

**STATE OF MINNESOTA  
OFFICE OF ADMINISTRATIVE HEARINGS  
FOR THE DEPARTMENT OF LABOR AND INDUSTRY**

In the Matter of Proposed Amendments to  
Rules Governing Apprenticeship Wages,  
Minn. R. 5200.0390.

**REPORT OF THE  
ADMINISTRATIVE LAW JUDGE**

Administrative Law Judge Richard C. Luis held a hearing concerning the above rules on February 27, 2006, at 9:30 a.m. in the Minnesota Room, Department of Labor and Industry, 443 Lafayette Road, St. Paul, Minnesota. The hearing continued until everyone present had an opportunity to state his or her views on the proposed rules.

The hearing and this Report are part of a rulemaking process governed by the Minnesota Administrative Procedure Act.<sup>[1]</sup> The legislature has designed the rulemaking process to ensure that state agencies have met all the requirements that Minnesota law specifies for adopting rules. Those requirements include assurances that the proposed rules are necessary and reasonable and that any modifications that the agency made after the proposed rules were initially published do not result in their being substantially different from what the agency originally proposed. The rulemaking process also includes a hearing when a sufficient number of persons request one. The hearing is intended to allow the agency and the Administrative Law Judge reviewing the proposed rules to hear public comment regarding the impact of the proposed rules and what changes might be appropriate.

The agency hearing panel, consisting of Roslyn Wade, Assistant Commissioner of Workplace Services; Jerry Briggs, Director of Labor Standards and Apprenticeship (Director); William Bierman, attorney for the Department; and Julie Leppink and Tricia Matzek, Assistant Attorneys General, were available to provide the public with information about the proposed rules and to answer any questions. Approximately 125 members of the public attended the hearing. Eighty-seven individuals signed the hearing register.

The Department of Labor and Industry (Department, DLI, or Agency) sent some materials to the Administrative Law Judge prior to the hearing. Additional exhibits were received during the hearing. After the hearing ended, the record remained open for 20 days, until March 20, 2006, to allow interested persons and the Agency an opportunity to submit written comments. During this initial comment period, the ALJ received written comments from the Department and 225 public comments. Following the initial comment period, the record remained open for an additional five business days to allow the Agency the opportunity to file a written rebuttal to the comments submitted. The agency and several members of the public filed rebuttal responses. The hearing record closed for all purposes on March 27, 2006.

## NOTICE

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

Pursuant to the provisions of Minn. Stat. § 14.15, subds. 3 and 4, and Minn. R. 1400.2240, subp. 4, this Report has been submitted to the Chief Administrative Law Judge for his review. 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 rules 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 and reasonableness, the Commissioner may either adopt the Chief Administrative Law Judge's suggested actions to cure the defects, or if the Commissioner does not elect to adopt the suggested actions, the statute requires the proposed rules be submitted to the Legislative Coordinating Commission and to the House of Representatives and the Senate policy committees with primary jurisdiction over state governmental operations for advice and comment.

If the Agency chooses to follow the Chief Judge's recommended corrections and makes the suggested changes and/or others in order to cure the defects found, the agency must resubmit the rules for review by the Chief Judge. The Agency may not adopt the rules until the Chief Judge reviews all changes and determines that all defects have been corrected.

If the Agency chooses to submit the rules to the Legislative Coordinating Commission and the legislative committees for review, the agency must wait at least 60 days after its submission before adopting the rules.

After the rules have been adopted, the Office of Administrative Hearings will file the rules with the Secretary of State. The Agency must give notice of the rules' filing to all persons who requested that they be informed.

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

## FINDINGS OF FACT

### Procedural Requirements

1. On April 25, 2005, the Department published a Notice of Request for Comments on planned rule amendments governing apprenticeship wages. The notice indicated that the Department was engaged in rulemaking on this topic and that the Department would seek advice from the Apprenticeship Advisory Council (AAC) on the possible rules.<sup>[2]</sup> The Request for Comments did not contain any specific rule language but sought comment generally about the possibility of using other factors in addition to prevailing wage rates and existing apprenticeship agreements to determine a

journeyman wage rate for work other than construction of public works.<sup>[3]</sup> The Request for Comments was published in the *State Register*.<sup>[4]</sup> The comment period ended on June 16, 2005. In response to the Request for Comments, the Department received 67 comments, 28 were favorable and 39 were against the proposal.<sup>[5]</sup>

2. The Department prepared a preliminary draft of a proposed rule and provided it to the AAC. The preliminary draft was discussed at the AAC's meeting on October 12, 2005. The preliminary rule draft provided that the Department of Employment and Economic Development's (DEED) Occupational Employment Statistics (OES) median wage data would be adopted as the journeyman wage rate.<sup>[6]</sup> The AAC voted 6-2 not to recommend the approval of the rule to the commissioner and requested that an apprenticeship stakeholder meeting be held.<sup>[7]</sup>

3. The Department held a stakeholders meeting on October 26, 2005.<sup>[8]</sup> The meeting was transcribed.<sup>[9]</sup> Nine witnesses testified in favor of the proposed rule and six witnesses testified against it.<sup>[10]</sup> At the conclusion of the public testimony, the AAC reconvened and voted 4-2, with one abstention, recommending that the commissioner not adopt the proposed rule.<sup>[11]</sup>

4. After the October 12, 2005 AAC meeting and the October 26, 2005 stakeholder meeting, the Department received 76 additional written comments of which 43 were in favor of the rule and 33 opposed.<sup>[12]</sup>

5. The Department revised the proposed rule by making DEED's OES median wage data one of several factors to be considered by the director in determining the journeyman wage rate as required by Minn. Stat. § 178.03, subd 8.<sup>[13]</sup>

6. On December 19, 2005, the Agency filed copies of the proposed Dual Notice, proposed rule, and draft SONAR with the Office of Administrative Hearings. The filings complied with Minn. R. 1400.2080, subp. 5. On the same date, the Agency also filed a proposed additional notice plan for its Dual Notice and requested that the plan be approved pursuant to Minn. R. 1400.2060. By letter of December 22, 2005, Administrative Law Judge Steve M. Mihalchick approved the additional notice plan.

7. As required by Minn. Stat. § 14.131, the Department asked the Commissioner of Finance to evaluate the fiscal impacts and benefits of the proposed rules upon local units of government. The Department of Finance concluded on January 4, 2006, that the rules would have no fiscal impact on local units of government.<sup>[14]</sup>

8. On January 13, 2006, the Department mailed the Dual Notice of Hearing to all persons and associations included in the additional notice plan.<sup>[15]</sup> Notice was also mailed to all individuals and associations that had registered their names with the Department for receiving notice of the Department's rulemaking efforts.<sup>[16]</sup> The Dual Notice contained the elements required by Minn. R. 1400.2080, subp. 2. Requests for a hearing had to be received by February 16, 2006. The Dual Notice stated that if the required 25 requests for hearing were received, a hearing would be held February 27,

2006, in St. Paul. The Dual Notice also announced that the hearing would continue until all interested persons had been heard.

9. The Department received over 5,000 requests for a public hearing.<sup>[17]</sup>

10. On February 17, 2006, a Notice of Hearing was mailed to a representative sample of the over 5,000 persons who had requested a hearing.<sup>[18]</sup> The Office of Administrative Hearings approved the notice process.

11. At the hearing on February 27, 2006, the Department filed the following documents as required by Minn. R. 1400.2220:

A. The Department's Request for Comments as published in the *State Register* on April 25, 2005;<sup>[19]</sup>

B. The proposed rules dated December 21, 2005, including the Revisor's approval;<sup>[20]</sup>

C. The Statement of Need and Reasonableness ("SONAR");<sup>[21]</sup>

D. The certification that the Department mailed a copy of the SONAR to the Legislative Reference Library;<sup>[22]</sup>

E. The Dual Notice of Hearing as mailed and published in the *State Register* on January 17, 2006;<sup>[23]</sup>

F. The Certificate of Mailing the Dual Notice of Hearing and Certificate of Mailing List;<sup>[24]</sup>

G. A copy of the transmittal letter sending a copy of the SONAR and other documents to Legislators on January 13, 2006;<sup>[25]</sup>

H. Written comments and requests for hearing received by the Department in response to the Dual Notice;<sup>[26]</sup> and

I. The Certificate of mailing the notice to those persons who requested a hearing, dated February 17, 2006, and the notice of hearing sent to representatives of those who requested a hearing.<sup>[27]</sup>

12. The Administrative Law Judge finds that the Department has met all of the procedural requirements under the applicable statutes and rules.

### **Background and Nature of the Proposed Rules**

13. Apprenticeship is one of the oldest forms of skill training in the United States.<sup>[28]</sup> Apprentices learn by working under the supervision of a mentor or master craft worker, referred to as a journeyman. The education acquired through work experience is supplemented with training through classroom instruction. Apprenticeship

training usually takes three to four years to complete, covers all aspects of the trade or profession, and includes both on-the-job training and at least 144 hours of technical instruction. As apprentices learn the mechanics of the trade, they receive higher pay and perform their work under less supervision.<sup>[29]</sup>

14. Minnesota participates in a federal-state partnership that regulates apprenticeship standards and encourages employers and unions to provide education and training for construction and craft jobs.<sup>[30]</sup> Congress initially encouraged Minnesota to regulate apprenticeship programs in 1937 when Congress passed the National Apprenticeship Act.<sup>[31]</sup> The purpose of the legislation was to formulate and promote labor standards necessary to safeguard the welfare of apprentices, bring together employers and labor to formulate apprenticeship programs, and cooperate with state agencies in formulating and promoting standards of apprenticeship.<sup>[32]</sup> Commonly referred to as the Fitzgerald Act, this legislation directs the United States Secretary of Labor “to cooperate with State agencies engaged in the formulation and promotion of standards of apprenticeship...”<sup>[33]</sup>

15. Federal and state governments share responsibility for administering apprenticeship programs.<sup>[34]</sup> States are encouraged to promote and administer apprenticeship programs. The Act provides that states could use the services of the Office of Apprenticeship, Training Employer and Labor Services (ATELS) (formerly, Bureau of Apprenticeship and Training (BAT)) of the U.S. Department of Labor or states could create their own State Apprenticeship Council (SAC).<sup>[35]</sup> Twenty-seven states, including Minnesota, administer apprenticeship programs.<sup>[36]</sup> The federal government administers apprenticeship in those states without a state-operated program. In order for a state to administer a federally approved apprenticeship program, it must conform to the U.S. Department of Labor’s published standards and apply for federal recognition as an apprenticeship registration agency.<sup>[37]</sup>

16. Minnesota began administration of apprenticeship training programs in 1939. The Department’s apprenticeship program has been federally recognized as the apprenticeship registration agency and its program has been approved by the BAT of the United States Department of Labor as a SAC state.<sup>[38]</sup> States with approved apprenticeship programs are commonly referred to as SAC states. States without approved programs are referred to as BAT states.<sup>[39]</sup>

17. The Minnesota Industrial Commission, a predecessor agency to the Department, appointed a SAC for the purpose of formulation of policy and establishment of standards for the voluntary apprentice program administration.<sup>[40]</sup> The Department’s Division of Labor Standards and Apprenticeship and the Apprenticeship Advisory Council are the successor state entities.<sup>[41]</sup>

18. Once the U.S. Secretary of Labor approves a state program, it operates independently. State Apprenticeship Council states are, under federal regulations, authorized to approve apprenticeship programs for “federal purposes,” register apprentices, and work to encourage inclusion of federal minimum standards in programs under the Fitzgerald Act and its regulations. “Federal purposes” include

determining whether a worker may be paid at an apprentice rate on federal public works.<sup>[42]</sup> The regulations require a progressive schedule of wages based upon the apprentice's hours of experience and completion of supplemental technical instruction. Federal regulations also specify that the entry wage for apprentices shall not be less than the minimum wage, or higher if required by other applicable federal or state law, respective regulations, or collective bargaining agreements.<sup>[43]</sup>

19. The primary purpose of the Minnesota Apprenticeship program is to encourage employers to establish certified apprenticeship programs and oversee the operation of programs to ensure compliance with state, federal, and industry standards.<sup>[44]</sup> The Department consults with and provides technical assistance to employers, unions and others in setting up and registering apprentice training programs, provides oversight and monitoring of existing apprenticeship programs to ensure compliance with applicable law and successful completion of apprenticeships, certifies apprentices on public projects and records graduation certificates for individuals who successfully complete their apprenticeship training program.<sup>[45]</sup>

20. The federal Davis-Bacon Act contains labor standards applicable to contracts covering federally funded construction projects. These standards require workers in training status to be registered apprentices. A major incentive for construction contractors to use apprentices has been that registered apprentices can be paid less than the prevailing wage rate on federally funded construction projects.

21. Minnesota has a prevailing wage law that sets the minimum wages on a trade-by-trade basis that must be paid to workers on public works projects in the state.<sup>[46]</sup> This law is modeled after the Davis-Bacon Act, which sets the minimum wages that must be paid on federal public works projects.<sup>[47]</sup> The Minnesota prevailing wage rule provides that contractors on public works pay all their workers the prescribed minimum wage deemed prevailing at the journey (fully trained) level in the location and for the trade or craft for which the work is performed.<sup>[48]</sup> Like the Davis-Bacon Act, Minnesota rules allow registered apprentices working on state-funded projects to be paid less than the state prevailing wages.<sup>[49]</sup>

22. Certified apprenticeship is a voluntary training program.<sup>[50]</sup> There are no federal or state mandates that employers must participate in apprenticeship programs.<sup>[51]</sup> Employers, or employers together with unions, act as sponsors of all registered programs.<sup>[52]</sup> Both employer-sponsors and apprentices benefit from participation in a registered apprenticeship program. Participating employers have a source of trained workers with experience specific to their particular business. Apprentices benefit from the program by receiving a broad education combining work experience with academic instruction, earning wages while they learn, and receiving regular pay raises as job skills progress.<sup>[53]</sup>

23. There are two types of apprenticeship programs, joint and non-joint programs.<sup>[54]</sup> Non-joint programs are programs sponsored by employers not having a collective bargaining agreement with a union.<sup>[55]</sup> A single employer or a group of employers can sponsor a non-joint apprentice program. The employer agrees to

sponsor the apprentice and the apprentice agrees to work for the sponsor.<sup>[56]</sup> Employers together with a union sponsor joint programs.<sup>[57]</sup> A Joint Apprenticeship and Training Committee, which includes members representing both management and labor, generally administer joint management-labor apprenticeship programs. The committee's role is to oversee apprentice training. Apprentices sponsored by a joint program are placed with employers who have collective bargaining agreements.<sup>[58]</sup>

24. As of February 2006, 99.5% (8,596 out of 8,637) of registered apprentices in Minnesota are associated with joint programs.<sup>[59]</sup> There are 25 non-joint apprentice programs training 41 apprentices in 5 occupations.<sup>[60]</sup> There are 54 joint apprentice programs training 7,026 apprentices in 36 occupations.<sup>[61]</sup>

25. The Minnesota Director of the Division of Labor Standards and Apprenticeship is required by statute to determine the journeyman wage rate.<sup>[62]</sup> The graduated apprentice wage schedule reflects increasing percentages of the established journeyman wage rate.<sup>[63]</sup> When apprentices are enrolled in a registered apprenticeship program, they are required to be paid a percentage of the journeyman prevailing wage rate regardless of whether they are working on public or private work.<sup>[64]</sup>

26. Under the existing Minnesota rule, the journey worker rate must be determined by county and must be the most current state or federal prevailing wage determination or existing apprenticeship agreement for a trade. The existing rule reads:

Journeyman wage rate. The journeyman wage rate for apprenticeship agreements where no bargaining agreement exists shall be determined by counties, for all trades. If there is either a state or federal prevailing wage determination or apprenticeship agreement for a trade, the most current rate of the determination or agreement must be used as the journeyman wage rate.<sup>[65]</sup>

27. The existing rule mandates the adoption of the prevailing wage rate or existing agreement rate on private, non-prevailing wage work.<sup>[66]</sup>

28. Under the existing rule, prevailing wage rates were used to establish journeyman and apprenticeship rates. In 2005, the Department certified 13,175 wage rates for 147 different job classifications in 87 counties and 10 regions.<sup>[67]</sup> Of these 13,175 certified wage rates, 6,591 or 50.03 % were at the union rate. Six thousand five hundred and eighty-four or 49.97% were not at the union rate.<sup>[68]</sup>

29. There are currently 7,967 apprentices registered in construction trades. 7,926 of these apprentices, or 99.5 percent, are union apprentices, and the Director is prohibited from altering their wages by statute.<sup>[69]</sup>

30. Currently, the majority of apprenticeship programs in Minnesota are within the building and construction trades. Apprenticeship programs also exist in manufacturing.<sup>[70]</sup>

31. Minnesota conducts prevailing wage surveys for master job classifications in construction occupations.<sup>[71]</sup> About 40 percent of apprenticeship programs are in occupations for which there is no prevailing wage.<sup>[72]</sup> Because there are no prevailing wage certifications in non-construction occupations, the prevailing wage data does not affect non-construction apprenticeship programs.<sup>[73]</sup>

32. The Department began considering revision of the rule after it received comments from employers. Employers asserted that under the current rule the required wage rate paid to registered apprentices frequently resulted in apprentices being paid a higher rate of pay than journeymen are paid on private work projects thus making it economically unfeasible for merit shop contractors to register apprentices in state approved training programs.<sup>[74]</sup> Employers further argued the existing rule frequently resulted in the adoption of union wage rates and that this is inappropriate since 80 percent of the construction workforce now works for non-union merit shop contractors.<sup>[75]</sup>

33. Responding to these concerns, the Department determined that the rule needed to be modified to allow for an alternative basis for establishing the journey worker rate for non-prevailing wage work.<sup>[76]</sup>

34. The Department initially considered making the DEED's OES median wage rate data the mandatory standard journeyman wage rate for all non-prevailing wage work.<sup>[77]</sup> This approach was presented as a draft rule for discussion at the stakeholder meeting on October 26, 2005. The Department heard testimony that setting the journeywork wage rate at the OES median wage rate would probably deter manufacturers from participating in the registered apprenticeship program because it would take away their ability to set their wages or to negotiate wages with employees.<sup>[78]</sup>

35. The Department concluded that the mandatory use of DEED's OES median wage rate did not make sense, particularly for non-construction apprenticeship programs.<sup>[79]</sup> Unlike construction craft programs, manufacturing apprenticeship programs generally are not affected by prevailing wage rate or collective bargaining agreements.<sup>[80]</sup>

36. The Department also considered proposing a rule amendment that only mirrored the statutory requirements and would not require the Director to consider the OES median wage rate data for the trade in the area. The Department rejected this alternative because it believed this would remove the only statistically valid measure of actual wages paid in various areas of the state.<sup>[81]</sup> The Department observed:

The only limitations on the journey worker wage rate then for programs not connected with a collective bargaining agreement would be the two requirements

in the statute that an apprentice rate cannot be below the minimum wage rate and cannot alter a rate in the collective bargaining agreement. The Department elected not to propose a rule amendment which merely mirrored the statute because considerations of the OES median wage data is a good measure for wages actually paid private construction and in non-construction trades and therefore is a valuable addition to the other factors in the statute.<sup>[82]</sup>

37. The Department's final proposed rule adds OES median wage data as a consideration for the Director in addition to the prevailing wage data and existing agreements factors required by the statute.<sup>[83]</sup> The proposed rule states that the journeyman wage rate be: a) the bargained rate for apprenticeship agreements where a bargaining agreement exists, b) the prevailing wage base rate pursuant to Minn. Stat. §§ 177.41 to 177.44 where a collective bargaining agreement does not exist and the work is construction work on public works projects funded in whole or in part by state funds, or c) as determined by the Director, considering "existing wage rates in the employer's area for the trade including the current OES all-industry median wage rate, the current prevailing wage rates...and existing apprenticeship agreements for the trade in the area."<sup>[84]</sup>

38. The Department's proposed rule broadens the types of wage data considered by the Director of Labor Standards and Apprenticeship in setting apprentice wages.<sup>[85]</sup>

39. The Department wants to increase apprenticeship programs in the manufacturing industry and does not want to do anything that would have a negative impact on expanding apprenticeship in non-construction trades.<sup>[86]</sup> The existing rule provides no guidance to the Director on how to set apprenticeship wages in nonunion, non-construction, i.e. manufacturing, businesses when there is no prevailing wage and generally no bargaining agreement.<sup>[87]</sup> The Department maintains that the proposed rule will not change its practices with respect to non-construction apprenticeship programs.<sup>[88]</sup>

### **Statutory Authority**

40. Minnesota Statutes, section 178.041, subd 1, gives the Department's commissioner program-specific rulemaking authority.<sup>[89]</sup> Minnesota Statutes, section 175.171, gives the commissioner authority to "adopt reasonable and proper rules relative to the exercise of its powers and duties."

41. The Administrative Law Judge finds that the Department has general statutory authority to adopt the proposed rules and rule amendments.

## Rulemaking Legal Standards

42. Under Minnesota law,<sup>[90]</sup> one of the determinations that must be made in a rulemaking proceeding is whether the agency has established the need for and reasonableness of the proposed rules by an affirmative presentation of facts. In support of a rule, an agency may rely on legislative facts, namely general facts concerning questions of law, policy and discretion, or it may simply rely on interpretation of a statute, or stated policy preferences.<sup>[91]</sup> The Department prepared a Statement of Need and Reasonableness (SONAR) in support of its proposed rules.<sup>[92]</sup> At the hearing, the Department relied upon the SONAR as its affirmative presentation of need and reasonableness for the proposed amendments. The SONAR was supplemented by comments made by Agency staff at the public hearing, and by the Agency's written post-hearing comments and reply.

43. The question of whether a rule has been shown to be reasonable focuses on whether it has been shown to have a rational basis, or whether it is arbitrary, based upon the rulemaking record. Minnesota case law has equated an unreasonable rule with an arbitrary rule.<sup>[93]</sup> Arbitrary or unreasonable agency action is action without consideration and in disregard of the facts and circumstances of the case.<sup>[94]</sup> A rule is generally found to be reasonable if it is rationally related to the end sought to be achieved by the governing statute.<sup>[95]</sup> The Minnesota Supreme Court has further defined an agency's burden in adopting rules by requiring it to "explain on what evidence it is relying and how the evidence connects rationally with the agency's choice of action to be taken."<sup>[96]</sup>

44. Reasonable minds might be divided about the wisdom of a certain course of action. An agency is legally entitled to make choices between possible approaches so long as its choice is rational. It is not the role of the Administrative Law Judge to determine which policy alternative presents the "best" approach, since this would invade the policy-making discretion of the agency. The question is, rather, whether the choice made by the agency is one that a rational person could have made.<sup>[97]</sup>

45. In addition to need and reasonableness, the Administrative Law Judge must also assess whether the rule adoption procedure was complied with, whether the rule grants undue discretion, whether an agency has statutory authority to adopt the rule, whether the rule is unconstitutional or otherwise illegal, whether the rule constitutes an undue delegation of authority to another entity, or whether the proposed language is not a rule.<sup>[98]</sup>

46. Minnesota law allows an agency to withdraw a proposed rule, or a portion of a rule, at any time prior to filing it with the Secretary of State,<sup>[99]</sup> "unless the withdrawal of a rule or a portion of the rule makes the remaining rules substantially different."<sup>[100]</sup>

47. The standards to determine whether changes to proposed rules published initially create a substantially different rule are found in Minn. Stat. § 14.05, subd. 2. The statute specifies that a modification does not make a proposed rule substantially

different if “the differences are within the scope of the matter announced . . . in the notice of hearing and are in character with the issues raised in that notice,” the differences “are a logical outgrowth of the contents of the . . . notice of hearing, and the comments submitted in response to the notice,” and the notice of hearing “provided fair warning that the outcome of that rulemaking proceeding could be the rule in question.” In determining whether modifications to initially published proposals are substantially different, the administrative law judge is to consider whether “persons who will be affected by the rule should have understood that the rulemaking proceeding . . . could affect their interests,” whether the “subject matter of the rule or issues determined by the rule are different from the subject matter or issues contained in the . . . notice of hearing,” and whether “the effects of the rule differ from the effects of the proposed rule contained in the . . . notice of hearing.”

### **Additional Notice Requirements**

48. Minn. Stat. § 14.131 requires that an agency include in its SONAR a description of its efforts to provide additional notification to persons or classes of persons who may be affected by the proposed rule or must explain why these efforts were not made. The Department made significant efforts to inform and involve interested and affected parties in this rulemaking. The following individuals and groups received notice of the proposed rule amendments from the Department:

- a. Members of the AAC.
- b. All 198 sponsors of registered apprenticeship programs in Minnesota.
- c. Persons who requested notice of the proposed rules in their response to the Request for Comments.
- d. All persons who attended the October 12, 2005 Advisory Council meeting and the October 26, 2005 stakeholder meeting who signed in with addresses and who were not already on the list of sponsors and interested parties.

49. The Administrative Law Judge finds that the Department fulfilled its additional notice requirement.

### **Regulatory Analysis in the SONAR**

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

**(A) A description of the classes of persons who probably will be affected by the proposed rule, including classes that will bear the costs of the proposed rule and classes that will benefit from the proposed rule.**

The Department lists construction workers and contractors, primarily merit shop, who work primarily on private construction projects as the organizations and types of individuals that will be affected by the rules.<sup>[101]</sup> The list compiled by the Department does not appear to be consistent with the text of the proposed rule which states that it would govern the determination of journeyman wage rates “for all trades.”<sup>[102]</sup> Commentators opposed to the proposed rule note that the Department did not explicitly include a reference to “apprentices” as one of the classes affected by the rule.<sup>[103]</sup> Apprentices are included in the term “construction workers.” The application of the proposed rule to non-construction apprenticeship programs is discussed more fully in the section-by-section review of the proposed rule.

**(B) 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.**

The Department does not anticipate that the rule amendments will have any significant impact on the Department or any other agency.<sup>[104]</sup>

**(C) A determination of whether there are less costly methods or less intrusive methods for achieving the purpose of the proposed rule.**

Registered apprenticeship programs are voluntary. The Department does not charge a fee for registration. The Department does not expect that the proposed rule amendment will have any significant impact on the operation or cost of the apprenticeship program.<sup>[105]</sup>

**(D) 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.**

The Department considered several alternative methods for changing the methods used to determine the journeyman wage rate. These alternatives are discussed more fully in the section-by-section review of the proposed rule.

**(E) The probable costs of complying with the proposed rule, including the portion of the total costs that will be borne by identifiable categories of affected parties, such as separate classes of governmental units, businesses, or individuals.**

The Department does not believe that the amended rules would result in any cost to any affected party.<sup>[106]</sup>

**F) The probable costs or consequences of not adopting the proposed rule, including those costs or consequences borne by identifiable categories of affected parties, such as separate classes of government units, businesses, or individuals.**

A cost and consequence of not adopting the proposed rules is that employers and sponsors who wish to have registered apprenticeship programs but have not because the current importation of the prevailing wage rates makes registered apprenticeship programs economically unfeasible and they would continue to be unable to sponsor such programs.<sup>[107]</sup>

**(G) An assessment of any differences between the proposed rule and existing federal regulations and a specific analysis of the need and reasonableness of each difference.**

There are federal regulations governing apprenticeship programs. These are discussed in the section-by-section analysis of the amended rule. The Department notes that there is a need for differences between the federal regulations and the state rule because there are different considerations added by Minnesota statute.<sup>[108]</sup>

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

***Performance-Based Regulation***

52. Minn. Stat. § 14.131, requires that an agency include in its SONAR a description of how it “considered and implemented the legislative policy supporting performance-based regulatory systems set forth in section 14.002.” Section 14.002 states, in relevant part, that “whenever feasible, state agencies must develop 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.”

53. The Department states that the rules as proposed are performance-based by standards outlined in state and federal regulations.<sup>[109]</sup> The proposed rule would remove the de facto importation of prevailing wage rates onto private construction work as a requirement of having an apprenticeship program. The proposal would add the requirement that the Director consider DEED’s OES median wage data for an employer’s area as one factor to consider in determining the journeyman wage rate. In using that approach, the Department complies with Minn. Stat. § 14.002. The merits of this approach and its rationale are discussed subsequently.

***Consultation with the Commissioner of Finance***

54. Under Minn. Stat. § 14.131, the Agency is also required to “consult with the commissioner of finance to help evaluate the fiscal impact and fiscal benefits of the proposed rule on units of local government.”

55. The Agency consulted with its Department of Finance representative, Keith Bogut, on January 4, 2006. The Agency predicted, and the Department of Finance agreed, that the proposed rules would have no fiscal impact on units of local government.<sup>[110]</sup>

56. The Administrative Law Judge finds that the Agency has met the requirements set forth in Minn. Stat. § 14.131 for assessing the impact of the proposed rules, including consideration and implementation of the legislative policy supporting performance-based regulatory systems.

### **Analysis Under Minn. Stat. § 14.127**

57. Effective July 1, 2005, under Minn. Stat. § 14.127, the Department must “determine if the cost of complying with a proposed rule in the first year after the rule takes effect will exceed \$25,000 for: (1) any one business that has less than 50 full-time employees; or (2) any one statutory or home rule charter city that has less than ten full-time employees.”<sup>[111]</sup> The Agency must make this determination before the close of the hearing record, and the Administrative Law Judge must review the determination and approve or disapprove it.<sup>[112]</sup>

58. The Agency has determined that the cost of complying with the proposed rules in the first year after they take effect will not exceed \$25,000 for any small business or small city.<sup>[113]</sup>

59. The Administrative Law Judge finds that the Agency has met the requirements set forth in Minn. Stat. § 14.127 and approves the Agency’s determination that the proposed rule, in the first year after the rule takes effect, will not create costs exceeding \$25,000 for: (1) any one business that has less than 50 full-time employees; or (2) any one statutory or home rule charter city that has less than ten full-time employees.

60. This Report is limited to discussion of the portions of the proposed rules that received critical comment or otherwise need to be examined, and it will not discuss each comment or rule part. Persons or groups who do not find their particular comments referenced in this Report should know that each and every suggestion, including those made prior to the hearing, has been carefully read and considered. Moreover, because sections of the proposed rules were not opposed and were adequately supported by the SONAR, a detailed discussion of each section of the proposed rules is unnecessary.

### **Comments in Support of this Rulemaking**

61. Proponents of the proposed rule claim that the market does not support the wages required by the Department’s current rule.<sup>[114]</sup> They argue that the existing rule requires paying statutory prevailing wages to apprentices on non-public jobs and that the prevailing wage is frequently higher than the actual wage paid to journeymen.<sup>[115]</sup> Thus, they assert that the current rule functions to prevent merit shop contractors from offering registered apprenticeship training opportunities to their employees.<sup>[116]</sup> Proponents contend that a more accurate measure of wages may result in companies having the resources to hire additional apprentices.<sup>[117]</sup> They contend that the current rules artificially raise wages to apprentices creating a lethargic and mediocre work force.<sup>[118]</sup>

62. Proponents of the proposed rule assert that while the vast majority of apprentices in Minnesota are affiliated with joint union programs, only 29% of construction workers are unionized.<sup>[119]</sup> Proponents maintain that approximately 71% of the construction work force is non-union and that these workers are not receiving registered apprenticeship training.<sup>[120]</sup>

63. Proponents argue that under the current rule, the prevailing wage rate is based upon unreliable voluntary surveys using the mode method.<sup>[121]</sup> This methodology identifies the wage rate that is reported most frequently in each county for each work classification.<sup>[122]</sup> Proponents further assert that the prevailing wage rate is frequently equivalent to the union wage rate.<sup>[123]</sup>

64. Proponents assert that use of DEED OES median wage rate data provides statistically valid wage rates for the trades.<sup>[124]</sup>

65. Proponents maintain that the Department should create a dual wage rate that reflects the prevailing wage rate or collective bargained wage rate where appropriate but also permits a lower, market-based wage rate for private contract work.<sup>[125]</sup> They argue that there is a severe shortage of construction workers, especially in skilled trades.<sup>[126]</sup> Proponents further assert that creation of a dual wage rate, using the DEED OES median wage rate, will result in more non-joint apprenticeship programs in Minnesota and more opportunities for employees working for non-union employers to become registered apprentices.<sup>[127]</sup>

### **Objections to this Rulemaking**

66. Opponents to the proposed rule argue that the creation of a dual rate system for apprentices would cut apprentice wages.<sup>[128]</sup> Opponents contend that cutting apprentice wages would be counter-productive to the Department's goal of improving recruitment and training of apprentices and would adversely affect apprentices currently training for an occupation in the trades.<sup>[129]</sup>

67. Opponents contend that the Department's proposed use of DEED OES wage rate data will result in an impermissible delegation of authority to DEED.<sup>[130]</sup> They argue that the OES median wage rate is not representative of the journeyman wage rate.<sup>[131]</sup> Opponents further contend that the proposed rule would encourage employers to establish offices in the area paying the lowest wages in the state.<sup>[132]</sup>

68. Opponents further assert that the proposed rule improperly abandons the prevailing wage rate required by statute and is therefore improper.<sup>[133]</sup>

69. Opponents also argue that the proposed rule is unduly vague, arbitrary and capricious.<sup>[134]</sup> To the extent opponents had specific objections, those objections are addressed in the section-by-section review, *infra*.

### **Rule-by-Rule Analysis**

Minn. R. 5200.0390, subp. 1 - Apprenticeship unit.

70. The Department proposes to amend Minn. R. 5200.0390, subpart 1 to change the reference from the “Division of Voluntary Apprenticeship” to the “apprenticeship unit.”<sup>[135]</sup> The Department’s states that this reflects a statutory reorganization that combined the Department’s divisions of Labor Standards and Voluntary Apprenticeship into one Division of “Labor Standards and Apprenticeship.”<sup>[136]</sup> No one has objected to this change.

71. The ALJ notes that the phrase “Division of Voluntary Apprenticeship” will continue to appear in many of the rules governing apprenticeship.<sup>[137]</sup> In order to avoid confusion, the ALJ suggests that the Department add a parenthetical reference on line 7 of the proposed amended rule: “... on file with the apprenticeship unit (also referred to as the Division of Voluntary Apprenticeship).” The ALJ finds that if the Department revises this portion of the proposed rule as suggested it would not constitute a substantial change.

Minn. R. 5200.0390, subp. 2 – Summary of proposed changes.

72. The Department’s proposed amendment to subpart 2 consists of eight basic changes:

- a) The proposed amendment was divided into two clauses, clauses A and B. Clause A deals with apprenticeship programs where no bargaining agreement exists. Clause B relates to the journeyman wage rate for all construction work on public works projects.
- b) The change from “county” to “area.”
- c) The adoption of DEED Economic Development Regions as the areas used in making journeyman wage determinations.
- d) The elimination of the mandate to adopt prevailing wage rates or existing agreement rates in apprenticeship agreements where no collective bargaining agreements exist.
- e) The addition of the DEED OES median wage data to be used by the director in making the journeyman wage rate for apprenticeship agreements not part of a collective bargaining agreement.
- f) The deletion of references to the federal prevailing wage rate.
- g) The adoption of the prevailing wage rate as the journeyman wage rate for construction on public works projects.<sup>[138]</sup>
- h) The prevailing wage is the “base” rate without fringe benefits. This is a clarification intended to conform to the statute and existing practice.

Minn. R. 5200.0390, subp. 2 – meaning of “wage rate prevailing”

73. Opponents argue that the proposed rule exceeds the Department's statutory authority because the rule is inconsistent with the statute.<sup>[139]</sup> They contend that the statute's requirement that the Director give "consideration to the existing wage rates prevailing throughout the state" means that the Director must use the prevailing wage rate as that term is defined in the Prevailing Wage Act.<sup>[140]</sup>

74. Proponents of the rule argue that the phrase "existing wage rate prevailing throughout the state" does not mean the "prevailing wage rate" as that term is used in the Prevailing Wage Act.<sup>[141]</sup>

75. The phrase "wage rate prevailing" is not defined in the Apprenticeship Program Act.<sup>[142]</sup> The phrases "wage rate prevailing" and "prevailing wage rates" are used in the Prevailing Wage Act:

Subd. 3. Investigations by Department of Labor and Industry. The Department of Labor and Industry shall conduct investigations and hold public hearings necessary to define classes of laborers and mechanics and to determine the hours of labor and wage rates prevailing in all areas of the state for all classes of labor and mechanics commonly employed in highway construction work, so as to determine prevailing hours of labor, prevailing wage rates, and hourly basic rates of pay.<sup>[143]</sup>

76. The phrase "wage rate prevailing" is not synonymous with the phrase "prevailing wage rate." The legislature used the phrase "wage rate prevailing in all areas of the state" in the Prevailing Wage Act to refer to data that was to be used to determine the "prevailing wage rate." The phrase "wage rate prevailing" is used in a similar manner in the Apprenticeship Program Act.

77. The ALJ concludes that the Apprenticeship Program Act does not obligate the Department to use only the "prevailing wage rate" as that term is defined in the Prevailing Wage Act. The Department's proposal to use factors other than the "prevailing wage rate" does not exceed its statutory authority. The Department's proposal to use other factors to determine the journeyman wage rate is within its appropriate discretion.

Minn. R. 5200.0390, subp. 2 - Delegation.

78. Opponents argue that because the proposed rule uses the DEED OES median wage rate it impermissibly delegates the Department's authority to DEED.<sup>[144]</sup>

79. Under the proposed rule, the Department uses DEED data to determine the journeyman wage rate. The Department is not proposing to delegate any authority to DEED, rather the Director is proposing to use data gathered by DEED in the decision-making process.

80. The ALJ finds that the Department's proposed use of DEED OES data in its determination of the journeyman wage rate is not an improper delegation of its authority. The proposed rule does not delegate decision-making power regarding the apprenticeship program to DEED.

Minn. R. 5200.0390, subp. 2 – Reduction of Apprentice Wages – Dual wage rates.

81. Proponents of the proposed rule argue that creation of a dual wage rate for apprentices working on private work would have the effect of increasing the number of merit shop contractors who would participate in the registered apprenticeship program.<sup>[145]</sup>

82. Opponents of the proposed rule argue that there is no justification for the creation of a dual wage rate for apprentices working on private work.<sup>[146]</sup>

83. The proposed rule will not affect apprenticeship programs that are not engaged in construction of public works projects funded in whole or in part by the state nor does the proposed rule alter the existing wage rates paid to journeymen or apprentices under a collective bargaining agreement.<sup>[147]</sup>

84. Under the statute, the Department has the obligation to determine the journeyman wage rate and the wage rate for apprentices.<sup>[148]</sup> The Department received complaints from some employers that they could not afford to pay the wages required by current Department policy and that the wages requirement was a barrier to employers sponsoring apprentices. Nothing in the statutory language prohibits the Director from establishing dual wage rates.

85. The ALJ finds that the Department has the discretion under the statute to determine wages, including dual wage rates that will result in a different wage rate being paid to apprentices depending upon the program and location.

Minn. R. 5200.0390, subp. 2 – DEED OES median wage data.

86. Opponents to the proposed rule object to the Department's use of the OES median wage rate to determine the journeyman wage rate. They argued that the DEED OES median wage data includes wages paid to everyone in a trade, including beginning apprentices and experienced journey workers. They assert that the median OES wage rate is significantly less than the prevailing wage currently determined for journeymen. Opponents argue that though the DEED OES wage survey may be statistically sound it does not accurately report the wage rates paid to journeymen.<sup>[149]</sup>

Finally, they argue that the occupational classifications used in the OES wage survey are too generic and are significantly different from the classifications used by the Department.

87. Dr. Jordan asserted that the DEED OES median wage rate is not a reliable indicator of the wage rate prevailing for journeymen. She noted that the OES wage data includes all persons employed in a trade, regardless of experience, and uses that data to report the median wage rate.<sup>[150]</sup>

88. Minnesota DEED OES occupation data includes wages of everyone in a given occupation, regardless of experience.<sup>[151]</sup> Minnesota DEED OES data does not provide information on wages paid to journeymen.<sup>[152]</sup> Unlike the Department's prevailing wage survey, which only obtains data for the wages of journeymen, the DEED OES wage data includes data on all people working in a trade regardless of experience.<sup>[153]</sup>

89. In order to demonstrate that the journeyman wage rate is more than the DEED OES median wage rate, Dr. Lisa Jordan, a labor economist, compared the DEED OES median wage rate with the DLI prevailing wage rate data for selected Department occupational classifications used in both Highway and Heavy and Commercial projects.<sup>[154]</sup>

90. The Department acknowledges that comparison of the Department's base rate with the OES wage rate is appropriate because "(t)he definitions of the DLI prevailing wage survey 'base' rate and the OES wage rate are very similar."<sup>[155]</sup>

91. The Department attempted to replicate Dr. Jordan's findings as reported in Table B. The Department reported that it was unable to replicate Dr. Jordan's Table B findings "possibly because it is not clear what is meant by 'mean change in wages rates by occupation.'" Nevertheless, the Department obtained data to compare the Department's prevailing wage rate for the 21 occupations for both Commercial and Highway and Heavy wage rates. The Department compared both the prevailing wage base rate in a county at the end of 2005 to the reported OES wage rate. There are potentially 3,654 data points for comparison (87 counties X 21 occupations X 2 project classifications, Highway and Heavy, and Commercial).

92. The Department analyzed the selected occupations for Commercial projects. There are 1,827 potential data points for comparison of the selected commercial occupations.<sup>[156]</sup> The Department found that in 333 instances, or 18% of the 1,827 of the possible data points, the Department was unable to make the comparison because the data for either the Department's prevailing wage or the OES wage was missing.<sup>[157]</sup> The Department found data to complete 1,494 data points or "cells."<sup>[158]</sup>

93. The Department reported that "(i)n about 19% of the 1,494 cells the OES wage was higher than (the prevailing wage)."<sup>[159]</sup> In about 81% of the cells, the prevailing wage was higher than the OES wage rate. While the Department's study shows a smaller difference between the Department's prevailing wage rate and DEED's OES median wage rate than Dr. Jordan reported, the Department found that the prevailing wage rates were higher than the OES median rate in most instances. The Department has found that in 72% of the comparison cells the prevailing wage rate was more than 5% greater than the OES wage rate.<sup>[160]</sup>

The following table compares the data reported by Dr. Jordan and the data reported by the Department.

	Const. Dr. J.	Const. Dept.	Heavy & Highway Dr. J.	Heavy & Highway Dept
Bricklayers	-10.9	-13.9	2.97	17.40
Carpenters	-16.95	-14.9	-26.33	-26.10
Crane Over 135	-17.76	-17.1	-6.62	-8.90
Derrick-Guy	-15.07	-11.3	-20.54	-20.80
Dual Tractor	-19.58	-13	-21.31	-21.70
Electricians	-16.01	-16.1	-11.64	-7.50
Elevating Grater	-19.58	-13	-21.31	-21.70
Front End Loader up to 1 cu yd	1.93	6	-4.12	-3.30
Front End Loader over 1 cu yard	-22.33	-30.6	-18.53	-18.60
Front End Loader 5 Cubic Yrds	-15.07	-11.3	-20.54	-20.80
Grader or Motor Patrol	-15.07	-11.3	-20.54	-20.80
Ironworkers	-2.46	1.5	-6.78	-4.20
Labors, Common	-19.55	-16.2	-13.24	-12.90
Painters	-25.65	-25.5	-26.86	-26.30
Plumbers	-22.39	-23.3	-25.50	-22.70
Pipe fitters- Steamfitters	-23.1	-21.1	-22.67	-25.00
Scraper up to 32 cu yrds	-22.33	-19.3	-18.53	-18.60
Sheet Metal Workers	-19.61	-18.3	-22.15	-19.10
Tower Crane	-12.7	-10.6	-6.62	-8.90
Tower Crane Crawler Crane	-6.13	-5.4	-9.94	-11.30
Underground & Open Ditch Labor	-21.84	-10.1	-16.16	-14.70
Average decrease	-16.29	-14.04	-16.05	-15.07

94. Dr. Jordan and the Department agree that in most instances that the DEED OES median wage rate is lower than the DLI prevailing wage rate. This by itself is not surprising because the Department intended to create a dual rate system that would result in a lower wage rate.<sup>[161]</sup> Because the DLI prevailing wage survey only gathers wage data for master job classifications, it does not include wages for apprentices and trainees.<sup>[162]</sup> The above table therefore shows the difference between DLI's voluntary survey of wages paid to journeymen only and DEED's OES statistical survey of wages paid to all workers in a trade.

95. The ALJ has already found that the Department has the authority to establish a dual rate system. The statute, however, requires the Director to determine the journeyman wage rate that is used to establish the apprentice wage schedule.<sup>[163]</sup>

The requirement that apprentices have distinct wages from journeymen implies that the wage data used to establish the journeyman wage rate must reliably reflect wage rates paid to journeymen, and not some broader grouping of wages.

96. DEED OES reports a range of wages for each occupation. These include the 10th, 25th, 50th or median, 75th, and 90th percentiles for each reported occupation.<sup>[164]</sup> For example, the DEED OES wage rates for carpenters in the Northwest Area of Minnesota are as follows:<sup>[165]</sup>

47-2031 Carpenters  
Occupational Employment Statistics(OES) Wage Data  
Wages Updated to Fourth Quarter, 2005<sup>[166]</sup>

Geography	Employment	Percentiles				
		10th	25th	Median	75 <sup>th</sup>	90th
EDR 5 – North Central	770	\$11.84/hr	\$13.53/hr	\$15.76/hr	\$18.08/hr	\$21.79/hr

97. There is no evidence in the record regarding the Department's decision to use the median OES wage rate, as opposed to the 75th or 90th percentile, as being a reasonable indicator of the wages paid to journey workers.

98. Dr. Jordan and the Department's witness, Dr. Theresa Van Hoomissen, an economist for the Department, agree that DEED OES wage data does not report the median wage rate related to journeyman wage levels.<sup>[167]</sup>

99. The Department in its SONAR and in its testimony at the public hearing acknowledged the United States Department of Labor's Foreign Labor Certification (FLC) program.<sup>[168]</sup> The FLC program permits the use of OES wage data to determine the prevailing wage paid to foreign workers.<sup>[169]</sup> In revising the FLC program, the United States Department of Labor has recently considered issues similar to those confronting the Department.

100. On December 27, 2004, the United States Department of Labor published new prevailing wage guidelines that became effective on March 28, 2005.<sup>[170]</sup> These regulations modified the FLC prevailing wage determination process to provide that Davis-Bacon prevailing wage determinations were no longer controlling and to permit wage determinations to be made using OES wage data.<sup>[171]</sup>

101. The FLC regulations provide that if a job offered to a foreign worker is not covered by a collective bargaining agreement, the wage component of the OES survey shall be used to determine the prevailing wage for the employer's job offer. Unlike the Department's proposed rule however, the federal FLC regulations specify that the OES wage rate data must be adjusted to reflect the level of experience, education, and supervision required in an occupation. The federal regulations require prevailing wage determinations to be selected from one of the four wage levels for an occupation based on a comparison of the employer's job requirements to the occupational requirements: tasks, knowledge, skills and specific vocational preparation generally required for acceptable performance in that occupation.<sup>[172]</sup> The U.S. Department of Labor's Prevailing Wage Determination Policy Guidance recognizes that occupations that require years of training, such as trades with apprentice program training to become journeymen, should be ranked at the highest of the four OES wage levels.<sup>[173]</sup>

102. Unlike the United States Department of Labor's use of OES wage data, the Department's proposed use of DEED's OES median wage rate does not make any adjustment for the education, training, and experience required to become a journeyman.

103. Dr. Van Hoomissen observed that the DEED OES wage data is based on the occupational classifications as defined in the Standard Occupational Classification Manual (SOC).<sup>[174]</sup> There are significant differences between the Department's labor classifications and the OES job classifications.<sup>[175]</sup> The Department's data lists 147 separate labor classifications while the OES data condenses these job classifications into less than half that number. OES data also eliminates the distinction between highway and heavy and commercial types of construction.<sup>[176]</sup>

104. The Department acknowledges that the SOC classification system differs from the occupational classification system currently used by the Department and that in some instances the SOC classifications define occupations "too broadly" for comparison to the Department's occupational classification system.<sup>[177]</sup>

105. The ALJ finds that the proposed rule, insofar as it seeks to use the OES median wage rate as a factor to determine the wage paid to journeymen, in the absence of evidence demonstrating a relationship between the OES median wage rate and journeyman wages,<sup>[178]</sup> exceeds the Agency's statutory authority. The Director has the responsibility to determine journeyman wages.<sup>[179]</sup> Under the Department's proposed rule, the Director would consider DEED OES median wage data for the trade in the area.<sup>[180]</sup> The SONAR describes the OES median wage data as "an accurate measurement of the central tendency of what is actually paid to workers in the area for both private and public work in the trade to be apprentices."<sup>[181]</sup> (Emphasis added). The statute requires the Director to determine the journeyman wage rate, not the wage rate actually paid to all workers in a trade.

106. The ALJ finds also that the Agency has failed to demonstrate the need for and reasonableness of the proposed rule's use of the median OES wage rate as a factor to determine the wage rate prevailing for journeymen in Minnesota. The OES median wage rate includes all persons employed in an occupation, which includes both beginning apprentices and experienced journeymen. There is nothing in the record indicating why the Department has concluded that the OES median wage rate, as opposed to the 75<sup>th</sup> or 90<sup>th</sup> percentile, represents the wage rate prevailing for journeymen throughout Minnesota. While the DEED OES wage rate data may be statistically valid as a measure of all wages in a job classification, the Department has not established that the OES median wage rate is a valid indicator of the journeyman wage rate. The Department cannot use OES median wage rate data to fulfill its statutory obligation to determine the wage rate for journeymen without providing evidence of the relationship between the wages paid to journeyman and the median OES wage rate.

107. The ALJ finds that the Department's proposal is unreasonable and violates substantive principles of law by granting the Director overly broad discretion.<sup>[182]</sup> The proposed consideration of the OES median wage rate, which includes wages paid to apprentices and trainees, to establish the journeyman wage rate, a percentage of which is then used to determine the wage rate to be paid to apprentices, represents a circular analysis.

108. In order to facilitate the use of the OES median wage rate, the proposed rule changes the geographic region from “county” to “area.”<sup>[183]</sup> The ALJ finds the change from “county” to “area” is premised upon the use of the OES median wage rate. Because the Agency cannot use the OES median wage there is no reasonable basis for the change from “county” to “area.”<sup>[184]</sup>

109. To cure the defects noted in Findings 86 – 108, the Department’s proposed use of the DEED’s OES median wage rate to determine the journeyman wage rate needs to be clarified and supported by evidence. If the Department wishes to use DEED’s OES median wage rate to determine the journeyman wage rate it must demonstrate a relationship between the OES median wage rate and the wage rate paid to journeymen in various areas in Minnesota. This may be established by surveys from public or private sources or employer-conducted surveys. In addition or in the alternative, the Department could use DEED OES wage rate data, after it demonstrates that it has considered education, experience, length of training and other relevant factors required to become a journeyman in a trade. The Department may find the United States Department of Labor, Foreign Labor Certification programs, as described in Findings 101 – 104, instructive in determining how OES wage rate data could be used to establish the wage rate paid to journeymen. None of these approaches have been taken in the current proceeding. In order to make an appropriate record, the Department should publish a new Notice of Hearing and document the evidence required in a new SONAR.<sup>[185]</sup> Alternatively, the Department could withdraw the proposed rule and consider a new proposed rule that would create a dual wage rate using one of the approaches that have been adopted in other SAC states without using the DEED OES median wage data.<sup>[186]</sup> Finally, the Department could withdraw the proposed rule and continue to use the existing rule.

Minn. R. 5200.0390, subp. 2 – Non-construction, manufacturing apprenticeship

110. The proposed rule, subpart 2, first sentence provides:

The journeyman wage rate *for work other than construction on public works projects* funded in whole or in part by state funds in apprenticeship agreements where no bargaining agreement exists shall be determined by areas, *for all trades.*<sup>[187]</sup> (Emphasis added).

111. The Department’s proposed rule would establish the journeyman wage rate for all works other than construction on public works projects.<sup>[188]</sup> Proposed Minn. R. 5200.0390, subp. 2 B retains the provision that the prevailing wage rate is the journeyman wage rate for construction on public works projects funded in whole or in part by state funds in apprenticeship agreements where no collective bargaining agreement exists.

112. The ALJ finds that the proposed rule's provisions regarding the requirement that the prevailing wage rate is the journeyman wage rate for construction on public works projects are reasonable.<sup>[189]</sup>

113. In the SONAR and in testimony by the Director, the Department indicated that it considered and rejected the imposition of a rate from the OES data on non-construction apprenticeship programs in the manufacturing sector.<sup>[190]</sup> The Request for Comments did not indicate that the Department was considering excluding non-construction or manufacturing apprenticeship programs from the application of a proposed rule.<sup>[191]</sup>

114. In its final submission in support of the proposed rule, Department stated:

The rule will only change practice with respect to merit shops not working on public construction projects...

Minnesota conducts prevailing wage surveys only in construction occupations. There are no prevailing wage certifications in any other occupation and *this rule will not change practice with respect to non-construction apprenticeship programs.*<sup>[192]</sup> (Emphasis added)

115. The text of the proposed rule clearly indicates that it governs the determination of the journeyman wage rate for all trades other than construction on public works projects.

116. The ALJ finds that the proposed rule expressly applies to "all trades" other than construction on public works projects.<sup>[193]</sup>

Minn. R. 5200.0390, subp. 2 - Vague, Arbitrary or Capricious.

117. Opponents of the Department's proposed rule challenge it as vague, arbitrary and capricious.

118. At the rule, hearing the Director was asked to describe how the proposed rule would be implemented. He testified as follows:

Could you tell me how you would then determine what the wage would be, what factors?

MR. BRIGGS: Judge, I had a couple other people ask me this a while back, even when we were planning all of this, and my response to them --it was on the other side, Dick -- my response to them at the time was, I guess I can't really say until I see what the proposal is.

I have ways, and I've gone through, and I've looked at different counties, I've looked at the OES in that county, I've looked at the prevailing wage in that county, and there are some similarities, there are some closeness issues that will all come into play.

But to say right now, the best I can say is what the rule will say if it changes, and that is I would give consideration to those three factors, and I would have to give those considerations. And I'm sure that when we begin this process, it's not going to be a matter of just me sitting there. I would imagine we're going to have some staff involved and assistant commissioner and commissioner to make sure this whole thing works right and Bill Bierman.

Dick, I wish I could give you an answer, but the best I can say is we will use all three of those to make a determination.<sup>[194]</sup>

119. At the conclusion of the hearing, the ALJ specifically asked parties submitting comments to address the alleged vagueness of the proposed rule.<sup>[195]</sup>

120. In its initial response, the Department indicated that it was not constrained by the factors in the statute or the proposed rule. "The director is not constrained by the statute or the proposed rule from considering other factors or indicia of existing wage rates, such as what an employer is paying its journeymen or entry level journeymen, a factor which has always been used outside of construction, and was used prior to the 1985 rule change in construction."<sup>[196]</sup> The Department further suggested that it would also consider other factors including:

a) What an employer is paying its journeymen or entry level journeymen,<sup>[197]</sup>

b) When the Standard Occupational Classification (SOC) used by the OES is too broadly defined, the Director will rely more heavily on other indicators.<sup>[198]</sup>

These factors are not mentioned in the SONAR or in the proposed rule.

121. The Department further described application of the proposed rule:

The proposed rule does not create a formula that requires a certain dollar determination, but relies on the authority granted to the director in the statute, as limited by the range created by consideration of the three factors. The department expects that the

director would make the determinations on a case by case basis within the guidelines provided by the statute and the proposed rule amendment. In doing so the department expects that the director would make a determination within the range developed using the three required dollar wage considerations, but not less than the employer was already paying its journeymen or entry-level journeymen, subject to the additional statutory general considerations of a reasonable wage and the best interests of the apprentice.<sup>[199]</sup>

122. The Department further explained its proposed use of OES median wage data:

The OES wage rate is only one gauge of the existing wage rate in the employer's area that the Apprenticeship Director is asked to consider. The Director will also consider the prevailing wage rate, existing apprenticeship agreements in the area and the wage rate in the shop proposing the apprenticeship program. In instances where the SOC occupation is too broadly defined, the Director will rely more heavily on other indicators.<sup>[200]</sup>

123. The Department's responses to comments do not clarify the proposed rule. Does the Department's suggestion that it would consider an employer's payment of wages to "journeymen or entry level journeymen" indicate that the Department is making a distinction in its analysis of journeymen wages based on experience? If so, how are the different wage rates determined and how would the different rates affect the apprentice wage rate? The Department currently lists data for 147 separate labor classifications while the DEED OES data condenses these job classifications into less than half that number.<sup>[201]</sup> What factors would cause the Director to decide that a SOC classification was too broadly defined thereby causing the Director to rely more heavily on indicators other than the median OES wage rate? How would the Director determine the journeyman wage rate for non-joint programs if the relevant SOC classification were too broadly defined? As discussed above, the Department has indicated that the proposed rule is not intended to affect non-construction or manufacturing apprenticeship programs.<sup>[202]</sup> The proposed rule, however, states that its provisions govern the methodology used for establishing the journeymen wage rate for all trades.<sup>[203]</sup>

124. The ALJ finds that the proposed rule's standard for determination of journeyman wage rates is vague and indefinite; it provides no meaningful guidance on how a definite wage rate may be ascertained.<sup>[204]</sup> At the hearing, the Director stated that he did not know how to apply the proposed rule. The ALJ finds that the proposed

rule grants overly broad discretion to the Director, which violates substantive principles of law.

125. Following the hearing, the Department has suggested additional considerations that do not appear in the SONAR or the proposed rule. The additional considerations further confuse rather than clarify the proposed rule.

126. For these reasons, the ALJ finds that the proposed revisions to Minn. R. 5200.0390, subp 2 are vague and result in a rule that could be applied arbitrarily. While the statute provides significant discretion to the Director, the proposed rule is vague and indefinite, so as not to meet the statutory definitions of a “rule.”<sup>[205]</sup> Even though economic rules like the proposed apprenticeship rules are subject to a less strict vagueness test, the proposed rule fails to give a person a reasonable opportunity to understand what standards are being applied by the Department to determine the journeyman wage rate.<sup>[206]</sup> The ALJ finds also that the Department has not demonstrated that the proposed amendments to Minn. R. 5200.0390, subd. 2 have a rational basis and finds that the proposed rule is unreasonable.

127. The ALJ also notes that the Department’s proposed use of the OES median wage rate is not consistent with the statute’s directive to determine the wage rate of a journeyman. The OES median wage rate is based upon a survey of all persons employed in a trade, including apprentices and journeymen. There is no evidence in the record indicating whether or how the OES median wage rate for a trade relates to the existing wage rates paid exclusively to journeymen as opposed to all persons employed in the trade. For these reasons, the Department lacks statutory authority to apply OES median wage rates. See also, Finding 106.

128. To cure the defects noted in Findings 120 - 126, the ALJ suggests that the Department withdraw the identified portions of the proposed rule that are defective and submit a new proposal that incorporates the additional factors the Department included in its post-hearing comments in a new proposed rule. If the Department wants to use the OES median wage rate it needs to provide evidence for the record that demonstrates that the OES median wage rate reasonably approximates the wages paid to journeymen.

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

### **CONCLUSIONS**

1. The Department of Labor and Industry gave proper notice in this matter.
2. The Department has fulfilled the procedural requirements of Minn. Stat. § 14.14 and all other procedural requirements of law or rule.

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 in Findings 86 – 105 and 117 – 126.

4. The Department has not 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) as noted at Findings 86 – 104, 106 – 108 and 117 – 125.

5. The Administrative Law Judge suggests that the Department take the actions described in Findings 109 and 128 to correct the defects cited in Conclusions 4.

1. Due to Conclusions 3, 4 and 5, this Report has been submitted to the Chief Administrative Law Judge for his approval pursuant to Minn. Stat. § 14.15, subds. 3 and 4.

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

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

### **RECOMMENDATION**

IT IS RECOMMENDED that the proposed rules be adopted except where specifically otherwise noted above.

Dated this 21st day of April, 2006.

/s/ Richard C. Luis  
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RICHARD C. LUIS  
Administrative Law Judge

Recorded: Transcribed. Barbara J. Carey, Kirby A. Kennedy & Associates Reporting and Captioning (one volume).

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<sup>[1]</sup> Minn. Stat. §§ 14.131 through 14.20. (Unless otherwise specified, all references to Minnesota Statutes are to the 2004 edition, and all references to Minnesota Rules are to the 2005 edition.)

- [2] The Director is mandated by statute to appoint an Apprenticeship Advisory Council. Minn. Stat. § 178.02.
- [3] The terms “journeyman” or “journey worker” are used interchangeably throughout this report.
- [4] 29 S.R. 1246 (April 25, 2005); Ex. A.
- [5] SONAR, Ex. 21, p. 3 (There are several versions of the SONAR in the record. Exhibit 21 is the SONAR, as corrected at the hearing on February 27, 2006.)
- [6] SONAR, Ex. 21, p. 3; Ex. 3.
- [7] SONAR, Ex. 21, p. 3;
- [8] *Id.*
- [9] Ex. 15.
- [10] *Id.*
- [11] SONAR, Ex. 21, p.3.
- [12] *Id.*; Ex.15.
- [13] SONAR, Ex. 21, p. 3; Ex. B.
- [14] Ex. 8.
- [15] Ex. G.
- [16] *Id.*
- [17] Testimony of Julie Leppink, Tr. 16.
- [18] Ex. J.
- [19] Ex. A.
- [20] Ex. B.
- [21] Ex. C.
- [22] Ex. D.
- [23] Ex. E, 30 S.R. 789 (January 17, 2006).
- [24] Exs. G (Certificate of Additional Notice) and F (Certificate of Accuracy of Mailing List).
- [25] Ex. I.
- [26] Ex. H (2 Brown Expandable Files).
- [27] Ex. J. The ALJ approved sending notice to representatives rather than to all 5,000 individuals who requested a hearing.
- [28] *W.J. Rorabaugh, The Craft Apprentice: From Franklin to the Machine Age in America* (1986).
- [29] SONAR, Ex. 21, p. 1-2.
- [30] SONAR, Ex. 21, p.2; Minn. Stat. § 178.01 *et seq.*
- [31] 50 Stat. § 664 codified as amended at 29 U.S.C. § 50 *et seq.*
- [32] 29 U.S.C. § 50.
- [33] *Id.*
- [34] SONAR, Ex. 21, p. 2.
- [35] 29 U.S.C. § 50; 29 C.F.R. 29.1 *et seq.*
- [36] Ex. 19, Department’s survey of SAC states.
- [37] 29 C.F.R. § 29.3.
- [38] SONAR, Ex. 21, p. 2.
- [39] Testimony of Roslyn Wade, Tr. 24.
- [40] *Id.*
- [41] *Id.*
- [42] 29 C.F.R. § 29.5.5(a)(4).
- [43] 29 C.F.R. § 5 (b)(5).
- [44] SONAR, Ex. 21, p. 1.

- [45] Minn. R. 5200.0290 *et seq.*
- [46] Minn. Stat. §177.41 *et. seq.*
- [47] 20 U.S.C. § 276a.
- [48] Minn. R. 5200.1000 *et. seq.*
- [49] Minn. R. 5200.1070. The proposed rule establishes the journeyman wage rate for construction work on public works projects funded in whole or in part by state funds to be the prevailing wage base rate where there is no bargaining agreement. Proposed Rule, 5200.0390, subp. 2 B., Ex. B.
- [50] SONAR, Ex. 21, p. 1; Minn. R. 5200.0290.
- [51] Minn. R. 5200.0300;
- [52] 29 C.F.R. § 29.2.
- [53] SONAR, Ex. 21, pp. 1-3; Department's response dated March 27, 2006, pp. 1-2.
- [54] SONAR Ex 21, p.1; see Minn. R. 5200.0420, subp. 2; 29 C.F.R. § 29.2(i).
- [55] Non-joint programs are sometimes referred to as "merit shop" programs in the hearing record. Testimony of R. Heise, Tr. 133-136.
- [56] *Id.*
- [57] 29 C.F.R. § 20.2(i).
- [58] Minn. R. 5200.0420, subp. 2; 29 C.F.R. § 29.2 (i).
- [59] SONAR, Ex. 21, p.15.
- [60] *Id.*
- [61] SONAR, Ex. 21, p. 5; Ex. 9.
- [62] Minn. Stat. § 178.03, subd. 3. This subpart reads:

Subd. 3. Duties and functions. The director, under the supervision of the commissioner, and with the advice of the Apprenticeship Advisory Council, is authorized: to administer the provisions of this chapter; to promote apprenticeship and other forms of on the job training; to establish, in cooperation with the Apprenticeship Advisory Council and with the apprenticeship committees, conditions and training standards for the approval of apprenticeship programs and agreements, which conditions and standards shall in no case be lower than those prescribed by this chapter; to promote equal employment opportunity in apprenticeship and other on the job training and to establish a Minnesota plan for equal employment opportunity in apprenticeship which shall be consistent with standards established under Code of Federal Regulations, title 29, part 30, as amended; to issue certificates of registration to sponsors of approved apprenticeship programs; to act as secretary of the Apprenticeship Advisory Council; to approve, if of the opinion that approval is for the best interest of the apprentice, any apprenticeship agreement which meets the standards established hereunder; to terminate any apprenticeship agreement in accordance with the provisions of such agreement; to keep a record of apprenticeship agreements and their disposition; to issue certificates of completion of apprenticeship; and to perform such other duties as the commissioner deems necessary to carry out the intent of this chapter; provided, that the administration and supervision of supplementary instruction in related subjects for apprentices; coordination of instruction on a concurrent basis with job experiences, and the selection and training of teachers and coordinators for such instruction shall be the function of state and local boards responsible for vocational education. *The director shall have the authority to make wage determinations applicable to the graduated schedule of wages and journeyman wage rate for apprenticeship agreements, giving consideration to the existing wage rates prevailing throughout the state, except that no wage*

*determination by the director shall alter an existing wage provision for apprentices or journeymen that is contained in a bargaining agreement in effect between an employer and an organization of employees, nor shall the director make any determination for the beginning rate for an apprentice that is below the wage minimum established by federal or state law. (Emphasis added)*

[63] *Id.*

[64] SONAR Ex. 21, p. 2. Testimony of J. Tornquist, Tr. 99. While federal regulations require apprentice wage to increase as skills are acquired, the regulations do not set the progressive schedule of apprenticeship wages as a percentage of journeyman wage rate. 29 C.F.R. § 29.5.

[65] Minn. R. 5200.0390, subp. 2.

[66] SONAR, Ex. 21, p. .6.

[67] *Id.*, p. 15.

[68] *Id.*

[69] Department's Response to Hearing Testimony, March 10, 2006, p. 2; Ex. 9.

[70] *Id.*

[71] SONAR, Ex. 21, p. 15.

[72] Department's Response to Comments, March 17, 2006, p. 10, Table 1.

[73] *Id.* p. 10.

[74] SONAR, Ex. 21, p. 9.

[75] Ex. 15, Testimony of R. Heise. At October 26, 2005 stakeholder meeting, Tr. 5; Testimony of Jerry Briggs, Tr. 28.

[76] SONAR, Ex. 21, p. 9.

[77] SONAR, Ex. 21, p. 6.

[78] Testimony of Mike Gramse, Ex. 15, October 26, 2005 stakeholder meeting, p. 57.

[79] Testimony of J. Briggs, Tr. 28, SONAR, Ex. 21, p. 6.

[80] SONAR, Ex. 21, pp. 6-7.

[81] SONAR, Ex. 21, p. 7.

[82] SONAR, Ex. 21, p. 7

[83] *Id.* The proposed rule, with cross-outs and underlines indicating the changes from the existing rule, reads:

5200.0390 DETERMINATION OF APPRENTICE WAGES.

Subpart 1. Procedure. Determination of the graduated schedule of wages for an apprenticeship agreement will be determined by the percentage rate used in the majority of individual apprenticeship agreements on file with the ~~Division of Voluntary apprenticeship unit~~ in any particular trade. The beginning rate must be at least the federal or state minimum wage rate, whichever is higher.

Subp. 2. Journeyman wage rate rates.

A. The journeyman rate for work other than construction on public works projects funded in whole or in part by state funds in apprenticeship agreements where no bargaining agreement exists shall be determined by counties, areas for all trades. If there is either a state or federal prevailing wage determination or apprenticeship agreement for a trade, the most current rate of the determination or agreement must be used as the journeyman wage rate. The areas used to make the journeyman wage rate determinations shall be the most current Occupational Employment Statistics (OES) Economic Development Regions utilized by the Department of Employment and Economic Development. In making the determination of the journeyman wage rate the director of labor standards and apprenticeship shall consider existing wage rates in the employer's area for the trade including the current OES all-industry median wage rate, the current prevailing wage rates for the trade in the area certified pursuant to Minnesota Statutes, sections 177.41 to 177.44, and existing apprenticeship agreements for the trade in the area. The journeyman wage rate determination by the director shall not alter existing wage rates for apprentices or journeymen in a collective bargaining agreement and shall not have a beginning wage rate for an apprentice that is below the state or federal minimum wage.

B. The journeyman wage rate for construction work on public work projects funded in whole or in part by state funds in apprenticeship agreements where no bargaining agreement exists is the prevailing wage base rate pursuant to Minnesota Statutes, sections 177.41 to 177.44 for the trade on the project.

[84] SONAR, Ex. 21, pp. 9-10.

[85] *Id.*, p. 3.

[86] Testimony of J. Briggs, Tr. 28.

[87] SONAR, Ex. 21, p. 3.

[88] *Id.* The application of the proposed rule to non-construction apprenticeship programs is discussed in Findings 111 – 117 *infra*.

[89] The statute reads: “Rules. The commissioner may, upon receipt of the council's proposals, accept, adopt, and issue them by rule with any modifications or amendments the commissioner finds appropriate. The commissioner may refer them back to the council with recommendations for further study, consideration and revision. Additional rules may be issued as the commissioner may deem necessary.” Minn. Stat. § 178.041, subd. 1.

[90] Minn. Stat. § 14.14, subd. 2; Minn. R. 1400.2100.

[91] *Mammenga v. DNR of Human Services*, 442 N.W.2d 786 (Minn. 1989); *Manufactured Hous. Inst. v. Pettersen*, 347 N.W.2d 238, 244 (Minn. 1984).

[92] Ex. 6. The corrected version of the SONAR is Ex. 21.

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

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

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

[96] *Manufactured Hous. Inst. v. Pettersen*, 347 N.W.2d at 244.

[97] *Federal Sec. Adm'r v. Quaker Oats Co.*, 318 U.S. 218, 233 (1943).

[98] Minn. R. 1400.2100.

[99] Minn. Stat. § 14.05, subd. 3.

[100] Minn. R. 1400.2240, subp. 8.

[101] SONAR, Ex. 21, p. 5.

[102] Ex. B, Proposed 5200.0390, subp. 2.

[103] See e.g. Comments of the National Electrical Contractors Association, p. 2.

[104] SONAR, Ex. 21, p. 5.

[105] *Id.*

[106] SONAR, Ex. 21, p. 7.

[107] *Id.*, p. 8.

[108] *Id.*

[109] *Id.*

[110] Ex. 8.

[111] Minn. Stat. § 14.127, subd. 1 (2005).

[112] Minn. Stat. § 14.127, subd. 2 (2005).

[113] SONAR, Ex. 21, p. 11.

[114] See e.g. Testimony of Kevin O'Brien, Tr. 88-89.

[115] Testimony of J. Tornquist, Tr. 99-100; Testimony of Judi Rubin, Tr. 118-119; See also comments of D. Seaton, March 20, 2006 and March 27, 2006; Comment of J. Tornquist, March 17, 2006; Comment of Everette DeCramer, October 26, 2005.

[116] Testimony of Todd Ferrara, Tr. 76; Testimony of Jay Valentyn, Tr. 82-83; Testimony of Dale Zoerb, Tr. 109; Testimony of Judi Rubin, Tr. 118-119; Testimony of Kristin Pilling-Davis, Tr. 141-143.

[117] Comment of Thomas Hesse, February 16, 2006.

[118] Comment of Steve Oelfke, March 2, 2006.

[119] Testimony of J. Rubin, Tr. 125.

[120] Testimony of J. Tornquist, Tr. 100; Comments of D. Seaton, March 20, 2006 and March 27, 2006

[121] Ex. 22, Comment of R. Heise.

[122] Testimony of Kenny Javens, Tr. 112-113.

[123] Comments of D. Seaton, March 20, 2006 and March 27, 2006

[124] Testimony of J. Valentyn, Tr. 85; See e.g. comments of Thomas A. Hesse, February 16, 2006; Jeffery R. Hagen, February 6, 2006, D. Seaton, March 20, 2006 and March 27, 2006;

[125] Testimony of Kevin O'Brien, Tr. 88-90; Testimony of Larry Davis, Tr. 97; Testimony of D. Zoerb, Tr. 103.

[126] Testimony of R. Heise, Tr. 124.

[127] See e.g. comments of Ron Hill, February 6, 2006; Connie Caron, February 3, 2006; D. Seaton, March 20, 2006 and March 27, 2006;

[128] Comments of Minnesota State Building and Construction Trades Council, March 20, 2006, pp. 5-9

[129] See comments of Larry Casey, March 2, 2006; Minneapolis Joint Apprenticeship and Training Committee for the Electrical Industry, February 27, 2006. Over 225 written comments received after the public hearing objected to the proposed rule asserting that it would adversely affect existing apprentice wage rates.

[130] See e.g. Letter from thirty five Minnesota State representatives, March 16, 2006; Comments Minnesota State Building and Construction Trades Council, March 20, 2006, p. 22;

[131] Comment of the Minneapolis Joint Apprenticeship and Training Committee for the Electrical Industry, February 27, 2006.

[132] Testimony of Brendan Cummins, Tr. 200-201; Comment of Steven Petersen, Minnesota Mechanical Contractors Association, March 20, 2006.

[133] Comments of Minnesota State Building and Construction Trades Council, March 20, 2006, pp. 9-21.

[134] Comments Minnesota State Building and Construction Trades Council, March 27, 2006.

[135] Ex. B.

[136] SONAR, Ex. 21. pp. 12 – 13.

[137] See Minn. R. 5200.0300; 5200.0320, subps. 1 C and 7; 5200.0340; 5200.0350; 5200.0360 5200.0400; 5200.0410 and 5200.0420

[138] SONAR, Ex. 21, pp. 13-18.

[139] See e.g. Comments of the Minnesota State Building and Construction Trades Council, pp. 11-21;

[140] Minn. Stat. §§ 177.41 - .44.

[141] See e.g. Comments of D. Seaton, pp. 11- 12; Responsive Comments of D. Seaton, pp.1-3

[142] Minn. Stat. § 178.01 *et seq.*

[143] Minn. Stat. § 177.44, subd. 3.

[144] Comments of Minnesota State Building and Construction Trades Council, p. 22.

[145] Testimony of Dale Gruber, Tr. 95 – 96; Testimony of J. Tornquist, Tr. 100..

[146] Testimony of Dick Anfang, Tr. 148 – 153.

[147] Ex. B, proposed Minn. R. 5200.0390, subp. 2.

[148] Minn. Stat. § 178.03, subd. 3.

[149] Testimony of Dr. L. Jordan, Tr. 252; Testimony of John Quarnstrom, Ex. 15, Tr. 40-41. The Department uses a voluntary survey to obtain prevailing wage data. There has been a long-running discussion about the validity of wage rates derived from voluntary surveys. The United States Department of Labor, Wage and Hour Division uses voluntary surveys to determine the prevailing wage for purposes of the Davis-Bacon Act. The process was criticized in a report by Office of Inspector General, U.S. Department of Labor, *Inaccurate Data Were Frequently Used in Wage Determinations Made under the Davis-Bacon Act. Final Report* No. 04-97-013-04-420, March 10, 1997. In response to criticisms that the data gathered by Wage and Hour was not statistically valid, the Division defended its methods as follows:

With respect to your first recommendation, we cannot concur – at least at this time – that a viable long-term approach to conducting Davis-Bacon surveys must include a process to select survey participants using statistical or other independent means. As you know, we do not mean to “rule out” such an approach as we are currently examining different long-term approaches and at least one possible option would use the Bureau of Labor Statistics’ (BLS) survey data where participants are selected through statistical sampling. We do not believe, however, that the serious problems you found regarding the accuracy of the data submitted by survey participants relates only to the universe (rather than sample) survey approach currently used for the Davis-Bacon survey program. Whether conducting a universe survey (like the current process) or a sample survey (like BLS surveys), one must start with a comprehensive and reliable definition of the universe of possible respondents. And either survey approach must have effective means to validate the accuracy of information provided by survey respondents; as your draft report points out, there are many possible reasons that survey responses could be inaccurate ranging from purposeful misreporting to simple misunderstanding of the information being sought. These essential issues must be addressed by any survey approach – but there is nothing that we see which makes a sample survey inherently preferable to a universe survey approach. A universe survey gives all potentially interested parties an opportunity to participate and – provided adequate verification mechanism (needed in any case) – could produce more accurate results (with no sampling error) provided there is adequate, representative response. On the other hand, sample surveys are likely to be somewhat less expensive and time-consuming than universe surveys (sic) It is clear, however, that the data reliability issues identified in the draft report must be addressed regardless of the survey approach utilized, and we do not believe that statistical sampling – in and of itself – will contribute to improving the accuracy of wage data submitted to and used by the Department.

Letter from Wage and Hour attached to the March 10, 1997 Inspector General’s Report.

Wage and Hour has continued to examine the use of OES data in conjunction with voluntary surveys to determine prevailing wage rates. Prevailing Wage Resource Book, U.S. Department of Labor, Employment Standards Administration, Wage and Hour Division, November 2002.

[150] Testimony of Dr. L. Jordan, Tr. 256.

[151] SONAR, Ex. 21, p. 9; Testimony of Dr. L. Jordan Tr. 258-59; Testimony of Dr. T. Van Hoomissen, Tr. 258.

[152] Testimony of Dr. T. Van Hoomissen, Tr. 258-59.

[153] Testimony of John Quarnstrom, Ex. 15, Tr. 40; SONAR, Ex. 21, p. 15.

[154] Ex. 28, Analysis p. 2. Although Dr. Jordan describes her study as consisting of 19 occupations, Table B reports data for 21 occupations. Ex. 28, Analysis, p. 4, Table B. The Department counted 21 occupations in Table B when it reviewed Dr. Jordan’s analysis. Department responses, March 27, 2006, p. 11.

[155] Department’s response comments, March 27, 2006, p. 10.

[156] *Id.*

[157] *Id.* The Department’s statistics refer to comparison of the “cells.” The ALJ adopts this terminology for purposes of quoting the statistical data reported by the Department.

[158] *Id.*

[159] *Id.*

[160] *Id.* In 19% of the 1,494 cells with data, the Department found that the OES wage was higher than the prevailing wage and in an additional 9% of the cells, the prevailing wage was less than 5% higher. (19%+9% =28%, 100% - 28% = 72%).

[161] SONAR, Ex. 21, p. 3.

[162] *Id.* p. 15.

[163] Minn. Stat. § 178.03, subd. 3.

[164] Testimony of J. Briggs, Tr. 52.

[165] *Id.*

[166] See <http://www.deed.state.mn.us/lmi/tools/projections/detail.asp?code=472031&geog=2708R05000EDR%20%205%20-%20North%20Central> Data displayed at hearing.

[167] Testimony of Dr. T. Van Hooissen, Tr. 258. The Minnesota Electrical Association, Inc. (MEA) submitted comments, dated March 16, 2006 that reported journeyman wage rates on a county basis using DEED data. The MEA compared the market journeyman wage rate to the average wage rate for all citizens and the journeyman prevailing wage rate in Houston County. DEED OES data is reported on a regional, not county basis. The average hourly wage rate number reported by the Association comes from a different DEED set of statistics, the Quarterly Census of Employment and Wages (QCEW). (The comment reports the the average citizen in Houston County earns \$11.75 an hour. This appears to be derived from the QCEW report, All Industries for Houston County, Private, weekly wage - \$470. 470/40 = \$11.75.) Because the comment relies upon the use of a different set of data (QCEW) for its statistics it is not compelling evidence regarding the use of DEED OES median wage rates.

[168] SONAR, Ex. 21, p. 16; Testimony of Dr. T. Van Hoomissen, Tr. 59 – 60.

[169] 20 C.F.R. § 656.40.

[170] 69 Fed. Reg. 77325-77421 (December 27, 2004) (codified at 20 C.F.R. § 656).

[171] *Id.*

[172] 20 C.F.R. § 656.40.

[173] United States Department of Labor, "Employment and Training Administration, Prevailing Wage Determination Policy Guidance, Nonagricultural Immigration Programs, Revised May 9, 2005.

[174] *Id.* pp. 60-61.

[175] Report of Dr. L. Jordan, Ex. 28.

[176] Report of Dr. L. Jordan, Ex. 28, p. 2. ; See also Testimony of John Quarnstrom, Ex. 15, Tr. 41-43.

[177] Department response to comments, March 27, 2006, p. 12. Because the text of the proposed rule does not address the appropriateness of SOC classifications this issue will not be analyzed as a possible defect. Although the Department recognizes that different classification systems may cause difficulties, it was not until the comment period that the Department stated that it might determine that the SOC classification is "too broad." The proposed rule has no provision regarding the appropriateness of SOC classifications. Speculation about the Department's possible interpretation of the proposed rule if it were adopted is beyond the scope of this report.

[178] See Finding 98. J. Tornquist, in written comment dated March 17, 2006, compared wage data for electricians in Kandiyohi County from the Minnesota Electrical Association, Wage and Benefit report, the median OES wage rate and the rate journeymen were actually paid by an employer. "According to MEA Wage and Benefit report, the average electrical JM made \$17.48 in Kandiyohi in 2005. WES (Willmar Electric Service) actually averaged \$19.00 per hour, well above the established rate for our area. Currently, the (median) OES wage for electrical JM in our county is \$17.59 per hour." There is no other evidence in the record about the Minnesota Electrical Association, Wage and Benefit report. It is not possible to make a determination of the adequacy of the MEA data. There is no information on the methodology used in conducting the MEA survey. See Department of Labor, Employment and Training Administration, Prevailing Wage Determination Policy Guidance, Nonagricultural Immigration Programs, Revised May 9, 2005.

[179] "The director shall have the authority to make wage determinations applicable to the graduated schedule of wages and journeyman wage rate for apprenticeship agreements..." Minn. Stat. § 178.03 subp. 3.

[180] Testimony of J. Briggs, Tr. 52-53.

[181] SONAR, Ex. 21, p. 9.

[182] Department response to comments, March 27, 2006, p. 12.

[183] Ex. B, line 12; SONAR, Ex. 21, p. 13.

[184] See Findings 87 – 110.

[185] The Department's passing reference to the U.S. Department of Labor's use of OES wage data is not sufficient to establish for the record that the Department considered the OES wage rate data, or how the Department would use or apply the the U.S. Department of Labor's approach to that data. See SONAR, Ex. 21, p. 16; Testimony of Dr. T. Van Hoomissen, Tr. 59 – 60.

[186] Ex. 19.

[187] Ex. B.

[188] Ex. B, lines 10 - 11.

[189] Ex. B, Minn. R. 5200.0390, subp. 2 A, lines 10 - 12 and subp. 2 B, lines 1- 4.

[190] SONAR, Ex. 21, p. 6; Testimony of J. Briggs, Tr. 28.

[191] Ex. A.

[192] Department's response to comments, March 27, 2006, p. 10. See Finding 34, *supra*.

[193] If the Department intends to exclude non-construction apprenticeship programs from the proposed rule it will need to withdraw the proposed rule language in Minn. R. 5200.0390, subp. 2, line 12 and propose new rule language. Post-hearing comments by the Department suggesting that it did not intend the proposed rule to govern non-construction apprenticeship programs do not create a defect because the proposed rule is clear.

[194] Testimony of Jerry Briggs, Tr. 145.

[195] Tr. 293.

[196] Department's response, p. 4 dated March 20, 2007 [*sic*].

[197] *Id.*

[198] Department's response, March 27, 2006, p. 12.

[199] Department's response, March 27, 2006, p. 8.

[200] Department's response, March 27, 2006, p. 12.

[201] Dr. Jordan study, Ex. 28, p. 2.

[202] See Findings 112 & 113.

[203] Ex. B, Proposed Minn. R. 5200.0390, subp. 2.

[204] As discussed above, the United States Department of Labor has adopted changes to the Foreign Worker Certification program. Application of many of the concepts contained in the Department's proposed rule including the repeal of mandatory consideration of Davis-Bacon prevailing wage determinations and use of OES wage data have been thoroughly analyzed and discussed by the U.S. Department of Labor. The FLC regulations and guidelines include a discussion of factors that must be considered when using OES wage data to determine the prevailing wage. A review of this material should materially assist the Department in drafting and describing the application of its proposed rule.

[205] Minn. Stat. § 14.02, subd. 4.

[206] See *Minnesota League of Credit Unions v. Minnesota Department of Commerce*, 486 N.W.2d 399, 404-405 (Minn. 1992)