

STATE OF MINNESOTA
OFFICE OF ADMINISTRATIVE HEARINGS
FOR THE MINNESOTA DEPARTMENT OF HUMAN RIGHTS

In the Matter of the Proposed Rules
THE
Relating to Discrimination Complainant.
JUDGE

REPORT OF
ADMINISTRATIVE LAW

The above-entitled matter came on for hearing before Administrative Law Judge Peter C. Erickson at 9:30 a.m. on Thursday, July 17, 1986, in the Auditorium of the Hubert H. Humphrey Institute on the University of Minnesota Campus in Minneapolis, Minnesota,

This report is a part of a rule hearing proceeding held pursuant to Minn. Stat. §§ 14.131 - 14.20, to determine whether the Agency has fulfilled all relevant, substantive and procedural requirements of law, whether the proposed rules are needed and reasonable, and whether or not the rules, if modified, are substantially different than those originally proposed.

Carl Warren, Special Assistant Attorney General, 1100 Bremer Tower, 7th Place and Minnesota Street, St. Paul, Minnesota 55101, appeared on behalf of the Minnesota Department of Human Rights. Appearing and testifying in support of the proposed rules was Linda C. Johnson, Commissioner of the Department of Human Rights and Walter Barwick, Deputy Commissioner. The hearing continued until all interested groups or persons had had an opportunity to testify concerning the adoption of the proposed rules.

The Commissioner of the Department of Human Rights must wait at least five working days before taking any final action on the rules; during that period, this Report must be made available to all interested persons upon request,

Pursuant to the provisions of Minn. Stat. § 14.15, subd. 3 and 4, this Report has been submitted to the Chief Administrative Law Judge for his approval. If the Chief Administrative Law Judge approves the adverse findings of this Report, he will advise the Commissioner of actions which will correct the defects and the Commissioner may not adopt the rule until the Chief Administrative Law Judge determines that the defects have been corrected. However, in those instances where the Chief Administrative Law Judge identifies defects which relate to the issues of need or reasonableness, the Commissioner may either adopt the Chief Administrative Law Judge's suggested actions to cure the defects or, in the alternative, if the Commissioner does not elect to adopt the suggested actions, she may submit the proposed rule to the Legislative Commission to Review Administrative Rules for the Commission's advice and comment.

If the Commissioner elects to adopt the suggested actions of the Chief Administrative Law Judge and makes no other changes and the Chief Administrative Law Judge determines that the defects have been corrected, then

the Commissioner may proceed to adopt the rule and submitnit to the Revisor of Statutes for a review 6f the f6fil If the Commission Makes changes in the rule other than those suggested by the Administrative Law Judge and the Chief Administrative Law Judge, then she 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 Commissioner files the rule with the Secretary of State, she shall give notice oh 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 May 27, 1986, the Department filed the following documents with the Chief Administrative Law Judge:

- (a) A copy of the proposed rules certified by the Revisor of Statutes.
- (b) The Order for Hearing.
- (c) The Notice of Hearing proposed to be issued.
- (d) A Statement of the number of persons expected to attend the hearing and estimated length of the Agency's presentation.
- (e) The Statement of Need and Reasonableness.
- (f) A Statement of Additional Notice.

2. On June 9, 1986, a Notice of Hearing and a copy of the proposed rules were published at 10 State Register pages 2471-2479.

3. On May 27, 1986, 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.

4. On June 6, 1986, the Department filed the following documents with the Administrative Law Judge:

- (a) The Notice of Hearing as mailed.
- (b) The Agency's certification that its mailing list was accurate and complete.
- (c) The Affidavit of Mailing the Notice to all persons on

- the Agency's list.
- (d) The names of Department personnel who will represent the Agency at the hearing together with the names of any other witnesses solicited by the Agency to appear on its behalf.
 - (e) A copy of the State Register containing the proposed rules.

The documents were available for inspection at the Office of Administrative Hearings from the date of filing to the date of the hearing.

5. The period for submission of written comment and statements remained open through July 24, 1986. The hearing record closed on July 29, 1986, at the end of the third business day following the close of the comment period.,

Statutory Authority

6. Statutory authority to "adopt suitable rules and regulations for effectuating the purposes of this chapter" is found at Minn. Stat. § 363.05, subd. 1(8) (1984)..

Small Business Considerations

7. Pursuant to Minn. Stat. § 14.115, the Department's Statement of Need and Reasonableness sets forth the methods it considered for reducing the impact of the proposed rules on small business.

Modifications Made to the Proposed Rules Prior to and During the Hearing

8. Prior to the public hearing on the proposed rules, the Department made the following modifications which were distributed at the commencement of the hearing:'

Certain errors noted in the proposed rules are hereby corrected and a statement of the reason for the correction follows each notation.

Page 6, line 5. The commissioner P-p-t- to shall not process: Reason: shall not, clarifies by stating more directly that resources shall not be expended inappropriately.

Page 6, line 7. B. a charge which the commissioner 4e??*4o, determines Reason: determines is consistent with the statute at 363.14, subd. 1(b)(1).

Page 6, line 12. The commissioner at* shall dismiss a charge the commissioner Reason: shall is consistent with the statute at 363.06, subd. 4(1).

Page 6, line 13. 4*??e*et determines is: Reason: determines is consistent with the statute at 363.06, subd. 4(1).

Page 7, line 28. request to the charging party, the commissioner a4y.shall process the Reason: shall indicates that timely and appropriate disposition will be made.

Page 9, line 24. discriminatory practice, the commissioner"*41 shall attempt to Reason: shall is consistent with the statute at 363.06, subd. 4(3).

Page 9, line 26. act and parts 5000.0500 - 5000.0800- , unless the commissioner determines that attempts to conciliate would be unproductive or unsuccessful. Reason: this is consistent with the statute at 363.06, subd. 4(3).

'This "errata" sheet is keyed to the revisor's copy of the proposed rules which was used at the hearing.

Page 12, line_33 notice of the determination-a44 which may include a Reason this is consistent with the statute at 363.06, subd. 4.

Page 12, line 34: participate in a conciliation conference, _as provided in Rule 5000.0580, subp. 2, for Reason: this is consistent with the statute at 363.06, subd. 4.

Page 13, line 9; commissioner may shall terminate attempts to conciliate the Reason: clarifies the circumstances under which the commissioner will terminate proceedings in accordance with earlier provisions of the rules.

Page 13, line 10. matter and.may shall issue a complaint in accordance with the Reason: clarifies the circumstances under which the commissioner will terminate proceedings in accordance with earlier provisions of the rules.

Page 13, line 11. act and parts 5000.0050 to 5000.2400 , unless the commissioner determines to dismiss the charge pursuant to 5000.0400, subp. 6, 5000.0520 or 5000.0540. Reason: clarifies the circumstances under which the commissioner will terminate proceedings in accordance with earlier provisions of the rule.

Page 14, line 3. the receipt of the notice to respony, the commissioner.ma4.shall Reason: to indicate that claims of noncompliance are taken seriously.

Page 14, line 6. determined, the commissioner.=4y.shall commence proceedings to enforce. Reason: shall is consistent with statute language at 363.06, subd. 3.'

Page 14, line 7. the agreement--, unless the commissioner determines that to do so would not warrant use of department resources. Reason: to clarify that resources will not be expended inappropriately as expressed in the statement of needs and reasonableness.

Page 14, line 14. Subpart 1. When issued. The commissioner la,.shall Reason: shall is consistent with the statute at 363.06, subd. 4(3).

Page 14, line 19. have been terminated+., or when the commissioner has reason Reason: to continue the sentence at line 21 and following.

'The Judge points out that the statutory citation should be Minn. Stat. 363.091 rather than Minn. Stat. □ 363.06, subd. 3.

Page 14, Itne 21. practice- unless-t commissioner determines that it is appropriate to dismiss the charge pursuant to Rule 5000.0520 or Rule 5000.0540. Reason: to parallel the changes made in Rule 5000.0800; subp. 2 for clarification of that provision.

The modifications above clarify the intent of the proposed rules and eliminate the Department's "unbridled discretion" to act in some situations.

The Judge finds that the proposed modifications have been shown to be both needed and reasonable and none constitute a substantial change from the rules as proposed.

9. During the hearing on this matter the Department corrected a clerical error in proposed rule 5000.0750, subp. 3, by changing a reference to rule 5000.0700, subp. 4 to rule 5000.0700, subp. 9.

Nature of the Proposed Rules

10. Minn. Stat. § 363.06 provides for the filing, processing and disposition of "grievances" for any person alleging a violation of the Minnesota Human Rights Act. The Commissioner of the Department of Human Rights was authorized by the 1983 Legislature to adopt temporary rules to implement the Act. These temporary rules were in affect from February 17, 1984 to February 11, 1985. Pursuant to Minn. Stat. § 363.05, subd. 1(8), the Commissioner has proposed these proposed rules for adoption as permanent rules.

The proposed rules are designed to outline the procedure for processing charges of discrimination, or grievances, if the document filed does not meet the requirements for a charge. These rules will provide all parties with information concerning the procedures which will be followed after a charge, or grievance is filed with the Department. The Department intends that these rules will increase the efficiency of investigations and ensure equitable treatment of all parties involved in a charge of unfair discriminatory practices.

Discussion of the Proposed Rules

11. Provisions of the proposed rules, as modified above, which are

adequately supported by the Statement of Need and Reasonableness and received no negative public comment, will not be specifically discussed below. Rather, only provisions about which issues of need, reasonableness, and/or statutory authority have been raised will be addressed. Except as specifically modified below, the Administrative Law Judge finds that the need for and reasonableness of each portion of the proposed rules has been demonstrated.'

'In order for an agency to meet the burden of reasonableness, it must demonstrate by a presentation of facts that the rule is rationally related to the end sought to be achieved. *Broen Memorial Home v. Minnesota Department of Human Services*, 374 N.W.2d 436, 440 (Minn.App. 1985). Those facts may either be adjudicative facts or legislative facts. *Manufactured Housing Institute v. Pettersen*, 347 N.W.2d 238, 244 (Minn. 1984). The agency must show that a reasoned determination has been made. *Manufactured Housing Institute* at 246.

Proposed Rule 5000.0050 subp. 11

1 --This provision defines a "statement of grievance" as "written information received by the Department that may become a charge of discrimination . . . but that lacks one or more of the required elements . . . -The St. Paul Chamber of Commerce and the Minnesota School Boards Association both argue that this "procedural step" is unnecessary, it is not authorized by statute, and will not provide adequate notification to respondents. The Department contends that this provision will protect persons who file incomplete information with the Department concerning an alleged discriminatory practice. Proposed rule 5000.0400 states clearly that in order for a statement of grievance to be actionable, it must result in the filing of a verified charge.

Although Minn. Stat. § 363.06 does not specifically provide that a charging party may file a statement of grievance, the proposed rules make it clear that this is only a preliminary step to filing a verified charge. The statute does not require service of an allegation of a discriminatory practice on the respondent until five days after a "charge" is filed. The Administrative Law Judge finds that this newly created procedural step is within the Commissioner's authority to implement Chapter 363 and does not conflict with any statutory provisions. The reasonableness of this proposed rule has been demonstrated.

13. Proposed rule 5000.0400, subp. 2.

As initially proposed, this provision stated that any statement of grievance filed with the Department within 245 days after the occurrence of a discriminatory practice must be perfected into a verified charge by the 300th day after the occurrence. Additionally, it provided that a statement of grievance received between the 246 and 300 days following the occurrence of the alleged discriminatory practice would be considered filed as of the date of its receipt if it became a verified charge within 30 days of the Department's mailing of a perfected charge to the person filing the charge. This language allowed for a statement of grievance to be filed as a perfected

charge more than 300 days following the occurrence of the discriminatory practice. This clearly conflicts with Minn. Stat. § 363.06, subd. 3 which sets a 300 day statute of limitations. This issue was raised by several persons at the hearing.

The Department subsequently proposed that subpart 2 of proposed rule 5000.0400 be modified as follows:

Subp. 2 Filing. A statement of grievance received by the department between the 260th and 300th days, inclusive, will be considered filed as of the date of its receipt. Within five days of the filing, the commissioner shall:

- A. serve on the respondent a draft of an unverified charge based on the statement of grievance.
- B. provide the charging party with a draft charge to be perfected to conform to part 5000.0400 subp. 1.

A charge which is filed and served As an unverified charge must be perfected into a verified charge within 30 days of the department's mailing of a draft charge to the charging party or it will be dismissed pursuant to part 5000.0540. The commissioner shall provide a copy of the verified charge to the respondent within five days of its receipt by the department.

The above-modification still permits, however, a statement of grievance to be filed as a verified charge after the 300 day statutory time limit. Thus, the Judge finds that the proposed rule, as amended, is in violation of a substantive provision of law. This defect can be corrected by rewriting subpart 2 as follows:

Subp. 2 Filing. A statement of grievance received by the department must be filed as a verified charge pursuant to Minn. Stat. § 363.06, subd. 3

The Department may also add a provision stating that a copy of an unverified charge will be served on the Respondent and/or that the charging party will be provided with a copy of a draft charge within a certain number of days after receipt of the statement of grievance. 4

14. Proposed rule 5000.0400, subp. 2a.

The above-provision provides that if a charge is filed with the Department of Human Rights that alleges a violation of anti-discrimination laws administered by EEOC or HUD, it will automatically be filed by the Department with the EEOC or HUD. The Minnesota School Boards Association argues that there is no statutory authority for this "cross-filing". The Department contends that the proposed rule is consistent with long established practice and obviates the necessity for charging parties to file separately with both state and federal agencies.

Minn. Stat. § 363.05, subd. 1 gives the Commissioner of Human Rights very broad powers to enforce anti-discrimination laws and develop programs and policies to aid in that enforcement. The Judge finds that the "cross-filing" provision falls within those broad powers of enforcement.

15. Rule 5000.0500, subp. 3.

The above-provision allows the Commissioner to order any person to produce documents for inspection and copying if those documents pertain to a charge of discrimination or a complaint. Dakota County argued that this rule may be overly burdensome to potential respondents and that it should be amended to

4The Judge points out that subpart 1b. of rule 5000.0050 states that all charges must be filed within 300 days of an alleged unfair discriminatory practice. There is, however, an exception to this time limit found in Minn. Stat. § 363.06, subd. 3. Subpart 1b. might be more technically correct if it provided that, "a charge must be filed within 300 days of an alleged unfair discriminatory practice unless the limitation period is suspended during the time a potential charging party and respondent are voluntarily engaged in a dispute resolution process pursuant to Minn. Stat. § 363.06, subd. 3."

provide for a response regarding reasons for non production. The Judge points out that this rule is currently in effect; it is not a "new" rule and no amendments were proposed by the Department. Consequently, proposed changes to this provision are outside the scope of this proceeding and cannot be considered at this time. Dakota County's proposal will be forwarded to the Department of Human Rights for consideration in the future.

16. Proposed rule 5000.0510.

The above-proposed rule permits the Commissioner to schedule a fact finding conference, require the attendance of persons at that conference and restrict the attendance of others. The St. Paul Chamber of Commerce argues that the Commissioner's ability to restrict attendance, without any standard for the restriction, is unreasonable. The Chamber contends that this power to restrict may be used arbitrarily, resulting in a skewed fact finding proceeding. The Department contends that the fact finding conference is one of the tools it uses to investigate suspected violations of the Human Rights Act. The Department states that its decision to restrict the attendance of some persons will be exercised only to exclude those whose presence is in appropriate so that the conference will be an effective means of processing the case. A respondent may request the inclusion of persons at a fact finding conference without objection from the Department if those persons have relevant testimony. Additionally, a respondent's opportunity to submit or identify relevant evidence is not foreclosed by the Commissioner's ability to restrict attendance at a fact finding conference.

Because Chapter 363 gives the Commissioner of Human Rights broad authority to investigate and process charges of discrimination, and does not prohibit in any way a respondent's right to submit information to the Department as part of that investigation, the Judge finds that the need for and reasonableness of proposed rule 5000.0510 has been demonstrated.

17. Proposed rule 5000.0540.

This proposed rule provides that the Commissioner of Human Rights "may" dismiss a charge because of the failure to provide required information in several specified circumstances. The authority for this rule is based on Minn. Stat. § 363.06, subd. 1, which states that, "the commissioner may dismiss a charge when the charging party fails to provide required information." The above-rule seeks to implement that authority by setting forth specific circumstances when dismissal will occur. Rather than making dismissal mandatory, the rule provides that the Commissioner may dismiss if the required information is not provided. The purpose of rulemaking, however, is to set specific bounds for the discretionary authority of agency heads.

It has been the long-standing position of the Attorney General's Office - and the Office of Administrative Hearings that use of the word "may" when defining departmental duties or responsibilities can result in "unbridled discretion" which is in violation of Minn. Stat. § 14.02, subd. 4, the definition of "rule". That definition states that rules are adopted to "implement or make specific the law enforced or administered by . . ." the agency. (Emphasis added). In the above-rule, the Department has spelled out the situations in which dismissal could occur if the required information is not provided. However, dismissal is still discretionary with the Commissioner rather than mandatory, or specific, as required by Chapter 14. Consequently;

the Judge finds that the discretionary provisions in the above rule are in conflict with a substantive provision of law:- This defect can be remedied by replacing the word "may" found in subparts 1 and 2 of proposed rule 5000.0540 with the word "shall".

18. Proposed rule 5000.0570

The above-proposed rule provides that charging parties may request that proceedings which have been terminated because the Commissioner has dismissed a charge be reopened. The Department has modified subpart I of the rule to read, "the request must be in writing and must state a substantive reason for reopening." The proposed rule requires that the Commissioner shall promptly notify the Respondent by certified mail of the request to reopen and that the respondent has ten days to respond in writing regarding the reopening. Considerations for deciding whether to reopen are enumerated in the rule. Additionally, the rule provides that if it is determined that the "department clearly erred in closing a proceeding, the commissioner may reopen the proceedings without a request."

The Minnesota School Boards Association, St. Paul Chamber of Commerce, Dakota County and the Association of Metropolitan School Districts all commented in opposition to the proposed rule. Their objections to the rule were: (a) there is no maximum time limit for the reopening of a case, thus, it could occur months or even years after a respondent was informed that the charge had been dismissed; and (b) the factors enumerated which will be used by the Commissioner to determine whether or not to reopen a case are overly broad and permit too much discretion. In response to these concerns, the Department stated that a 60-day time limit for case reopening would be acceptable.

As has been stated previously, the Commissioner of Human Rights has very broad statutory authority to investigate and process cases of alleged discrimination. Based on that broad authority, the Judge finds that the considerations for reopening a case set forth in subpart 3 of proposed rule 5000.0570 have been shown to be reasonable. However, the indefiniteness of the time period when reopening could occur has not been shown to be

reasonable. This defect must be corrected by setting a maximum time for case reopening. Subpart 6 could be added to the rule which would read, "No case shall be reopened pursuant to this rule more than 60 days after notice that the proceedings have been terminated was served by the commissioner." Additionally, use of the word "may" in subpart 4 of the rule permits "unbridled discretion" as discussed above and is a violation of a substantive provision of law. To correct this defect, the rule must be changed by substituting the word shall for may. As amended above, the Judge finds that the need for and reasonableness of proposed rule 5000.0570 has been demonstrated.

19. Proposed rules 5000.0700 and 5000.0750.

These proposed rules provide for the administrative appeal of no probable cause and probable cause determinations by charging parties and respondents, respectively. Dakota County and the Minnesota School Boards Association commented in opposition to the basis for reconsideration contained in each of the rules. They argue that a charging party is entitled to submit new-evidence in an effort to change a no probable cause determination while a

respondent is only able to submit evidence that was not available during the investigation. The two organizations contend that the difference in standards, which appear to favor the charging party, is unreasonable.

In response to these concerns, the Department stated that the deletion of the word "new" from subpart 8 of rule 5000.0700 would be acceptable. However, the criteria for reconsideration for a charging party would then read, "evidence that was not originally considered" and the standard for respondents would read, "evidente that was not available during the investigation." These standards are obviously not the same and would allow a charging party much more latitude to find or produce evidence which was not considered during the investigation. A respondent would have to show that any evidence that it submitted was "not available". The Judge finds that the reasonableness of the differing standards has not been demonstrated by the Department. In order to correct this defect, the Department must use a uniform "evidence" standard for both respondents and charging parties when petitions for reconsideration are submitted. Either of the standards used in the proposed rules would be reasonable.

20. Proposed rule 5000.2250.

This proposed rule requires that respondents who are notified that a charge of discrimination is pending must retain all documents related to the charge that are under its control. The rule further provides that the documents must be retained until the Commissioner notifies the respondent that the charge has been resolved. Several persons commented that due to the unlimited time frame in which a case may be reopened (this provision was discussed above), it is unreasonable to require that respondents retain records indefinitely. Finding 18 above clearly states that the Department must provide for a maximum time limit to reopen cases. The preservation of records rule only requires that documents be retained until the respondent is notified that the charge has been resolved. With the changes noted above, retention of records will not be an "indefinite" proposition. Consequently, the Judge finds that the need for and reasonableness of proposed rule 5000.2250 has been demonstrated.

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

CONCLUSIONS

1. That the Department of Human Rights gave proper notice of the hearing in this matter.

2. That the Department has 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.

3. That the Department has demonstrated its statutory authority to adopt the proposed rules and has fulfilled all other substantive requirements of law or rule within the meaning of Minn. Stat. §§ 14.05, subd. 1, 14.15, subd. 3 and 14.50 (i)(ii), except as noted at Findings 13, 17 and 18.

4. That the Department has documented the need for and reasonableness of its proposed rules with an affirmative presentation of facts in the record within the meaning of Minn. Stat. §§ 14.14, subd. 2 and 14.5b (iii), except-as noted at Findings 18 and 19.

5; That the amendments and additions 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. That the Administrative Law Judge has suggested action to correct the defects cited in Conclusions 3 and 4 as noted at Findings 13, 17, 18 and 19.

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

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

9. That a finding or conclusion of need and reasonableness in regard to any particular rule subsection does not preclude and should not discourage the Department 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 this rule hearing record.

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

RECOMMENDATION

It is hereby recommended that the proposed rules be adopted except where

specifically otherwise noted above.

Dated this day of August, 1986.

PETER C. ERICKSON
Administrative Law Judge

