

STATE OF MINNESOTA  
OFFICE OF ADMINISTRATIVE HEARINGS  
FOR THE MINNESOTA DEPARTMENT OF PUBLIC SAFETY  
BOARD OF PRIVATE DETECTIVE AND PROTECTIVE AGENT SERVICES

In the Matter of the Proposed Permanent  
Rules of the Board of Private Detective  
and Protective Agent Services Relating to  
Private Detectives and Protective Agents;  
Minnesota Rules Chapter 7506

REPORT OF THE  
ADMINISTRATIVE LAW JUDGE

The above-entitled matter came on for hearing before Administrative Law Judge Barbara L. Neilson on May 20, 1997, at 9:00 a.m. in Room 230 of the Minnesota Judicial Center in St. Paul, Minnesota.

This Report is part of a rulemaking proceeding held pursuant to Minn. Stat. §§ 14.131 to 14.20 (1995 Supp.), to hear public comment, determine whether the Board of Private Detective and Protective Agent Services (hereinafter referred to as "the Board") has fulfilled all relevant substantive and procedural requirements of law applicable to the adoption of the rules, evaluate whether the proposed rules are needed and reasonable, and assess whether or not any modifications to the rules proposed by the Board after initial publication are substantially different from the rules as originally proposed.

Jeffrey F. Lebowski, Assistant Attorney General, 525 Park Street, Suite 200, St. Paul, Minnesota 55103, appeared on behalf of the Board at the hearing. The agency hearing panel consisted of Michael Campion, Chair of the Board; Thomas Spence, Ross Thorfinnson, and Andriel Dees, Board Members; Marie Ohman, the Board's Executive Director; and Valerie M. Jensen, Rules Coordinator, Department of Public Safety. Thirty persons signed the hearing register. The Administrative Law Judge received thirteen agency exhibits and two public exhibits as evidence during the hearing. The hearing continued until all interested persons, groups, or associations had an opportunity to be heard concerning the adoption of these rules.

The record remained open for the submission of written comments until the close of business on June 9, 1997, twenty calendar days following the date of the hearing. Pursuant to Minn. Stat. § 14.15, subd. 1 (1994), five working days were allowed for the filing of responsive comments. At the end of business on June 16, 1997, the rulemaking record closed. The Administrative Law Judge received six written comments from interested persons during the twenty-day period. The Board submitted

two written comments which were filed by the close of business on June 9 and 16, 1997. The Board's written comments responded to matters discussed at the hearing and comments filed during the twenty-day period. In its written comments, the Board proposed further amendments to the rules. The Board also submitted a letter and three clarifying certificates on July 11 and 14, 1997.

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

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

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

### FINDINGS OF FACT

#### Procedural Requirements

1. On March 5, 1997, the Board filed the following documents with the Chief Administrative Law Judge:

- (a) a copy of the proposed rules, with a certification of approval as to form by the Revisor of Statutes (Ex. D);
- (b) a proposed dual Notice of Intent to Adopt Rules without a Public Hearing Unless 25 or More Persons Request a Hearing, and Notice of Hearing if 25 or More Requests for Hearing are Received; and
- (c) a draft of the Statement of Need and Reasonableness (hereinafter referred to as the "SONAR").

2. On March 26, 1997, the Board mailed the Dual Notice of Intent to Adopt Rules to all persons and associations who had registered their names with it for the purpose of receiving such notice. (Ex. H and supplemental certificates supplied by Valerie M. Jensen and Rae Lynn Westbury on July 11 and 14, 1997.)

3. On March 31, 1997, the Dual Notice of Intent to Adopt Rules and a copy of the proposed rules were published at 21 State Reg. 1400. (Ex. G.)

4. On April 1, 1997, the Board filed a revised draft of the SONAR.

5. On May 9, 1997, the Board filed copies of the letters it had received either requesting a hearing regarding the proposed rules or making comments on the proposed rules.

6. On the day of the hearing, the Department placed the following documents in the record:

(a) two Requests for Comments published on June 1, 1993, and April 15, 1996, at 17 State Reg. 2985 and 20 State Reg. 2260 (Exs. A and A-1);

(b) the Affidavit of Mailing the April, 1996, Request for Comments, as signed and dated April 17, 1996; with attached mailing list (Ex. B);

(c) the Certificate of the Board's Chair and two members attesting that the Board passed a resolution granting the Board's Executive Director authority to give all persons who had registered their names with the Board notice of the Board's intent to adopt rules, publish the notice and rules in the State Register, and perform other acts incidental thereto (Ex. C);

(d) a copy of the proposed rules, including the Revisor of Statutes approval, dated February 20, 1997 (Ex. D);

(e) the Revised Statement of Need and Reasonableness, dated March 28, 1997, signed by the Board's Executive Director (Ex. E);

(f) a copy of a letter dated March 27, 1997, to Senator Allan Spear, Chair of the Legislative Coordinating Commission, from the Rules Coordinator notifying him of the Board's intent to adopt the proposed rules and transmitting a copy of the SONAR, and an attached certificate of mailing the SONAR to the Legislative Coordinating Commission dated March 28, 1997 (Ex. F);

(g) the Dual Notice of Intent to Adopt Rules dated March 14, 1997, as mailed, and attached proposed rules (Ex. G);

(h) the Dual Notice of Intent to Adopt Rules and attached proposed rules, as published at 21 State Reg. 1400 (Ex. G);

(i) certificates of mailing the dual notice, as signed and dated March 26, 1997, and March 28, 1997, and a certificate that the mailing list utilized with respect to the 1996 Request for Comments was accurate, complete, and current as of April 12, 1997 (Ex. H);

(j) a letter from the Office of Administrative Hearings dated April 4, 1996, indicating that the OAH had approved the Additional Notice Plan submitted by the Board with respect to the Request for Comments on the proposed rules, and attached underlying submission from the agency dated April 1, 1996 (Ex. I);

(k) a letter from the Office of Administrative Hearings dated March 12, 1997, indicating that the OAH had approved the Additional Notice Plan submitted by the Board with respect to the Notice of Intent to Adopt the proposed rules, and attached underlying submissions from the agency dated March 5 and March 12, 1997 (Ex. I);

(l) copies of written comments received by the Board relating to the proposed rules (Ex. J);

(m) a certificate that a notice was mailed on May 8, 1997, notifying all persons who requested a hearing that a hearing would be held regarding the proposed rules because twenty-five or more requests for hearing were received, and a copy of the notice and other informational materials that were mailed (Exs. K and L);

(n) a list of Advisory Task Force Participants dated September 8, 1995 (Ex. M).

All of the above documents were available for inspection at the Office of Administrative Hearings from the date of filing to June 16, 1997, the date the rulemaking record closed.

7. Because the certifications submitted by the Board at the hearing in Exhibit H did not clearly reflect whether the Board's 1996 Request for Comments and the Notice of Intent to Adopt Rules were in fact mailed to all of the individuals and organizations in accordance with the additional notice plans that had been approved by the OAH and whether the mailing list for the dual notice was determined to be accurate, the Administrative Law Judge requested that the Board file additional materials clarifying the nature of the notice that was given. On July 11 and July 14, 1997, the Board filed a clarifying letter and three additional certificates. Based on this additional information, it is evident that the 1996 Request for Comments and the Notice of Intent to Adopt Rules were, in fact, mailed to the individuals and organizations that were reflected in the additional notice plans. Thus, the Notice of Intent to Adopt Rules was mailed on March 26, 1997, to current license holders; Minnesota state colleges, universities, and technical colleges that offer a law enforcement degree program or security/investigative coursework, trade magazines published by the American Society of Industrial Security and the Certified Fraud Examiners Association; the Peace Officer Standards and Training Board, the Minnesota Sheriff's Association, and the Minnesota Chiefs of Police Association; and all persons who had requested notice of the Board's rule-making activities. The Request for Comments was mailed on April 12, 1996, to all of those same individuals and organizations plus persons on the registered mailing list of the Department of Public Safety.

8. Pursuant to Minn. Stat. § 14.15, subd. 5 (1995 Supp.), the Administrative Law Judge must disregard any error or defect in the proceeding due to the agency's failure to satisfy a procedural requirement if the Judge finds that the failure "did not deprive any person or entity of an opportunity to participate meaningfully in the

rulemaking process . . . .” It is clear that the Board did, in fact provide notice of the Request for Comments and the dual notice in accordance with their approved additional notice plans and that the mailing list was determined to be accurate. No one objected to the alleged inadequacy of notice, and various segments of the industry affected by the proposed rule actively participated in the rulemaking proceeding. Under these circumstances, the Board’s failure to submit accurate and complete certifications at the time of hearing is deemed to be a harmless error which must be disregarded. The Board should, however, be more careful to file accurate and complete certificates of mailing in future rulemaking proceedings.

9. After the hearing, the Administrative Law Judge noticed that the Rule Hearing Procedures information sheet that was available at the May 20, 1997, rule hearing was an old version which had not been revised to show the current address of the Office of Administrative Hearings. On May 28, 1997, the Administrative Law Judge sent a letter to all persons who had signed the Rule Hearing Register or filled out an envelope at the hearing informing them of the error and providing them with the correct address of the Office of Administrative Hearings.

#### Public Input on the Proposed Rules

10. An advisory task force composed of private detectives and protective agents representing small, large, metropolitan, and outstate companies was formed to assist the Board in formulating this rule. SONAR at 2-3. In addition, the Board requested comments on the proposed rules in 1993 and 1996 (see 17 State Reg. 2985 (June 1, 1993), and 20 State Reg. 2260 (April 15, 1996)) and held a public hearing in June of 1995. SONAR at 2; Exs. A, A-1.

#### Nature of the Proposed Rules and Statutory Authority

11. The proposed rules amend the Board’s existing rules to add new provisions establishing the minimum requirements for the training of private detectives and protective agents and the standards for evaluation and certification of training programs by the Board. The proposed rules add several new definitions relating to the training provisions, set forth a procedure and minimum requirements for obtaining Board certification of training programs, authorize suspension, revocation, or other disciplinary sanctions against certified training programs that fail to comply with the rules or the governing statute, establish requirements for preassignment or on-the-job training, create continuing education requirements, specify that license holders who fail to complete the minimum educational or reporting requirements will be subject to the existing contingent or lapsed license rule provisions, and repeal the current rule requiring that new applicants and renewal applicants pass a written examination as part of the application process.

12. The Board primarily relies on Minn. Stat. § 326.3361 (1994) as its source of authority to adopt the proposed rules. SONAR at 4. That statutory provision expressly provides that the Board “shall, by rule, prescribe the requirements, duration, contents, and standards for successful completion of certified training programs for license

holders, qualified representatives, Minnesota managers, partners, and employees . . . .” In addition to this specific grant of authority, the Legislature granted the Board general authority to “adopt rules . . . to govern the selection, training, conduct, discipline, and licensing of private detectives and protective agents, and any other matters necessary to carry out duties imposed by [Minnesota Statutes] sections 326.32 to 326.339.” Minn. Stat. § 326.3331 (1994). The Administrative Law Judge finds that the Board has statutory authority to adopt the proposed rules.

13. Most of the proposed rules reflect the Board’s attempt to carry out the mandate of the Legislature that it adopt rules requiring training of those holding private detective and protective agent licenses, as well as qualified representatives, Minnesota managers, partners, and employees. The proposed rules also repeal part 7506.0120 of the existing rules. That provision requires the Board to write and revise a written examination on Chapter 7506 of the Rules and Minn. Stat. §§ 326.32 through 326.339 to be administered to new and renewal applicants. The rule provision which drew the greatest number of comments was the provision relating to the minimum requirements for the subject areas of Board-certified training programs.

#### Cost and Alternative Assessments in SONAR.

14. Minn. Stat. § 14.131 (1995 Supp.) provides that state agencies proposing rules must include in the SONAR a discussion of the classes of persons affected by the rule, including those incurring costs and those reaping benefits; the probable effect of the rule upon state agencies and state revenues; whether less costly or less intrusive means exist for achieving the rule’s goals; what alternatives were considered and the reasons why any such alternatives were not chosen; the probable costs of complying with the rule; and differences between the proposed rules and existing federal regulations.

15. In its discussion of costs and alternative assessments in the SONAR (at pages 1-4), the Board concluded that the proposed rule would affect all persons licensed by the Board, as well as educational institutions and those who may be interested in developing training programs or providing instruction. The Board indicated that the proposed rules would benefit the public by ensuring that licensees meet minimal training and performance standards. The Board determined that licensees would bear the cost of the rule amendments and that there would be administrative costs incurred by the Board to implement and enforce the proposed rule. The SONAR indicates that the Task Force and Board considered the cost effectiveness of various approaches and least intrusive methods for implementing the legislative mandate and that these issues were also discussed during the public hearing in June of 1995. Some more onerous possibilities were rejected, such as certifying individual instructors. The determination of compliance with the training requirements will be made at the time of application or renewal to ease the burden of reporting for both the Board and the license holders. Consideration was also given to the appropriate manner in which to utilize the established training programs of licensees. Several different alternatives were presented to the Board through the Task Force and the June, 1995, hearing. The SONAR indicates that the Board seriously considered these alternatives and ultimately

rejected them in favor of the proposed rules. For example, a multi-level training program drafted by an intern for the Board which specified course content, length, testing, sanctions, facility specifications and instructor requirements was rejected as being too complex and far-reaching. The Board also reviewed training requirements issued by other regulatory bodies in Minnesota and by agencies in other states to gain insight into what would be a reasonable and effective training requirement. The Board concluded that the costs to licensees of compliance with the proposed rule would vary depending upon their nature and size. While the cost estimates varied, the Board determined that the proposed rules would improve the professionalism and safety of everyone involved with the industry with as little cost and inconvenience as possible. There is no applicable federal law in this area. The Administrative Law Judge finds that the Department has met the requirements of Minn. Stat. § 14.131 relating to cost and alternative assessments.

### Impact on Farming Operations

16. Minn. Stat. § 14.111 (1995 Supp.), imposes an additional notice requirement when rules are proposed that affect farming operations. The proposed rules will not affect farming operations and no additional notice is required.

### Outline of Substantive Analysis of a Proposed Rule

17. Under Minn. Stat. § 14.14, subd. 2 (1994), and Minn. Rule 1400.2100 (1995), one of the determinations which must be made in a rulemaking proceeding is whether the agency has established the need for and reasonableness of the proposed rule or rule repeal by an affirmative presentation of facts. An agency need not always present adjudicative or trial-type facts in support of a rule. The 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. Manufactured Housing Institute v. Pettersen, 347 N.W.2d 238, 244 (Minn. 1984); Mammenga v. Department of Human Services, 442 N.W.2d 786 (Minn. 1989). In addition to its affirmative presentation, the statute allows the agency to rely upon facts presented by others on the record during the rule proceeding to support the proposal. Minn. Stat. § 14.14, subd. 2 (1995 Supp.).

18. In this case, the Board prepared a Statement of Need and Reasonableness ("SONAR") in support of the proposed rules. At the hearing, the Department primarily relied upon the SONAR as its affirmative presentation of need and reasonableness for the rules. The Board supplemented the SONAR by an extensive dialogue with members of the public throughout the hearing session. The Board also submitted written post-hearing comments.

19. The question of whether a rule is needed focuses upon whether a problem exists that calls for regulation. In an early case after the requirement of establishing need and reasonableness was first enacted, the Chief Administrative Law Judge adopted the rationale that in establishing the need for a rule "the agency must make a presentation of facts that demonstrates the existence of a problem requiring some

administrative attention." Report of the Hearing Examiner, In the Matter of the Proposed Adoption of Rules Relating to the Control of Emissions of Hydrocarbons, OAH File No. PCA-79-008-MG, as cited in Beck, Bakken & Muck, Minnesota Administrative Procedure (Butterworth, St. Paul, 1987) at § 23.4.

20. 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. In re Hanson, 275 N.W.2d 790 (Minn. 1978); Hurley v. Chaffee, 231 Minn. 362, 367, 43 N.W.2d 281, 284 (1950). Arbitrary or unreasonable agency action is action without consideration and in disregard of the facts and circumstances of the case. Greenhill v. Bailey, 519 F.2d 5, 10 (8th Cir. 1975). A rule is generally found to be reasonable if it is rationally related to the end sought to be achieved by the governing statute. Mammenga v. Department of Human Services, 442 N.W.2d 786, 789-90 (Minn. 1989); Broen Memorial Home v. Minnesota Department of Human Services, 364 N.W.2d 436, 444 (Minn. App. 1985). The Minnesota Supreme Court has further defined the 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." Manufactured Housing Institute, 347 N.W.2d at 244.

21. An agency is entitled to make choices between possible approaches as long as the choice it makes is rational. A rule cannot be said to be unreasonable simply because a more reasonable alternative exists, or a better job of drafting might have been done. If commentators suggest approaches other than a rational one selected by the agency, it is not the proper 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 a rational person could have made. Federal Security Administrator v. Quaker Oats Company, 318 U.S. 218, 233 (1943). The Agency is free, however, to adopt a "better" proposal if it chooses to do so, subject to the limitations set forth in Conclusion 7, below.

22. In addition to need and reasonableness, the Administrative Law Judge must assess whether the agency complied with required rule adoption procedures, whether the rule grants undue discretion, whether the agency has statutory authority to adopt the rule, whether the rule is unconstitutional or illegal, whether the rule improperly delegates agency authority to another, and whether the proposed language is not a rule. Minn. R. 1400.2100 (1995).

23. Where changes are made to the rule after publication in the State Register, the Administrative Law Judge must determine if the new language is substantially different from that which was proposed originally. Minn. Stat. § 14.15, subd. 3 (1995 Supp.); Minn. R. 2100(C) (1995). The standards to determine if the new language is substantially different are found in Minn. Stat. § 14.05, subd. 2 (1995 Supp.). Pursuant to that statute, a modification does not make a proposed rule substantially different if the differences are within the scope and character of the matter announced by the agency in its notice of intent to adopt rules, the differences are a logical outgrowth of the notice

and responsive comments, and the notice provided fair warning that the outcome of the rulemaking proceeding could be the rule in question.

24. This Report is generally limited to the discussion of the portions of the proposed rules that received significant critical comment or otherwise need to be examined. Accordingly, this Report will not discuss each amendment, nor will it respond to each comment which was submitted. Persons or groups who do not find their particular comments referenced in this Report should know that each and every submission has been read and considered. Moreover, some sections of the proposed rules were not opposed and were adequately supported by the SONAR. A detailed discussion of each subpart of the proposed rules thus is unnecessary. The Administrative Law Judge specifically finds that the Board has demonstrated the need for and reasonableness of provisions of the rule that are not discussed in this Report, that such provisions are within the Board's statutory authority noted above, and that there are no other problems that prevent their adoption. Any language proposed by the Board which differs from the rule as published in the State Register and is not discussed in this Report is found not to be substantially different from the language published in the State Register.

#### Section-by-Section Analysis of the Proposed Rules

##### Proposed Rule Part 7506.0100 - Definitions

25. The proposed rules would amend part 7506.0100 of the existing rules to include new definitions of "employee," "equivalent training," "certified training program," "continuing education," "in-house training," and "preassignment training." As discussed more fully in Paragraph 59 below, the Board deleted the definition of "in-house training" based upon its decision to delete part 7506.2300, subp. 4 (A) and (B).

26. Only the definitions of "equivalent training" and "continuing education" generated critical comment. The other definitions contained in the proposed rule are found to be reasonable and necessary to define the terms used in the proposed rules, clarify their applicability, and ensure compliance with Minn. Stat. § 326.3361. The definitions reflect reasonable interpretations of these terms which are rationally related to carrying out the training goals set forth in the statute.

##### Subpart 2b - Equivalent Training

27. Wackenhut Corporation requested in its written comments that the Board clarify the definition of "equivalent training" to make it clear whether the Board intends to apply the term to those other than certified public law enforcement officers. At the hearing, Patrick McCarthy of McCarthy & Associates, Investigative Services, Inc., also indicated that he felt that the meaning of "equivalent training" required further clarification. Lawrence Plack of L.S. Plack & Associates suggested that the rules include a specific provision indicating that training certified by the Peace Officer Standards and Training Board would be accepted by the Board.

28. The Board declined to change the definition of “equivalent training” contained in the proposed rules. The Board responded in its post-hearing comments that it had defined the term broadly to build in more flexibility and inclusiveness. It indicated that the definition would encompass certified public law enforcement training as well as any other training related to the private detective or protective agent industry.

29. The SONAR supporting the proposed rules states that the definition of “equivalent training” was intended to make it clear that individuals must not assume that a particular training course constitutes “equivalent training” but must instead submit the course to the Board for approval. SONAR at 5. A case-by-case consideration of whether a particular continuing education course shall be approved by the Board as equivalent training has been shown to be necessary and reasonable to ensure that the proposed rules are carried out in a reasoned and consistent manner while affording the Board the flexibility to look at the particular nature of each submitted course. Although the proposed rule does not specifically state that training certified by the POST Board will be accepted by the Board as equivalent training, that failure does not render the proposed rule defective. The statute specifies that persons licensed by the Board of Peace Officer Standards and Training are deemed to meet the training requirements of the statute, and arguably implies by this language that POST-certified training should be accepted by the Board. See Minn. Stat. § 326.3361, subd. 4 (1994). However, the statute does not explicitly state that training certified by the POST Board must be accepted by the Board of Private Detective and Protective Agent Services. The approach set forth in the proposed rule, under which the Board will examine and approve or disapprove each course submitted for its consideration, is not at odds with the governing statute and reflects a policy choice within the Board’s discretion.

#### Subpart 3b - Continuing Education

30. Several commentators objected to the definition of “continuing education” on the grounds that the language was vague, and asked that the Board provide clarification. Wackenhut Corporation, Charles Thibodeau (an instructor at Pine Technical College and a security consultant), Quest Investigations & Consultants, Dunbar Armored, Inc., CRI, and Borg Warner Protective Services Corporation asked for clarification regarding which individuals would be required to be trained in first aid and CPR and the nature of the training required. Quest questioned the need for such training for investigators who are not armed with any type of weapons or restraints. CRI indicated that the investigators it employs are never in a situation in which they would need such training. Wackenhut Corporation objected to the requirement that all employees receive extensive AMA-certified first aid and CPR training. Wackenhut indicated that security officers are not normally expected to be able to administer first aid or CPR, and urged that security clients be allowed the discretion to contract for whatever level of service they wish. Wackenhut recommended that the Board eliminate this training requirement or that, in the alternative, the Board reduce the number of hours required or permit self-study courses with written examinations, such as the American Red Cross Basic First Aid course. Borg Warner also urged the Board to revise the first aid training requirement to permit American Red Cross training rather than just American Medical Association-certified training. Dunbar Armored, Inc., also

objected to the inclusion of CPR and first aid training since neither program fits with its policies and procedures or the requirements of its armored car personnel and indicated that armored car drivers and guards in its employ are instructed to call 911 when they see an accident or a person in need rather than stopping to give first aid and jeopardizing the valuables they are guarding. Dunbar thus asserted that it would not be logical to require that armored car industry employees receive first aid and CPR training. Lawrence Plack of L.S. Plack & Associates recommended that different continuing education areas be specified for private investigators and protective agents.

31. The Board agreed that the definition of “continuing education” should be modified to clarify ambiguous language and to be consistent with Minn. Stat. § 326.3361. The Board also decided that the definition of “continuing education” contained in subpart 3b of the rules as originally proposed should be deleted and the relevant language should be moved to part 7506.2700, subp. 2, of the proposed rule. Pursuant to the modifications proposed by the Board, part 7506.2700, subp. 2, would be modified to state as follows:

Subp. 2. **Continuing education.** Continuing education for all license holders and employees means mandatory board certified training directly related to the field of private detective/investigator or protective agent. Armed license holders and employees must:

- A. Complete an additional six hours annually of training in the weapons used in the course of employment, including annual certification on the firing range for those who carry a firearm;
- B. Complete an approved first aid training course; and
- C. Provide the board with evidence of certification in cardiopulmonary resuscitation (CPR) and first aid.

32. The modifications made by the Board specifically note that the continuing education requirement applies to all license holders and employees. The modifications also clarify that armed license holders must receive training in the use of weapons they utilize in the course of their employment, thereby responding to confusion on the part of several commentators which stemmed from the language of the rule as originally proposed. In addition, the modifications made by the Board remove the requirements contained in the rules as originally proposed that first aid courses must be certified by the American Medical Association and that the Board must annually be provided with evidence of continuous certification in CPR and first aid, and replace these provisions with requirements that the Board merely be provided with evidence of completion of an “approved” first aid course and certification in CPR and first aid. In doing so, the Board indicated that it was attempting to incorporate flexibility in the rule and acknowledge that the private investigator and protective agent industry has diverse needs and resources.

33. The deletion of the definition of “continuing education” contained in subpart 3b of part 7506.0100, coupled with the modifications made to part 7506.2700, clarifies

the intent of the continuing education requirement, is responsive to comments of the public, and is consistent with the intent of Minn. Stat. § 326.3361 to apply more stringent training requirements to license holders and employees who are armed. Minn. Stat. § 326.3361 requires that employees who are armed receive training in first aid. It is necessary and reasonable to include CPR training as part of the first aid requirement, particularly where, as the Board panel noted at the hearing, there is a possibility that armed employees may injure someone and be called upon to render aid. While armored car drivers and guards may not always be in a position to render aid, it is possible that they would be able to do so in the event of an accidental discharge of their weapon in which a co-worker or innocent bystander were injured. Moreover, the statute requires first aid training of all armed employees, without specifying any exceptions. For that reason, it also would not be appropriate for the Board to make distinctions in the type of training to be provided armed private investigators and armed protective agents. A statutory amendment would be necessary before the rule could apply differing standards to the two groups.

34. The Administrative Law Judge thus concludes that the modification of the definition of “continuing education” and its incorporation in part 7506.2700 has been shown to be needed and reasonable. Because the modifications made are a logical outgrowth of the concerns expressed in numerous written comments and public testimony and are within the scope of the areas announced by the Board in its notice of intent to adopt rules, the Administrative Law Judge finds that the new language is not substantially different from that which was proposed originally. Several other modifications made to part 7506.2700 are discussed in Paragraph 68 below.

#### Rule Part 7506.2200 - Board Certification of Training Programs

##### Subpart 1 - Contents of Application

35. Wackenhut Corporation, Vance International Companies, Quest Investigations & Consultants, McCarthy & Associates, and Borg Warner objected to the requirement in subpart 1 (A) and (E) that 90-days' notice to the Board is necessary before commencing a new training program and that training must be pre-scheduled on an annual and continuing basis. Wackenhut Corporation pointed out that contract requirements and business demands fluctuate, the need for employees cannot always be pre-determined, and the location of training (particularly firearms training) is subject to availability and weather conditions. Wackenhut and Borg Warner urged the Board to allow flexibility in training dates and locations. Wackenhut argued that it would be unreasonable to render the company unable to fulfill contract requirements because training sessions must be conducted in accordance with a pre-determined and approved date. Vance International Companies recommended that an exception be included in the rule for companies operating under contracts for security services, based upon the fact that such contracts are often awarded with less than 60-days notice. Vance suggested that the proposed rule be modified to include a provision under which a license holder could request an exception to the 90-day rule for instances in which a contract firm was awarded a contract requiring the firm to develop a new training program to meet the customer's operational requirements. Quest Investigations

recommended that the Board consider the possibility of having a class certified before all of the details, such as students, location, and date, are finalized, since it would be beneficial if it could be stated in the advertisement that the class has been certified. With respect to item E, Mr. Thibodeau commented that the locations and dates of training may be impossible to report to the Board because training may be continuous and sporadic and trainers may travel from town to town.

36. In response to the concerns about the time lines, the Board indicated that it had originally established a 90-day timeline because of concerns that the Board would require that amount of time to consider the applications fully. In its post-hearing comments, the Board modified the rule to provide for a 60-day time line based on its belief, after further consideration and discussion, that 60 days would be adequate. The Board declined to change items A or E in response to the other concerns that were raised. In its post-hearing comments, the Board indicated that it would not be able to hold programs accountable, conduct audits, or take other action to ensure compliance with the rule if it did not know the location, time, and number of hours of each training session. Moreover, the Board emphasized that subpart 3 of this rule part provides some flexibility by permitting changes to be made in the curriculum, instructors, location, evaluation policies, or dates of training within ten working days after a change is made if advance notice is not possible. The Board also pointed out that new employees usually are subjected to background checks which should give the employer sufficient time to comply with the rule even if the need for applicants was not anticipated far in advance.

37. Subpart 1, item B(1) of the rule as originally proposed required the application for Board certification of a training program to include a description of the course work that the program will offer, accompanied by “satisfactory proof that the program will offer courses meeting the prescribed training objectives approved by the board.” Several commentators, including Wackenhut Corporation, McCarthy & Associates, and Mr. Thibodeau, objected that the proposed rule was unduly vague with respect to the nature of the training required for Board certification. Many of those who objected to the proposed rule on this basis suggested that the proposed rule identify specific training objectives for the certified training program, including course subjects and hours of instruction. The Board responded that it did not have the resources to have someone write the entire training program. The Board also indicated that the Advisory Task Force was asked to submit course outlines but the individual members were unable to agree, and pointed out that several participants in the public hearing admitted that the subject matter outlines would vary dramatically from person to person in the industry. In its post-hearing comments, the Board indicated that the rule is intended to create only minimum requirements that will be flexible and take the differing needs of its license holders into consideration. The Board proposed to modify subpart 1(B)(1) to delete the reference to “training objectives approved by the board” and substitute a reference to “minimum requirements” in order to be consistent with Board policy, but otherwise declined to modify item B(1). As modified, item B(1) will require that applicants provide satisfactory proof that the program “will offer courses meeting the prescribed minimum requirements as outlined in part 7506.2300, subpart 1, A-E.”

38. The Minnesota Supreme Court has held that, “A rule, like a statute, is void for vagueness if it fails to give a person of ordinary intelligence a reasonable opportunity to know what is prohibited or fails to provide sufficient standards for enforcement.” In re Charges of Unprofessional Conduct against N.P., 361 N.W.2d 386, 394 (Minn. 1985). The Court went on to note that a rule “should be upheld unless the terms are so uncertain and indefinite that after exhausting all rules of construction, it is impossible to ascertain legislative intent.” The Court indicated that due process “does not require that a rule contain an explicit definition of every term. . . . All that is necessary is that the rule prescribe general principles so that those subject to the rule are reasonably able to determine what conduct is appropriate.” Id., citing Getter v. Travel Lodge, 260 N.W.2d 177 (Minn. 1977). In considering a similar vagueness challenge, the Wisconsin Supreme Court has held that “[a] fair degree of definiteness is all that is required to uphold a statute or regulation, and a statute or regulation will not be voided merely by showing that the boundaries of the area of proscribed conduct are somewhat hazy.” State ex rel. Hennekens v. City of River Falls Police and Fire Commission, 369 N.W.2d 670, 674 (Wis. 1985).

39. When these standards are applied, it does not appear that the rule is unduly vague. Part 7506.2200, when read in conjunction with the remainder of the rule, sets forth the general subject areas that are to be encompassed in training sought to be certified. This specification of general subject areas provides license holders, employees, and others subject to the rule with reasonable notice of what must be included in the training to obtain Board certification. While the exact details of the training provided in each of the subject areas is not specified in the rule, the lack of that level of detail does not render the rule defective. As the Board noted, it would be difficult to be more precise in this situation, especially where the industry being regulated is diverse and the intention is to allow those who are being regulated some flexibility in designing a training program that will meet their company’s unique needs. Moreover, as the Board pointed out in its final post-hearing comments, a new statute has been enacted which specifies that “[t]he definition of a rule [under the Minnesota Administrative Procedure Act] does not include . . . the curriculum adopted by an agency to implement a statute or rule permitting or mandating minimum educational requirements for persons regulated by an agency, provided the topic areas to be covered by the minimum educational requirements are specified in statute or rule.” Minn. Laws 1997, Ch. 187, Art. 5, § 2, amending Minn. Stat. § 14.03, subd. 3. This new legislation, which has already taken effect, suggests that it is sufficient if an agency rule merely sets forth the educational topic areas to be covered. The legislation also permits an agency to issue a recommended curriculum without complying with rulemaking procedures, thereby allowing agencies more leeway in arriving at an approved curriculum. As the Board gains experience in considering and approving training sessions, perhaps it will issue a recommended training curriculum. It is not, however, required to do adopt a curriculum as part of this rule.

40. With respect to subpart 1, item B(2), Wackenhut Corporation, Quest Investigations & Consultants, and Charles Thibodeau recommended that the Board define the phrase “reasonable training facilities” as used in item B. Mr. Thibodeau asked whether the rule would allow the instructor to move from location to location, work

out of a home office, and utilize the Internet or the ITV (interactive television) system. He emphasized that such approaches are currently employed at his technical college in Minnesota and also at universities throughout the country. He urged that the rule allow for ITV and Internet training, particularly in cases in which the curriculum is supported by colleges.

41. At the hearing, the Board panel responded that it intentionally decided to permit some flexibility with respect to what was meant by the term “reasonable training facilities.” The Board decided it was best to let the trainer make his or her own arrangement rather than dictating in the rule the size of the room, the lighting, and other details, and let the marketplace dictate what will be a reasonable training facility. Although one member of the Board panel indicated in response to Mr. Thibodeau’s remarks that the rules did not contemplate the use of the Internet or videos to take home, counsel for the Board later stated that nothing in the rules prohibits ITV training and that it was premature to be concerned about this, and the Board reiterated in its post-hearing comments that nothing in the rule would prohibit the use of the Internet or ITV. The Board thus declined to modify the proposed rule.

42. Vance International Companies, Mr. Thibodeau, McCarthy & Associates, and Quest Investigations & Consultants pointed out that the proposed rule does not indicate under what criteria the Board will evaluate an instructor’s qualifications and recommended that item C of subpart 1 be amended to establish criteria under which the Board would evaluate instructors. Mr. Thibodeau complained that the proposed rule is too vague regarding the qualifications of trainers and leaves too many issues up to arbitrary decisions by the Board. Mr. Thibodeau asserted that practitioners could not afford to make numerous trips to the Board to install a new trainer, especially where the Board meets only once a month. Mr. McCarthy of McCarthy & Associates urged the Board to consider modifying the rules to acknowledge that an individual who has a master’s degree or has completed coursework at the University of Minnesota would be a qualified instructor.

43. The Board responded that, while it wishes to ensure that trainers are competent to teach, it did not want to require trainers to be certified teachers. If the resume submitted shows that the individual is obviously qualified and in the field, the Board would anticipate approving the instructor. The Board indicated that the marketplace would do much to determine what courses and teachers were accepted, and that it wanted to be as all-inclusive as possible. The Board panel pointed out that a law degree should not automatically qualify someone to conduct training since the individual’s sole experience may be in tax law or some other area unrelated to private investigation and protective services.

44. Minn. Stat. § 326.3361 does not require the approach urged by those who objected to this provision. The proposed rule gives adequate notice to those subject to the proposed rule that they will need to submit resumes relating to instructors and that the qualifications and experience of the instructors will be one factor the Board will consider in deciding whether to certify a training program. The Board has explained the basis for its policy choice by stating that it did not want to imply in the rule that a formal

credential was determinative because that might discourage individuals with experience who lack such a credential and mandate automatic approval of an individual who lacks the proper background or experience. As noted above, the agency is permitted to make a choice between competing alternatives as long as the choice is rational.

45. The Board has demonstrated that subpart 1 of the proposed rule, as modified, is needed and reasonable to permit the Board sufficient time to review applications for certification on a case-by-case basis, provide the Board with adequate information to investigate compliance and determine whether a training course should be certified, and clarify the Board's intent to merely prescribe minimum training requirements. Subpart 3 provides sufficient flexibility to accommodate those who must make changes in the location, dates, or other details of training. The language relating to the need to offer courses meeting the prescribed minimum requirements is not unduly vague since, when read in conjunction with the remainder of the rule, it provides those who are being regulated with adequate notice of the course work that will be required for certification. The modifications to the time line for submission of applications and the reference to "minimum requirements" do not result in a rule that is substantially different from that which was proposed originally. The Board's failure to adopt other modifications urged by members of the public does not render the proposed rule defective.

#### Subpart 2 - Program Certification

46. Mr. Thibodeau requested that the proposed rules be modified to state an amount of time within which the Board would be required to render its decision regarding whether a training program would be certified. The Board did not specifically respond to this suggestion in its post-hearing submissions. The Board is free to consider this suggestion and, should it wish, set forth a time line in the rule. Such a modification would not be a substantial change in the rule. No time line is specified in the governing statute, however, and the rule is not rendered defective by its failure to incorporate such a time limitation.

#### Subpart 3 - Changes in Certified Programs

47. Vance International pointed out that there is no indication in the proposed rule regarding how much time the Board will take to indicate whether it will approve changes to certified training programs and stressed the importance of timely notification of the Board's decision. Once again, the Board did not respond to this comment in its post-hearing submissions. While the Board may incorporate such a modification in the rule without bringing about a substantial change in the rule, it is not required to do so.

#### Subpart 4 - Periodic Review of Certification

48. Subpart 4 of the proposed rule indicated that Board certification would be subject to periodic review by the Board or the Executive Director and, as originally proposed, required that renewal applications be submitted every two years. Wackenhut Corporation objected to this requirement on the grounds that it was a significant

administrative burden to continue to resubmit material previously approved by the Board. In response to this comment, the Board proposed to modify the proposed rule to require submission of a renewal application “or reaffirmation of original information” every two years. The proposed rule, as modified, has been shown to be reasonable and necessary to enable the Board to obtain the required information while minimizing the burden to those seeking certification. The modification is a logical outgrowth of the notice of intent to adopt the rule and the comments received with respect to the rule provision and does not constitute a substantial change.

## Rule Part 7506.2300 - Minimum Requirements for Board-Certified Training Programs

### Subpart 1 - Subject Areas

49. This subpart generated comment from a number of individuals and companies. D Wayne Mincke of Wayne Mincke Motor Escorts, who provides funeral escorts, expressed concern at the hearing regarding the impact of the training provisions on his small business. He indicated that his employees do not use or carry any weapons and asked for clarification whether the provisions in items A-D regarding firearms training, training in the use of weapons other than firearms, training in alternatives to the use of force, and weapons standards training would apply to his employees. Mr. Thibodeau commented that item A of this rule part would have a high probability of litigation because he contends that it conflicts with statutory provisions protecting the right to bear arms. Premier Investigations, Inc., suggested that item A be revised to prohibit private detectives and protective agents from carrying or using a weapon “while on the job” or “while conducting licensable activity” without the proper training since the rule was not intended to deprive individuals of their right to own, carry, or use a firearm while not on duty, and suggested that the Board revise items B, C, and E to clarify that these items apply only to armed guards or security guards in general, and not to all employees of any type of agency. Ed Wunsch of CRI also recommended that the Board clarify in the language of subpart 1 of the proposed rule that it is unnecessary to train an employee in areas that the employee is not going to use. Wackenhut Corporation expressed concern that the training required under item B would be required of private security firms even if they do not employ these weapons or restraining techniques. Wackenhut Corporation, Dunbar Armored, Inc., CRI, and Mr. Thibodeau objected to item C, which requires training in “alternatives to the use of force.” Mr. Thibodeau asked whether every officer would be required to be trained in the use of force and alternatives to the use of force. Dunbar indicated that training in the use of weapons other than firearms and training in alternatives to the use of force would be unnecessary and undesirable in the armored car industry. CRI commented that such training would be of no use to its private investigators. With respect to item D, Wackenhut requested that the Board provide standards for weapons and equipment as part of the rule and asked whether the Board would review requests for exceptions to weapons standards based upon client preferences or federal requirements, noting that the caliber of handgun to be used may be mandated by federal law or dictated by the client under a security contract. Concerns expressed with respect to item E, which requires first aid training, are discussed above. See Paragraphs 30-34, relating to the definition of “continuing education.”

50. After some discussion at the hearing, the Board panel agreed that several of the subject areas set forth in subpart 1 were intended to apply only to individuals who use weapons in their jobs and agreed that clarification was warranted. At the hearing, the Board panel also indicated that the firearm standard only applies when the individual is carrying out licensable activities and stated that it would propose clarifying language. In its post-hearing comments, the Board proposed several modifications to subpart 1 and items A and B. As modified, the provision would read as follows:

Subpart 1. **Subject areas.** Consistent with the minimum requirements in the following subject areas, the training for armed private detectives and armed protective agents must minimally include training in areas A-G, training for unarmed employees must minimally include training in areas F-G:

A. firearms training for armed employees, including training in the legal limitations on the justifiable use of force and deadly force as specified in Minnesota Statutes, section 509.05 and 609.065. No license holder, qualified representative, Minnesota manager, partner, or employee may carry or use a weapon while carrying out licensable duties without having successfully completed board-certified training;

B. training in the use of weapons for employees armed with weapons other than firearms (See Minn. Stat., section 326.3351, subdivision 1, clause (2));

C. training in the alternatives to the use of force;

D. standards for weapons and equipment issued, carried or used by license holders, qualified representatives, Minnesota managers, partners, and employees;

E. first aid training;

F. pre-assignment or on-the-job training, in the subject areas set out in part 7506.2600; and

G. continuing training for license holders and employees.

51. The governing statute, Minn. Stat. § 326.3361, requires training in certain subject areas. The statute expressly limits first aid, firearms training, and training in the legal limitations on the use of force to armed employees, and implicitly limits training in the use of weapons other than firearms, training in alternatives to the use of force, and training in weapons standards to those who actually use weapons in their jobs. The statute requires preassignment training (or on-the-job training or its equivalent) of applicants for employment and continuing training of all license holders, qualified representatives, Minnesota managers, partners, and employees. The modifications proposed by the Board clarify the rule provisions, alleviate confusion regarding who was subject to the training requirements, and are consistent with the express and implied

intent of the statute. The modifications are responsive to critical comment made at the hearing and during the written comment period and do not render the rule substantially different from the rule as originally proposed. The Board may wish to correct the apparent typographical error in the wording of the modification by inserting a period after the reference to “training in areas A-G” and starting a new sentence with the phrase, “Training for unarmed employees . . . .”

52. Mr. Thibodeau asked whether his instruction regarding legal aspects, which normally exceeds thirty hours in length, must now be reduced to 50 minutes. Mr. McCarthy expressed similar concerns and urged the Board to identify training objectives rather than merely subject areas. As mentioned above, the Board responded at the hearing that it decided to leave the exact parameters of the subject matter areas to the trainers to outline in order to leave some flexibility for course presenters. The Board and several of the hearing participants acknowledged that definitions of the areas would vary from person to person. The Board panel indicated that the governing statute requires training in certain areas and stated that the Board was trying to implement the statute with minimal burden. The panel also stated that the rules do not require that a certain amount of time must be spent on a particular topic but simply require that particular issue areas be addressed.

53. The Board has shown that subpart 1, as modified, is needed and reasonable to delineate the minimum requirements for training in accordance with the governing statute.

#### Subpart 2 - Training Objectives

54. As originally proposed, subpart 2 of the proposed rule indicated that the Board may periodically issue or amend specific learning objectives applicable to the content of the training, and that these revisions would have to be incorporated into any certified training program. Wackenhut Corporation asked the Board to clarify whether there would be a hearing prior to the incorporation of any changes issued by the Board, how long private security firms would have to comply with any such changes, and whether private security firms would be required to re-submit their previously certified training programs for recertification. In its post-hearing comments, the Board deleted subpart 2 in its entirety, apparently in accordance with its policy decision to delineate minimum requirements rather than training objectives. The deletion of subpart 2 has been shown to be needed and reasonable to clarify the proposed rule, and is not a substantial change.

#### Subpart 4 - Minimum Requirements

55. Wackenhut Corporation objected to the redundant record submissions required by the first paragraph of the subpart 4. Wackenhut pointed out that firms were required to submit all training records for all employees on an annual basis and pre-assignment training records upon completion of initial training requirements, and argued that it was not logical to require the annual resubmission of these documents. Wackenhut asserted that it would be an unwarranted administrative burden for both the

state and the license holders to comply with these requirements, and urged the Board to modify the rule to require that continual training records be submitted only during the following year. As set forth more fully below, the Board proposed in its post-hearing comments to delete the sentence from the rule that required all records listed in subpart 3 to be submitted to the Board annually.

56. Subpart 1, items A and B contained the most controversial provisions of the proposed rules. As originally proposed, the rule included a provision in subpart A requiring that companies conducting in-house training must make at least 25 percent of the space available to participants who are not members or employees of the company if the training was to be certified by the Board. The Board modeled the 25 percent requirement after a similar requirement applicable to law firms seeking continuing legal education credit for in-house seminars. In the SONAR, the Board indicated that the requirement was necessary to ensure that small firms who could not afford to put on their own in-house training sessions would have access to other industry training. At the hearing, the Board indicated that, by opening in-house training sessions to the public, it was also hoped that the quality of the courses would be improved and that compliance with the rule requirements would be ensured. This self-monitoring approach was thought to be less expensive and less intrusive than hiring someone to observe in-house training session and determine if they met the rule requirements, and fairer than simply prohibiting in-house training.

57. Numerous commentators, including Wackenhut Corporation, Vance International Companies, Mr. Thibodeau, Inpro Investigative Services & Consultants, Borg Warner, McCarthy & Associates, CRI, NSP, and Dunbar Armored, Inc., objected to the 25 percent requirement and recommended that the provision be deleted or modified. Those objecting to the 25 percent requirement argued that many adverse consequences would stem from the requirement, such as an inability to offer timely and effective training, the forced release of confidential company information and proprietary customer information, limited space and facilities available for training, the possibility that large firms would set unreasonable fees, and potential liability of the training company if non-employees who attended training at the company were later involved in an incident using a weapon. Wackenhut Corporation, Vance International, and Mr. Thibodeau argued that the 25 percent requirement would be an unreasonable encroachment on private business. CRI stated that the requirement would be unworkable in situations in which just one or two investigators were being trained, and asked whether the rule could be modified to apply only where four or more individuals were being trained. Borg Warner questioned whether the Board would get genuine feedback from members of the public attending the training sessions, since they would not have an adequate basis for comparison. Dunbar indicated that the 25 percent requirement would require Dunbar to set up an off-site training facility to avoid potential criminals from gaining access to its building or the valuable property of customers and questioned the necessity of the rule in the armored car industry. Vance International, Mr. Thibodeau, and other commentators contended that the 25 percent requirement would significantly interfere with the recruiting and retention of quality personnel. Vance argued that the provision would increase employee turnover and training costs. Wackenhut asserted that the proposed rules would have a negative impact on the

company's competitive edge by insisting that the company share the training resources it has developed with others. There was extensive discussion at the hearing of possible alternatives to the 25 percent requirement, such as surveying attendees, accepting qualified representatives as acceptable trainers, having Board monitors attend training sessions on a random basis, testing on training materials, submitting videotapes, and imposing a surcharge on courses to cover the costs of monitoring.

58. Under Item B of the proposed rules as originally proposed, those offering in-house training would have been required to advertise to persons outside the company to obtain certification and ensure that the price charged per person for outside participants bore "a reasonable relationship to the cost per person per course." At the hearing and in its SONAR, the Board panel explained that this provision was designed to ensure that it would be possible for persons from outside the firm to attend and to help prevent the possibility that the provision of training would become a cottage industry. There were several objections to this item. Quest Investigations & Consultants and McCarthy & Associates asked that the Board spell out more clearly the requirements for advertising in-house training to outside individuals. Mr. Thibodeau objected to item B as an improper attempt by government to control the prices that trainers charge attendees. He stated that the marketplace should determine the price and that it should be permissible to charge outsiders more to attend in-house training. He also questioned how the advertising requirement would be met and how much would have to be spent on advertising, and asked whether word-of-mouth advertising would meet the requirements of the proposed rule. Wackenhut Corporation recommended that the advertising requirement and pricing provisions set forth in item B be deleted.

59. In its post-hearing submission, the Board proposed modifications to the opening paragraph of subpart 4 and deletion of items A and B due to the overwhelming opposition to these provisions. As modified, subpart 4 would read as follows:

Subp. 4. **Minimum requirements.** Certified training programs must comply with subpart 1 and upon request furnish reasonable and necessary proof to the board to verify that compliance. Certified training programs shall file with the board additional information that the board requires and cooperate with any board investigation relative to its certification status. Nothing in parts 7506.2100 to 7506.2900 precludes any certified training program from offering training that goes beyond the minimum requirements of subpart 1.

60. Subpart 4, as modified, has been shown to be needed and reasonable to ensure that the Board is able to review compliance with the rule. The modifications made by the Board in deleting the annual reporting requirement and items A and B are needed and reasonable to alleviate the administrative burden imposed by the rule and to avoid the detrimental impact on private investigation and protective services firms that would have stemmed from imposition of the 25 percent and advertising requirements. The modifications were made in response to public comment and were the logical outgrowth of the notice of intent to adopt rules and public response thereto. These issues were the subject of significant discussion at the hearing, and their deletion

from the rule does not constitute a substantial change from the rule as originally proposed.

#### Subpart 5 - Firearms Instructors

61. As originally proposed, subpart 5 required firearms instructors to be currently certified by “the Federal Bureau of Investigation, the National Rifle Association, or other nationally recognized certifying organization approved by the board.” After the hearing, the Board proposed modifying this subpart to refer to “a governmental agency” rather than the FBI. The proposed rule, as modified, has been shown to be needed and reasonable to ensure that firearms instructors providing training to license holders and employees under the rule are adequately trained. The modification does not constitute a substantial change.

#### Subpart 6 - First Aid

62. In accordance with the modifications to the definition of continuing education discussed in Paragraphs 30-33 above, the Board modified subpart 6 to require that first aid instructors have completed “certified training” (rather than “training certified by the American Medical Association,” as originally proposed).

#### Rule Part 7506.2500, subp. 3(A) - Grounds for Revocation or Suspension of Certification

63. To maintain consistency with the language changes made elsewhere in the rule, the Board proposed in its post-hearing submission to modify subpart 3(A) to list as a ground for suspension or revocation of certification status of a training program the use of curricula that fails to comply with “the minimum requirements as outlined in part 7506.2300, subpart 1, A-E,” rather than retaining the prior reference to “board-approved learning objectives.” This modification is reasonable and necessary to achieve consistency and promote flexibility, and does not constitute a substantial change.

#### Rule Part 7506.2600 - Preassignment or On-the-Job Training Requirements

64. Premier Investigations opposed the preassignment training requirements as an expensive and unnecessary government intrusion. Dunbar Armored, Inc., objected to the twelve-hour requirement and indicated that eight hours is appropriate in the armored car industry. McCarthy & Associates asked that the Board clarify whether the rule refers to 12 hours of coursework.

65. The Board did not respond to any of these comments in its post-hearing submissions. Minn. Stat. § 326.3361 requires the Board to “by rule, prescribe the requirements, duration, contents, and standards for successful completion of certified training programs . . . , including . . . preassignment or on-the-job training, or its

equivalent, required before applicants may be certified as having completed training. . . . The Board thus was required by the statute to include some type of preassignment training requirement in its rule. The requirement that persons employed as private detectives or protective agents complete twelve hours of such training within their first 21 days of employment constitutes a reasonable interpretation of the statutory requirement and is necessary to provide notice of the parameters of the preassignment training requirement.

66. With respect to the delineation of subject areas contained in subpart 3, Wackenhut Corporation recommended that the Board provide specific definitions of training objectives and minimum hours of instruction for the protective agent subject areas, as well as the private detective subject areas. Mr. Thibodeau also objected that this subpart of the proposed rule did not detail with sufficient specificity what was meant by the training objectives set forth in the rule, such as “security overview,” “legal authority,” “communications,” and “ethics.” He complained that practitioners would have to guess what the content of training should be under the proposed rules and, if they were incorrect, revise and resubmit their materials and wait another month for the Board to meet and consider the revision. Mr. Thibodeau stated that the process would put some small companies out of business or discourage compliance with the rule. Mr. Thibodeau also suggested that the Board specify in the rules that all training must be grounded in a private security, “pro-active preventive” perspective, not a public law enforcement “reactionary apprehension” perspective.

67. These arguments are similar to those discussed previously in this Report and must be rejected for the same reasons. The Board has justified its decision to allow trainers to fashion their own approaches to the subject areas identified in the rule. The Board’s approach is a reasonable exercise of its policy-making discretion and is supported by the recent enactment of Minn. Laws 1997, Ch. 187, Art. 5, § 2.

#### Rule Part 7506-2700 - Continuing Education Requirements

##### Subpart 1 - License Renewal

68. Following the hearing, the Board proposed modifications to this provision to clarify its requirements. As modified, subpart 1 reads as follows:

Subp. 1. **License renewal.** Every employee, as well as license holders, qualified representatives, Minnesota managers, or partners, shall complete six hours of training in board-certified training programs annually. In addition, armed license holders and employees must complete an additional six hours of training in the weapons used in the course of their employment. At the time of license renewal, license holders shall submit to the board an affidavit listing all employees and attesting to the fact that they have met all training requirements. A private detective or protective agent license must not be renewed without written proof that all employees have met all requirements.

69. The modifications clarify the individuals who must comply with this provision and implement the directive of Minn. Stat. § 326.3361 that armed individuals must complete an additional six hours of continuing education each year. The provision, as modified, is needed and reasonable. Although this provision of the rule as originally proposed did not set forth the additional firearms training requirement, that requirement was clearly delineated in the original version of subpart 3a of rule part 7506.0100 and the supporting SONAR provision (see SONAR at 5) as well as in Minn. Stat. § 326.3361. Accordingly, the Administrative Law Judge finds that the modifications do not result in a rule that is substantially different from the rule as originally proposed.

#### Subpart 2 - Continuing Education

70. As noted above with respect to part 7506.0100 (see Paragraphs 30-33 above), subpart 2 has been modified by the Board in response to comments received and to render the provision consistent with the intent of Minn. Stat. § 326.3361.

#### Rule Part 7506.2900 - Failure to Satisfy Training Requirements

71. In its final post-hearing submission, the Board corrected the language contained in its SONAR with respect to this provision. The language which appeared in the original SONAR suggested that the rule imposed a one-year suspension for failure to meet the minimum training requirements, which is a more severe penalty than the rule in fact imposes.

#### Repealer (Repeal of Minn. R. 7506.0120 - Test)

72. The proposed rule includes a repealer of Minn. R. 7506.0120, which currently requires the Board to write and revise a test to be administered to new applicants and renewal applicants as part of the application process. The Board's SONAR does not contain any discussion of the reasons for this repealer, and the Dual Notice of Hearing mailed and published by the Board mentioned only the training provisions of the proposed rule, not the repeal of the test requirement. The repeal of the test requirement was, however, discussed at the hearing on the proposed rule, and the Board panel explained the reasons for the repeal.

73. Under Minn. Stat. § 14.02, subd. 4, the repeal of a rule is subject to the same requirements under the Minnesota Administrative Procedure Act as the adoption of a new rule. It has been held at the federal level that an agency must present a "reasoned analysis" for its change of course in repealing a rule when it comes to a different conclusion. Motor Vehicle Manufacturers Association v. State Farm Mutual, 463 U.S. 29 (1983). It thus was an error for the Board to fail to address the repeal of the test requirement in its SONAR.

74. Pursuant to Minn. Stat. § 14.15, subd. 5 (1995 Supp.), the Administrative Law Judge must disregard any error or defect in the proceeding due to the agency's failure to satisfy a procedural requirement if the Judge finds that the failure "did not deprive any person or entity of an opportunity to participate meaningfully in the rulemaking process . . . ." The repeal was discussed at the hearing, and there was a

lengthy discussion of testing as an alternative to training. It is evident that the testing provision is being replaced by the training requirements, which are viewed by the Board as a more effective means to ensure that license holders will possess the minimum skills to enter and remain in the industry. No one objected to the repeal of the testing provision. Under these circumstances, the failure of the Board to address the repeal of the testing provision in its SONAR is deemed to be a harmless error which must be disregarded.

### Other Concerns

75. Vance International Companies recommended that the rule be modified to provide for a system under which the Board would grade the training programs of private firms to indicate where these programs stood in relation to the Board's minimum requirements for certification and issue "report cards" reflecting those grades. If this approach was adopted, Vance suggested that various other rule provisions be amended to permit the Board to suspend, revoke or not renew the "C" rating issued by the Board, require firms to show their "report card" to customers and provide customers with the Board's telephone number, allow the Board to contact customers at random to determine compliance, authorize the Board to impose fines as sanctions, and permit firms that attain an "A" rating to pay reduced license renewal fees.

76. Premier Investigations suggested that the rules include a provision that indicates that those persons who have been state certified would receive official identification cards that identify them as being licensed or an authorized, certified, trained employee.

77. Mr. Thibodeau suggested that the Board should include a "whistle blower" provision in the proposed rule which encourages employees to contact the Board if they were placed on the job without adequate training in their first 21 days. He also recommended that each individual who receives pre-assignment training be required to sign and send to the Board a card indicating that he or she has received the training.

78. The Board did not adopt the approaches recommended by Vance, Premier, or Mr. Thibodeau. As noted above, where commentators suggest approaches other than the approach selected by the agency and where the agency's approach is rational, it is not the proper 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. Federal Security Administrator v. Quaker Oats Company, 318 U.S. 218, 233 (1943). The choice made by the Board in this instance is one a rational person could have made and thus cannot be found to be defective by virtue of the failure to adopt the approach recommended by Vance International or Premier Investigations.

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

## CONCLUSIONS

1. The Board gave proper notice of the hearing in this matter.
2. The Board has fulfilled the procedural requirements of Minn. Stat. §§ 14.14, subd. 1, 1a and 14.14, subd. 2 and 2a, and all other procedural requirements of law or rule.
3. The Board has demonstrated its statutory authority to adopt the proposed rules and has fulfilled all other substantive requirements of law or rule within the meaning of Minn. Stat. §§ 14.05, subd. 1, 14.15, subd. 3 and 14.50(i)(ii).
4. The Board has documented the need for and reasonableness of its proposed rules with an affirmative presentation of facts in the record within the meaning of Minn. Stat. §§ 14.14, subd. 2 and 14.50(iii).
5. The amendments and additions to the proposed rules which were suggested by the Board after publication in the State Register do not result in rules which are substantially different from the proposed rules as published in the State Register within the meaning of Minn. Stat. §§ 14.05, subd. 2 and 14.15, subd. 3 and Minn. Rule 1400.2240, subp. 7.
6. Any Findings which might be properly be termed Conclusions and any Conclusions which might properly be termed Findings are hereby adopted as such.
7. A Finding or Conclusion of need and reasonableness in regard to any particular rule subsection does not preclude and should not discourage the Board from further modification of the proposed rules based upon an examination of the public comments, provided that no substantial change is made from the proposed rules as originally published, and provided that the rule finally adopted is based upon facts appearing in this rule hearing record.

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

## RECOMMENDATION

IT IS HEREBY RECOMMENDED: That the proposed rules be adopted.

Dated this 16th day of July, 1997.

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BARBARA L. NEILSON  
Administrative Law Judge

Reported: Tape Recorded