

STATE OF MINNESOTA
OFFICE OF ADMINISTRATIVE HEARINGS
FOR THE MINNESOTA BOARD OF PEACE OFFICER STANDARDS AND TRAINING

In the Matter of the Proposed Permanent
Rules of the Board of Peace Officers
Standards and Training; Minnesota Rules
Chapter 6700

REPORT OF THE
ADMINISTRATIVE LAW JUDGE

The above-entitled matter came on for hearing before Administrative Law Judge Barbara L. Neilson on December 2, 1997, at 9:00 a.m. in Room 500 South of the State Office Building, 100 Constitution Avenue, St. Paul, Minnesota.

This Report is part of a rulemaking proceeding held pursuant to Minn. Stat. §§ 14.131 to 14.20 (1997) to hear public comment, determine whether the Board of Peace Officer Standards and Training (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.

Mary Ann Bernard, 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 John Laux, Executive Director of the Board; Mark Bliven, Board Rules Coordinator; Dan Boytim, Fiscal and Administrative Services, Department of Public Safety; Virginia Bopp, Department of Finance; Daniel Glass, Testing Coordinator for the Board; and Mary Bjornberg and Deborah Halfen, Board employees. Eight of the nine persons who attended the hearing were affiliated with the Board, the Department of Public Safety, or the Department of Finance. The Administrative Law Judge received eleven 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 December 22, 1997, twenty calendar days following the date of the hearing. Pursuant to Minn. Stat. § 14.15, subd. 1 (1997), five working days were allowed for the filing of responsive comments. At the end of business on December 30, 1997, the rulemaking record closed. The Administrative Law Judge received seven written comments from interested persons during the twenty-day period, one of which was late-filed. The Board submitted two written comments which were filed by the close

of business on December 22 and 30, 1997. The Board's written comments responded to matters discussed at the hearing and comments filed during the twenty-day period.

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 or about September 29, 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. 2);

(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 October 8, 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. 6).

3. On October 13, 1997, the Dual Notice of Intent to Adopt Rules and a copy of the proposed rules were published at 22 State Reg. 589. (Ex. 5).

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

(a) the Board's Request for Comments on Planned Amendment to Rules Governing Licensing and Examination Fees published on March 31, 1997, at 21 State Reg. 1412 (Ex. 1);

(b) a copy of the proposed rules dated August 4, 1997, including the Revisor of Statutes approval (Ex. 2);

(c) the revised Statement of Need and Reasonableness ("SONAR") dated October 9, 1997, signed by the Board's Executive Director (Ex. 3);

(d) a copy of a letter dated October 9, 1997, to the Librarian of the Minnesota Legislative Reference Library, notifying the Librarian 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 Librarian (Ex. 4);

(e) the Dual Notice of Intent to Adopt Rules and proposed rules, as published at 22 State Reg. 589, and a copy of the Dual Notice and proposed rules as mailed to licensees and other interested parties (Ex. 5);

(f) the Certificate of Mailing the Dual Notice dated October 8, 1997, the Certificate of Mailing List attesting that the mailing list was accurate, complete, and current as of October 8, 1997, and attached mailing list (Ex. 6);

(g) the Certificate of Giving Notice Pursuant to the Notice Plan dated October 8, 1997, with attached mailing list and copies of publications of the Board and the League of Minnesota Cities which mentioned the proposed rules (Ex. 7);

(h) copies of written comments received by the Board relating to the proposed rules and names of those who requested a hearing on the proposed rules (Ex. 8);

(i) letters from the Office of Administrative Hearings dated October 7 and October 9, 1997, indicating that the Additional Notice Plan that was submitted by the Board with respect to the Notice of Intent to Adopt the proposed rules had been approved (Ex. 9);

(j) a listing of the total number of licensed peace officers as of January 1, 1997, new licenses issued in 1996, and tests taken in 1996 compared to previous years (Ex. 10); and

(k) a list identifying Board personnel, their salary, and percentages of each staff member's time spent on licensing and testing matters for 1996 and projected through fiscal year 1999. (Ex. 11).

5. All of the above documents were available for inspection at the Office of Administrative Hearings from the date of filing to December 30, 1997, the date the rulemaking record closed.

Public Input on the Proposed Rules

6. On March 31, 1997, the Board published in the State Register and sent to all agencies and interested parties a request for comments on its planned rule amendments. 21 State Reg. 1412 (March 31, 1997) (Ex. 1); SONAR at 2. The request for comments included a reference to the projected increases in fee levels for licensing, license renewal, and examinations. Ex. 1. The Board received numerous comments and requests for additional information over the next six months. SONAR at 2. Additional notice was provided in the June, August, October, and December issues of "Keeping POSTed," a Board publication which is sent to every licensed peace officer, every agency, and all interested parties on the Board's mailing list. Notification of the proposed rules was also included in the October issue of the "Cities Bulletin," a publication of the League of Minnesota Cities. Ex. 7; Board's post-hearing submission. Discussions were held with individual officers and with representatives of peace officer organizations such as the Minnesota Chiefs of Police Association, the Minnesota Sheriffs Association, and the Minnesota Police and Peace Officers Association. SONAR at 2.

Nature of the Proposed Rules and Statutory Authority

7. The proposed rules in large part seek to increase the fees charged by the POST Board for examinations, initial licensing, and renewal of peace officer and part-time peace officer licenses. Specifically, the proposed rules would increase the nonrefundable fee for taking a peace officer license examination from \$40 to \$105. The nonrefundable fee for taking a part-time peace officer licensing examination would be increased from \$12.50 to \$52.50, and the fee for taking a reciprocity examination would be increased from \$40 to \$105. The proposed rules also would amend the Board's existing rules to increase initial licensing fees and renewal fees. The initial licensing fee (covering the first three years of licensure) and renewal fees (covering subsequent three-year periods) would increase from \$15 to \$90 for regular officers and from \$7.50 to \$45 for part-time officers. The fee for renewing expired peace officer licenses would increase from \$45 to \$125 for regular officers and from \$37.50 to \$80 for part-time officers. The proposed rules also would eliminate the peace officer license endorsement examination.

8. The Board primarily relies on Minn. Stat. §§626.843, 626.845, and 214.06 (1997) as its sources of authority to adopt the proposed rules. SONAR at 2-3. Minn. Stat. § 626.845, subd. 1(d), provides that the Board shall have the power and duty to "license peace officers who have satisfactorily completed certified basic training programs, and passed examinations as required by the [B]oard." Minn. Stat. § 626.843, subds. 1(p) and 3(d), provide that the Board shall adopt rules pertaining to "[s]uch other matters as may be necessary consistent with sections 626.84 to 626.863" and that the Board may "[p]erform such other acts as may be necessary or appropriate to carry out the powers and duties" of the Board "as set forth in sections 626.841 to 626.863." The statutory provisions to which these sections refer pertain (among other things) to eligibility to take the peace officer licensing examination, the need for licensure in order to obtain permanent appointment, the Board's power to license peace officers and require examinations, and areas to be covered in part-time peace officer licensing examinations. Minn. Stat. § 214.06, subd. 2, provides that, "[n]otwithstanding any law to

the contrary, each . . . non-health-related licensing board shall promulgate rules providing for the renewal of licenses. The rules shall specify the period of time for which a license is valid, procedures and information required for renewal, and renewal fees to be set pursuant to subdivision 1.”

9. The Board has shown that the promulgation of rules setting fees to be paid by those who wish to take peace officer licensing examinations, apply for initial licensure, or renew their licenses is necessary and appropriate to carry out the examination and licensure duties imposed by the Legislature on the Board. The Administrative Law Judge finds that the Board has statutory authority to adopt the proposed rules.

Cost and Alternative Assessments in SONAR

10. Minn. Stat. § 14.131 (1997) 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.

11. In the SONAR, the Board discussed the classes of persons affected by the rules; the probable costs to the Board, other agencies and state revenue; alternatives to the rule as proposed and why they were rejected; and the probable costs of complying with the proposed rule. The Board also indicated that there were no federal regulations in this area, so there was no need to discuss differences between the proposed rules and existing federal regulations. SONAR at 3-4. With respect to the classes of persons affected by the rules, the Board noted that the proposed rule would cause licensees to see an increase in their renewal fees and applicants to see an increase in both their examination fees and their license fees. The Board indicated that public agencies would be affected only if they agree in employment contracts to pay licensing fees for their officers. The Board asserted that the general public would see a decrease in the state subsidy for licensing and examination costs incurred by the Board. SONAR at 3.

12. The probable costs to the Board, other state agencies, and local units of government stemming from the proposed rules were assessed by the Board as minimal. The Board indicated that, although some additional staff time would undoubtedly be devoted to answering questions on the fees, it did not expect the implementation and enforcement of the proposed rules to increase costs to any great degree. Due to computer-generated application and licensing forms, few resources are necessary to provide a smooth transition. There should be no difference in costs between processing the existing fees and processing larger fees. The Board stated that no state agencies currently pay the licensing fees and that, accordingly, no additional state costs would be incurred. The Board indicated that there is no uniform standard as to whether local hiring agencies pay the renewal fee on behalf of peace officer employees. The local

hiring agencies that choose to pay the license and renewal fees of their employees would see an increase that would amount to an additional \$25 per licensee annually. The Board concluded that the largest fiscal impact of the proposed rules would be an increase of approximately \$315,000 in fees, which would be deposited in the state general revenue fund reduction. The Board asserts that the proposed rules would result in a shift from a general state subsidy of the licensing and examination costs to individual licensee responsibility for such costs. SONAR at 3.

13. As alternatives to the proposed rule, the Board considered (1) proposing to the Legislature that the Board be released from the obligation imposed by Minn. Stat. § 214.06 to recover its licensing and examination costs, or (2) phasing in the increases in fees over a longer period of time. The Board indicated that the low fees currently charged for peace officer licensing and the consistency of the proposed fees with those charged by other licensing agencies caused it to conclude that exemption of the Board should not receive priority. Although imposing graduated increases every year would reduce the dramatic one-year increase, the Board rejected this approach based on its determination that phasing in the fee increase would require many increases for many years to cover the costs and remedy the under recovery from prior years, would introduce an unacceptable level of complexity, and would increase implementation costs. The Board concluded that, while the increased fees were dramatic in relation to existing fees, they were minor in terms of their impact on individual and agency budgets. SONAR at 4.

14. The Board determined that the costs of complying with the proposed rules would not increase, although costs would be shifted from the state to the individual licensees or the agency which pays their fees. Individual licensees would see an increase of \$25 per year payable every three years; agencies that pay fees for licensees would see an increase of \$25 per year per licensee; applicants would see the cost of the examination increase by \$65 and the cost of initial licensure increase by \$75 (for a three-year license); and part-time licensees would see the cost of the examination increase by \$40 and initial licensure increase by \$37.50. SONAR at 4. The Board concluded that the proposed rule was the best method of accomplishing the goal of financing the licensing and examination functions of the Board, consistent with the legislative directive to recover costs.

15. 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 (1997), 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.

Commissioner of Finance Review of Charges in Proposed Rules

17. Minn. Stat. § 16A.1285, subd. 5 (1997) requires that the Commissioner of Finance review and comment on all departmental charges submitted under chapter 14. The Board in fact submitted the charges set forth in the proposed rules to the Commissioner of Finance. The Commissioner's comments and recommendations were attached to the Board's SONAR as an exhibit. The Board thus has complied with Minn. Stat. § 16A.1285, subd. 5.

Standards for Analyzing the Proposed Rule

18. Under Minn. Stat. § 14.14, subd. 2 (1997), 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 (1997).

19. 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 with the presentation of its Executive Director during the hearing session. The Board also submitted written post-hearing comments.

20. 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.

21. 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.

22. 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.

23. 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).

24. 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 (1997); 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 (1997). 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.

25. The proposed amendments are brief and each will be discussed in this Report. No language was proposed by the Board which differs from the rule as published in the State Register and therefore none of the language in the proposed rule can be found to be substantially different from the language published in the State Register.

Section-by-Section Analysis of the Proposed Rules

Proposed Rule Part 6700.0600 - Licensing Examinations

26. The proposed rules would amend subpart 2 of existing rule part 6700.0600 to change the peace officer licensing examination fee and reciprocity examination fee from \$40.00 to \$105.00, delete the peace officer license endorsement examination, and increase the part-time peace officer licensing examination from \$12.50 to \$52.50. No one submitting comments on the proposed rules objected to the changes in this rule part.

27. In the SONAR, the Board explained that the fee for peace officer license endorsement examination is being removed from the fee schedule as unnecessary because license endorsements were never put into place by the Board. The Board further explained that the fees for examinations have not been raised for many years. Based upon the review and analysis of Board expenditures conducted by the Board and by representatives of the Finance Department in December, 1996, it was determined that \$104,850 of the Board's \$964,916 operations budget should be allocated to testing. The testing portion of the budget (11%) was allocated among the license examinations taken to arrive at the new fee of \$105. SONAR at 1-2. The increase in the fee charged for part-time peace officer examinations is a larger percentage increase because the Board determined that those costs were already low in proportion to the regular license examination fee. SONAR at 5.

28. The Board's approach comports with the standards set out in Minn. Stat. §§ 16A.1285 and 214.06 governing the setting of fees by rule. The Board has demonstrated that an adjustment of the examination fees is needed and that the amounts proposed are reasonable. Deletion of the reference to license endorsements is needed and reasonable since the Board does not issue license endorsements.

Proposed Rule Part 6700.0800 - Licensing of Peace Officers and
Proposed Rule Part 6700.1000 - License Renewal

29. The only change proposed to be made to existing rule 6700.0800 is to replace the \$15 fee set forth in subpart 4 of the current rule with a \$90 fee. The proposed rules would also amend existing rule 6700.1000, subp. 3, to specify that the fee for renewal of peace officer licenses is \$90 (rather than \$15) and the fee for renewal of part-time peace officer licenses is \$45 (rather than \$7.50). These changes would increase the amount that licensed peace officers must pay every three years to maintain their licenses with the Board to \$90, a six-fold increase. In its SONAR, the Board acknowledged that the proposed increase in license renewal fees would have the largest impact because the renewal fees affect every regular licensee. The Board indicated that it was this fee which is expected to recapture the majority of costs of license oversight and administration. SONAR at 5.

30. The proposed increase in the fee for regular peace officer licenses was the only part of the proposed rules that received public attention. Dennis J. Flaherty, Executive Director of Minnesota Police and Peace Officers Association, testified in opposition to the proposed rules at the rule hearing and also submitted post-hearing comments critical of the proposed rules on behalf of the Board of Directors of the Minnesota Police and Peace Officers Association and its 6,600 members. While the

Association does not oppose a fee increase, it believes that a 600% increase is outrageous and arbitrary and would impose a financial burden on individual peace officers as well as on local governments that either voluntarily or as a result of a labor agreement assume the cost of employees' licensing fees. Mr. Flaherty indicated that at least 20 law enforcement agencies represented by the Association's affiliate union had entered into collective bargaining agreements under which the employer had agreed to pay licensing fees. He stated that, if the increase was implemented, money previously earmarked by such agencies for crime-fighting purposes or for training and equipment would have to instead be paid to the Board. In addition, Mr. Flaherty recommended that the Board make any increase in increments in order to reduce the financial burden.

31. Based on an examination of the statutes pertaining to the Board (Public Ex. A) and position descriptions of the Board staff engaged in licensing functions (Public Ex. B), Mr. Flaherty also asserted that the duties of those staff members did not support the allocation made by the Board of staff time and resulting expenses attributable to licensing functions. For example, he asserted that it was absurd to believe that the Executive Director spends 50% of his time on licensing functions in light of the description of his position and the many statutory responsibilities the Executive Director is required to carry out. Moreover, based on their position descriptions, Mr. Flaherty contended that the Executive Assistant and Clerk Typist IV spend at most 15% of their time on oversight of the licensing function (rather than the 50% and 40%, respectively, claimed by the Board in its calculations), and that the Management Analyst spends at most 60% of total time on the licensing function (rather than the 75% claimed by the Board in its calculations). Mr. Flaherty thus argued that the time allocation of staff attributed to the licensing function was grossly overstated and that the process used to determine the needed increase in fees was flawed. He contended that, under the proposed rules, the Board would significantly over-recover its costs in violation of Minn. Stat. § 16A.1285. He further asserted that it was inappropriate under Minn. Stat. § 16A.1285, subd. 1, for the Board to include "attorney general costs" of \$120,000 for fiscal years 1998 and 1999 in itemizing licensing function costs. Mr. Flaherty suggested that a time study should be done to demonstrate what actual costs are incurred in the licensing area and what increase in fees is necessary.

32. Several other organizations filed post-hearing comments in which they also objected to the magnitude of the proposed licensing fee increase. Mathew Hodapp, President of the Minnesota State Patrol Troopers Association, indicated in a late-filed comment that his 438-member association objected to the 600% increase on the grounds that it was excessive and without merit. Mr. Hodapp suggested that, at most, the annual fee should be doubled by raising it to \$10 per year, since the Board receives appropriations from the Legislature for its operating expenditures. Dennis J. Delmont, Executive Director of the Minnesota Chiefs of Police Association, also expressed opposition to the fee increase. He indicated that the overwhelming majority of the members of the Minnesota Chiefs of Police Association pay for their officers' license renewal from their annual budgets. Mr. Delmont asserted that the proposed rule would cause serious financial burdens for many of his member agencies and would require that funds be diverted from other important operational functions. He suggested that any increase in fees be done incrementally over a period of time. Patrick J. Finnigan,

President of the St. Paul Police Federation, similarly stated that the 570 law enforcement officers of the St. Paul Police Federation opposed the dramatic increase in fees and suggested that any increase in Board funding should come from the public sector.

33. Larry A. Cuffe, Secretary-Treasurer of the St. Louis County Deputy Sheriff's Association, indicated that the Association objected to the increase as "arbitrary and excessive." He said that the increase would have a pronounced financial impact both on individual peace officers and local government agencies with limited budgets and would also affect labor contract negotiations. Mr. Cuffe indicated that St. Louis County currently allocates \$1,830 for licensing its officers and stated that the proposed rule change would increase the expenditure to \$10,980. Michael W. Schiltz, President of the Duluth Police Union, described the increase as "astronomical" and indicated that it would either affect services offered by the agency or negatively affect officers. Tony Cornish, President of the Minnesota Conservation Officers' Association, also objected to the magnitude of the increase and asserted that the increase would recover much more than the Board needs to operate their organization.

34. Minn. Stat. § 214.06 requires that non-health-related licensing boards "shall by rule, with the approval of the commissioner of finance, adjust, as needed, any fee which the . . . board is empowered to assess." The statute further specifies that, "[a]s provided in section 16A.1285, the adjustment shall be an amount sufficient so that the total fees collected by each board will as closely as possible equal anticipated expenditures during the fiscal biennium" Minn. Stat. § 16A.1285, subd. 2, provides that, unless otherwise specified by statute, state agencies must set licensure fees "at a level that neither significantly over recovers nor under recovers costs, including overhead costs, involved in providing the services."

35. The Board was established in 1978. The original cost of obtaining a peace officer license was set in 1979 at \$10 for a three-year license. The Board indicated in the SONAR that the initial fees were set at a modest level in order to bring about rapid and universal compliance with the new law. In 1984, in response to a Finance Department review of fee levels, the fees were increased to \$15 for a three-year license. Since that time, the Board has not made any other increases. SONAR at 1.

36. In late 1996, representatives of the Department of Finance met with the Board to review fee levels and compare them to the costs of administering licenses. It was determined that \$291,985 of the total 1997 Board operations budget of \$964,916 should be allocated to the licensing portion of the Board's functions. SONAR at 1. The Board's Executive Director explained during his oral presentation at the hearing that this calculation was based upon an analysis of the cost of supplies and the direct and indirect time that each staff person spends on the Board's licensing function. The licensing function was defined to include not only the physical renewal of licenses but also the oversight of licenses to ensure compliance with standards and training. Most of the costs allocated to the Board's licensing function were associated with personnel (including clerical staff and the standards coordinator), administrative costs, and attorney costs. Approximately \$25,000 of the costs were attributed to indirect

expenses, such as postage and supplies. SONAR at 1. The Board divided the total portion of the budget allocated to the licensing function by the total number of licenses to arrive at a determination of the annual amount the Board should charge as a licensing fee. That amount was \$30 (or \$90 for a three-year license). The Board then compared the resulting license fee with other license fees and concluded that the increased fee still would be among the lowest in Minnesota. SONAR at 2.

37. Fees collected by the Board are not retained by the Board, but paid into the State's general fund. Board Comment at 6. Whatever fees are determined to be appropriate, the Board cannot offset any portion of its budget with the money collected through fees.

38. The fee policy, as set by statute, requires the Board to set its fee to recover its licensing costs from license fees. The Board's estimate of those costs includes staff time of the Executive Director and Executive Assistant, both of whom, according to the Board's estimate, spend half of their time on licensing-related work. In response to Mr. Flaherty's assertion that the estimates are not supported by the position descriptions, the Board stated that the position descriptions were intended to describe the type of work performed and not allocate that work into particular areas. Board Comment at 4. In its SONAR, the Board described the areas included in the cost estimates as "not just the physical renewal of licenses but also the oversight of licenses for standards and training compliance." SONAR at 1.

39. In its post-hearing submissions, the Board asserted that those holding the Executive Director and Executive Assistant positions are directly involved in license requirements and training issues even though they do not perform the clerical task of issuing licenses. The Board indicated that the Clerk Typist IV position provides administrative support to the Executive Director, the Standards Coordinator, the Board, and various committees, and that the Management Analyst position is responsible for continuing education requirements for licensees, which come directly into play when license renewal is sought. The Board points out that, although the job descriptions set forth areas of responsibility, they do not show allocation to expense areas. The Executive Director, at the request of the Finance Department, conducted an analysis of the positions in order to allocate expenses for the purposes of adjusting the Board's fees. It was determined that the license function of the Board includes not only the issuance of licenses but also subsequent oversight of conduct and training. The Executive Director determined that it was appropriate to allocate portions of 8 of the 16 positions at the Board to the licensing function. See Ex. 11. These costs amounted to 30% of the Board's total operating budget. The analysis of staff time spent on the licensing function was the first step undertaken by the Board, and the allocation was not affected by any desire on the part of the Board to arrive at any specific cost total or license fee level. Board's Dec. 30, 1997, submission at 4, 5.

40. A review of the statutes that set forth activities required of the Board supports the conclusion that the licensing, training, and oversight of peace officers are among the Board's primary responsibilities. Public Exhibit A. The statutory standards for setting fees by rule do not require that formal time studies be conducted to justify fee

adjustments. It does not appear that the Board is seeking to over-recover its costs, particularly since the allocation to the licensing function is only 30% of the Board's operating budget. Moreover, the statute governing the adjustment of fees expressly authorizes the inclusion of the cost of "overhead" and other "costs . . . involved in providing the services" in the calculation of costs to be recovered by license fees, which in this case would include costs relating to both the issuance of licenses and the oversight of licenses during the period of licensure. Minn. Stat. § 16A.1285, subd. 2. Oversight and managerial costs thus are appropriately included in the total to be recovered in fees. The Administrative Law Judge concludes that the estimates provided by the Board of staff time spent in various areas are sufficiently reliable to support the cost analysis upon which the setting of the proposed license fees is based.

41. The Board included in the total cost to be recovered attorney's fees of \$60,000 per year paid by the Board to the Office of the Attorney General in connection with contested case proceedings in which the Board seeks to take adverse action against licensees. Mr. Flaherty asserted that recovery of those costs is prohibited by Minn. Stat. § 16A.1285, subd. 1. That provision defines the phrase "departmental earnings" as follows:

In this section, "departmental earnings" means any charge for goods and services and any regulatory, licensure, or other similar charges levied by any state agency and paid by individuals, businesses, or other nonstate entities. This definition must not be construed to include general taxes collected by a state agency or **charges for services provided by one state agency to another state agency.**

(Emphasis added.) The Board responded to the objection by pointing out that its only departmental earnings are licensure and testing fees. The Board asserted that services of the Office of the Attorney General for which the Board pays constitute expenses rather than departmental earnings. Board Comment at 6.

40. The Administrative Law Judge concludes that the exclusion from the definition of "departmental earnings" of "charges for services provided by one state agency to another state agency" is not intended to preclude the Board from including expenses relating to legal services provided by the Office of the Attorney General among its costs for purposes of the determination of the appropriate fee adjustment. The Board is required by Minn. Stat. §§214.06 and 16A.1285 to adjust its fees in rulemaking in order to recover costs "involved in providing the services," regardless of the source of such costs. The language upon which Mr. Flaherty relies is not intended to limit the definition of costs associated with an agency's provision of a service. The Administrative Law Judge thus determines that it was appropriate for the Board to include legal costs in calculating the proposed license fees.

41. With respect to the comments complaining of the impact of the proposed fee increases on local agencies employing peace officers, the Board acknowledged that there would be an effect on local agency budgets, but emphasized that fees are paid by employing agencies as the result of negotiated contracts between the officers and their

employer, and not due to any state mandate. The Board indicated that a small agency employing one officer would see a \$25 increase as part of a budget of perhaps \$20,000 or more, while a larger agency employing 100 officers would see a \$2,500 increase as part of a budget of \$2 million or more. The yearly cost faced by St. Louis County would only be about \$3,660, since only about one-third of the officers come up for licensing every year. Thus, St. Louis County's annual budget allocation for fees would increase from \$610 to \$3,660. The Board pointed out that agencies received a state reimbursement for training which averaged \$328.11 per officer in 1997. The Board stated that, during the last renewal period, a little less than 50% of the agencies paid the renewal fees for their officers, while the remainder required the individual licensees to be responsible for their fees. Due to the notice of the proposed fee increase which has been provided by the Board during the past year, the Board asserted that many agencies have taken the increase into account in budgeting for 1998. Board's Dec. 30, 1997, submission at 6-7.

42. The fee adjustments are required under Minn. Stat. § 214.06 and 16B.1285 in order to ensure that departmental earnings from licensing fees recover the cost of that service. Current costs and projected future costs were used to set the fee levels. As required by law, the Department of Finance reviewed and approved the cost estimates and revenue projections that formed the basis for the licensure fees. Although the percentage increase in fees appears dramatic in light of the current modest fee which has been in place since 1984, the actual yearly increase in cost is just \$25 per licensee. The fees received will not affect the Board budget, since all fees paid to the Board for licensing are deposited directly in the general fund. When the proposed fees are compared with those in other occupations, it is evident that the increased fees proposed by the Board would remain among the lowest charged by any state agency. See Attachment A to Board's Dec. 30, 1997, submission. The Administrative Law Judge concludes that the increases in fees, whether paid by licensees or their employing agency, have been shown to be needed, reasonable, and consistent with the Board's authority and obligations under relevant state statutes. Although the Board could, if it wished, decide to phase in the fee increase over several years, the proposed rule is not rendered unreasonable by its failure to do so.

43. The proposed rules would also amend existing rule 6700.1000, subp. 7, to provide that the fees for renewal of expired peace officer and part-time peace officer licenses are \$125 and \$80, respectively, rather than \$45 and \$37.50. In its SONAR, the Board explained that these fees represent the addition of a \$35 expiration penalty to the usual renewal fee. No one commenting on the proposed rules objected to this provision of the proposed rules. The Board has demonstrated that an adjustment of the fees for renewal of expired licenses is needed and that the amounts proposed are reasonable.

Proposed Rule Part 6700.1101 - Part-Time Peace Officers

44. The proposed rules amend subpart 6 of current rule part 6700.1101 to increase the fee for initial licensure of part-time peace officers to \$45 from \$7.50. No one objected to the increase in fees for part-time officers. This increase is consistent with the increase discussed above for license renewal fees for part-time peace officers.

In the SONAR, the Board indicated that this increase reflects the allocation of expenses made to the initial processing of license applications and administration during the initial license period. SONAR at 6. This process comports with the standards set out in Minn. Stat. §§ 16A.1285 and 214.06 governing the setting of fees by rule. The Board has demonstrated that an adjustment of this fee is needed and that the amount proposed is reasonable.

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, subds. 1 and 1a, and 14.14, subds. 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. There were no amendments or additions to the proposed rules suggested by the Board after publication in the State Register. Therefore, the rules are not 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. R. 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 29th day of January, 1998.

BARBARA L. NEILSON
Administrative Law Judge

Reported: Tape Recorded (No Transcript Prepared)