

STATE OF MINNESOTA
OFFICE OF ADMINISTRATIVE HEARINGS

FOR THE MINNESOTA DEPARTMENT ECONOMIC SECURITY

In the Matter of Proposed
Rules Relating to Rehabilitation
Services; Extended
Employment Programs,
Minnesota Rules, Parts
3300.2005 to 3300.2055

**REPORT OF THE
ADMINISTRATIVE LAW JUDGE**

Administrative Law Judge Bruce H. Johnson conducted a hearing on these rules beginning at 9:00 a.m. on March 5, 1998, at the Radisson Hotel, 11 East Kellogg Boulevard, St. Paul, Minnesota. The hearing continued until everybody present had an opportunity to state their views on the proposed rules.

That hearing and this report are part of a rulemaking process that must occur under the Minnesota Administrative Procedure Act¹ before an agency can adopt rules. The legislature has designed that process to ensure that a state agency — here, the Minnesota Department of Economic Security — has met all the requirements that Minnesota law specifies for adopting rules. Those requirements, for example, include assurances that the proposed rules are necessary and reasonable and that any modifications that the Department may have made after the proposed rules were initially published do not result in them being substantially different from what the Department originally proposed. The rulemaking process also includes a hearing to allow the administrative law judge reviewing the proposed rules to hear public comment about them.

Donald E. Notvik, Assistant Attorney General, 525 Park Street, Suite 200, St. Paul, Minnesota 55103-2106, appeared at the rule hearing as the attorney for the Department. The Department also made a hearing panel available to provide the public with information about the proposed rules and to answer any questions. The members of that panel were: David Sherwood-Gabrielson, Director of Extended Employment for the Department; Michael Coleman, the Department's Assistant Commissioner for Rehabilitation Services; Kim Resick, Director of Contract Services for the Department's Rehabilitation Services Branch; and Anita Weckman and John Sherman of the Department's Extended Employment Program Staff. Approximately twenty-five members of the public attended the hearing. Twenty-three of them signed the hearing register.

¹ Minn. Stat. §§ 14.131 through 14.20 (1996). (Unless otherwise specified, all references to Minnesota Statutes are to the 1996 edition.)

After the hearing ended, the Administrative Law Judge kept the administrative record open for another eleven days – that is, until March 16, 1998 – to allow interested parties to submit written comments. Following that, Minnesota law² required that the hearing record remain open for another five business days to allow interested parties to respond to any written comments. The hearing record closed for all purposes on March 23, 1998.

NOTICE

The Department must make this report available for review by anyone who wishes to review it for at least five working days before the Department takes any further action to adopt final rules or to modify or withdraw the proposed rules. If the Commissioner of the Department of Economic Security makes changes in the rules other than those recommended in this report, she must submit the rules, along with the complete hearing record, to the Chief Administrative Law Judge for a review of those changes before she may adopt the rules in final form.

After adopting her final version of the rules, the Commissioner 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 Commissioner must file them with the Secretary of State. On the day she makes that filing, she 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

Compliance with Procedural Rulemaking Requirements:

1. On July 1, 1996, the Department published a Request for Comments on Planned Adoption of Rules Governing Extended Employment in the *State Register*,³ as required by law.⁴

2. On February 2, 1998, the Department made available for public review a statement of the need for and reasonableness of the proposed rules (“SONAR”). The form and content of that SONAR meet the requirements of the law.⁵

3. The Department incorporated an Additional Notice Plan into its SONAR,⁶ describing the notice it would be providing to interested persons beyond what the law

² Minn. Stat. § 14.15, subd. 1.

³ 21 *State Register* 9.

⁴ Minn. R. pt. 1400.2220, subp. 1A (1997). (Unless otherwise specified, citations to Minnesota Rules refer to the 1997 edition.)

⁵ Minn. Stat § 14.131.

minimally requires. Administrative Law Judge Barbara L. Neilson approved that Additional Notice Plan on January 22, 1998.⁷

4. On January 28, 1998, the Department mailed the Notice of Hearing to everyone who had registered a request with the Department to receive that notice and to everyone else identified in the Additional Notice Plan, as Administrative Law Judge Neilson had approved it.

5. State law⁸ required the Department to include in the hearing record a copy of the Notice of Hearing it had mailed to interested parties and had submitted for publication in the *State Register*. Although the Department did that, it did not also submit evidence at the hearing that the Notice of Hearing had actually been published in the *State Register*.⁹ Nevertheless, the Administrative Law Judge takes official notice of and finds that the required publication actually did occur at 22 *State Register* 1327.

6. On February 2, 1998, the Department sent a copy of the SONAR to the Legislative Reference Library, as required by law.¹⁰

7. At the hearing, the Department filed the following documents with the Administrative Law Judge as exhibits for the hearing record:

- (a) a copy of the Notice of Request for Comments on Planned Adoption of Rules Governing Extended Employment published at 21 *State Register* 6 on July 1, 1996 (Exh. A);
- (b) a copy of the Proposed Permanent Rules Relating to Rehabilitation Services; Extended Employment Program, approved and certified by the Revisor of Statutes on January 20, 1998 (Exh. B);
- (c) a copy of the Department's Statement of Need and Reasonableness dated February 2, 1998 (hereinafter "SONAR") (Exh. C);
- (d) a certification that the Department mailed the SONAR to the Legislative Reference Library on February 2, 1998 (Exh. D);
- (e) a copy of the Notice of Hearing issued by the Commissioner on January 22, 1998 (Exh. E);
- (f) a Certification that the Department mailed the Notice of Hearing and Proposed Rules to persons on its mailing list on March 3, 1998 (Exh. F);

⁶ Exhibit C, p. 10.

⁷ As required by Minn. R. pt. 1400.2060.

⁸ Minn. R. pt. 1400.2220, subp. 1F.

⁹ This requirement can be inferred from Minn. Stat. § 14.14, subd. 1a and Minn. R. pt. 1400.2220, subp. 1K.

¹⁰ Minn. Stat. § 14.131 and Minn. R. pt. 1400.2220, subp. 1E.

- (g) a Certification of the Department's Mailing List dated February 27, 1998 (Exh. G);
- (h) an Affidavit of Mailing Additional Notice of a Request for Comments (Exh. H);
- (i) comments concerning the proposed rules received by the Department prior to the hearing (Exh. I(1), I(2), and I(3));
- (j) an Overview of Proposed Extended Employment Rules (Exh. J); and
- (k) Proposed Extended Employment Program Rule: Summary of Non-substantive Changes and Corrections Based On Agreements With Consumer Advocate and Provider Representatives (Exh. K).

8. Eight of the persons who testified at the hearing provided written comments along with their testimony.¹¹ During the eleven-day comment period that followed the hearing, the Administrative Law Judge received nine more written comments from interested persons,¹² as well as written comments from the Department.¹³ During the five-business-day response period, the Administrative Law Judge received four written responses,¹⁴ as well as a written response from the Department, all responding to the comments made or submitted by others.¹⁵

9. With one exception, the Department met all of the procedural requirements established by statute and rule. Although the Department failed to place into the hearing record evidence that it had published the Notice of Hearing in the *State Register*, as required by law,¹⁶ that this publication actually did occur on February 2, 1998¹⁷ is a matter of which the Administrative Law Judge can take official notice. The Administrative Law Judge therefore finds that failing to submit evidence of that publication at the hearing is an insubstantial and a harmless error under Minnesota law.¹⁸

¹¹ Exhibits 1 through 8.

¹² Exhibits 9 through 17.

¹³ Exhibit L.

¹⁴ Exhibits 18 through 21.

¹⁵ Exhibit M.

¹⁶ Finding of Fact No. 5, *supra*.

¹⁷ Beginning at 22 *State Register* 1327.

¹⁸ Minn. Stat. § 14.15, subd. 5.

Roles of Advisory Council and of Stakeholders' Work Group

10. State law¹⁹ and the federal Rehabilitation Act of 1973²⁰ require the Commissioner to establish a State Rehabilitation Advisory Council. Its purpose is to advise the Governor, the Commissioner, the Department, and the Secretary of the U. S. Department of Education on the quality and effectiveness of the state's vocational programs for persons with disabilities, including extended employment programs. The Governor has appointed that advisory council, and by resolution passed on September 30, 1996, it adopted a statement of principles to guide development of the new extended employment rules. The proposed rules conform to that statement of principles.

11. Although not required by law, the Commissioner also established a Stakeholders' Work Group ("Work Group") to give advice on the fundamental values and assumptions that should underlie the proposed rules and to make recommendations about the rules' contents. Five representatives of rehabilitation facilities that provide extended employment services and three representatives of consumer advocacy groups that promote and represent the interests of people receiving those services participated in the Work Group.²¹ The Work Group did develop a set of underlying assumptions and values for the proposed rules,²² and it also made specific recommendations on the contents of the draft rules that were submitted to the Office of the Revisor of Statutes.²³ Finally, the Work Group continued its work on the proposed rules up to the date of the rule hearing, and that continuing work forms the basis for most of the rule changes and corrections that the Department submitted at the hearing.²⁴

Statutory Authority

12. In its SONAR, the Department cites two statutes²⁵ that give it authority to adopt these rules.²⁶ The first directs the Commissioner to adopt rules "on an individual's eligibility for the extended employment program, the certification of rehabilitation facilities, and the methods, criteria, and units of distribution for the allocation of state grant funds to certified rehabilitation facilities."²⁷ The second, in subsection (m) empowers the Commissioner to "adopt, amend, suspend, or repeal rules necessary to implement or make specific programs that the commissioner by sections

¹⁹ Minn. Stat. § 268A.02.

²⁰ Pub. L. No.93-112 (codified as amended at 29 U.S.C. § 700 et seq.)

²¹ SONAR, p. 4.

²² SONAR, pp. 4-8.

²³ Id.

²⁴ Exhibit K.

²⁵ Minn. Stat. §§ 268A.15, subd. 3, and 268.03.

²⁶ SONAR, at 1.

²⁷ Minn. Stat. §§ 268A.15, subd. 3.

268A.01 to 268A.15 is empowered to administer.”²⁸ The Administrative Law Judge finds that these two statutes authorize adoption of the proposed rules.

Cost and Alternative Assessments in SONAR

13. State law requires agencies proposing rules to prepare statements of need and reasonableness that must, among other things, include the following information:²⁹

(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;

(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;

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

(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;

(5) the probable costs of complying with the proposed rule; and

(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.

14. In its SONAR,³⁰ the Department identified providers of extended employment services and consumers employed through those providers as being the two classes of persons that will be most directly affected by the rules. Replacing the existing funding system, which has resulted in unpredictable funding levels in the past, will generally impact providers favorably because it will, for example, eliminate long delays in settlement of accounts and replace a system that resulted in almost random financial winners and losers.³¹ New incentives for payment of higher wages, a system that encourages community integration and employment for persons with disabilities, and having meaningful employment choices available will all impact consumers favorably.³² The comments submitted by providers, provider organizations, consumers, and consumer advocacy organization were unanimous in their beliefs that the proposed rules will generally have a favorable impact on the persons most directly affected by them.

²⁸ Minn. Stat. § 268.03.

²⁹ Minn. Stat. § 14.131.

³⁰ At p. 9.

³¹ SONAR at pp. 4-8.

³² Id.

15. But the new funding system will also result in reductions of the state grants allocated to some providers and in increases in state grants allocated to others. And the proposed rules will also exclude a class of extended employment workers from future participation in the program — namely, certain workers who participate in day training and habilitation programs. A requirement in the proposed rules that extended employment workers and their payroll agents make FICA payments will result in some cost increases in cases where providers have secured an IRS exemption from FICA. The Administrative Law Judge will specifically discuss these matters later in this report. Although not directly affected by the proposed rules, employers who are not providers but who employ extended employment workers and family members of those workers may be indirectly affected in some of the ways described above.

16. Because the proposed rules involve some major simplifications of the extended employment funding system, there may be reductions in the cost of administering extended employment programs, both for the Department and for providers of services. Because the proposed rules replace existing rules and pertain to an ongoing program, neither the Department nor any other governmental agency is likely to incur additional costs as a consequence of the rules' adoption. Moreover, since the proposed rules do not establish any new fees or charges that must be paid to the Department or other state agencies, it will have no effect on state revenues; it is therefore unnecessary for the Commissioner of Finance to conduct the fiscal review and evaluation required by Minn. Stat. § 16A.1285.

17. Since the Department encouraged stakeholders to become actively involved in developing the proposed rules, there was a general consensus that what is being proposed represents the best current thinking about how the program should be administered. For this reason, the Department did not consider any alternative methods to achieve the purposes of the proposed rules, and no one commenting on them suggested that some other approach would have been superior. Public comments about the proposed rules indicated a general belief that what has emerged from the rulemaking process represents a less costly and less intrusive method for achieving statutory purposes than the existing rules. There are no differences or conflicts between the proposed rules and any pertinent federal regulations.

18. The Administrative Law Judge finds that the Department's statement of need and reasonableness meets all legal requirements.³³

Impact on Farming Operations

19. The law imposes an additional notice requirement when proposed rules affect farming operations.³⁴ The proposed rules will not affect farming operations, and no additional notice is therefore required.

Nature of the Proposed Rule

20. The Department intends the proposed rules to replace existing parts 3300.2005 through 3300.2055 of Minnesota Rules, Chapter 3300, which currently

³³ See Minn. Stat. § 14.131.

³⁴ Minn. Stat. § 14.111.

govern the extended employment program. As noted above, in proposing these rules the Department is responding to a specific statutory rulemaking requirement.³⁵ The proposal involves a number of changes, of varying importance, from the rules it replaces. An entirely new and simpler system of allocating state grant funds to extended employment providers represents one very profound change. One can also find other important changes in the system of financial incentives the new rule creates to improve the quality of work life for persons with disabilities. For example, incentives encourage providers to place extended employment workers in community-based employment settings rather than in center-based settings. Others encourage employers to pay workers wages that meet or exceed the federal minimum wage.

21. The first part of the proposed rules deals with definitions. These are notable because the Department and the Work Group have made a concerted effort to correlate them with definitions found in the state's federally-funded vocational rehabilitation program, which is the primary referral source for workers in the extended employment program. The proposal next addresses issues relating to state certification of providers. A major feature of certification is that it incorporates the program standards established by the national Commission on Accreditation of Rehabilitation Facilities ("CARF") by requiring that extended employment providers be accredited by CARF. Although the Department may provisionally certify new extended employment providers without requiring CARF accreditation, those new providers must ultimately become accredited in order to become fully certified. The next major portion of the rules relates to program eligibility. Although those provisions generally deal with identifying which workers may participate in the program and which are excluded, they also contain requirements about the kinds of compensation and benefits that providers and employers must extend to participating workers.

22. Multiple parts of the proposed rules define the features of the program's funding system which, as previously discussed, represents a significant departure from and improvement on the system found in existing rule. The proposal establishes what may be described as a "two fund, three subprogram, three rate" funding system.³⁶ The monies appropriated by the legislature to the extended employment program will be divided into two funds — first, a "Center-Based Fund" that funds the center-based employment subprogram; second, a "Community Support Fund" that funds both the community employment subprogram and the support employment subprogram.³⁷ The proposed rules assign each subprogram a different payment rate, based on what an hour of employment on average earns for a worker. In general, the subprogram yielding the highest average hourly wage receives the highest reimbursement rate, while the subprogram yielding the lowest average hourly wage receives the lowest. Thus, there is an incentive for providers to secure employment for workers in the subprogram that yields for them the highest possible average hourly wage.

Standards for Analyzing the Proposed Rule

³⁵ Minn. Stat. § 268A.15, subd. 3.

³⁶ Transcript of March 5, 1998, rule hearing ("Tr.") at p. 24.

³⁷ Id.

23. In a rulemaking proceeding, an administrative law judge must determine whether the agency has established the need for and reasonableness of the proposed rule by an affirmative presentation of facts.³⁸ An agency need not always support a rule with adjudicative or trial-type facts. It may rely on what are called “legislative facts” — that is, general facts concerning questions of law, policy, and discretion. The agency may also rely on interpretations of statutes and on stated policy preferences.³⁹ Here, the Department prepared a SONAR setting out a number of facts, statutory interpretations, and policy preferences to support the proposed rules. It also supplemented information in the SONAR with information presented both at the hearing and in written comments and responses placed in the record after the hearing.

24. Inquiry into whether a rule is reasonable focuses on whether the rulemaking record establishes that it has a rational basis, as opposed to being arbitrary. Minnesota law equates an unreasonable rule with an arbitrary rule.⁴⁰ Agency action is arbitrary or unreasonable when it takes place without considering surrounding facts and circumstances or disregards them.⁴¹ On the other hand, a rule is generally considered reasonable if it is rationally related to the end the governing statute seeks to achieve.⁴²

25. The Minnesota Supreme Court has defined an agency's burden in adopting rules as having to “explain on what evidence it is relying and how the evidence connects rationally with the agency's choice of action to be taken.”⁴³ An agency is entitled to make choices between different approaches as long as its choice is rational. Generally, it is not proper for an administrative law judge to determine which policy alternative might present the “best” approach, since making a judgment like that invades the policy-making discretion of the agency. Rather, the question for an administrative law judge is whether the agency’s choice is one that a rational person could have made.⁴⁴

26. In addition to ascertaining whether proposed rules are necessary and reasonable, an administrative law judge must make other decisions — namely, whether the agency complied with the rule adoption procedure; whether the rule grants undue discretion to the agency; whether the agency 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; and whether the proposed language is not a rule.⁴⁵ The SONAR contains information establishing the need for and reasonableness of most of the proposed rules, and the Department’s compliance with laws governing the rulemaking process is apparent in most cases. Moreover, a majority of provisions drew

³⁸ Minn. Stat. § 14.14, subd. 2, and Minn. Rule 1400.2100.

³⁹ Manufactured Housing Institute v. Pettersen, 347 N.W.2d 238, 244 (Minn. 1984); Mammenga v. Department of Human Services, 442 N.W.2d 786 (Minn. 1989).

⁴⁰ In re Hanson, 275 N.W.2d 790 (Minn. 1978); Hurley v. Chaffee, 231 Minn. 362, 367, 43 N.W.2d 281, 284 (1950).

⁴¹ Greenhill v. Bailey, 519 F.2d 5, 10 (8th Cir. 1975).

⁴² Mammenga v. Department of Human Services, 442 N.W.2d 786, 789-90 (Minn. 1989); Broen Memorial Home v. Minnesota Department of Human Services, 364 N.W.2d 436, 444 (Minn. Ct. App. 1985).

⁴³ Manufactured Housing Institute, *supra*, 347 N.W.2d at 244.

⁴⁴ Federal Security Administrator v. Quaker Oats Company, 318 U.S. 2, 233 (1943).

⁴⁵ Minn. Rule 1400.2100.

no unfavorable public comment. For these reasons, the Administrative Law Judge will not discuss every part and subpart of the proposed rules in this report. Rather, he finds that the Department has demonstrated the need for and reasonableness of all rule provisions not specifically discussed in this report. He also finds that all provisions not specifically discussed are authorized by statute and that there are no other problems that would prevent their adoption.

Standard for Analyzing Proposed Modifications

27. When an agency makes changes to proposed rules after it publishes them in the *State Register*, an administrative law judge must determine if the new language is substantially different from what the agency originally proposed.⁴⁶ The legislature has established standards for determining if the new language is substantially different.⁴⁷

Proposed Technical Modifications and Corrections

28. The technical and non-substantive modifications and corrections to the proposed rules that appear in Exhibit K and on pages 3 through 8 and 20 through 21 of Exhibit M are all reasonable, necessary, and do not make the proposed rules substantially different from what the Department originally proposed.

Proposed Part 3300.2005 - DEFINITIONS

29. Public comment produced two proposals to modify the proposed rules' definitions. The first proposal addressed a possible lack of clarity in the definition of "rehabilitation facility or facility" in Part 3300.2005, subp. 34.⁴⁸ The underlying concern was that one could interpret the definition, as originally proposed, as equating a "rehabilitation facility or facility" with a CARF-accredited facility. That interpretation would create an apparent conflict with Part 3300.2010, subp. 5. That provision allows the Department to grant provisional certification under limited circumstances to facilities which meet the federal definition of "community rehabilitation program" but which may not yet be CARF-certified. The concern here was that Part 3300.2005, subp. 34, might be regarded as limiting Part 3300.2010, subp. 5. But other commenters objected to changing this definition, arguing that it might open the door to provisional certification of providers who might not intend to become CARF-accredited.⁴⁹ Ultimately, the Department decided to modify this definition to make clear that it does include all entities that meet the definition of "community rehabilitation program," as that term is used in the federal Rehabilitation Act, regardless of whether they are CARF-accredited.⁵⁰ The Administrative Law Judge notes that Part 3300.2010, subp. 5, contains safeguards to ensure that providers who do not genuinely intend to become CARF-accredited cannot engage in prolonged operations under provisional certification. Accordingly, the Administrative Law Judge finds that the proposed modification to Part

⁴⁶ Minn. Stat. § 14.15, subd. 3.

⁴⁷ Minn. Stat. § 14.05, subd. 2

⁴⁸ Exhibits 6 and 11.

⁴⁹ Exhibit 18.

⁵⁰ Exhibits L and M.

3300.2005, subp. 34, is reasonable, necessary, and does not make the proposed rules “substantially different” from what the Department originally proposed.

30. The second proposal pertaining to rules’ definitions⁵¹ recommended that the Department define the term “primary language” because it appears frequently throughout the proposed rules without ever being defined. Responding to this concern, the Department has proposed to add a definition of “primary language”.⁵² The Administrative Law Judge finds that adding that definition is reasonable, necessary, and does not make the proposed rules “substantially different” from what the Department originally proposed.

Proposed Part 3300.2010 - STATE CERTIFICATION

31. An association of extended employment providers expressed concern about a potential ambiguity in proposed Part 3300.2010, subp. 4G which relates to continuing education requirements for governing board members of provider organizations. The precise question was whether substantial compliance by a majority of board members was sufficient to meet the requirement or whether every board member had to receive all the training hours prescribed by the rule. In response to this concern, the Department offered a clarifying modification to Part 3300.2010, subp. 4G that required two-thirds of governing board members and management staff to complete the specified training. As modified, the rule is reasonable, necessary, and does not make the proposed rules “substantially different” from what the Department originally proposed.

32. Another perceived ambiguity related to the requirement in Part 3300.2010, subp. 4H that training be provided to the members of the governing board on directors’ fiduciary responsibilities to not-for-profit corporations. Specifically, the issue was whether this training requirement was in addition to the eight hours of continuing education specified in subp. 4G or whether it could be included as part of that eight hours of training. A commenter, who had been a member of the Stakeholders’ Work Group, proposed a modification to Part 3300.2010, subp. 4H specifying that the fiduciary training was to be “over and above the eight hours of continuing education described in 3300.2010, Subpart 4-G.”⁵³ But the Department indicated in its comments⁵⁴ that members of the Stakeholders’ Work Group understood training on fiduciary responsibilities was to be added to the continuing education requirements in subp. 4G and that further clarification of the rule was therefore unnecessary. However, comments submitted by another member of the same Work Group⁵⁵ appeared to suggest that training on fiduciary responsibilities could be included as part of the eight hours of training specified in Subpart 4G. This raises a question about how clear any understanding about interpretation of this subpart really is. Differing interpretations of a rule by members of the Work Group that drafted it should raise concern that the rule may be ambiguous. Although the Administrative Law Judge finds the rule, as drafted, is

⁵¹ Exhibit 6.

⁵² Exhibit M.

⁵³ Exhibit 6.

⁵⁴ Exhibit L.

⁵⁵ Exhibit 18.

not so imprecise that it violates rulemaking standards, he recommends that the Department make clarifying modifications, such as those proposed, to eliminate the possibility of future disputes over the rule's interpretation.

Proposed Part 3300.2015, Subp. 3 — EXTENDED EMPLOYMENT ELIGIBILITY; Social Security (FICA)

33. A provision in the proposed rules that elicited strong objections from some commenters was Part 3300.2015, subp. 3, which requires all extended employment workers and their payroll agents to pay FICA payroll taxes. Some providers — all providing center-based employment — believed that the workers in their programs met criteria established by the IRS for determining when employers with employees in “training programs” are exempt from the payment of FICA. Those providers challenged both the need for and reasonableness of requiring them to pay FICA when their extended employment workers seemed to meet the IRS criteria for exemption.

34. One argument against requiring providers to pay FICA was that it would conflict with federal law and would speak to a subject that has been pre-empted by the federal government.⁵⁶ But the IRS does not require providers whose workers meet the established criteria to refrain from paying FICA, it simply permits them not to do so. In other words, the rule does not attempt to supplant federal law, nor does it have that effect. The underlying question here is not about federal-state relations; it is about whether conditioning a grant of state funds on an extended employment provider's paying FICA is reasonable when the provider may not otherwise be legally obliged to do so.

35. The provision's opponents also argued that the workers most likely to qualify for the exemption were persons with severe disabilities whose earnings and earning power tended to be extremely low. They went on to reason that it was unlikely paying FICA would ever result in any increase in Social Security benefits when those individuals retired. Thus, in their view, the rule results in some cost to both provider and employee without a corresponding financial benefit to either and is therefore unnecessary and unreasonable.⁵⁷

36. On the other hand, consumer advocates, other providers, and the Department argued that assuming persons with severe disabilities will always lack the earning power and earnings required to enhance their retirement benefits is not only unwarranted, that assumption is incompatible with the purposes of the federal and state legislation underlying the extended employment program. Those purposes include, for example, making a “broad range of employment choices available to all persons and promot[ing] an individual's self-sufficiency and financial independence,”⁵⁸ as well as administering programs “in a manner consistent with the principles of . . . respect for individual dignity, personal responsibility, self-determination, and pursuit of meaningful careers, based on informed choice, of individuals with disabilities.”⁵⁹ It is the

⁵⁶ Exhibits 5, 7, and 10.

⁵⁷ Exhibit 7.

⁵⁸ Minn. Stat. § 268A.15, subd. 2.

⁵⁹ 29 U.S.C. § 701(c).

Department's position that the purposes of the program require it to reject policies based on "assumptions regarding low wages and minimal earning capacities for persons with severe disabilities."⁶⁰

37. Another reason for requiring all providers to pay FICA is that in order to meet the IRS criteria for exemption, an employer must essentially show that the activities its workers are performing are not really productive "work" in any conventional sense of that word. On the other hand, the legislative purpose for establishing the extended employment program is to make grants available to help disabled workers engage in activities that do represent real "work." Thus, it would violate legislative intent for the Commissioner to provide funding for activities that meet the IRS criteria for exemption from FICA.

38. Requiring providers to pay FICA also has some practical implications for persons with severe disabilities that offset any costs. The federal Rehabilitation Act Amendments of 1992, Minnesota Statutes, Chapter 268A, and the proposed rules all incorporate policies to encourage the placement of persons with disabilities in community-based employment settings, whenever possible. Permitting providers of center-based extended employment to obtain exemptions from paying FICA may create a financial disincentive to placing those workers into community-based employment programs where they likely would not be exempt from FICA. More important, it is the payment of FICA that is frequently the benchmark that establishes the existence of an employment relationship for purposes of other important state and federal statutes, such as the Americans with Disabilities Act, the federal Civil Rights Act, and state Human Rights Act, etc. Allowing exemptions from paying FICA may result in workers with severe disabilities being unable to benefit fully from other important protective legislation.

39. What the Commissioner has done here has been to balance the economic costs attributable to paying FICA against a number of risks — that extended employment workers may otherwise be engaged in activities that do not represent real work, that exemption from FICA may become a financial incentive to maintain workers in inappropriate center-based settings, and that extended employment workers may be deprived of important legal protections. Making choices between legitimate competing policy considerations is a proper function for the Commissioner and a function with respect to which she must be accorded considerable discretion. Choices, such as the one she has made, should not be disturbed except where the record demonstrates an arbitrary decision, and the record does not demonstrate the Commissioner made an arbitrary decision here. The requirement that extended employment workers and their payroll agents pay FICA meets the statutory requirements for rulemaking, and that provision is both reasonable and necessary.

Proposed Part 3300.2015, Subp. 6 — EXTENDED EMPLOYMENT ELIGIBILITY; Fair and Equitable Pay Requirements

40. There was also an objection to the requirement in Part 3300.2015, subp. 6, that self-employed extended employment workers realize net income equal to or greater

⁶⁰ Exhibit L.

than the state and federal minimum wage.⁶¹ There were two bases for the objection. First, the commenter believed the requirement to be discriminatory, since the proposed rules contain provisions allowing employers of other extended employment workers to obtain federal subminimum wage certificates to pay their workers less than the state or federal minimum wage. Second, the party raising the objection believed the requirement would unfairly disadvantage those persons with disabilities who, given a choice, would prefer the option of self-employment even though they might not be able to achieve income equal to the minimum wage.

41. Many persons with severe disabilities are vulnerable to exploitation by others. The Department believes that allowing employers with subminimum wage certificates to employ extended employment workers is reasonable because the U. S. Department of Labor's Wage and Hour Division, which issues the certificates, also provides direct oversight to ensure that employers are not exploiting those workers and that their interests are being protected.⁶² The Department of Labor monitors such things as the workers' productivity, prevailing wage rates, and established job norms. On the other hand, no similar system of oversight exists to protect the interests of self-employed extended employment workers, and it is not reasonable to leave them vulnerable to potential exploitation. Although the decision to include this provision in the proposed rules again involves a balancing of competing interests, the Administrative Law Judge concludes that the choice the Commissioner made here is both reasonable and necessary.

⁶¹ Exhibit 8; Tr. pp. 84-88.

⁶² SONAR p. 53; Exhibit L.

Proposed Part 3300.2015, Subp. 7 — EXTENDED EMPLOYMENT ELIGIBILITY; Participants in day training and habilitation programs

42. Some providers expressed strong objections to the provision of the proposed rules that makes persons participating in day training and habilitation (“DT&H”) programs at “full-day per diem rates” ineligible to participate in the extended employment program. The Department’s reason for excluding them is that state law requires it to coordinate its programs with those of other state agencies to “promote the most efficient and effective funding” and to “avoid duplication of services.”⁶³ The rates that the Minnesota Department of Human Services has established for DT&H services are intended to cover the full cost of comprehensive services provided to full-day participants, including vocational and employment services.⁶⁴ In other words, allowing a DT&H provider to receive an extended employment grant for a full-day participant would result in the state paying twice for the same service.

43. On the other hand, DT&H providers argue that the legislature and the Department of Human Services have historically underfunded those programs and that they need extended employment grants to ensure that participants receive quality services.⁶⁵ In one case, a provider estimated that it will lose 35% of its extended employment grant funds as a result of this exclusion.⁶⁶ The primary claim, however, is that the Department did not adequately discuss this exclusion with providers in advance and therefore violated state law⁶⁷ by failing to give those who might be adversely affected by the exclusion fair warning that the rulemaking process might produce this result.

44. In rebuttal, the Department pointed out that it had invited all extended employment providers to participate in a December 20, 1996, Stakeholders’ Task Force meeting at which participants discussed at length whether or to what extent to exclude DT&H recipients.⁶⁸ Moreover, the Department subsequently sent a memorandum to those providers requesting them to provide information about DT&H recipients who were also participating in the extended employment program. Only five providers responded to that request, and none of them objected to the proposed exclusion. The failure of providers to raise objections on those occasions led the Department to believe that the impact of the exclusion would not be serious.⁶⁹ In fact, the Administrative Law Judge observes that there is still no evidence in the administrative record tending to establish that the problem is widespread and serious. Under these circumstances, the Administrative Law Judge finds that the measures the Department has taken to elicit information from providers about the impact of excluding DT&H recipients from the program meet the legal requirements for the Department to provide fair warning that the exclusion was a possible outcome of the rulemaking process⁷⁰ and that the provision

⁶³ SONAR, p. 53, quoting Minn. Stat. § 252.431.

⁶⁴ Id.

⁶⁵ Exhibits 15 and 19; Tr. pp. 65-68.

⁶⁶ Id.

⁶⁷ Minn. Stat. § 14.05, subd. 2(b)(3).

⁶⁸ Exhibit L.

⁶⁹ Id.

⁷⁰ Minn. Stat. § 14.05.

excluding full-day DT&H recipients from participating in the extended employment program is both reasonable and necessary.

Proposed Part 3300.2020, Subp. 2 — REPORTING REQUIREMENTS; Required data elements

45. Consumer advocates proposed to modify the rule by adding several data elements to the provider reporting requirements. The main reason given for collecting more data was to “identify clear and measurable provider performance criteria that could promote the goals of the federal Rehabilitation Act, as amended in 1992,” and form the basis for an outcome-based periodic evaluation of the efficacy of the extended employment program.⁷¹ Some providers objected to collecting more data, arguing that the new data elements were unnecessary and would violate understandings reached by members of the Stakeholders’ Work Group.

46. For its part, the Department has declined to accept proposals to collect more data, indicating that the data that the rules currently require is sufficient to support the functions currently addressed by the rules. The Department prefers to address larger issues of data collection and program evaluation separately and outside the context of these rules. As further discussion later in this report indicates, the law does not require the Department to address the issue of program evaluation in these rules although it has the discretion to do so if it chooses. Here, it has chosen to address the issues raised by the advocates in other ways. More important, proponents have indicated that recommendations about collecting more data are not directed toward the reasonableness of the rules, as currently drafted. Rather they are suggestions the proponents believe would make the rules better.⁷² A rulemaking authority is not required to adopt the best rule possible, only a rule that is rationally related to the end sought by the governing statute, which here does not require the Commissioner to address the issue of program evaluation. In view of all of this, the Administrative Law Judge finds that the Department’s failure to accept the suggestion of adding required data elements does not represent a defect in Part 3300.2020, subp. 2, and that provision is reasonable and necessary as it stands.

Proposed Part 3300.2025, Subp. 5 — PROGRAM PLANNING, SERVICE ; DELIVERY, AND CASE RECORDS; Minimum contact by provider

47. Another proposal requested the Department to delete the requirement in Part 3300.2025, subp. 5, that to receive reimbursement for extended employment services provided to a particular worker, the provider must have a minimum of two in-person contacts with that worker each month.⁷³ Specifically, the complaint was that this requirement creates insurmountable difficulties for extended employment workers to hold telecommuting jobs established by a provider some considerable distance from the workers’ homes. The primary difficulty is financial — that is, some providers argue the cost of sending staff to make bimonthly visits would be prohibitive when compared with the size of the Department’s grant for providing the service. Proponents of deleting the

⁷¹ Exhibits 6 and 11.

⁷² Tr. p. 78.

⁷³ Exhibit 8; Tr. pp. 84-88.

requirement also argue that failing to do so will deprive persons of telecommuting options at a time when advances in technology make it possible for persons with severe disabilities to perform work from remote sites.

48. The Department's response to this criticism was that this minimum requirement represented the consensus of the members of the Stakeholders' Work Group.⁷⁴ In other words, the fact that provider representatives and consumer advocates could both agree on this requirement is strong evidence of its reasonableness and necessity. But the necessity and reasonableness of this requirement is also supported by considerations of policy. The Administrative Law Judge notes that the main purpose of the extended employment program is to provide the external supports that enable persons with disabilities to engage in meaningful and productive work activities. Some of a provider's major responsibilities are to assess how well a worker is functioning within his or her work environment and how other factors in the worker's life may be affecting that work environment. A provider is also responsible for determining what specific kinds of accommodation and support workers need to overcome actual and potential obstacles to their success. Limiting communication between provider and worker to telecommunications places too much pressure on the workers to identify and articulate their own needs. Not only does this represent a shift of responsibility from provider to worker, it may also place unrealistic expectations on persons with severe disabilities.

Proposed Part 3300.2030, Subp. 2 — NEW OR EXPANDED PROGRAMS; Department review of proposals

49. Consumer advocates also proposed to modify the proposed rules by adding a requirement to include representatives of racial and ethnic minorities in the review process for evaluating proposals for new or expanded extended employment programs.⁷⁵ No one raised any objections to this modification, and the Department has agreed to it. This modification is reasonable, necessary, and does not make the proposed rules "substantially different" from what the Department originally proposed.

Proposed Part 3300.2035, Subps. 3 and 4 — ALLOCATION OF EXTENDED EMPLOYMENT FUNDS (Provider contracts)

50. There was considerable dispute about the form and content of the Department's contracts with extended employment. Representatives of providers contended that contracts have historically been excessively lengthy and complex. Moreover, they argue that when the Department wished to make policy changes in the program, it often made those changes by altering and amending provider contracts rather than making changes to program rules. Put another way, the provider's claim is that the Department has engaged in illegal rulemaking through substantive manipulation of provider contracts — that is, effectively adopted rules without going through the process prescribed by law. Although conceding that "the new rule in its crafting with all of the input from many providers allows less opportunity for interpretation and should make it easier to have a simple contract,"⁷⁶ providers proposed two additional remedial

⁷⁴ Exhibit L; SONAR, p. 64.

⁷⁵ Exhibit 11.

⁷⁶ Tr. p. 35.

and preventive measures that would ostensibly make it more difficult for the Department to engage in illegal rulemaking by contract in the future: The first was a provision in Part 3300.2035, subp. 3, requiring the Department to circulate for review an advance copy of the provisions it was proposing to include in provider contracts for the upcoming year; the second was a provision in Part 3300.2035, subp. 3, requiring the Department's provider contracts to conform to a sample contract that would be attached to the proposed rules as an appendix.⁷⁷

51. First, in order for the proposed modifications even to raise a threshold question of reasonableness and necessity, there would have to be some basis in the record for the Administrative Law Judge to find that the Department has engaged in the practice of using provider contracts as a vehicle for illegal rulemaking in the past, and there is nothing in the record that supports such a finding. Although proponents of the changes submitted several provider contracts for consideration, an administrative law judge may only hear claims that some statute specifically allows him or her to hear. There is no statute allowing administrative law judges to hear claims arising out of provider contracts under any circumstances, much less as part of a rulemaking proceeding.

52. Second, as the Department points out in its response,⁷⁸ including these modifications in the proposed rules would bring them into conflict with another law⁷⁹ that confers on the Commissioner of the Department of Administration the authority to "supervise, control, review and approve all state contracts." In other words, that statute operates as an effective limit on the authority of the Commissioner of the Department of Economic Security to adopt rules prescribing the form and content of contracts.

53. Finally, even taking at face value the providers' claims that the Department's past contracting practices amount to illegal rulemaking, there would remain the ultimate question of whether the proposed rules are unreasonable for failing to address that issue. At the hearing and in response to questions posed by the Administrative Law Judge, proponents of these modifications conceded that they did not consider the rules to be unreasonable for failing to address contractual issues adequately.⁸⁰ For this and the other reasons discussed above, the Administrative Law Judge finds that the provisions of the proposed rules relating to provider contracts are reasonable and necessary without further modification.

Proposed Part 3300.2035, Subp. 6 — ALLOCATION OF EXTENDED EMPLOYMENT FUNDS; Statewide uniform rates

54. The rate structure and system for allocating program funds in the proposed rules has the effect of allocating relatively more funding to the community employment and supported employment subprograms than the existing rule does and relatively less funding to the center-based subprogram. The proposed rule also creates incentives for

⁷⁷ Exhibit 1; Tr. pp. 31-43.

⁷⁸ Exhibit L, pp. 1-2.

⁷⁹ Minn. Stat. § 16B.04, subd., 2(1).

⁸⁰ Tr. p. 43.

moving extended employment workers from center-based programs into community-based programs. A number of commenters — primarily those associated with center-based programs — objected to this reallocation of funding and characterized it as being unreasonable. Still other commenters believed that the proposed rules do not go far enough and that community-based programs should receive even a larger share of the funding available. Several commenters advanced proposals to modify the funding rates set forth in 3300.0235, subp. 6, in a number of different ways.⁸¹

55. Virtually everyone commenting on the proposed rules, including Department representatives, shared the view that current levels of funding for extended employment programs are insufficient to meet all of the needs of persons with disabilities. In other words, program funding is a finite resource that cannot meet all of the actual and potential demand, and with large numbers of worthy state programs competing for tax dollars, it is unlikely that the program will ever be funded at a level that meets all potential demand. Given a fixed level of funding by the legislature, the two major variables that affect the payments the Department makes to providers are the rate of payment per unit of service and the number of hours of service that are funded. With a three-rate system, increasing the rate in one subprogram must be accompanied either by reductions in the rates in the other subprograms or by a reduction in the hours of service being funded. Doing the former most directly affects the providers of extended employment services in each of the three subprograms and may indirectly affect extended employment workers if the rate changes result in fewer providers in one or more subprograms. Doing the latter most directly affects extended employment workers themselves, since it will result either in a reduction of the number of people served or a lower level of service for the people being served.

56. Because of these fiscal realities, the Department was faced with making some difficult choices in establishing its system for allocating funds. The diversity of the persons served by extended employment programs made those choices even more difficult. On one extreme are individuals with very severe disabilities who are unlikely to achieve financial independence through work but who still have significant productive capacity and whose lives will be enriched by the dignity of work. On the other extreme are individuals with less severe disabilities who with modest assistance may be able to achieve financial independence through work. The evidence suggests that the latter group of individuals significantly outnumbers the former. Nevertheless, the human needs of both groups must be given consideration. Against this backdrop and in setting a balance between the many competing considerations, the Department solicited and accepted most of the advice of the Stakeholders' Work Group, whose members had experience in working with the whole range of persons with disabilities. The record also indicates that in setting that balance, the values and goals embodied the federal Rehabilitation Act and Minnesota Statutes, Chapter 268A, guided both the Stakeholders' Work Group's recommendations and the Department's final decisions. It is for these reasons that the Administrative Law Judge finds the system for allocating extended employment funds that the proposed rules creates meets the tests of necessity and reasonableness.

Proposed Part 3300.2035— ALLOCATION OF EXTENDED EMPLOYMENT FUNDS (Program evaluation)

⁸¹ Exhibits 5, 14, and 17.

57. As noted above, consumer advocates strongly recommended that the Department include in the proposed rules a requirement that the Department conduct a triennial review of the extended employment program to determine the progress being made in meeting the goals of the federal Rehabilitation Act.⁸² Minnesota law⁸³ already requires the Department to:

evaluate the extended employment program to determine whether the purpose of extended employment as defined in subdivision 2 is being achieved. The evaluation must include an assessment of whether workers in the extended employment program are satisfied with their employment. A written report of this evaluation must be prepared at least every two years and made available to the public.

The advocates' proposal was later modified to specify a biennial, rather than triennial, evaluation that would be incorporated into the evaluation already specified by law.⁸⁴

58. The Department declined to accept this suggestion. First, it indicated that it was already required by law to conduct a program evaluation every two years and to issue a written report of the results.⁸⁵ To this extent, the Department considered another program evaluation to be redundant. The consumer advocates' proposal also recommended that the Department periodically ascertain the extent to which the extended employment program was meeting the goals of the federal Rehabilitation Act. But the Department pointed out that although there is an indirect relationship between the extended employment program and the federal Rehabilitation Act so that the two programs could be considered complementary, the extended employment program is not governed directly by the goals of the Rehabilitation Act. Although it might be useful to evaluate the relationship between the two informally, it is unnecessary, and might perhaps be inappropriate, to require such an evaluation in these rules. Finally, proponents of the requested evaluation indicated that although they believed inclusion of this provision in the rules would make them better, they did not believe that failing to include provisions for this kind of periodic evaluation would make the proposed rules unreasonable.⁸⁶ For this and the other reasons discussed above, the Administrative Law Judge finds that the proposed rules are reasonable and necessary without modifying them to require a periodic evaluation of the progress being made in the extended employment program in meeting the goals of the federal Rehabilitation Act.

Proposed Part 3300.2035, Subp. 8 — ALLOCATION OF EXTENDED EMPLOYMENT FUNDS; Adjustment of state grant funds allocated to providers

59. A provider recommended that the language relating to audit standards in the proposed rules be modified to require establishing an audit committee to develop audit standards for the program. The proposal would explicitly specify the audit committee's

⁸² Exhibits 6 and 11.

⁸³ Minn. Stat. § 268A.15, subd. 4.

⁸⁴ Exhibit 21.

⁸⁵ Minn. Stat. § 268A.15, subd. 4.

⁸⁶ Tr. p. 78.

composition — that is, two department representatives, two provider representatives, and two outside firm representatives.⁸⁷ The Department declined to accept this suggestion, indicating that Part 3300.20535, subp. 8D(1)(c), already requires it to “seek the input of providers and private audit firms in the review of the standards.” The Administrative Law Judge notes that state law⁸⁸ vests legal authority and responsibility to administer the program, including establishment of audit standards, in the Department. That responsibility is nondelegable. Even if the proposed audit committee were established, it could only be advisory to the Department and would not have authority to make binding recommendations. Because of this, the proposed modification would add little to the rule that is not already there. For this reason, the Administrative Law Judge finds that the proposed rules are reasonable and necessary without modifying them to require establishment of an audit committee to develop program audit standards.

Proposed Part 3300.2035, Subp. 4 through 8 — ALLOCATION OF EXTENDED EMPLOYMENT FUNDS

60. A group of providers indicated that Part 3300.2035, subp. 4 through 8, required clarification about whether both supported employment and community employment hours would be used jointly to earn allocations for providers under the Community Support Fund.⁸⁹ The Department responded that it interpreted the proposed rule to mean that work hours from the Supported Employment and Community Employment subprograms will be used jointly to earn the provider’s contract allocation from the Community Support Fund. Furthermore, adjustments for underproduction under subpart 4 will take place only when the combined (Supported Employment and Community Employment) hours fall short of the contracted allocation.⁹⁰ Although the commenter did not request a modification of the proposed rule to clarify the potential ambiguity, the Department’s response suggests that an ambiguity may exist. Although the Administrative Law Judge does not find the proposed rule to be so vague as to violate rulemaking standards, he recommends that that Department make its interpretation of the rule explicit to avoid any future misunderstandings.

Proposed Part 3300.2035, Subps. 4 through 8 — ALLOCATION OF EXTENDED EMPLOYMENT FUNDS

61. Finally, one group of commenters suggested that the rules include a provision specifying that the Department use any new extended employment appropriations to promote the goal of providing competitive employment to persons with severe disabilities or to improve available choices and wage rates in community employment for groups of persons who have previously been underserved.⁹¹ In response, the Department stated that its policy has been to give priority in allocating

⁸⁷ Exhibit 16.

⁸⁸ Minn. Stat. § 268A.15, subd. 1.

⁸⁹ Exhibit 14.

⁹⁰ Exhibit L.

⁹¹ Exhibit 11.

new funding to people who have historically been underserved, that it intends to continue to do so, and that modifying the proposed rules to require that is unnecessary.⁹² The legislation empowering the Department to adopt these rules does not require the Department to specify its priorities for allocating any new appropriations. For this reason, the Administrative Law Judge finds that the proposed rules are reasonable and necessary without modifying them to specify priorities for allocating any new appropriations by the legislature.

62. The Administrative Law Judge adopts as Findings any Conclusions which are more appropriately described as Findings.

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

CONCLUSIONS

1. The Department gave proper notice of this rulemaking hearing.
2. The Department has the statutory authority to adopt the proposed rules.
3. The Department has substantially complied with all the procedural requirements set out in Minn. Stat. § 14.14, subds. 1, 1a, and 2, as well as in other provisions of Minnesota law, so that the Department may now proceed to adopt the proposed rules.
4. The record demonstrates a rational basis for the need for and reasonableness of the proposed rules.
5. Although the Department has proposed several modifications of the proposed rules after publishing them in the *State Register*, those proposed modifications do not make the proposed rules “substantially different” from what the Department originally proposed.
6. A finding or conclusion that any particular part or subsection is necessary and reasonable does not preclude, and should not discourage, the Department from modifying the proposed rules further based upon an examination of the public comments. But any rule resulting from further modifications may not be substantially different from the proposed rules as originally published, and the rules that are finally adopted must be based upon facts appearing in the rule hearing record.
7. The Administrative Law Judge adopts as Conclusions any Findings which are more appropriately described as Conclusions.

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

⁹² Exhibit M.

RECOMMENDATION

IT IS HEREBY RECOMMENDED that the proposed rules be adopted.

Dated this _____ day of April, _____ 1998.

BRUCE H. JOHNSON
Administrative Law Judge

Reported: Stenographically Reported (Kirby A. Kennedy & Associates);
Transcript Prepared