

STATE OF MINNESOTA
OFFICE OF ADMINISTRATIVE HEARINGS

FOR THE MINNESOTA DEPARTMENT OF PUBLIC SAFETY

In the Matter of Proposed Permanent
Rules Relating to Preliminary Screening
Breath Test Devices, Minn. Rules
part 7501.0100 to 7501.0500.

REPORT OF THE
ADMINISTRATIVE LAW JUDGE

The above-entitled matter came on for hearing before Administrative Law Judge George A. Beck at 9:00 a.m. on December 19, 1996, at the NCL Tower Conference Center, 445 Minnesota Street, St. Paul, Minnesota. The hearing continued until all interested persons had been heard.

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

The Department's hearing panel consisted of Hope Jensen, Rules Coordinator, now with the Minnesota Department of Transportation; Lowell C. Van Berkomp, Director of the Bureau of Criminal Apprehension (BCA) Laboratory; Robert Mooney, Forensic Scientist II of the BCA; and Eldon Ukestad, Forensic Scientist III of the BCA. Fourteen persons attended the hearing. Eleven persons signed the hearing register. The hearing continued until all interested persons, groups or associations had an opportunity to be heard concerning the adoption of these rules.

The record remained open for the submission of written comments for five calendar days following the hearing, to December 27, 1996. Pursuant to Minn. Stat. § 14.15, subd. 1, five working days were allowed for the filing of responsive comments. At the close of business on January 6, 1997, the rulemaking record closed for all purposes. The Administrative Law Judge received a written comment from the Department reiterating matters discussed at the hearing. No written comments from interested persons were received during the comment period. No comments were received during the reply period.

NOTICE

This Report must be available for review to all affected individuals upon request for at least five working days before the agency takes any further action on the rule(s). The agency may then adopt a final rule or modify or withdraw its proposed rule. If the Commissioner of the Public Safety makes changes in the rule other than those

recommended in this report, he must submit the rule with the complete hearing record to the Chief Administrative Law Judge for a review of the changes prior to final adoption. Upon adoption of a final rule, the agency must submit it to the Revisor of Statutes for a review of the form of the rule. The agency must also give notice to all persons who requested to be informed when the rule is adopted and filed with the Secretary of State.

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

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

FINDINGS OF FACT

Procedural Requirements

1. On August 21, 1995, the Department published a Notice of Solicitation of Outside Information or Opinions Regarding Proposed Amendments to Rules Governing Preliminary Screening Breath Test Devices at 20 *State Register* 353. Exhibit 1.

2. An Additional Notice Plan setting out the notice to be provided to interested persons by means other than the statutory minimum requirements was approved by the undersigned Administrative Law Judge on July 31, 1996.

3. On August 12, 1996 and August 19, 1996, the Department transmitted its Notice of Intent to Adopt these rules to State, county, and local law enforcement agencies by teletype. Statement of Need and Reasonableness (SONAR), at 4. The Notice was mailed to interested persons on the Department's mailing list and published in the *State Register*. One written comment was received in response to the Department's Notice. Exhibit 8, Becker Letter.

4. The Department submitted the rule for review and approval without a public hearing, pursuant to Minn. Stat. § 14.26. The rules were disapproved due to the lack of statutory authority to adopt these particular rules without a public hearing. Order on Review of Rules Under Minn. Stat. § 14.26, OAH Docket No. 74-2400-10676-1 (Order dated October 21, 1996).

5. On November 12, 1996, the Notice of Hearing and the proposed rules were published at 21 *State Register* 689. Exhibit 5.

6. On November 15, 1996, the Department mailed the Notice of Hearing to all persons and associations who had registered their names with the Department for the purpose of receiving such notice. Exhibit 6. The list had been certified as accurate and complete as of November 13, 1996. *Id.*

7. On November 14, 16 and 19, 1996, the Notice of Hearing was transmitted by teletype to State, county, and local law enforcement agencies. Exhibit 7. One

comment was received by the Department in response to these notices. Exhibit 8, Chief Hauschildt Letter.

8. At the hearing, the Department filed the following documents with the Administrative Law Judge:

- (a) the Notice of Solicitation of Outside Opinion published at 20 State Register 353, on August 21, 1995 (Exhibit 1);
- (b) a copy of the proposed rules certified by the Revisor of Statutes (Exhibit 2);
- (c) the Statement of Need and Reasonableness (SONAR), with an Addendum dated December 18, 1996 (Exhibit 3);
- (d) a copy of the letter transmitting the SONAR to the Legislative Coordinating Commission as required by Minn. Stat. §14.131 (Exhibit 4);
- (e) a copy of the Notice of Hearing as mailed to persons on the Department's mailing list and published in the *State Register* (Exhibit 5);
- (f) the certification of the mailing list and mailing the Notice to all persons on the Department's list (Exhibit 6);
- (g) the Certification of Additional Notice (Exhibit 7);
- (h) all the comments that the Department has received concerning the proposed rules (Exhibit 8); and,
- (i) an informational document showing differing types of breath test devices with specifications and background information about each device (Exhibits 9 and 10).

Task Force on Proposed Rule.

9. No advisory task force was formed to assist the Department in formulating this rule. SONAR, at 1.

Statutory Authority.

10. In its SONAR, the Department cites Minn. Stat. § 169.121, subd. 6, as its statutory authority to adopt these rules. SONAR, at 1. That statute authorizes peace officers with an articulable suspicion that a driver is violating the prohibition against operating a motor vehicle while intoxicated or impaired to require the driver to provide a breath sample using a device approved by the Commissioner of Public Safety. Minn. Stat. § 169.121, subd. 6. The cited statutory provision does not discuss rulemaking. The Department's Notice of Hearing identifies Minn. Stat. § 129.128 as an additional source of statutory authority to adopt these rules. Exhibit 5. Under Minn. Stat. § 169.128, the Commissioner is expressly authorized to adopt

rules “to carry out the provisions of sections 169.121” The Judge concludes that the Department has the general statutory authority to adopt the proposed rule under Minn. Stat. § 169.128.

Cost and Alternative Assessments in SONAR.

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

12. In the Addendum to its SONAR, the Department concluded that there will be no costs to the State or any other agency. SONAR Addendum. This conclusion is based on the lack of any provision in the rule requiring the purchase of any testing device. The Department concluded that the proposed rule would save the State money by allowing devices currently in use to remain in use for a variety of purposes. Should the proposed rule not be adopted, the Department and several commentators maintain that reprogramming or the purchase of more expensive PBTs will be required. There is no applicable federal law in this area. The proposed rules significantly reduce the restrictions on what devices may be used for preliminary breath samples. Some of the restrictions removed by these rules eliminate any need to reprogram some of the devices, thereby eliminating some costs. 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

13. Minn. Stat. § 14.111 (1996), imposes an additional notice requirement when rules are proposed that affect farming operations. The proposed rules will not affect farming operations and no additional notice is required.

Nature of the Proposed Rule

14. Law enforcement officers use preliminary breath test devices (“PBTs”) to initially determine if persons operating motor vehicles are intoxicated or impaired. Minn. Stat. § 169.121, subd. 6. Depending upon the result of the PBT, among other factors, the officer may require the driver to take a more accurate infrared breath test (commonly known as the “Intoxylizer”) or an alternative test of blood or urine. See Minn. Stat. § 169.123, subds. 2b and 3. The PBT is hand-held, can be administered rapidly at the site of a traffic stop, and is, relatively speaking, inexpensive. These factors render the PBT a useful tool for traffic enforcement when consumption of alcohol by a driver is suspected. The other tests are administered at fixed locations by specially trained personnel.

15. The existing rule requires a PBT to show whether the test sample is above or below a blood alcohol concentration of 0.10. Minn. Rule 7501.0100, subp. 7. No PBT is allowed to show numerical results when the test sample is positive

(that is, equaling or exceeding a blood alcohol concentration of 0.10). Minn. Rule 7501.0300 B. All PBTs must not register as positive when testing samples contain a blood alcohol concentration of 0.05 or less. For blood alcohol concentrations between 0.05 and 0.10, the existing rule requires a deviation of no more than 0.02 more or less than the actual blood alcohol concentration. Minn. Rule 7501.0300 G.

16. Minn. Stat. 169.121 has been changed since this rule was originally adopted. The current statute allows law enforcement officers to consider alcohol concentrations as low as 0.04 in breath samples as evidence of a driver's impairment. Minn. Stat. § 169.121, subd. 2(b). Commercial vehicle drivers are subject to an alcohol sample limit of 0.04. Minn. Stat. § 169.1211. Drivers under the legal drinking age are subject to misdemeanor prosecution if "there is physical evidence of the [alcohol] consumption present in the person's body." Minn. Stat. § 169.1218(a). This means that underage drivers are subject to prosecution with lower alcohol levels of alcohol concentration in the sample than drivers of legal drinking age. The existing rules impose restrictions on PBTs that have become incompatible with the standards that law enforcement officers are obligated to enforce. To eliminate the incompatible restrictions, the Department proposes to delete the definition of "positive result" and "negative result," alter the definition of "screening device," and amend the minimum standards for PBTs. In addition, the Department altered the requirement for applications for approval to require that two devices be submitted for testing and verification of results.

Analysis of the Proposed Rules

17. Under Minn. Stat. § 14.14, subd. 2, and Minn. Rule 1400.2100, 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). Under Minn. Stat. § 14.02, subd. 4, the repeal of a rule is subject to the same APA requirements 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). The Department prepared a Statement of Need and Reasonableness ("SONAR") in support of the repeal of the rule. At the hearing, the Department primarily relied upon the SONAR as its affirmative presentation of need and reasonableness for the repeal. The SONAR was supplemented by the comments made by the Department at the public hearing and in its written post-hearing comments.

18. 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. Ct. 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, *supra*, 347 N.W.2d at 244. An agency is entitled to make choices between possible approaches as long as the choice it makes is rational. Generally, 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. 2, 233 (1943).

19. In addition to need and reasonableness, the Administrative Law Judge must assess whether the rule adoption procedure was complied with, 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 constitutes an undue delegation of authority to another, or whether the proposed language is not a rule. Minn. Rule 1400.2100. Because the proposed rule was unopposed and was adequately supported by the SONAR, a detailed discussion of each subpart of the rule is unnecessary. The Administrative Law Judge specifically finds that the Department has demonstrated the need for and reasonableness of the proposed rule for any provision of the rule not specifically discussed in this Report, that such provision is specifically authorized by statute and there are no other problems that would prevent the adoption of the rule.

20. 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 (1996). The standards to determine if the new language is substantially different are found in Minn. Stat. § 14.05, subd. 2 (1996). The Department did not propose any modification of the language that was published in the State Register.

Existing PBTs

21. Under the restrictions imposed by the current rules, only two PBTs are eligible for use in traffic enforcement. Those two PBTs are the Alcosensor Pass, Warn, Fail ("Alcosensor PWF") and the Alcosensor IV. The Alcosensor PWF does not have any digital readout of a blood alcohol concentration. Rather, the device uses three colored lights. Green indicates that the sample has an alcohol concentration of 0.004 to 0.056 (Pass). Exhibit 10. Yellow indicates that the sample has an alcohol concentration of 0.056 to 0.110 (Warn). *Id.* Red indicates that the sample has an alcohol concentration of 0.110 and above (Fail). *Id.* There are 2,161 Alcosensor PWFs in service in Minnesota and each costs \$334.00. *Id.*

22. The Alcosensor IV is a programmable PBT containing a digital readout that shows “.”***” for the sample alcohol concentration. Under current rules, the programming (known as “digifail”) shows the sample alcohol concentration numerically up to 0.100. When the sample tests at 0.100 or higher, the digital readout shows “FAIL”. There are 99 Alcosensor IVs in service in Minnesota. Each unit costs \$585.00 and can be reprogrammed to change the readout at a cost of \$90.00 per unit. Exhibit 10.

23. An additional PBT, the Alcosensor III, is in limited use in Minnesota. This unit provides a digital readout, but does not provide a “fail” signal at an alcohol concentration of 0.10 or higher. The unit costs \$334 and there are five units in service in Minnesota. Exhibit 10. The Alcosensor III is used by probation officers for determining if parolees are abiding by the terms of their release and jailers in determining if a person is eligible to drive after being arrested while intoxicated. Since there is a numeric readout above 0.10, rather than a generic indication of having failed the test, the Alcosensor III cannot be used for traffic stop testing under the current rules.

24. The Alcosensor PWF and Alcosensor IV comply with the current rule standards, which reflect the statutory prohibitions existing in 1986 on testing alcohol concentration in breath samples provided by drivers. SONAR, at 1. The alcohol levels in samples from commercial drivers or drivers under the legal drinking age can be positive at levels below 0.10, but that status is not reflected in the readouts for the Alcosensor PWF or the Alcosensor IV. In each case, the PBT would be useful, since the more restrictive alcohol concentrations would be noted (either by a yellow light or a digital readout). However, the current rule regarding PBT readouts and the levels of alcohol concentration to be shown by the PBTs is now more restrictive than the statutory approach to breath testing required of drivers suspected of driving while impaired. The Department has demonstrated that there is a need for amending the current rule standards to allow use of PBTs by law enforcement officers to assess alcohol concentrations in drivers consistent with the statutory prohibitions.

Minn. Rule 7501.0100 - Definitions

25. Minn. Rule 7501.0100, subp. 5 defines “negative result” as an alcohol concentration of less than 0.10. This definition is inconsistent with Minn. Stat. §§ 169.1211, subd. 1; and 169.1218(a), which establish a lower prohibited alcohol concentration for commercial drivers and any alcohol consumption by drivers below the legal drinking age. The definition is also inconsistent with the statutory authorization for law enforcement officers to use sample results of alcohol concentrations of 0.04 or higher as evidence of impaired driving. Minn. Stat. § 169.121, subd. 2(b). The Department proposes to resolve these inconsistencies by repealing this subpart. With a range of prohibitions to be tested for by use of PBTs, there is no reasonable way to impose a single standard of measuring a “negative result” with a PBT. Repealing subpart 5 is needed and reasonable.

26. Subpart 6 defines “positive result” as an alcohol concentration of 0.10 or greater. This subpart is incomplete, since some lower alcohol concentrations also constitute positive result for certain drivers. See, Finding 25, above. In addition, the

degree of alcohol concentration above 0.04 can be taken into account by law enforcement officers in pursuing an arrest for violations of Minn. Stat. §§ 169.121, subdivision 1. *Id.* The Department proposes to delete subpart 6 to avoid conflict with the different statutory standards for positive results for alcohol concentrations from different classes of drivers. The deletion of subpart 6 is both needed and reasonable.

27. Subpart 7 defines “screening device” as a device which measures alcohol concentrations in breath samples to determine if that concentration is above or below 0.10. As in the foregoing Findings, the explicit reference to 0.10 is conflict with the other standards established by statute. To restrict PBTs to the 0.10 concentration is to render some of the devices useless for assessing violations of other statutory prohibitions. The Department proposes that the definition be limited to devices that will indicate the alcohol concentration of a person from a breath sample. The reference to any particular alcohol concentration would be deleted. Lynne Goughler, Legislative Chairperson for Mothers Against Drunk Driving (MADD), indicated that further amendment of Minn. Stat. § 169.121 would be sought in the coming legislative session. MADD seeks an amendment to reduce the prohibited alcohol concentration in drivers from 0.10 to 0.08. Should that amendment be adopted by the Legislature, the reference to an alcohol concentration of 0.10 would be completely irrelevant to any statutory prohibition.

28. The number of different positive results that are currently enacted into law renders deleting the reference to 0.10 both needed and reasonable. The possibility of a legislative change, further reducing the basic standard alcohol concentrations in drivers to 0.08, is too speculative to require a rule change. At the hearing, the Department noted that the proposed changes to these rules will be consistent with the reduction in the prohibited alcohol concentration in drivers advocated by MADD. In addition, should the “fail” standard be lowered and the rule remain unchanged, law enforcement agency could consider themselves bound to remove Alcosensor PWFs from service and reprogram Alcosensor IVs to read “fail” for samples testing at 0.08 alcohol concentration or higher. Captain Richard Smith of the Minnesota State Patrol supports the rule modifications to remove the obligation to reprogram any PBTs and thereby avoid the costs that would be imposed. Kim Elverum, Boat and Water Safety Coordinator for the Minnesota Department of Natural Resources, supports the rule change to allow flexibility in purchasing new PBTs. Exhibit A. Amending the rule language clarifies that no reprogramming is required. The flexibility in the proposed rule further demonstrates the reasonableness of the language the Department seeks to adopt. The Department has shown the changes to subpart 7 to be both needed and reasonable.

Minn. Rule 7501.0300 - Minimum Standards and Specifications

29. The Department has proposed modifications to six items in Minn. Rule 7501.0300. The rule part sets minimum standards for PBTs that qualify for use in traffic enforcement. Item B is modified by deleting the prohibition against registering an alcohol concentration when an alcohol sample registers a positive result. Deleting this provision is consistent with the deletion of “positive result” from the rule definitions and the variety of alcohol concentrations to be tested for by law enforcement. Removing the language eliminates the possibility that Alcosensor IVs

would have to be reprogrammed, thereby saving law enforcement agencies \$90.00 per unit. In addition, the rule modification would allow replacement of PBTs at the end of their useful life with the digital Alcosensor III, rather than the more expensive Alcosensor IV. This option allows law enforcement agencies to avoid incurring additional costs when obtaining a PBT that covers the range of alcohol concentrations relevant to the traffic laws governing consumption of alcohol. The deletion from item B is both needed and reasonable.

30. The Department proposes adding a requirement to item D that manufacturers include calibration instructions in the operating instructions for each PBT. In its SONAR, the Department indicated that users need information “to properly check, adjust and standardize” PBTs, as well as use them. SONAR, at 3. No commentators opposed this provision. The modifications to item D are needed and reasonable.

31. The possibility of “false positives” and “false negatives” are addressed in items E and F of the current rule. The Department proposes to amend item E to prohibit a qualifying PBT from showing that alcohol is present in an “alcohol-free individual.” The change is suggested by the Department to allow PBTs to be used for detecting alcohol consumption by drivers not of legal drinking age. SONAR, at 3. The suggested language establishes a standard under which all alcohol sample levels relevant to law enforcement can be tested for by qualifying PBTs. The modifications to item E are needed and reasonable.

32. Item F disqualifies a PBT which shows a false negative where the sample contains an alcohol concentration of 0.13 or higher. The Department has proposed to delete item F, since the definition of “negative result” has been deleted. SONAR, at 4. The underlying requirement, that the PBT provide an accurate measurement of the alcohol concentration in the sample, is included in the definition of “screening device” (see Findings 27 and 28, above) and in item G. Deleting item F is needed and reasonable.

33. PBTs that are designed to be used for measuring more than one sample before disposal must, under the existing item G, accurately identify the alcohol concentration of a sample between 0.06 and 0.12 to within plus or minus 0.02. The Department has proposed modifying the item to require the samples to be accurately identified to be those with an alcohol concentration of 0.02 or greater and that such samples be accurately identified to within plus or minus 0.015 of the actual alcohol concentration. The imposition of a smaller range for variation in samples taken is supported by the Department as needed to render a higher degree of accuracy in the results of tests. SONAR, at 4. The smaller degree of variation in testing is supported by the Department as consistent with improved technology. *Id.* The rule change is needed and reasonable to render the standards consistent with the range of alcohol concentrations being tested for by law enforcement officers. The proposed modifications to Item G are needed and reasonable.

34. The current wording of item H requires PBTs that require periodic calibration to retain the calibration for seven days. The Department proposes to increase the time the calibration must be retained to fourteen days. In addition, the Department proposes to change the numeral ± 0.01 to “plus or minus 0.010” in the

item. The Department maintains that the new standard is needed to assure the stability of the devices and is not overly burdensome for manufacturers. SONAR, at 4. No objections were made to this provision. The modifications to item G are needed and reasonable.

Minn. Rule 7501.0500 - Application for Approval, Samples Required

35. In order to obtain Department approval of a PBT for use in traffic enforcement, Minn. Rule 7501.0500 requires that the manufacturer submit fifty samples of nonreusable devices or one device with enough disposable components to conduct fifty breath tests. The Department proposes to change the rule on reusable PBTs to requires two such devices be submitted. The Department returns the devices upon completion of testing and thus no additional costs are imposed on manufacturers. SONAR, at 4. Requiring two devices will provide additional verification of the accuracy and calibration of the PBTs. The proposed rule language is needed and reasonable.

36. The Department has made a reasoned analysis in support of its rule. The changes proposed in these rules allow the State and local public bodies to purchase less expensive equipment or to forego reprogramming existing equipment and thereby eliminate additional spending. The new language recognizes the range of alcohol concentrations that must be tested for by law enforcement officers. The changes also incorporate flexibility into the rule, thereby eliminating the need for additional rulemaking in the event that the Legislature changes the threshold alcohol concentration for enforcement of Minn. Stat. § 169.121.

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

CONCLUSIONS

1. The Minnesota Department of Public Safety (the Department) gave proper notice of this rulemaking hearing.
2. The Department has substantially fulfilled the procedural requirements of Minn. Stat. §§ 14.14, subds. 1, 1a and 14.14, subd. 2, and all other procedural requirements of law or rule so as to adopt to repeal the proposed rule.
3. The Department has demonstrated its statutory authority to adopt the proposed rule, and has fulfilled all other substantive requirements of law or rule within the meaning of Minn. Stat. §§ 14.05, subd. 1, and 14.50 (i) and (ii).
4. The Department has demonstrated the need for and reasonableness of the proposed rule by an affirmative presentation of facts in the record within the meaning of Minn. Stat. §§ 14.14, subd. 2 and 14.50 (iii).
5. There were no additions or amendments to the proposed rules suggested by the Department after publication of the proposed rules in the State Register and therefore the rules are not substantially different from the proposed rules as published in

6. Any Findings which might properly be termed Conclusions 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 Department from further modification of the proposed rules based upon an examination of the public comments, provided that the resulting rule is not substantially different 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 _____ day of January, _____ 1997.

GEORGE A. BECK
Administrative Law Judge

Reported: Taped, One Tape
No Transcript Prepared