

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.

**CHIEF ADMINISTRATIVE LAW
JUDGE'S ORDER ON REVIEW
OF RULES UNDER MINN.
STAT. § 14.16, SUBD. 2 AND
MINN. R. 1400.2240, SUBP. 4.**

The Minnesota Department of Labor and Industry (Department) proposes to adopt the above-entitled rules, as modified by a version dated August 10, 2006, pursuant to Minn. Stat. § 14.16 and Minn. R. 1400.2240, subp. 4. The initial version of these proposed rules, published on January 17, 2006, was presented at a public hearing on February 22, 2006. The Administrative Law Judge disapproved the proposed rules in a Report dated April 21, 2006. The Chief Administrative Law Judge, by Report dated April 24, 2006, concurred with the determination of the Administrative Law Judge. On October 3, 2006, the Department requested that the Chief Administrative Law Judge review modifications to the rules that had been disapproved. For reasons discussed in the attached Memorandum, the Chief Administrative Law Judge finds that the final proposed rules are substantially different from those published in the *State Register* on January 17, 2006, and proposed at the public hearing.

Based upon a review of the modifications made by the Department as presented in the October 3, 2006 submissions and filings, Minnesota Statutes, Minnesota Rules, and the previous orders issued in this matter,

IT IS HEREBY ORDERED: that the modified proposed rules, dated August 10, 2006, are not approved because they are substantially different from the rules as originally proposed.

Dated this 10th day of October, 2006.

s/Raymond R. Krause

RAYMOND R. KRAUSE
Chief Administrative Law Judge

MEMORANDUM

The Department's Director of the Division of Labor Standards and Apprenticeship is required to determine the journeyman wage rate.¹ The Department seeks to modify the rules governing this process.² A rulemaking proceeding was commenced by a Dual Notice published on January 17, 2006.³

The published version of the proposed rules would have permitted the Director to use the Minnesota Department of Employment and Economic Development's (DEED) OES medium wage data as one consideration used in determining the journeyman wage rate for non-prevailing wage work.⁴ The ALJ found the proposed rules were defective because the Department had not demonstrated how DEED's OES medium wage rate, which includes wages paid to all workers in a trade, related to the wages paid only to journeymen. The ALJ suggested several possible remedies for the defects he found, including a suggestion that the Department might find the United States Department of Labor's Foreign Labor Certification (FLC) program instructive. The FLC uses OES data with adjustments to reflect the level of experience, education and supervision demanded by an occupation.

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

¹ Minn. Stat. § 178.03, subd. 3.

² Statement of Need and Reasonableness ("SONAR")

³ 30 S.R. 789 (January 17, 2006).

⁴ *Id.*

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. 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. Finally, the Department could withdraw the proposed rule and continue to use the existing rule.⁵

The modified rule submitted by the Department adds language that would require the Director of Labor Standards to “adopt the most current level three wage from the United States Department of Labor Foreign Labor Certification Program pursuant to the United States Code, title 8, section 1182(p)(4)” as the journeyman wage rate.⁶ This is substantially different from the multiple factor analysis that was initially proposed by the Department. The published proposed rule would have added OES median wage data as one of several factors the Director would have considered in determining the journeyman wage rate.⁷ The modified rule would narrow the data considered by the Director of Labor Standards to only one factor. Furthermore, the Dual Notice did not apprise affected parties that the Department would adopt the current level three wage determined by the United States Department of Labor Foreign Labor Certification Program as the journeyman wage rate. Accordingly, none of the parties discussed the possible use of the FLC level three wage rate as the journeyman wage rate in their oral or written submissions. Adopting the modified rule at this stage of the proceeding constitutes a substantial change in the rules as they were proposed and presented at the hearing.⁸

R.R.K.

⁵ Report of the Administrative Law Judge, Finding 109 (footnotes omitted).

⁶ Modified rule date August 10, 2006.

⁷ The proposed rule stated that the journeyman wage rate would have been determined by: 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.” Proposed Rule dated December 21, 2005. See *also* SONAR at 7.

⁸ Minn. Stat. § 14.05, subd. 2.