if the Commissioner does not elect to follow the suggested actions, he must submit the proposed rule to the Legislative Coordinating Commission, and the House of Representatives and Senate Policy Committees with primary jurisdiction over state governmental operations for the advice of the Commission and Committees.

When the rule is filed with the Secretary of State, the Commissioner must give notice on the day of filing to all persons who requested that they be informed of the filing.

^[1] Minn. Stat. § § 14.131 through 14.20.

^[2] Dept. Ex. 1.

^[3] Dept. Ex. 10.

^[4] Dept. Ex. 6.

^[5] Dept. Ex. 9.

^[6] Dept. Ex. 4.

^[7] Dept. Ex. 5.

^[8] Dept. Ex. 7.

^[9] 1999 Laws of Minnesota, Ch. 245, Art. 2, §§ 24-26.

^[10] Minn. Stat. § § 144.411 to .417.

^[11] Minn. Stat. § 144.417, subd. 1.

^[12] Minn. Stat. § 144.412.

^[13] Minn. Stat. § 144.05, subd. 1(c).

^[14] Minn. Stat. § 14.131.

- [15] Minn. Stat. § 14.002.
- [16] *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).
- [17] *In re Hanson*, 275 N.W. 2d 790 (Minn. 1978); *Hurley v. Chaffee*, 231 Minn. 362, 367, 43 N.W. 2d 281, 284 (1950).
- [18] *Greenhill v. Bailey*, 519 F. 2d 5, 19 (8th Cir. 1975).
- [19] *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).
- [20] *Manufactured Housing Institute*, 347 N.W. 2d at 244.
- [21] *Federal Security Administrator v. Quaker Oats Co.*, 318 U.S. 218, 233 (1943).
- [22] Minn. R. 1400.2100.
- [23] Minn. Stat. § 14.15, subd. 3.
- [24] Minn. Stat. § 14.05, subd. 2.
- [25] Dept. Ex. 11.
- [26] Dept. Ex. 8.
- [27] Ex. 21.
- [28] Minn. Laws 1999, Ch. 245, Article 2, Section 25, Minn. Stat. § 144.414, subd. 1..
- [29] Minn. Stat. § 144.417.
- [30] *St. Paul Area Chamber of Commerce v. MPSC*, 251 N.W. 2d 350, 354 (Minn. 1950); *Drum v. Board of Water & Soil Resources*, 574 N.W. 2d 71, 73 (Minn. App. 1998).
- [31] Minn. Stat. § 14.05, subd. 6.
- [32] 1997 Minn. Laws, Ch. 98, Sec. 17.
- [33] Minn. Stat. § 14.126.
- [34] Minn. Stat. § 144.4165.
- [35] Ex. 3, p. 5-13; Ex. 13, p. 1-4.
- [36] Ex. 1.
- [37] Ex. 19.
- [38] Ex. 23, p. 4.
- [39] Ex. 10.
- [40] Ex. 2; Ex. 23.
- [41] Ex. 5, tab C-G; Ex. 6.
- [42] Ex. 13, p. 3.
- [43] *Manufactured Housing Institute v. Pettersen*, 347 N.W. 2d 238, 244 (Minn. 1984).
- [44] Ex. 4, Dept. Ex. 8.
- [45] Ex. 11.
- [46] Ex. 11.
- [47] Ex. 16.
- [48] Ex. 5, tabs J-P, Ex. 23, p. 11, Ex. 7.
- [49] Ex. 2, Ex. 20, Ex. 25.
- [50] Ex. 22, Ex. 23, p. 8.
- [51] Ex. 18.
- [52] Ex. 3, pp. 43-45.
- [53] Ex. 11, p. 2.
- [54] The legislature has authorized administrative law judges to find rules defective if they are not shown to be needed and reasonable, i.e. if they are arbitrary and disregard the facts and circumstances of a situation. (See Finding of Fact No. 19.) However, an ALJ is not empowered to decide what policy is the best; to do so would intrude on the agency's discretion delegated to it by the legislature.
- [55] See Minn. Rule pt. 1400.2100.
- [56] Ex. 14.
- [57] Ex. 13, p. 12.
- [58] Ex. 2; see also Ex. 24.
- [59] Dept. Ex. 8.
- [60] Dept. Ex. 8.
- [61] *Manufactured Housing Institute v. Pettersen*, 347 N.W. 2d 238, 244 (Minn. 1984).
- [62] *Mammenga v. Dept. of Human Services*, 442 N.W. 2d 786 (Minn. 1989).
- [63] Dept. Ex. 8.

[\[64\]](#) Ex. 25, p. 5.

[\[65\]](#) Ex. 12.

[\[66\]](#) Dept. Ex. 3, p. 42.

[\[67\]](#) Ex. 4, p. 9.

[\[68\]](#) The adoption of the 30% standard in 4620.1010, subp. 1 is appropriately regarded as the adoption of a new rule that should reflect 2002 conditions rather than a continuation of an existing requirement since it is contained in a new separate rule part and the existing requirement is to be eliminated two years after the effective date of the new part.

[\[69\]](#) Ex. 25, p. 5-6.

[\[70\]](#) Dept. Ex. 3, p. 59.

[\[71\]](#) E.g. Ex. 15, p. 2, Ex. 9, Ex. 23, p. 6.

[\[72\]](#) Ex. 25, p. 2.

[\[73\]](#) Ex. 23, p. 4, Dept. Ex. 8.