

STATE OF MINNESOTA
OFFICE OF ADMINISTRATIVE HEARINGS

FOR THE MINNESOTA DEPARTMENT OF HUMAN RIGHTS

In the Matter of the Proposed
Permanent Rules Relating to
Public State Contracts,
Minnesota Rules 5000.3200 to
5000.3600.

**REPORT OF THE
ADMINISTRATIVE LAW JUDGE**

The above-entitled matter came on for hearing before Administrative Law Judge Steve M. Mihalchick on December 21, 1998, at 10:00 a.m. in Conference Rooms A and B of the Army Corps of Engineers Centre, 190 East Fifth Street, Suite 700, Saint Paul, Minnesota 55101.

This Report is part of a rulemaking proceeding held pursuant to Minn. Stat. §§ 14.131 to 14.20, to hear public comment, to determine whether the Minnesota Department of Human Rights (Department) has fulfilled all relevant substantive and procedural requirements of law applicable to the adoption of the rules, whether the proposed rules are needed and reasonable and whether or not modifications to the rules proposed by the Department after initial publication are impermissible substantial changes.

Erica Jacobson, Assistant Attorney General, 1400 NCL Tower, 445 Minnesota Street, St. Paul, Minnesota 55101, appeared on behalf of the Department. The Department's hearing panel consisted of Janeen E. Rosas, then Acting Commissioner of Human Rights; Wendy Adler Robinson, Compliance Services Supervisor; and Melanie Miles, Enforcement Officer in Compliance Services.

Approximately 12 persons not from the Department attended the hearing. Seven such persons signed the hearing register. The hearing continued until all interested persons, groups or associations had an opportunity to be heard concerning the adoption of these rules.

The record remained open for the submission of written comments for twenty calendar days following the date of the hearing, to January 11, 1999. Pursuant to Minn. Stat. § 14.15, subd. 1 (1998), five working days were allowed for the filing of responsive comments. At the close of business on January 19, 1999, the rulemaking record closed for all purposes. The Administrative Law Judge received one written comment from the Minnesota Department of Administration during the comment period. The Department submitted written comments responding to matters discussed at the hearings and made changes in the proposed rules.

This Report must be available for review to all interested persons upon request for at least five working days before the Department takes any further action on the proposed amendments. The Department may then adopt a final rule, or modify or withdraw its proposed amendments.

Pursuant to the provisions of Minn. Stat. § 14.15, subd. 3 and 4, this Report has been submitted to the Assistant Chief Administrative Law Judge for his approval.¹ If the Assistant Chief Administrative Law Judge approves the adverse Findings of this Report, he will advise the Department of actions which will correct the defects and the Department may not adopt the rule until the Assistant Chief Administrative Law Judge determines that the defects have been corrected.

If the Department elects to adopt the suggested actions of the Assistant Chief Administrative Law Judge and makes no other changes and the Assistant Chief Administrative Law Judge determines that the defects have been corrected, then the Department may proceed to adopt the rule and submit it to the Revisor of Statutes for a review of the form. If the Department makes changes in the rule other than those suggested by the Administrative Law Judge and the Assistant Chief Administrative Law Judge, then it shall submit the rule, with the complete record, to the Chief Administrative Law Judge for a review of the changes before adopting it and submitting it to the Revisor of Statutes.

When the Department files the rule with the Secretary of State, it shall give notice on the day of filing to all persons who requested that they be informed of the filing.

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

FINDINGS OF FACT

Procedural Requirements

1. On June 8, 1998, the Department published a Request for Comments on the subject matter of these rules at 22 *State Register* 2165.
2. On October 14, 1998, the Department filed the following documents with the Office of Administrative Hearings:
 - a. A cover letter requesting the assignment of an Administrative Law Judge and approval of a the Department's Notice Plan.
 - b. A proposed dual notice of hearing.
 - c. A copy of the proposed rules certified by the Revisor of Statutes.

¹ The Chief Administrative Law Judge, being a former Deputy Commissioner of the Department, has delegated his responsibilities under the statute to the Assistant Chief Administrative Law Judge.

- d. A copy of the Statement of Need and Reasonableness (SONAR).

The Department requested approval of an additional notice plan that included direct mailing of a notice to organizations representing contractors, minorities, women, and persons with disabilities.² Trade unions, minority councils, legislators and organizations identified as "pro-business" also received a mailed notice.³ The additional notice plan was approved on October 22, 1998.⁴

3. On November 3, 1998, the Department mailed the Notice of Hearing to all persons and associations who had registered their names with the Department for the purpose of receiving such notice.⁵

4. On November 9, 1998, the Department published a copy of the proposed rules and the dual Notice of Hearing at 23 *State Register* 1176.⁶

5. On December 15, 1998, the Department notified the Administrative Law Judge that more than 25 people had requested a hearing and also filed copies of those requests for hearing and comments.

6. The Department filed the following documents with the Administrative Law Judge at the hearing:

- a. a copy of the Notice of Hearing. This was intended to be a copy of the Department's Request for Comments published at 22 *State Register* 2165 (Exhibit A);

- b. a copy of the proposed rules certified by the Revisor of Statutes (Exhibit B);

- c. the Statement of Need and Reasonableness (SONAR) (Exhibit C);

- d. copies of the transmittal letter and certificate of mailing the SONAR to the Legislative Reference Library (Exhibit D);

- e. the dual Notice of Hearing as published November 9, 1998, at 23 *State Register* 1176 (Exhibit E);

- f. a copy of the dual Notice of Hearing as mailed, a copy of the list, and certification of mailing to that list (Exhibit F);

- g. the letter from the Administrative Law Judge approving the Department's Notice Plan and the Department's certification of mailing notice according to that plan (Exhibit G);

² Exhibit C, at 6.

³ *Id.*

⁴ Exhibit G.

⁵ Exhibit F.

⁶ Exhibit 1E.

- h. all materials the Department received in response the published Notice of Hearing (Exhibit H); and
- i. possible language to modify the proposed rule after publication in the State Register (Exhibit I).

Statutory Authority.

7. In its Notice of Hearing, the Department cites Minn. Stat. § 363.074 as its statutory authority to adopt the proposed rules. The statute states:

The commissioner shall adopt rules to implement section 363.073 specifying the criteria used to review affirmative action plans and the standards used to review implementation of affirmative action plans. A firm or business certified to be in compliance with affirmative action requirements of a local human rights agency or the federal government shall be deemed to be in compliance with section 363.073 upon submission to the commissioner of an affirmative action plan approved by a local human rights agency or the federal government and amendments to the plan which are necessary to address the employment of disabled persons protected by section 363.03, subdivision 1.

8. Minn. Stat. § 363.073 sets out the statutory standards for certificates of compliance with affirmative action requirements for public contracts. The Commissioner is expressly authorized to adopt rules concerning compliance with affirmative action requirements. The Administrative Law Judge concludes that the Department has the statutory authority to promulgate these rules.

Nature of the Proposed Rules.

9. Before employers⁷ can contract⁸ with the State, they must be certified to be in compliance with the statutory obligation to have an affirmative action plan approved by the Department. Certificates of compliance can be suspended or revoked by the Department if the business does not make a good faith effort to implement its approved plan.⁹ Where such suspension or revocation occurs, the contract may be terminated or abridged by the Department or the contracting agency.¹⁰ Where a contract is issued to a contractor who lacks a valid certificate, the Department may void the contract.¹¹

10. The proposed rules add and modify definitions, add a process for inquiring into the status of contracting employers, and add a provision voiding contracts under certain circumstances. The criteria for approving affirmative action plans are modified to

⁷ Of more than 40 employees on a single working day during the previous 12 months within Minnesota (Minn. Stat. § 363.073, subd. 1).

⁸ For more than \$100,000 (*Id.*).

⁹ Minn. Stat. § 363.073, subd. 2.

¹⁰ Minn. Stat. § 363.073, subd. 3.

¹¹ Minn. Stat. § 363.073, subd. 3.

conform to statutory changes and clarify what information is desired by the Department. The contents of required notices are set out, and specific contract language is set out. Specific standards for affirmative action efforts toward disabled persons are set out, including contract language and standards for preemployment medical examinations. The existing standards for compliance reporting are also modified.

Cost and Alternative Assessments in SONAR.

11. Minn. Stat. § 14.131 provides that state agencies proposing rules must identify classes of persons affected by the rule, including those incurring costs and those reaping benefits; the probable effect upon state agencies and state revenues; whether less costly or less intrusive means exist for achieving the rule's goals; what alternatives were considered and the reasons why any such alternatives were not chosen; the costs that will be incurred complying with the rule; and differences between the proposed rules and existing federal regulations.

12. Regarding the anticipated costs of the rule, the Department concluded that the "probable costs to the Department of Human Rights is non-existent."¹² The other state agencies potentially affected were identified as the Departments of Administration and Finance and the Office of the Attorney General.¹³ The work is expected to be minimal.¹⁴ The persons or groups that the Department concludes will be most affected by the rules are employers obligated by statute to comply with the affirmative action standards.¹⁵

13. The Department's analysis suggests that the benefits of the rule outweigh the costs.¹⁶ Employers that comply with the standards will benefit by excluding competition from noncompliant employers. Paperwork is reduced by requiring reports only once per year. The groups benefiting from the affirmative action statute will also benefit from enforcement of the proposed rule.

14. The Department concluded that there was no less costly or intrusive method of accomplishing the goals of the statute or rules.¹⁷ Due to that conclusion, the Department did not seriously consider any alternatives to the rule.¹⁸ The costs to contractors and state agencies imposed by voiding contracts are discussed below and can be very significant. Since the potential exists for incurring significant costs by voiding contracts, the Department was not relieved of its statutory obligation to consider less costly or less intrusive methods of accomplishing compliance. This is a procedural defect that relates to the lack of flexibility in the proposed rule that has led the Administrative Law Judge to find it defective for substantive reasons below. If it is corrected as indicated below, this procedural error may be considered harmless.

¹² SONAR, at 3.

¹³ SONAR, at 3.

¹⁴ SONAR, at 3.

¹⁵ SONAR, at 2-3.

¹⁶ SONAR, at 3.

¹⁷ SONAR, at 4.

¹⁸ *Id.*

15. The Department relied heavily upon the regulations of the U.S. Department of Labor¹⁹ The differences from the federal regulations that do exist are required due to the age of the Federal standards and the relatively smaller staff available to the Department. Other differences arise due to differences between the federal statute and the Minnesota Human Rights Act. There are no requirements in the rules in conflict with Federal standards.

16. A new statutory provision requires agencies proposing rules after August 1, 1998, to consider and implement "rules and regulatory programs that emphasize superior achievement in meeting the agency's regulatory objectives and maximum flexibility for the regulated party and the agency in meeting those goals."²⁰ In regard to this requirement, the Department stated:

Agency achievement through flexibility for the contractors was considered in the rule allowing the commissioner to void a contract if the contractor does hold (*sic*) a valid certificate of compliance. The rule is flexible because the contractor is given an opportunity to explain why the contractor is (*sic*) does not have (*sic*) a valid certificate of compliance prior to the voiding of the contractor (*sic*). The contractor also is allowed to apply for a certificate of compliance at any time during the investigation of the potential violation. This rule allows the contractor flexibility in receiving a certificate of compliance, explaining why they do not have one, or proving that they are in possession of a valid certificate of compliance, while allowing the department to ensure that the state only does business with certified contractors.²¹

17. Jim Bigham, CEO of SMARCA of Minnesota, Inc. (representing sheet metal workers and air conditioning and roofing contractors), maintains that the SONAR conflicts with the rules as proposed. Betsy Hayes, Analyst with Materials Management Division (MMD) of the Department of Administration (Administration) also indicated that this language is inconsistent with the rule as proposed. The language quoted from the SONAR suggests that applying for a certificate by a contractor can cure the noncompliant condition. SMARCA points out that the proposed rule (5000.3415) does not allow for a contractor to retain the contract pending approval of the contractor's application. This issue is more fully discussed below in the findings on proposed rule 5000.3415. Since the rule as proposed does not allow for flexibility in meeting agency goals, the Department has not met its obligation under Minn. Stat. § 14.002 to implement rules emphasizing flexibility in meeting agency goals. Again, if the rule is corrected as described below, this procedural error will be harmless.

Effect on Farming Operations.

¹⁹ SONAR, at 4.

²⁰ Laws of Minnesota 1997, Chap. 303, Sec. 1 (codified as Minn. Stat. § 14.002).

²¹ SONAR, at 5.

18. Minn. Stat. § 14.111 (1996), imposes an additional notice requirement when rules are proposed that affect farming operations. The proposed rules will not affect farming operations and the additional notice requirement does not apply.

Standards for Analyzing the Proposed Rules.

19. 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.²² 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.²³ 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.

20. 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.²⁴ Agency action is arbitrary or unreasonable when it takes place without considering surrounding facts and circumstances or disregards them.²⁵ On the other hand, a rule is generally considered reasonable if it is rationally related to the end that the governing statute seeks to achieve.²⁶

21. 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.”²⁷ 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.²⁸

22. 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

²² Minn. Stat. § 14.14, subd. 2, and Minn. Rule 1400.2100.

²³ **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).

²⁴ **In re Hanson**, 275 N.W.2d 790 (Minn. 1978); **Hurley v. Chaffee**, 231 Minn. 362, 367, 43 N.W.2d 281, 284 (1950).

²⁵ **Greenhill v. Bailey**, 519 F.2d 5, 10 (8th Cir. 1975).

²⁶ **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. App. 1985).

²⁷ **Manufactured Housing Institute**, *supra*, 347 N.W.2d at 244.

²⁸ **Federal Security Administrator v. Quaker Oats Company**, 318 U.S. 2, 233 (1943).

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.²⁹

23. 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, the majority of the proposals drew 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.

24. 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.³⁰ The legislature has established standards for determining if the new language is substantially different.³¹

Proposed Rule 5000.3415 - Commissioner May Void Contract.

25. Proposed Rule 5000.3415 sets out a process for notifying a contractor and agency when the Department has reasonable cause to believe the contractor lacks a valid certificate. Under the proposed rule, the contractor and agency each have ten days to provide responses to the Department's notice. If the Department can determine from the responses that the contractor has a valid certificate, then notice is provided that the contract will not be voided. The rule part states that a contractor can file an application for a certificate at any time, but the rule does not state what impact such a filing has on any current Department inquiry. As it turns out, the Department is only interested in the status at the time the contract is executed, so the provision either has no impact or conflict with the Department's stated intent.

26. Based on comments received before the hearing, the Department formulated additional rule language setting out circumstances that would prohibit the Commissioner from voiding the contract. The contract would not be voided if the contractor were not at fault in failing to have a valid certificate and the contractor files a valid plan within ten days after the notice of noncompliance is given by the Department. The Department did not formally propose to adopt the language, but did indicate that it had no objection to that language.

27. SMARCA suggested that the proposed additional language would help contractors avoid termination of their contracts, but that additional protections were needed to avoid due process problems. SMARCA urged that a hearing be held to allow for explanations as to why noncompliance exists. The decision-maker who chooses to

²⁹ Minn. Rule 1400.2100.

³⁰ Minn. Stat. § 14.15, subd. 3.

³¹ Minn. Stat. § 14.05, subd. 2

refuse issuance of the certificate is the same who decides whether to void a contract. The Department completely controls the issuance of certificates. SMARCA's experience with obtaining certificates is that delays do occur. SMARCA asserts that the lack of a hearing before a contract is voided is a violation of due process. The impact of voiding a contract pending the appeal of any denial of a certificate is cited by SMARCA as a major concern of contractors.

28. Randolph Hartnett, Corrections Program and Policy Monitor of the Minnesota Department of Corrections, expressed concern that application of the rule could result in additional costs to agencies through the need to let additional contracts to obtain completion of work left unfinished by the voiding of a contract. Mr. Hartnett suggested making the Commissioner's action discretionary, and urged the Department to adopt alternative methods of addressing the noncompliance.

29. The Department maintains that no other action is necessary, since any contractor seeking to contract with a state agency is obligated to obtain the certificate prior to the contract being executed. To clarify that only the contractor's status at the time the contract was executed is at issue, the Department modified the rule part to apply only to those contracts and limited consideration only to whether the contractor held a certificate at the time the contract was executed.³² The Department maintains that this approach is reasonable because each agency is responsible for ensuring that the contractors are properly certified. There is no standard procedure agencies are obligated to follow in carrying out that responsibility. The Department is not aware of many instances where contracts are improperly entered into with uncertified contractors. The Department perceived the situation as "not a common occurrence."³³ The Department usually discovers a contractor may not have a valid certificate through information provided by competing contractors.

30. Kent Allin, Assistant Commissioner of Administration; Betsy Hayes, Analyst with MMD; and Paul Stembler, Assistant Director of MMD, objected to the Department's exercise of authority to void contracts as unnecessary and unreasonable. Assistant Director Stembler described as an "administrative nightmare" the impact of voiding a contract under the proposed rules.³⁴ The potential for adverse impact on contractors, subcontractors, and agencies in certain long-term contracts was raised by Administration.³⁵ Subcontractors could be adversely affected if the prime contract was voided, even if the subcontractor was in compliance.³⁶

31. As an example of the potential for far-reaching adverse impact, Administration related its experience with the contractor for the state payroll system. That contractor had allowed its affirmative action certificate to lapse. Upon discovery of the lapse, Administration acted to ensure that the contractor regained certification before any adverse action was taken against its contract. Had the same situation occurred under

³² Department Comment, at 3.

³³ Testimony of Wendy Adler Robinson.

³⁴ Testimony of Paul Stembler.

³⁵ Administration Comment, at 3.

³⁶ *Id.*

the proposed rule (as originally proposed or with any of the new language suggested by the Department) the lapse in certification would have required the termination of the contract. Such a termination could potentially disrupt the calculation and distribution of paychecks for every state employee. This single example refutes the Department's assertions regarding the cost potential for state agencies and demonstrates that the rules do not provide flexibility for either the Department or any regulated party in meeting the Department's goals.

32. Administration also objected to the manner in which the Department rendered the proposed rule from the statutory authority granted by Minn. Stat. § 363.073, subd. 3. The language of the statute is "the commissioner may . . ." As Administration points out, the rule does not incorporate discretion into the exercise of the Commissioner's authority. Rather, the rule requires voiding the contract if the contractor or the contracting agency cannot demonstrate that a valid certificate was already obtained. Administration also maintains that the Department's rule conflicts with Administration's authority over contracts.

33. Administration proposed language to correct the defects it perceived in the rule. That language would require the concurrence of the Commissioner of Administration and consideration of all relevant factors (including the circumstances of the lack of the certificate, cost or potential cost to the State, and other consequences) prior to voiding the contract.³⁷

34. The canons of statutory construction indicate that the Department's interpretation of its authority over contracts is correct. While Administration has the general authority to control contracting³⁸, the Legislature granted specific authority to void contracts on specific grounds to the Department. Specific language controls general language, in the absence of legislative intent to the contrary.³⁹ With the involvement of the Legislative Auditor in the initiation of this proceeding, an inference may fairly be drawn that the legislative intent remains for the Department to exercise this power. The proposal to require the concurrence of the Commissioner of Administration in voiding contracts is outside the statutory grant of power to either state agency.

35. The lack of due process protections was described in the Legislative Auditor's Report as a reason for not voiding contracts.⁴⁰ The Report predicted that "The termination of a contract without due process would probably be protested by the affected vendor and overturned in court."⁴¹ The Department's response to that warning was to propose a rule that results in a paper review without opportunity to appear before a decision maker, call witnesses, or be fully apprised of the evidence against the contractor. In contrast, the Department has a detailed process, in Chapter 5000, setting out the process to be provided when revoking or taking lesser discipline against a

³⁷ Administration Comment, Proposed Rule Language Attachment.

³⁸ Minn. Stat. § 16C.03, subs. 4 and 5.

³⁹ Minn. Stat. § 645.26, subd. 1.

⁴⁰ Department Comment, Legislative Auditor's Report, at 32.

⁴¹ *Id.*

contractor's certification.⁴² The Department has made no showing that the contractors whose contracts are being voided for problems with their certification are entitled to less

⁴² Minn. Rule 5000.3570, Subp. 5. Notification of deficiencies. If the department determines that a contractor has failed to adhere to its affirmative action plan or the equal opportunity clauses contained in its state contracts, that the contractor has failed to exercise good faith efforts to implement the plan or the equal opportunity clauses, or has failed to comply with Minnesota Statutes, section 363.073 and parts 5000.3400 to 5000.3600, it shall notify the contractor by first-class mail identifying the nature of the deficiency and stating specifically the corrective measures necessary for eliminating the deficiency. The contractor shall have 15 days to reply to the notice of deficiency.

Where deficiencies are found to exist, the department shall attempt to secure compliance through conciliation and persuasion unless it determines that such efforts would be unsuccessful or unproductive. Before the contractor can be found to be in compliance, the contractor shall make a specific commitment in writing to correct the deficiencies set forth in the notice. The commitment must include the precise action to be taken and dates for completion. The time period allotted must be no longer than the minimum period necessary to effect such changes. Upon approval of the commitment by the commissioner, the contractor may be considered in compliance, on condition that the commitment is faithfully kept. The contractor shall be notified that making such a commitment does not preclude future determinations of noncompliance based on a finding that the commitment is not sufficient to achieve compliance.

Subp. 6. Notification of sanctions and hearing. Where a contractor fails to respond to a notice of deficiency within 15 days or the department determines that attempts to correct the deficiencies through conciliation and persuasion have been or would be unsuccessful or unproductive, the department may impose one or more of the sanctions set forth in Minnesota Statutes, section 363.073, subdivision 2. The department shall serve the contractor with notice of the sanctions by mailing a copy thereof to the contractor by first-class mail. The sanctions shall become effective 20 days after the notice is served.

A contractor may obtain a hearing regarding the department's determination of deficiencies or any sanctions which it has imposed by filing a written request for a hearing with the department within 20 days after service of the notice of sanction. The hearing shall be a contested case proceeding pursuant to the Administrative Procedure Act, Minnesota Statutes, sections 14.57 to 14.69.

- A. If a timely request for a hearing is filed, the commissioner shall issue and serve upon the contractor by certified mail a notice and order directing the contractor to appear at the hearing, at a time and place specified in the notice, and show cause why the sanctions determined by the department shall not be imposed.
- B. The filing of a timely request for a hearing shall stay the enforcement of the sanctions in question until a final decision is issued or the request for a hearing is withdrawn or dismissed with prejudice. The failure of a contractor to appear at the hearing may be grounds for dismissal with prejudice.
- C. The administrative law judge shall make and file with the commissioner a report stating the findings of fact, conclusions, and recommendations. The commissioner shall serve each party with a copy of the report by mail. Within 20 days after service of the report, any party including the department, may file with the commissioner and serve exceptions to the report and reasons in support of their exceptions.
- D. Exceptions with respect to statements of fact or matters of law must be specific and must be stated and numbered separately. When exception is taken to a statement of fact, a corrected statement must be incorporated. If exception is taken to conclusions in the report, the points relied upon to support the exception must be stated and numbered separately. A reply to exceptions is not required,

procedural due process than contractors whose validly obtained certification is being suspended or revoked. The absence of process in the proposed rule for voiding contracts raises the real possibility of agency error. Since the potential for error is high, the private interests at stake are serious, and the governmental interest in this particular process is primarily for the Department's convenience, the rule as proposed constitutes a violation of due process.⁴³

36. The proposed rule contains both too much discretion and too little discretion regarding the voiding of contracts. The language of the rule allows the Commissioner to void a contract based on "credible evidence." There is no suggestion in the rule

but may be filed by any party including the department within ten days after service of the exceptions to which reply is made along with proof of service thereof on all parties of record.

E. Exceptions and replies shall contain written arguments in support of the position taken by the party filing such exceptions or reply. An opportunity for oral argument before the commissioner or the commissioner's designee shall be permitted if requested by a party at the time that they file their exceptions or reply, unless the commissioner in the exercise of discretion, determines that oral argument is unnecessary because the facts and legal arguments could be adequately presented by the briefs and records and the decisional process would not be significantly aided by oral argument. Oral arguments shall be limited to a discussion of legal questions and a restatement of facts in evidence. No new evidence shall be received at oral arguments.

F. Within 20 days from the date of the mailing by the commissioner of a final decision or order, any party including the department, may petition for a rehearing, or for an amendment or vacation of the findings of fact, decision or order, or for reconsideration or reargument. If the petition is for a rehearing, vacation, reconsideration, or reargument, the grounds relied upon shall be specifically set forth and the claimed errors clearly stated. If the petition is for an amendment of the findings of fact, decision, or order, it shall contain the desired proposed amendments, and the reasons for it shall be clearly stated. The petition shall be served upon all parties to the proceeding. An adverse party shall have ten days from the date of the service of the petition to answer and no reply will be permitted. The commissioner may grant or deny the petition without a hearing, or in the commissioner's discretion set a hearing thereon. Pending the decision of the commissioner on the petition, the commissioner may vacate and set aside the decision or order. No petition will extend the time of appeal from the decision or order.

G. A second petition for rehearing, amendment, or vacation of any finding of fact, decision, or order, reconsideration or reargument by the same party or parties and upon the same grounds as a former petition which has been considered and denied, will not be entertained.

Within ten days after the date that sanctions become effective, the department shall notify the state agency or state agencies which hold contracts with the affected contractor about the sanctions and make recommendations regarding whether such contracts shall be terminated pursuant to Minnesota Statutes, section 363.073, subdivision 3.

⁴³ The standards for what process is due in a given situation are set out in *Good Neighbor Care Centers, Inc. v. Minnesota Dept. of Human Services*, 428 N.W.2d 397, 405 (Minn.App. 1988) as follows:

The sufficiency of a given procedure is to be tested against (1) the private interest at stake; (2) the risk of erroneous deprivation of that interest and the extent to which additional procedural safeguards would reduce that risk; and (3) the governmental interest, including administrative convenience. *Mathews v. Eldridge*, 424 U.S. 319, 335, 96 S.Ct. 893, 903, 47 L.Ed.2d 18 (1976).

language or the record of the rulemaking proceeding as to how the credibility of the information relied upon is to be assessed by the Commissioner. This lack of a standard upon which evidence will be assessed is a violation of due process. To cure this defect, the rule must reflect the standard of proof to be applied when concluding that a contract is to be voided.⁴⁴

37. The lack of discretion in the same rule provision is demonstrated once the Commissioner makes a determination that a contract was awarded to a contractor lacking valid certificate. Voiding the contract is the only outcome allowed under the rule. The proposed rule eliminates the discretion that was expressly included in Minn. Stat. § 363.073, subd. 3. The saving clause offered as a possible alternative provides only limited protection (arising in extraordinary situations) for contractors and agencies.

38. The fundamental basis of an agency's authority to adopt rules is the power granted to the agency by statute. As the Minnesota Supreme Court has stated:

It is a fundamental tenet of administrative law that the powers of an administrative agency can only be exercised in the manner prescribed by its legislative authorization. **Souden v. Hopkins Motor Sales, Inc.**, 289 Minn. 138, 182 N.W.2d 668 (1971). Neither agencies nor courts may under the guise of statutory interpretation enlarge the agency's powers beyond that which was contemplated by the legislative body. *Cf.* **Flemming v. Florida Citrus Exchange**, 358 U.S. 153, 79 S.Ct. 160, 3 L.Ed.2d 188 (1958).⁴⁵

39. There is no indication that the Legislature desires to have every contract with an uncertified contractor voided. Using the word "may" vests discretion with the Commissioner and implies that the Legislature wanted the Commissioner to exercise discretion. With the change from "may" in the statute to "must" in the rule, without the exercise of standards or judgment on the part of the Commissioner, the Department has proposed a rule inconsistent with the statute authorizing that rule. This is a defect in the proposed rule. To cure this defect, rule language must be crafted to ensure that the rule is not more restrictive than the statute that authorizes the rule.

40. In addition to statutory authority, a rule must be demonstrated to be needed and reasonable.⁴⁶ The commentators objected to proposed rule part 5000.3415 as being unreasonable due to the harsh impact of the rule when Commissioner concludes that a contractor lacks a valid certificate. The question of whether a rule's impact is too harsh was addressed in **Keefe v. Cargill, Inc.**, 393 N.W.2d 425, 427 (Minn. App. 1986) where the Minnesota Court of Appeals stated:

⁴⁴ The usual standard in administrative matters is by the preponderance of the evidence and that is the standard that would be used under contested case proceedings initiated under Minn. Rule 5000.3570, subp. 6.

⁴⁵ **Waller v. Powers Dept. Store**, 343 N.W.2d 655, 657 (Minn. 1984). This language from **Waller** was quoted with approval to govern state agencies by **Handle With Care, Inc. v. Department of Human Services**, 393 N.W.2d 421, 424 (Minn.App. 1986).

⁴⁶ Minn. Stat. § 14.14, subd. 2.

Dismissal of proceedings is an extremely harsh sanction, particularly where, as here, dismissal follows a minor infraction of a procedural rule. In ***Firoved v. General Motors Corp.***, 277 Minn. 278, 152 N.W.2d 364 (1967) the court stated:

An order of dismissal on procedural grounds runs counter to the primary objective of the law to dispose of cases on the merits. Since a dismissal with prejudice operates as an adjudication on the merits, it is the most punitive sanction which can be imposed for noncompliance with the rules or order of the court or for failure to prosecute. It should therefore be granted only under exceptional circumstances.

Id. at 283, 152 N.W.2d at 368 (footnote omitted). While ***Firoved*** pertained to actions in courts of law, we find its reasoning equally persuasive in the administrative setting.

41. Under proposed rule part 5000.3415, the failure of both an agency and the contractor to file a response results in the voiding of the contract. This result is indistinguishable from that in ***Keefe v. Cargill, Inc.***, *supra*.

42. The Legislative Auditor's Report described the current process used by the Department as follows:

Citing scarcity of resources, compliance unit staff told us that **the department is unable to review the contents of each compliance report**. More than 2,400 certified businesses submit compliance reports every six months, and only three professional staff are available to review the reports. According to the compliance unit supervisor, the department has had to focus its attention on issuing certificates and reviewing affirmative action plans in order to keep up with the state contracting process, which depends on timely department action. **Therefore the compliance staff merely records whether or not a contractor has submitted a report and begins procedures to suspend a contractor only if the required report is not received**. In practice, the department does not evaluate whether a contractor is taking prompt action to correct deficiencies in its employment practices.⁴⁷

43. The Department's proposed rule does nothing more than formalize in rule the practice described in the Legislative Auditor's report. The reasonableness of the Department's proposed process can be assessed by comparison to the process for revoking the certificate of a contractor who has violated its affirmative action plan. The Department's proposed rule would require voiding a contract regardless of the degree of compliance in hiring and employment policies, simply because the employer failed to file

⁴⁷ Department Comment, Legislative Auditor's Report, at 31 (emphasis added).

the plan. Where an employer files a plan (and does not follow it, even intentionally) the employer is entitled to a full notification of deficiencies, conciliation, notice of sanctions, a hearing before an administrative law judge under the Administrative Procedures Act, a stay of enforcement of sanctions pending a final decision of the appeal, written findings of fact, conclusions and recommendation regarding sanctions, exceptions to the recommendation and the opportunity to request oral argument before the Commissioner, a final decision from the Commissioner, and an opportunity for rehearing before the Commissioner.⁴⁸ Once this process is concluded and the certificate is either suspended or revoked, the Department **makes recommendations** to the contracting agency regarding whether such contracts should be terminated.⁴⁹

44. Providing the full panoply of due process protections for revocations and suspensions of valid certificates is inconsistent with providing no such protections for contractors holding contracts while lacking certificates. The summary voiding of contracts for failing to file a plan bears no relationship to the goal of conforming employment practices to affirmative action principles. The need for due process is as compelling for those lacking valid certificates as for those who failed to follow the plans filed with the Department. The voiding of a contract without the protections already adopted in rule for revocations and suspensions is unreasonable. This provision is a defect in the proposed rule.

45. To cure the due process, statutory authority, and reasonableness defects in the proposed rule, the Department must modify the rule language to provide for due process, incorporate the discretion included in Minn. Stat. § 363.073, subd. 3, and reasonably relate the action taken by the Department to the goal sought to be achieved. The modification must include standards by which that discretion will be exercised. SMARCA suggested that contracts not be voided while an application is pending. This allows a contractor, upon becoming aware that its certificate has lapsed, to prevent the voiding of its contract by filing its plan. Merely allowing a contractor to file its plan to avoid a penalty does not advance the Department's goal of compliance with the requirement that a contractor obtain certification prior to being awarded a contract.⁵⁰ The Department may wish to consider lesser sanction such as suspending payments during that period.

46. Administration and SMARCA asserted that havoc that can be wrought on agencies by voiding contracts in instances where there are many subcontractors. In its post-hearing comment, the Department maintained that its posting of lists regarding the status of contractors, the training afforded to persons involved in contracting with the State, and mailing notices to contractors about the need for renewal of their plan certification all act to prevent problems. In reviewing the contractors' status list, a

⁴⁸ Minn. Rule 5000.3570, subps. 5 and 6.

⁴⁹ Minn. Rule 5000.3570, subp. 6 (emphasis added).

⁵⁰ As Administration pointed out, the use of the Minnesota Accounting and Procurement System (MAPS) reduces potential for this event happening in the future because procurement is not approved unless the certificate of compliance is shown as valid on the system. But the MAPS system is only as good as its data, and errors as to the validity of a certificate of compliance can be made by humans and computers alike.

number of contractors are listed as "Expired" with AAP (Affirmative Action Plan) end dates throughout the years 1999 and 2000.⁵¹ This inconsistency arises because the listing of "Expired" may be due to the employer being involved in the recertification process, no longer doing business with the State, or no longer requiring certification in order to conduct business with the State.⁵² The wide range of possibilities for the status of "Expired" in the Department's own listing of contractors is evidence that voiding contracts summarily creates an unreasonable risk of erroneous deprivation of contract rights and is unreasonable.

47. Other circumstances may exist, such as completion deadlines or matters of great public importance, that would significantly weigh against voiding a contract already entered into between a contractor and a state agency. Administration suggested that such circumstances be considered when deciding whether a contract should be voided.⁵³ The Department may, consistent with Minn. Stat. § 363.073, subd. 3, include a standard of public harm to be assessed when the Commissioner determines whether to void a contract. Such a standard does not remove the obligation of a contractor to comply with the requirement to obtain a valid certificate, but does allow the Commissioner to avoid results that are disproportionately harmful to the public interest. The adoption of such a standard is not a limiting of the Commissioner's authority, rather it is further assurance that due process is afforded to each contractor who is subject to the penalty of having a contract voided.

48. Including a public interest standard would address circumstances raised through the rulemaking proceeding, and is a logical outgrowth of those comments. Persons who would be likely affected by the rule change would benefit from the exercise of discretion to not void an existing contract. Adopting such a standard as a basis for declining to void a contract would not constitute a substantial change.

49. The Department must modify the language of the rule part to cure the defects found in the foregoing Findings. The Department may simply reference Minn. Rule 5000.3570, subs. 6 and 7, and specify differences between the process to be followed in voiding cases and the process in revocation and suspension cases. In the alternative, the Administrative Law Judge suggests the following language as one possible way of curing those defects:

If the commissioner has a reason to believe that a state agency has awarded a contract in excess of \$100,000 to a contractor who employs more than 40 full-time employees in Minnesota but did not hold a valid certificate of compliance at the time the contract was awarded, the commissioner must notify the agency and the contractor of this potential violation, and of the commissioner's information and reason for believing that a violation has occurred, and request a written response from each within ten days. ~~The~~ Each response should explain why the state agency

⁵¹ Department Comment, Contractor Status Report.

⁵² Department Comment, at 2.

⁵³ Administration Comment, Proposed Rule Language.

or contractor believes it is the contract was in compliance with Minnesota Statutes, section 363.073, or set forth reasons as to why the contract should not be voided if not executed in compliance with Minnesota Statutes, section 363.073, and include an application for a certificate of compliance. The contracting agency's response must also include a copy of the contract.

If, after receipt consideration of both responses and other evidence available to the commissioner and previously shown to the contracting state agency and contractor, the commissioner determines by a preponderance of the evidence that the contract was legally awarded, the commissioner must notify the contracting state agency and the contractor within ten days that the contract will not be voided.

~~If only the contracting state agency or only the contractor submits a response, and the commissioner is able to determine that the contract was legally awarded from the response, the contracting state agency and the contractor will be notified that the contract will not be voided.~~

~~If both the contracting state agency and the contractor fail to respond, or if a written response or other credible information indicate that the contract was awarded illegally, the commissioner must notify the contracting state agency and the contractor by certified mail that the contract is void, effective ten days after receipt of the letter by the contracting state agency or contractor, whichever is later.~~

If the commissioner determines that the preponderance of the evidence shows the contract was not legally awarded, the commissioner shall consider whether the benefit of voiding the contract outweighs the potential for adverse impact to the public interest. The commissioner shall void the contract if the potential for adverse impact is outweighed by the benefit to be obtained from voiding the contract and no other means are reasonably available to obtain the contractor's ongoing compliance with the requirements for plan certification. The commissioner must notify the contracting state agency and the contractor within ten days of the commissioner's decision.

The commissioner's decision voiding any contract must be served upon the contracting state agency and contractor by certified mail. The commissioner's decision voiding a contract must be simultaneously mailed by regular mail to the commissioners of administration and finance, to the assistant attorney general representing the contracting state agency, and to any other parties to the contract. The contract is void upon the passage of ten days from the receipt of the commissioner's decision by the contracting state agency or the contractor, whichever is later.

A contractor may apply for a certificate of compliance at any time.

50. The foregoing language is offered as a suggestion to cure the due process, statutory authority, and reasonableness defects in the rule as finally proposed.⁵⁴ The suggested language is only that, suggested. The Department is free to adopt language that differs from the language above, so long as the language cures the defects in the rule, is based upon facts in the record, and does not constitute substantially different language from that published in the *State Register*.

Proposed Rule 5000.3520 - Commissioner Sets Goals and Timetables.

51. Proposed rule 5000.3520 indicates that the Commissioner "from time to time, shall issue goals and timetables" The issuance of such goals and timetables are needed and reasonable for achieving the purposes of the affirmative action rules. But the regulated contractors should be informed of where the most current goals and timetables can be obtained. No commentator objected to the rule language and the language itself does not rise the level of a defect in the proposed rule. If the Department chooses to modify the rule part to specify where the most recent goals and timetables can be obtained, the new language would not be substantially different from the rule as published in the *State Register*.

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 substantially fulfilled the procedural requirements of Minn. Stat. §§ 14.14, subds. 1, 1a and 14.14, subd. 2, and all other procedural requirements of law or rule so as to allow it to adopt the proposed rules except as noted in Findings 14 and 17.
3. 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) except as noted at Findings 35 - 39.
4. The Department has demonstrated the need for and reasonableness of the proposed rules by an affirmative presentation of facts in the record within the meaning of Minn. Stat. §§ 14.14, subd. 2 and 14.50 (iii), except as noted at Findings 40-46.

⁵⁴ The Administrative Law Judge cannot predict whether the language suggested is sufficient to insulate the Department from a court challenge regarding the adequacy of the process adopted to govern voiding contracts for the lack of due process. The option of referencing Minn. Rule 5000.3570 provides far greater confidence in the adequacy of the procedural protections afforded to contractors.

5. The additions and amendments to the proposed rules which were suggested by the Department 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. § 14.15, subd. 3, and Minn. Rule 1400.1000, subp. 1 and 1400.1100.

6. The Administrative Law Judge has suggested action to correct the defects cited in Conclusions 3 and 4 as noted at Findings 47-50. Such corrective action will also cure the procedural defects cited in Conclusion 2 and render them harmless error under Minn. Stat. § 14.15, subd.5.

7. Due to Conclusions 3 and 4, this Report has been submitted to the Assistant Chief Administrative Law Judge for his approval pursuant to Minn. Stat. § 14.15, subd. 3.

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

9. A Finding or Conclusion of need and reasonableness in regard to any particular rule subsection does not preclude and should not discourage the Department from further modification of the proposed rules based upon an examination of the public comments, provided that no substantial change is made from the proposed rules as originally published, and provided that the rule finally adopted is based upon facts appearing in the 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 otherwise noted above.

Dated this 25th day of February, 1999.

STEVE M. MIHALCHICK
Administrative Law Judge

Reported: Tape Recorded; No Transcript.