

STATE OF MINNESOTA
OFFICE OF ADMINISTRATIVE HEARINGS
FOR THE BOARD OF PRIVATE DETECTIVES
AND PROTECTIVE AGENT SERVICES

In the Matter of the
Proposed Rules of the
JUDGE
Board of Private Detective
and Protective Agent Services
Minn. Rules 7506.0100 to 7506.0180

REPORT OF THE
ADMINISTRATIVE LAW

The above-entitled matter came on for hearing before Administrative Law Judge Steve M. Mihalchick on November 15, 1990, at 9:00 a.m. in Conference Room D, Fifth Floor, Veterans Service Building, St. Paul, Minnesota.

Marie Ohman, Executive Director, Ina Haugen, Chair, and Steve Ulness and Michael Campion, members, appeared for the Board and testified in support of the proposed rules. Jeffrey Lebowski, Special Assistant Attorney General, appeared on behalf of the Board. Katherine Burke Moore, Department of Public Safety Rules Coordinator, also appeared on behalf of the Board.

Approximately fifty persons attended the hearing, 34 of whom signed the hearing register. The hearing continued until all interested persons had had an opportunity to be heard concerning the adoption of the proposed rules.

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 rules. The agency may then adopt the final rules or modify or withdraw any proposed rule. If the Board makes changes in the rules other than those recommended in this report, it must submit the rules with the complete hearing record to the Chief Administrative Law Judge for a review of the changes prior to final adoption. Upon adoption of final rules, the agency must submit them to the Revisor of Statutes for a review of the form of the rules. The agency must also give notice to all persons who requested to be informed when the rules are adopted and filed with the Secretary of State.

Based upon the record herein, the Administrative Law Judge makes the following:

FINDINGS OF FACT

Procedural Requirements

1. On August 22, 1990, the Board filed preliminary documents with the Chief Administrative Law Judge requesting the initiation of a rulemaking hearing. The request contained a statement of the number of persons expected

to attend the hearing and estimated length of the Board's presentation and a statement that additional notice would be given to all parties who indicated an interest in the rules.

2. On August 28, 1990, the Board filed the following documents with the Chief Administrative Law Judge:

(a) A copy of the proposed rules approved for publication by the Revisor of Statutes.

(b) The Order for Hearing.

(c) The Notice of Hearing proposed to be issued.

(d) The Statement of Need and Reasonableness.

3. On September 6, 1990, the Board mailed the Notice of Hearing to all persons and associations who had registered their names with the Department of Public Safety for the purpose of receiving such notice. The Board also mailed the Notice to all persons and associations that had expressed interest to the Board in the rulemaking proceeding and to other persons and associations that might have an interest in the rulemaking proceeding.

4. On September 10, 1990, the Notice of Hearing and a copy of the proposed rules were published at 15 State Register 612-618. Prior to submission of the Notice of Hearing to the State Register, the Board sent a copy of the Notice and the proposed rule to the offices of the chairs of the House Appropriations Committee and the Senate Finance Committee.

5. The Notice of Hearing published in the State Register and mailed by the Board was a "dual notice." The first part of the Notice gave notice that the Board intended to adopt the rules without a public hearing under the provisions of Minn. Stat. 14.22 to 14.28, but also provided that if 25 or more persons requested a hearing within thirty days, a public hearing would be held on Thursday, November 15, 1990. The second part of the Notice gave notice of a hearing to be held November 15, 1990, and stated that the hearing would be canceled if fewer than twenty-five persons requested a hearing in response to the first part of the Notice. The technique of using a "dual notice" provides a mechanism for agencies to adopt rules without unnecessarily delaying the process if twenty-five people request a hearing, while at the same time affording all required notice to interested persons.

6. More than twenty-five persons requested a hearing on the rules. Therefore, on October 18, 1990, the Board filed the following documents with the Administrative Law Judge:

(a) The Notice of Hearing as mailed together with the mailing list and the list of persons mailed the additional discretionary notice.

(b) The Board's certification that the mailing list was accurate and

complete.

(c) The Affidavit of Mailing the Notice to all persons on the Department of Public Safety's mailing list and to all persons on the Board's discretionary list.

(d) An Affidavit stating that the Board had sent the Notice and Proposed Rules to the chairs of the House Appropriations Committee and Senate Finance Committee prior to submitting the Notice of Public Hearing to the State Register as required by Minn. Stat. 16A.128, subd. 2(a).

- (e) The names of the persons who would represent the Board at the hearing.
- (f) A copy of the State Register containing the Notice of Hearing and the proposed rules.
- (g) A copy of a Notice of Intent to Solicit Outside Opinion published at
14 State Register 1722 on January 2, 1990 and a statement that no written materials were received by the Board in response to the Notice.

All documents were available for inspection at the Office of Administrative Hearings from the date of filing to the date of the hearing.

7. At the hearing, the Board submitted copies of the requests for hearing and substantive comments on the rules that had been submitted in response to the dual notice. The Board also submitted a copy of its application to the Department of Finance for approval of the fees proposed in these rules and the Department of Finance's approval thereof. The form indicated that the Board had anticipated costs for fiscal years 1990 and 1991 of \$77,000.00 per year and anticipated receipts from the proposed fees of \$78,000.00 per year. It also showed that 146 licensees would be expected to pay the fees.

8. No indication was made in the record that the Notice of Hearing was mailed to those persons who submitted a written request for the public hearing as required by Minn. Stat. 14.25. This requirement was recently added to the Administrative Procedure Act by Minn. Laws 1990, Ch. 422, 8, effective August 1, 1990. It has particular application in the situation where a notice of intent to adopt a rule without public hearing is published under Minn. Stat. 14.22 to 14.28. However, in the context of a "dual notice," the notice of the public hearing will have already have been provided to persons who request a hearing. This is so because they are requesting the public hearing in response to a notice of intent to adopt a rule without a public hearing that was published and mailed as part of the notice setting the hearing, subject to cancellation. The persons requesting a hearing in this case already knew when the hearing would be held at the time they requested it. Thus, all the notice required by the newly amended Minn. Stat. 14.25 has been provided and the requirements of that statute have been met.

9. The period for submission of written comment and statements remained open through December 7, 1990, having been extended from the normal five-working-day period by the Administrative Law Judge at the hearing. The record closed on December 12, 1990, the third business day following the close of the comment period. Four comments were received during the comment period. One comment was received during the response period and that was from the Board.

Nature of the-Proposed Rules

10. The Board licenses private detectives and protective agents under the provisions of Minn. Stat. 326.32-326.339 (the Act). This is the first

set of rules for the Board; no current rules exist. The Board's general intent is to set forth the basic procedures used by the Board internally and in issuing licenses, to establish a schedule of licensing fees and to set

forth basic procedures and standards for the imposition of sanctions for violations of the Act and rules by licensees. In large part, the proposed rules codify existing Board procedures and standards. In the future, the Board intends to adopt further rules, particularly in the area of selection and training of licensees.

Statutory Authority

11. Minn. Stat. 326.3331 provides:

The board shall adopt rules under chapter 14 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 sections 326.32 to 326.339.

12. Minn. Stat. 14.06 states:

Each agency shall adopt rules, in the form prescribed by the revised statutes, setting forth the nature and requirements of all formal and informal procedures related to the administration of official agency duties to the extent that those procedures directly affect the rights of or procedures available to the public.

Small Business Considerations

13. Minn. Stat. 14.115 requires agencies to consider the effect on small businesses when they adopt rules. In particular, Minn. Stat. 14.115, subd. 2 states, in part:

When an agency proposes a new rule, or an amendment to an existing rule, which may affect small businesses as defined by this section, the agency shall consider each of the following methods for reducing the impact of the rule on small businesses:

(a) the establishment of less stringent compliance or reporting requirements for small businesses;

(b) the establishment of less stringent schedules or deadlines for compliance or reporting requirements for small businesses;

(c) the consolidation or simplification of compliance or reporting requirements for small businesses;

(d) the establishment of performance standards for small businesses to replace design or operational standards as required in the rule; and

(e) the exemption of small businesses from any or all requirements of the rule.

In its statement of need and reasonableness, the agency shall document how it has considered these methods and the results.

14. In its Statement of Need and Reasonableness (SONAR), as updated at the hearing, the Board stated:

These rules unavoidably impose an administrative burden on private security business and throughout the drafting process the Board tried to reduce the administrative burden as much as possible consistent with the policy behind the legislative directive to promote gate rules. Particular attention was paid to minimizing the administrative burden for those private security businesses that are small businesses as defined in Minnesota Statutes, section 14.115.

Part .0130, subparts 1 and 2 are designed to provide some flexibility in the reissuance process for businesses that might have trouble complying with all the technical requirements of the statute and these rules. The board submits that these provisions benefit primarily small businesses because small businesses more often lack the personnel and business systems necessary to comply with the state requirements.

The rules contain a graduated application fee schedule based on the size of the applicant's business. This provision is a direct benefit to small businesses. It is justified by the reasonable assumption that a large business will require more services from the Board than a small business.

The compliance and reporting requirements, schedules, and deadlines contained in the proposed rule are the least stringent regulations possible, consistent with the objectives of the underlying legislative mandate. The compliance and reporting requirements in the rule have been consolidated and simplified to the maximum extent feasible, consistent with the underlying legislative mandate. These rules contain no operational or design standards. It is just as necessary to protect the public from abuses by the employees of small private security businesses as it is to protect the public from abuses by the employees of larger private security businesses. The exemption of small businesses from these rules is not feasible, consistent with the underlying legislative mandate.

15. The Board has considered and incorporated the applicable specific methods for reducing the impact of its rules on small businesses as required by Minn. Stat. 14.115, subd. 2.

Fees Imposed by the Rules.

16. The Commissioner of Finance has approved the fee schedule as required by Minn. Stat, 16A.128, subd. 1a. Copies of the Notice of Hearing and proposed rules were sent to the chairs of the House Appropriations and Senate Finance Committees as required by Minn. Stat. 16A.128, subd. 2a.

Public Expenditures

17. Adoption of these rules will not require local public bodies to make any expenditures. Therefore, the requirement of Minn. Stat. 14.11, subd. 1, for an estimate of total cost to public bodies if it is expected to exceed \$100,000.00 per year does not apply in this proceeding.

Agricultural Land_Impact

18. Minn. Stat. 14.11, subd. 2, is inapplicable because the proposed rules will not have any direct or substantial adverse impact on agricultural land in the state.

Minn. Rule\$ 7506.0100 Definitions

19. This rule defines "Board," "Director" and "Minnesota Manager." These terms are used in the proposed rules and definitions are necessary to avoid confusion because the meaning of the terms is not obvious.

20. The word "Director" is defined as the "Executive Director" of the Board as authorized by Minn. Stat. 326.3321. Use of the slightly shorter title in the rules is not unreasonable, but there is a remote possibility of some confusion being created by the use of two different terms. For consistency purposes, the Board should consider simply using the term "Executive Director" throughout the rules.

21. "Minnesota Manager" is a unique term that is used in the proposed rules as well as Minn. Stat. 326.32 to 326.339 (the Detective Licensing Act). It is defined by reference to the definition given in the Detective Licensing Act at Minn. Stat. 326.32, subd. 10a. The rule is necessary and reasonable as proposed.

Minn. Rule 7506.0110, Internal Procedures

22. Subpart I of this rule describes the duties of the Executive Director. Such information is helpful to the public and to licensees in conducting their business with the Board, as well as helpful to the Board and Executive Director in determining their relationship and duties.

23. Under Minn. Stat. 336.3381, subd. 2, the Board is required to review license applications. Subpart 2 of this outlines the Board procedures for issuing licenses. Under paragraph A, the review of initial license applications consists of a Board review of the application, a review of the

findings of the Executive Director's investigation and an in-person interview of the applicant. In the case of a reissuance, the Board's review is similar except that the in-person interview is only conducted if requested by the applicant or required by the Board if supplemental information is necessary for it to complete its review. Paragraph C allows the Board to take action if an initial application is not complete within four months of its first submission. It allows the Board to review the application and determine whether some or all of the application process should be repeated by the applicant or if the application should be denied in its entirety and reapplication required. The rule sets forth the following factors to be considered by the Board in making that determination:

- (1) Whether the information required in the application has lost substantive probative value due to the passage of time; and
- (2) Whether the delay in processing the application is due to delay by the applicant or the workload of the board.

The Board justified this provision in its SONAR as follows:

Paragraph C is necessary to address a potential situation: What should the board do with an application which is not reviewed within a reasonable amount of time? Four months was chosen as a potential limit to the review time because it is reasonable to expect the Board to be able to review an application within that period. That should also allow ample time for the director to complete the investigation and for the gathering of additional materials from the applicant if necessary. Once four months have elapsed, it is reasonable for the Board to evaluate why a particular application is not moving forward. Two factors shall be considered before the board requires the applicant to repeat the application process. (1) Requiring an applicant to reapply would only be allowed if it is evident that the passage of time has worked to make the contents of the application outdated. (2) The cause of the delay must be evaluated. If it is due to the board's extensive workload, the applicant should not be penalized and the application process should continue. However, if the delay is caused by the applicant's failure to provide the required materials, it would be reasonable to make the applicant withdraw the application and reapply when he or she has the required information in order.

The procedures proposed by the Board are reasonable on their face. The standards set forth in the rule to guide the Board in determining whether an interview is necessary in the case of a reissuance or whether an incomplete application can be supplemented or should be denied are clear and reasonable.

Minn. Rule 7506.0120 Test

24. The proposed rule states:

As part of the application process, a renew applicant and a reapplicant for renewal must pass a written examination on this chapter and Minnesota Statutes, sections 326.32 to 326.339. The board shall be responsible for writing the examination and revising it as needed.

25. The Board provided the following justification for this rule in its SONAR:

Minnesota Statutes, section 326.3331, gives the Board authority to determine by rule the appropriate training to require of private detectives and protective agents. This provision is necessary since all applicants for licenses have a responsibility to know how Minnesota Statutes, sections 326.32 through 326.339, and Minnesota Rules, Chapter 7506, governing private detectives and protective agents, affect their industry. It is also reasonable for the Board to require such a test, because those license holders who are familiar with the Minnesota law are most likely to act within that law in the scope of their jobs. A test written and administered by the Board is reasonable, because the Board is in the best position to evaluate the relevant law and keep informed of any law changes.

26. At the hearing, the Board explained that it was its intent to mail the test to the applicants along with copies of the current rules and the Act. Applicants would then complete the test in an "open book" manner and return it to the Board.

27. There were several comments on this rule at the hearing. Bruce Ryden stated that such an open book test was not enough. He suggested that, like Wisconsin, the Board should administer a real test, a closed book test to applicants. Paul Pederson felt that private detectives and protective agents needed knowledge of criminal law and had little need to know about the procedures for licensing. A test on the procedures was to him an unnecessary administrative burden. Juan Quitevis felt that the open book test was just "make work" for the Board. Charles Veach would prefer that the Board issue a booklet or pamphlet that would clearly outline what is required of licensees by the Act and rules. Tom Azzone, who provided some humor with his insightful comments, supported the rule the way it was, saying that he would rather take a fifteen-minute open book test than a three-hour closed book examination. He also suggested that the application form itself was an intelligence test because of the difficulty of completing it and that it ought to be left that

way. Other testimony at the hearing indicated that different licensees had different views on requirements imposed by the Act and, therefore, there was indeed confusion among licensees about the Act's requirements and a need for some method of encouraging licensees to know the requirements.

28. Comments on this rule received by the Board prior to the hearing suggested that the tests should only be required upon initial licensure and that applicants who renewed their licenses should be required to show proof of completion of a certain number of continuing education units. It was also suggested that the initial examination should include material from other statutes and topics such as invasion of privacy, fire arms, arrest and the Fair Credit Reporting Act.

29. There were also several post hearing comments on this rule. William Knaak of Business Security, Inc., stated that, based on his knowledge of the current situation, the Board is right in wanting some affirmation of a knowledge of the private security law from proposed license holders. He thought that the use of the word "test" was a misnomer for what the Board intended, particularly in light of the fact that in the future the Board will be implementing competency testing for security skills. He suggested that the application should be tied more closely to the law and the rules and that the application form should include an affidavit listing key points of the law which the applicant would be required to sign, affirming that he or she had read and understood those provisions.

Curtis M. Haugen of Curtis M. Haugen & Associates, Inc., suggested that if the Board was going to go to the time and expense of developing a test, it ought to have substance so that it could be used as a meaningful qualifying test. He suggested that the "test" might actually be completed by an office person and not the person the Board hoped would benefit from the examination. He thought the proposed rule did not adequately define what was meant by a written examination. Ed Wunsch of Commercial Reports, Inc., stated that the current board was extremely reasonable but that a future board might be different and could, under the rule as proposed, require each applicant to go to St. Paul and take a substantive test. He suggested that the rule be clarified to carry out the Board's current intent for the test.

30. In its post-hearing response, Ex. G, the Board replied to these comments as follows:

Board response to the comments above:

1. Why not a more substantive test?

There is a substance to the proposed test. If one

reviews the statutory sections and rule parts which are subject to the test the substance is evident. For example: Minnesota Statutes, section 326.336, Employees of License Holders., which states the responsibility of the license holder who employs persons who are unlicensed. Minnesota Statutes, section 326.3384, Prohibited Acts. Proposed Minnesota Rule, chapter 7506.0150 Conduct and Ethics. The board believes the contents of the test to be important to the industry. In addition, the board realizes that with additional rule mandates, i.e. arms training rules mandated by Minnesota Statutes, section 326.3361, subdivision 1, additional knowledge and skill tests may be required.

2. Why re-test?

Statutes and rules are amended. New laws are passed and rules promulgated. The knowledge of new and amended law, as well as retention of current law, is critical to all licensees - whether the person is a new applicant or an applicant for reissuance.

3. Administrative burden or make-work for the board.

Despite board practice of sending out a copy of statute with licensing and reissuance materials, many licensees do not read them. This is evident by the large percentage of license applications, both new and reissuance, which are completed in error due to ignorance of statutory requirements. The executive director spends a great deal of time corresponding by telephone and mail with those applicants. The board also spends time reviewing incomplete or erroneous applications and deciding what step to take with each application. The board feels very strongly that much time could be saved if the licensees knew the statutes under which they are to operate.

Testimony at the hearing emphasizes the board's position. Tom Azzone in supporting the test, admitted that in his experience few license holders read the statutes. Charlie Veach raised questions at the hearing regarding identification cards, criminal history checks, and uniforms. The answers to all of his questions can be found in statute. Dan Smith, Jr. also stated that when he first applied for a Minnesota license he kept waiting for his identification card. If all licensees and applicants for licensure read the statutes at the time of application, many of their questions and problems would not arise.

The board feels the test is a needed and reasonable means to regulate private detectives and protective agents.

The Board has demonstrated that its proposed rule is necessary and reasonable for the reasons it has stated.

Minn. Rule 7506.0130 Licensing and Qualification

31. Subpart I of this rule provides for a contingent license to be issued if an applicant for reissuance submits incomplete or inaccurate information and the Board determines that the applicant can correct the problem within sixty days. The rule provides that the contingent license shall be good for sixty days and the applicant may continue operations during that period. No comments were received regarding this provision and the Board has demonstrated that it is necessary and reasonable for the reasons stated in the SONAR.

32. Subpart 1 also contains a provision that if an application is incomplete or inaccurate due to circumstances within the control of the applicant, the Board may impose a fine of up to \$50.00, depending on the culpability of the applicant. In the SONAR, the Board justified this provision as follows:

The fine is reasonable since the applicant who is receiving a contingent license should pay for that privilege and the extra time that the Board will be spending on the application.

At the hearing and in its post-hearing comments, Ex. D, the Board explained that this "fine" was intended both as a fee to cover some of the additional costs incurred by the Board in processing an incomplete application and as a penalty to discourage a submission of incomplete applications. To make that even more clear, in its post-hearing comments, Ex. D, the Board has proposed that this subpart be modified so that the reference is to a "fine of up to \$50 under part 7506.0170, subpart 5,". This change helps clarify the rule and is not a substantial change. It should be adopted. This provision complies with the requirements of Minn. Stat. 326.3388 that administrative penalties specify a range (in this case from \$0 to \$50) and reflect the culpability, frequency and severity of the violator's actions.

33. In his post-hearing comments, Ex. B, Curtis Haugen questioned the use of the term "fine." He thinks of "fines" as being related to criminal charges. Use of the word "fine" in administrative settings is not at all unusual, so its use is not unreasonable here. However, the Board is given specific authority to assess "administrative penalties" under Minn. Stat. 326.3388 and, just to make things more clear, it is suggested that the Board use that term in these rules instead of "fine."

34. In his post-hearing comments, Ex. B, Mr. Haugen also stated this section needed more clearly defined standards and left too much discretion to the Board. The Administrative Law Judge finds the standards stated to be adequate. In the case of determining whether a contingent license should be issued in the case of a incomplete application, the standard is whether the applicant can correct the problem within sixty days. While some judgment will be required in making that determination, it is a very clear and objective standard. In assessing the administrative penalty, the standards are whether the incompleteness or inaccuracy are (1) due to circumstances within control of the application, and (2) the degree of culpability of the applicant. Again, findings and judgments will have to be made applying those standards, but they are the reasonable factors upon which such judgments should be made.

35. Subpart 2 of this rule provides for a lapsed license in the case of an incomplete or inaccurate application for reissuance where the applicant does not respond to Board inquiries. Such licenses will be treated as lapsed for sixty days from the normal expiration date. A person with a lapsed license cannot conduct business as a private investigator or a protective agent. The holder of a lapsed license is eligible for reissuance unless the additional sixty days expires, in which case the applicant must file an application for a new license. Again, there was no comment on these provisions of the rule and they appear reasonable in their face.

36. Subpart 2 originally contained a provision that stated: "An applicant with a lapsed license is subject to a fine of \$100." In its post-hearing comments, Ex. D, the Board modified the sentence to provide: "An applicant with a lapsed license is subject to a fine of up to \$100 to be imposed under part 7506.0170. subpart 5. As so modified, the rule is reasonable and complies with the requirements of Minn. Stat. 326.3387.

37. Subpart 3 of this rule specifies the documentation that must be submitted by applicant to prove that they have the insurance coverage net worth or irrevocable letter of credit required by Minn. Stat. 326.3382, subd. 3. There were no substantive comments on these provisions and they are necessary and reasonable for the reasons stated in the SONAR.

Minn. Rule 7506.0140 Schedule of Fees

38. Minn. Stat. 326.3386 provides as follows:

FEES .

Subdivision 1. Application fee. Each applicant for a private detective or protective agent license shall pay to the board a nonrefundable application fee, as determined by the board.

Subd. 2. License fee. Each applicant for a private detective or protective agent license shall pay to the board a license fee, as determined by the board. In the event that an applicant is denied licensing by the board, one-half of the license fee shall be refunded to the applicant.

Subd. 3. Designation fee. When a licensed private detective or protective agent who is a partnership or corporation, desires to designate a new qualified representative or Minnesota manager, a fee equal to one-half of the application fee shall be submitted to the board.

Subd. 4. Status fee. At the time a licensed private detective or protective agent wishes to change a license status, as in the case of an individual license holder establishing a corporation, the difference between the individual license fee and the corporate license fee shall be paid to the board.

Subd. 5. Reissuance fee. License holders seeking license reissuance shall pay to the board a license reissuance fee as determined by the board.

Subd. 6. Business or division fee. If a private detective or protective agent license holder wishes to add additional business names or corporate division names to an existing license, the license holder shall be

required to pay a fee as determined by the board.

Subd. 7. Rules. All fees authorized by this section shall be established by rule by the board. All fees paid to the board shall be paid to the general fund. The cost of administering sections 326.32 to 326.339, shall be paid from appropriations made to the board.

The proposed rule has five subparts and establishes fees for new applicants, license reissuance, designation of a new qualified representative or Minnesota manager, change in license status, and a filing fee.

39. Subpart 1 establishes new applicant fees. The fee for a private detective license is \$500 for an individual, \$850 for a partnership and \$950 for a corporation. The fee for a protective agent license is \$400 for an individual, \$800 for a partnership and \$900 for a corporation. In addition, the rule provides for a \$15 administrative fee to cover copying, packaging, time and mailing costs.

40. Subpart 2 establishes reissuance fees according to the number of employees as follows:

A. Private detective:

0 employees	\$400
1 to 10 employees	525
11 to 25 employees	650
26 to 50 employees	775
51 or more employees	900

B. Protective agent:

0 employees	\$350
1 to 10 employees	475
11 to 25 employees	600
26 to 50 employees	725
51 or more employees	850

The role counts as one employee each person who regularly works an average of thirty or more hours a week as a private detective or protective agent. The total hours for persons who work less than thirty hours per week or who are hired periodically as private detectives or protective agents are added together and divided by 1,500 to determine employee equivalence, which are then added to the number of regular employees to determine the total number of employees. The 1,500 hour figure is the total number of hours a thirty-hour per week employee would work in a typical year.

41. In the SONAR, the Board presented the following rationale for these rules:

.0140 Schedule of fees. This part is necessary to specify the fees which Minnesota Statutes, section 326.3386, authorizes the Board of assess. All the fees have been approved by the Commissioner of Finance and

sent to the chairs of the House Appropriations and Senate Finance Committees as required. Charging fees for licenses is necessary to cover the costs of issuing licenses and to fund the board which is self-sustaining.

Subpart 1. New applicant fees. This subpart sets out the applicable fees for new applicants. There are two categories of fees, one for private detectives and one for protective agents. The provision stating the fees for the private detectives is slightly higher than the fees for protective agents because the holder of a private detective is also licensed as a protective agent, thus is receiving a dual license. This is not the case with the protective agent license. Such a license holder is not licensed as a private detective.

The fees increase if the applicant is a partnership or a corporation. This gradation is reasonable because it is designed to take the small business entity into consideration. A business that is in a position to be a partnership or corporation is usually a larger business and can better afford the higher fee. Also considered in setting this fee, was the complexity involved with reviewing the paperwork and forms which are received from partnerships and corporations in comparison to the more simple individual application.

There is an additional administrative fee charged to a new applicant to cover the costs of processing the application. Because the materials submitted would be more extensive, it is reasonable that this fee be higher for a new applicant as opposed to the similar business/division fee for a license holder described in subpart 5.

Subpart 2. License reissuance fees. This subpart sets out the applicable fees for the reissuance of a license. As with the new applicant fees discussed above, the schedule differs for the broader private detective license (A) as compared with the protective agent license (B). In addition, the fees increase depending on number of employees. This gradation is reasonable because the greater the number of employees covered by a license, the more complex the license review becomes. In addition, the fewer the employees the smaller the business, and small businesses must be considered when setting fees.

42. There were several objections to the size of the fees, although some of that concern was reduced at the hearing when it was explained that the law required the Board to set fees at a level sufficient to cover its costs and the Department of Finance approval forms were reviewed. Bruce Ryden thought the fees were excessive. In his case, he is apparently the only employee of his corporation and has to pay the \$525 renewal fee every two years. He checked license fees for other professionals and found that CPAs pay an annual

fee of \$100, chiropractors pay \$150, dentists pay \$80 and attorneys pay \$102. Lawrence May testified that the licensing costs in Minnesota were very high compared to Wisconsin and Iowa and that the general costs of doing business in Minnesota are very high. Having previously been a member of the Board, he understood that because of the need for the Board to support itself because of being on a revolving fund, there was little the Board could do about it. Several speakers suggested that the laws should be changed so that the Board received at least some funding through appropriations, especially because sales taxes are now imposed on the services the licensees provide which goes into the general fund. The speakers realized that that subject was beyond the scope of the hearing and the Board's authority, but found it necessary to express that opinion. Other speakers supported the rules as proposed by the Board, including these fee provisions.

43. In its post-hearing response, the Board stated:

The board acknowledges that the fees are high. Unfortunately the board, being a self-sustaining board will have higher fees when the number of licensees are low in comparison to the number of licensed doctors, attorneys, dentist, etc. It is also not possible to do a simple comparison of other state fees without also reviewing how different states regulate the same industry. As in Wisconsin where investigations are done by another state body, whereas in Minnesota the board has been given that responsibility by the legislature. The fee schedule was designed to spread the burden as fairly as possible between licensees which are small businesses and those which are not.

One of the reasons that the fees are high in comparison to other professions is that there are far fewer private detectives and protective agents licensed than there are CPAs or attorneys and because fees are only paid every other year. The mailing list filed by the Board shows some 255 license holders. Since they renew their licenses every two years, only half of those license holders pay the fees each year. Adding a few applications for new licenses would yield the figure of 146 fee payers estimated in the Department of Finance review forms. The Board has little choice on the amount of the fees it must collect; its only choice is as to how they are allocated among the license holders. For the reasons the Board has given, its allocation of the burden of the fees among the license holders is reasonable.

44. At the hearing, the Board made a correction to subp. 2C(1) and (2). As originally drafted, these subparagraphs contained a reference to employees performing duties as described in Minn. Stat. 326.338, subd. 1, which defines private detectives. The Board had also intended to include protective agents, which are defined in subd. 4. Therefore, the references have been modified to refer to Minn. Stat. 326.338, subs. 1 and 4. As modified, the rules are necessary and reasonable.

45. Subp. 3 restates the requirements of Minn. Stat. 326.3386, subd. 3, that a change in qualified representative or Minnesota manager requires

payment of one-half the original license fee. Likewise, subp. 4 restates the requirements of Minn. Stat. 326.3386, subd. 4, that a change in license

status requires payment of the difference between the initial license fee and the established level being sought. Minn. Stat. 14.07, subd. 3(1), requires the duplication of statutory language to be minimized in rules. The restatement of the statutory requirements in these two subparts is reasonable because it is necessary that a complete rule on fees at least mention all fees that may be imposed and because paraphrasing of the statutory language here provides all the necessary information without requiring someone to go look up the statute.

46. Subp. 5 requires all license holders to pay a \$5 filing fee to cover new materials, copying, mailing, packaging, filing information updates, and time costs. According to the SONAR, this is intended as the business or division fee authorized by Minn. Stat. 326.3386, subd. 6, to cover the costs of making changes or additions to existing licenses. The amount set is the Board's estimate of the average costs of the items listed. However, the rule as proposed is somewhat confusing and could be read as a general requirement for all license holders to pay a \$5.00 fee at any time the Board asks, or at least any time any document is filed. The rule should be modified to clarify that it is only a fee for filing information updates. A change such as the following is suggested:

Subp. 5. Update. Filing Fee. All license holders filing information updates must pay a \$5 filing fee to cover new materials, copying, mailing, packaging, filing and time costs.

Minn Rule 7506.0150 Conduct and Ethics

47. This rule addresses four conduct issues that have been particular problems that have arisen in the past. The Board stated in its SONAR that these provisions are necessary to put license holders on notice of the standards of conduct to which they will be held.

48. Subp. I provides that no license holder shall undertake a service that conflicts with the interests of the license holder or any other client of the license holder. The Board justified this provision in its SONAR as follows:

Subpart 1. Conflict of interest. This subpart is necessary to assure that license holders will best serve the clients who are hiring them. It is reasonable to put a duty on a license holder to place the service of current clients before the acquisition of additional clients. If serving a prospective client will conflict with the service of a current client, the license holder

must forego serving the prospective client.

When the license holder's interest conflicts with the interest of the client, there is a greater potential that the license holder will be unable to provide the best service possible for that particular client. As stated in the general statement above, protection of the clients

is a major impetus behind these rules. Putting a duty on a license holder to avoid conflicts of interests will work to protect the client and the reputation of the industry.

49. Bill Ryan of Allied Security stated at the hearing that this provision could be more clear. Jerry Soderberg, an attorney appearing for Sims Security and Allied Security, also noted that the provision was vague, particularly for a provision for which penalties may be applied for a violation. He suggested that there should be a definition of "conflicts," that there should be a provision allowing the license holder to proceed with the knowledge and consent of the clients and that there should be a requirement that the license holder not knowingly undertake a service that conflicts. Sims Security repeated those comments in post-hearing comments, Ex. E. In his post-hearing comments, Ex. C, Ed Wunsch of Commercial Reports, Inc., expressed concern about the vagueness of the rules as did Curtis Haugen in Ex . B.

50. The Board responded to these comments in its post-hearing comments, Ex. D, by proposing a change to the rule:

The board proposes additional language to subpart 1, as suggested by Mr. Soderberg. The changes would read as follows:

Subp. 1. Conflict of interest. No license holder shall knowingly undertake a service that conflicts with the interests of the license holder or any other client of the license holder. Prior to accepting a prospective client wherein a conflict of interest may arise the license holder, shall disclose to the current client and prospective client such facts as may give-rise to a conflict of interest and obtain written consent from, both parties.

The additional language clarifies and limits what would be considered a conflict of interest. The proposed final sentence will allow the license holder to take on a client that may pose a conflict of interest if the new client and the current client consent after full disclosure. The changes do not constitute a substantial change because interested parties received adequate notice that this could be an issue as is shown by the submission of testimony on this matter.

51. Conflict of interest provisions are fairly common. For example, the Minnesota Rules of Professional Conduct adopted by the Minnesota Supreme Court

to govern attorney conduct state that a lawyer shall not represent a client if the representation of that client will be directly adverse to another client unless a lawyer reasonably believes the representation will not adversely affect the relationship with the other client and each client consents after consultation. It also provides that a lawyer shall not represent a client if the representation of that client may be materially limited by the lawyer's

responsibility to another client or to a third person or by the lawyer's own interests unless the lawyer reasonably believes that the representation will not be adversely affected and the client consents after consultation. Rule 1.7. Rule 1.9 states that a lawyer who has formally represented a client in a manner shall not thereafter represent another person in the same or a substantially related matter in which that person's interests are materially adverse to the interests of the former client unless the former client consents after consultation. It also prohibits the use of information relating to the representation to the disadvantage of the former client. In disciplinary proceedings against lawyers and judges, such standards have survived claims that they are over broad and void for vagueness. The Minnesota Supreme Court has held that "necessarily broad standards for professional conduct are constitutionally permissible." in re Knutson, 405 N.W.2d 234 (Minn. 1987); in re N.&, , 361 N.W.2d 386 (Minn, 1985), appeal dismissed , 106 S.Ct. 375 (1985); In re Gillard, 271 N.W.2d 785 (Minn. 1978).

52. It would be possible to more specifically identify conflicts of interest. But that is not required. The proposed rule, as modified by the Board, Is not so vague that it does not provide guidance to the license holders as to what is expected. Conflict of interest is a term in common use that most people understand to cover situations where a person has a personal interest or the interest of a third person at stake that could interfere with his or her professional obligations to a client. The proposed rule is necessary and reasonable as modified by the Board.

53. Proposed subp. 2 provides "A license holder shall respond within a reasonable time to all client communications." Similarly, subp. 3 provides, "A license holder shall respond within a reasonable time to all Board communication." The Board justified these provisions in its SONAR as follows:

Subpart 2. Client responses. This subpart is necessary to inform license holders that the Board will evaluate the manner in which they respond to their clients. The rule has left the time for a response open so cases can be reviewed individually. This individual evaluation is reasonable, because what constitutes a reasonable time will vary depending on the circumstances. Specifying a reasonable time in the rule could result in harsh treatment of license holder or insensitive reply to clients under some circumstances. Instead the Board, which is made up of persons with knowledge of the industry, can determine what is reasonable by looking at the details of each case.

Subpart 3. Board responses. This provision is necessary to inform the license holders that they are under a duty to respond to the board. Since the Board has the oversight of license holders as one of their

responsibilities it is reasonable to require the license holders to respond within a reasonable time. Again a reasonable time is left for the Board to decide on an individual basis where all applicable details can be considered.

54. Again, there were comments that use of a term such as "reasonable" rendered the rules vague. However, the term "reasonable" is a standard used in many statutes and rules. For example, Rule 1.4 of the Minnesota Rules of Professional Conduct for Attorneys provides, "A lawyer shall keep a client reasonably informed about the status of a matter and promptly comply with reasonable requests for information." Again, these rules could be improved by adding more specificity or listing factors that might be considered in determining whether response was made within a reasonable time, but the Board has stated a rational basis for its rule and, therefore, has demonstrated that these rules are "reasonable."

55. At the hearing, Mr. Soderberg suggested, in comments repeated by Sims Security after the hearing, Ex. E, that language should be added to subpart 2 to reflect that the license holder should respond promptly to clients in cases where the license holder knows that failure to do so would result in harm or substantial inconvenience to the client. In its post-hearing comments, Ex. D, the Board responded:

The board does not accept the proposed language change. Such language is unnecessary when the rule is looked at as a whole and not subpart by subpart. Chapter 7506 has nine parts which are interdependent. The conduct and ethic standards set out in part .0150, do not authorize the board to take any action against a license holder. If a complaint is made that a license holder has not fulfilled the standards within this part, the board would proceed under parts .0160 Complaint Procedures and .0170 Penalties before any action would be taken. Within those parts is the requirement that a violation be evaluated using the factors within part 7506.0170, subpart 2. Two of the factors within that subpart deal with the harm that arises from a violation. See part 7506.0170, subpart 2, items A. and B. This subpart does not need clarification.

56. Mr. Soderberg and Sims Security also had comments with regard to subpart 3. In particular, they suggested that the rule contain a provision that would require the Board to set out time limits in any communications it directs to license holders. In its post-hearing comments, Ex. D, the Board agreed to such a change and suggested the following:

Subp. 3. Board responses. A license holder shall respond within a reasonable time to all board communication. A reasonable time for response shall be specified in the communication.

The rule as modified is necessary and reasonable and the change does not constitute a substantial change from the rule as originally proposed.

57. Subp. 4 of this rule states that a license holder shall not knowingly enter into a contract with an unlicensed party under which the unlicensed party would perform as a private detective or protective agent

unless the license holder and unlicensed party fulfilled the requirements of Minn. Stat. 326.336. Minn. Stat. 326.336, subd. 1, provides that license

holders may employ as many unlicensed persons as they desire, provided certain requirements are met such as the license holder be accountable for each employee, submits fingerprints and information to the Bureau of Criminal Apprehension for a criminal records check and not allow the employee to work until the criminal record is checked and found to have no disqualifying offense. Other requirements are imposed by the section.

58. The Board justified this provision in its SONAR as follows:

Subpart 4. Unlicensed activities. This provision is necessary to assure that license holders who hire unlicensed persons do so by complying with the requirements of section 326.336 for employment of unlicensed persons. It is reasonable to require license holders to comply with the law that governs an industry that the legislature chose to regulate.

59. This rule is essentially a requirement that prohibits license holders from knowingly violating a certain provision of the law. Such requirements are normally not necessary because license holders are already required to comply with the Act and all of its parts. Nonetheless, the Board stated at the hearing that license holders not fully complying with the employment provisions of Minn. Stat. 326.336 has been a significant problem in the past. Therefore, the Board feels that special emphasis on these requirements is necessary in the rules. That position is reasonable.

Minn. Rule 7506.0160 Complaint Procedures

60. This rule provides:

Complaints to the board shall be processed under the procedures set out in Minnesota Statutes, section 214.10.

The Board justified this provision as follows in the SONAR:

This part is necessary as a reference to Minnesota Statutes, section 214.10, which governs the complaint procedures for examining and licensing boards such as the Private Detective and Protective Agents Board. It is reasonable to include this citation in the rule so that everyone is informed of the complaint procedures, including investigation and hearing processes, that the Board will use.

61. Again, the rule is necessary and reasonable for the reasons given by the Board, but it could be clarified so that people know that the complaints referred to are complaints about license holders violating the rules and the Act. The Board should consider a modification such as:

Complaints to the board regarding possible violation of a Statute or rule the board is empowered to enforce shall

be processed under the procedures set out in Minnesota

Statutes, section 214.10.

Minn. Rule 7506.0170 Penalties

62. This rule categorizes failures to comply with law or rule into two categories: Serious violations and violations (which will be referred to in this report as "other than serious violations"), and sets forth factors to be considered in assigning a violation to one of the categories. It provides that the Board may revoke a license for two years for a serious violation and impose fines from \$500 to \$2,500. For other than serious violations, the rule allows the Board to suspend the license for up to one year and to impose fines up to \$499.

63. Subp. 1 defines a "serious violation" as "a failure to comply with law or rule when the failure has a substantial adverse effect on the integrity of the business of private detective or protective agent services, the public health, safety, or welfare." A "violation" is defined as any failure other than a serious violation to comply with the law or rule related to private detective or protective agent services. The Board justified this subpart in the SONAR as follows:

Subpart 1. Categories of violations. This subpart is necessary to distinguish the seriousness of violations when determining which type of license sanction or administrative penalty to impose on the violator. Setting out categories of violations allows the Board to be consistent and fair when taking disciplinary action against violators.

Item A. This provision defines "serious violation" as it will be used when determining any penalty which may be imposed on violators. It is necessary to define serious violation as the penalty for such a violation differs from those which are deemed not serious. The criteria does not merely include a negative effect but a "substantial adverse effect," therefore requiring the Board to identify a strong and material effect on at least one of the areas including public health, public safety or the integrity of the industry. This criteria is reasonable because the purpose of these rules is to protect those three areas. The greater the effect violations have on those areas, the more critical it is that such violations are stopped and deterred. Additionally, subpart 2 below specifically sets out guidelines for assigning the category to each violation.

Item B. This provision defines "violation" as it will be used to impose penalties on violators. This definition is necessary to distinguish a violation from a serious

violation as defined in subpart 1. It is reasonable that this violation also results from a failure to comply with statute or rule, but whose effect is not as negative nor substantial as a serious violation. The guidelines in

subpart 2 will be used to weigh the effect of the violation.

64. Subp. 2 lists four factors to be considered by the Board in assigning the category of seriousness to a violation, and also for determining whether to revoke a license, whether to suspend and for how long, and also for determining the amount of an administrative penalty to impose. Subp. 2 provides:

Subp. 2. Assignment of categories. The board shall determine the seriousness of the violation by considering the following factors:

A. inherent severity of the conduct as indicated by the potential harm to person, property, or the integrity of the business of private detective or protective agent services;

B. actual harm caused to person, property, or the integrity of the business of private detective or protective agent services;

C. culpability of the violator; or

D. frequency of the violator's failure to comply with law or rules.

The board, in making a determination, shall consider both the number of factors applicable to a violation and the degree to which each applies.

65. Sims Security points out in its post-hearing comments, Ex. E, that the "or" at the end of paragraph C should be an "and" because the Board intends to consider all the applicable factors. In its post-hearing response, Ex. G, the Board stated:

The board believes the use of "or" is appropriate in this subpart. "And" is not appropriate because there may be situations when all the factors do not apply, yet the license holder's act or omission warrants a penalty. The final paragraph of subpart 2 makes it clear that the board is considering all the applicable factors in subpart 2. The last paragraph of subpart 2 reads as follows: "The board, in making a determination, shall consider both the number of factors applicable to a violation and the degree to which each applies."

In addition, the revisor of statutes has reviewed the language proposed by the board and has approved it as to proper form.

The Administrative Law Judge thinks that the word "and" is grammatically better in carrying out the Board's intent in this rule. Use of the term "or" would only allow the Board to consider one of the four factors while use of

the term "and" would allow it to consider all applicable factors. It is suggested that the Board check this particular question with the Revisor of Statutes. The change should be made to make the rule more clear and grammatically correct.

66. Due to comments at the hearing, the Board felt that there was some confusion in this subpart and proposed some changes in the introductory sentence in its post-hearing comments, Ex. D. The Board proposed to change the first sentence to read:

Subp. 2. Assignment of categories. The board shall determine the seriousResS severity of the serious violations or violation by considering the following factors:

The changes are an improvement and should be adopted. However, dividing violations into "serious violations" and "violations" is a bit confusing. It would be more clear if a term such as "non-serious violations" or "minor violations" were used instead of "violations".

67. The Board justified these provisions as follows in the SONAR:

Subpart 2. Assignment of categories. This subpart is necessary to set out the guidelines that the Board must use in determining whether a serious violation or minor violation has been committed.

Item. A. This item allows the Board to measure the potential severity of harm that could have resulted from the violation. It is reasonable to allow the Board to weigh potential harm and its severity for a number of reasons. First, the Board is a group knowledgeable in the industry that it is regulating and the purpose of the regulation. Secondly, a violation should be deemed serious if only by providence it did not result in actual harm. If the potential was present to cause substantial harm, that potential must be considered. Only in that way will the penalties truly work to protect the public and the industry.

Item B. It is reasonable and the objective of the rules to consider resulting harm when determining the penalty to impose.

Item C. The culpability of the violator cannot be ignored when imposing penalties and Minnesota Statutes, section 326.3388 requires the Board to consider culpability when imposing a penalty. It is reasonable to impose a severe penalty only if the violator is truly responsible for the violation that occurred.

Item D. Minnesota Statutes, section 326.3388 requires the Board to consider the number of times the violator has failed to comply with law or rule when imposing a penalty. A violator who repeatedly commits minor

violations can do as much harm to the public and industry as the violator who commits one serious violation. Additionally, a repeat violator shows little respect for the law or the body which is regulating the industry. The Board needs to treat such violators similarly and this provision will assure that it does.

The final paragraph is necessary to explain how the guidelines will be utilized by the Board when imposing penalties. It is reasonable for the Board to consider the number of factors which apply to the violation because logically the more factors that apply the more serious the violation. Conversely if only one factor applies, yet that factor is a grievous violation, that factor must be given more weight in determining the category of violation.

68. At the hearing there were again comments, particularly from Jerry Soderberg, that these provisions were too vague. For example, he thought the term "substantial adverse effect on the integrity of the business of private detective or protective agent services," needs to be defined. This comment was repeated in Sims Security's post-hearing comments, Ex. E.

69. The Board responded to this comment in its post-hearing comments, Ex. D, as follows:

The board will not change the above phrase. Similar phrasing is commonly used throughout rule for a number of purposes. Below are two examples:

Chapter 7897 Minnesota Racing Commission Prohibited Acts

7897.0130 Schedule of fines.

Subpart 2. A. A "serious violation" is a failure to comply with law or rule when the failure has a Substantial adverse effect on the intergrity of pari-mutuel horse racing public welfare health or safety. (Underline for emphasis.)

Chapter 9503 Department of Human Services Child Care Centers

9503.0170 Licensing Process

Subp. 6. C. The commissioner may grant a variance if the commissioner determines that granting the variance would not adversely affect the health, safety, and rights of children enrolled in the center. (Underline for emphasis.)

Language as illustrated in the rule parts above, is not vague, but leaves the identification of adverse effect to the person in the best position to evaluate the facts and

the situation. In the case of the proposed rule the board is in the best position to make such an evaluation. The board is a five member board, consisting of two persons from the regulated industry; one private detective and one protective agent, two public members, and the superintendent of the Bureau of Criminal Apprehension. This diverse and informed group is well-suited to make such an evaluation.

70, In post-hearing written comments, Curtis Haugen stated that the proposed rules should more clearly define "violations" and that without such a definition and more specificity regarding penalties, the Board is left with too much discretion. Ex. B. In its post-hearing comments, Ex. E, Sims Security stated that it was critical that the definition of violations be tightly drawn to give full notice to any license holder that an activity may be a violation. However, such requirements are usually directed at defining conduct that constitutes a violation. The definitions here are being used to determine the severity of a violation.

71, The Board stated at the hearing that its intent was to design a system that would guide it in determining appropriate penalties and sanctions considering relevant factors, but at the same time to allow it sufficient flexibility to evaluate each case on its merits and determine an appropriate, reasoned penalty.

72, Subps. 1 and 2 are not unreasonably vague and do not provide the Board with unbridled discretion. The factors listed in subp. 2 are legitimate factors to be used in determining the seriousness of a violation and the level of sanction to be imposed. Moreover, they prevent the Board from acting arbitrarily; the Board can base its determinations only on the factors specified in the rule.

73 Sims Security suggested that there should be three levels of violations. For reasons discussed below, the two-level classification proposed by the Board, together with the standards for classifying violations and imposing sanctions, provides a logical system for determining penalties that is not unreasonable.

74. Subp. 3 states that for a serious violation, the Board may revoke the violator's license for a period of two years, that the Board shall determine whether revocation is appropriate based on the factors set out in subp. 2, and that a revocation is subject to a contested case hearing under Minn. Stat. 326.3387. Subp. 4 provides that for violations other than serious violations the Board may suspend the violator's license and shall determine whether suspension is appropriate and the period of suspension based on the factors set out in subp. 2. The rule also provides that a suspension shall be for not more than one year and is subject to a contested case hearing.

75. The Board justified subps. 3 and 4 as follows in its SONAR:

Subpart 3. Revocation. Minnesota Statutes, section 326.3387, authorizes the Board to revoke licenses and

requires a contested case hearing before revoking. This subpart is necessary to specify that the Board shall

revoke for a two year period. This period is reasonable because a revocation is not imposed unless the violation is determined to be serious. A serious violation requires a severe penalty to act as a deterrent. The public and the reputation of the industry is best protected by deterring violations and preventing those who do violate from performing as protective agents or private detectives for two years.

Subpart 4. Suspension. Minnesota Statutes, section 326.3387, authorizes the Board to suspend licenses and requires a contested case hearing before suspending. This provision is necessary to give the Board the ability to determine whether to suspend after determining the severity of the violation by using the factors set out in subpart 2 above. In addition the Board shall determine the suspension period for each violation. Limiting suspensions to a maximum of one year is reasonable. If a violation is so serious that the Board determines that the violator should not practice for more than one year, the violation must be serious and revocation should be imposed. However, suspensions can be less than one year. This is reasonable because violations will differ as to seriousness and the less serious the violation the shorter the suspension period should be. The Board however is not given complete discretion to determine suspension periods, for the factors in subpart 2 above must be considered when determining the degree of seriousness. In addition, because a suspension cannot be imposed until there is a contested case hearing, the administrative law judge acts as a secondary check to assure that the suspension period is reasonable.

76. Minn. Stat. 326.3387 provides:

Subdivision 1. Basis for action. The board may revoke or suspend or refuse to issue or reissue a private detective or protective agent license if:

(a) the license holder violates a provision of sections 326.32 to 326.339 or a rule adopted under those sections;

(b) the license holder has engaged in fraud, deceit, or misrepresentation while in the business of private detective or protective agent;

(c) the license holder has made a false statement in an application submitted to the board or in a document required to be submitted to the board; or

(d) the license holder violates an order of the board.

Subd. 2. Hearing required. The board may impose the following penalties only after a contested case hearing

under chapter 14:

- (a) revoke or suspend a private detective or protective agent license; or
- (b) impose an administrative penalty in excess of \$500.

77. Sims Security stated that there appeared to be no rationale for requiring the imposition of a fixed two-year revocation and suggested that discretion for revocation up to two years should be provided. Ex. E. Revocation is generally a permanent sanction while suspension is a temporary sanction after which the disciplined license holder is reinstated. The rules proposed by the Board are already fairly lenient; they impose revocation for only two years and allow reissuance after that time. In many situations, that would be called a two-year suspension. The Board recognizes that revocation is a very serious penalty and fixing the term at two years for such a penalty is very reasonable.

78. Jerry Soderberg testified at the hearing that suspension for any length of time is a very serious penalty because of the loss of income and loss of business during the period of suspension which may be impossible to recover after reinstatement. He suggests that it is too serious to be imposed for any non-serious violation. In post-hearing comments, Sims Security added that the Board should have the option to impose a suspension for a serious violation rather than a revocation. Ex. E. There is some merit to this argument; imposition of a suspension for only a few days, particularly for license holders with large operations, could cost that license holder well in excess of \$500. As Minn. Stat. 326.3387, subd. 2 states, an opportunity for a contested case hearing must be afforded before the Board revokes or suspends a license or imposes an administrative penalty in excess of \$500. Therefore, it would appear that the Legislature thought that suspension was at least as severe a sanction as a \$500 penalty. While the language of the rules could be more clear, nothing in them requires the Board to impose a revocation for a serious violation. Subpart 3 states that a revocation may be imposed for a serious violation. It is a fair implication that any lesser sanction may be imposed instead. Likewise, subpart 4 allows a suspension to be imposed for a non-serious violation and that would imply that a lesser sanction could be imposed. With the subpart 2 standards established for imposition of sanctions, a system is established to impose appropriate sanctions in each case. Thus, the rule is not unreasonable. Nonetheless, the Board may wish to consider revisions in the rules to address the fears raised by Sims Security. For example, the Board could limit the imposition of revocation and suspension to serious violations and, perhaps, limit revocation to multiple, repeated or willful serious violations.

79. Subp. 5 states that the Board may impose a civil fine upon any licensee for a violation of laws or rules after determining the severity of the violation using the factors set out in subp. 2. Subp. 6 sets the amount of fines for serious violations at from \$500 to \$2,500 and in an amount not to

exceed \$499 for other violations, and states that the Board shall consider the severity of the violation using the factors set out at subp. 2. The Board justified this provision in its SONAR as follows:

Subpart 5. Imposition of fines. Minnesota Statutes, section 326.3388 allows the Board to impose civil fines

for violation of law or rules. This provision reasonably requires the Board to determine the seriousness of the violation using the factors set out in subpart 2 so the fine imposed will be appropriate. This part has laid out the scheme to give the Board criteria to rely on when determining severity.

Subpart 6. Amounts of fines. Minnesota Statutes, section 326.3387, subdivision 2 (b) permits the Board to impose administrative penalties in excess of \$500. This provision limits such penalties to \$2500 and allows the levying of such a fine only if the violation is serious as defined in Subpart 1, item A. As per statute, fines between \$500 and \$2500 can be imposed only after a contested case hearing. All serious violations are not necessarily of the same degree, so the schedule of fines allows the Board to levy greater fines against the more serious violations. A violation which is not serious may be fined under Minnesota Statutes, section 326.3388. Logically, the Board will impose fines not to exceed \$499 the amount of which will be determined by the seriousness of the violation. Before any fine is imposed, the factors of subpart 2 will be considered to determine the seriousness of the violation and the appropriate fine.

80. Minn. Stat. 326.3388, provides:

The board shall, by rule, establish a graduated schedule of administrative penalties for violations of sections 326.32 to 326.339 or the board's rules. The schedule must include minimum and maximum penalties for each violation and be based on and reflect the calculability, frequency, and severity of the violator's actions. The board may impose a penalty from the schedule on a license holder for a violation of sections 326.32 to 326.339 or the rules of the board. The penalty is in addition to any criminal penalty imposed for the same violation. Administrative penalties imposed by the board must be paid to the general fund.

81. Again, this provision was attacked as being vague by several commentators. However, because the standards set forth at subp. 2 apply here as well, there are sufficient standards to guide the Board in assessing the administrative penalties in a fair and rational manner on a case-by-case basis and to assure that a penalty assessment will not be an arbitrary decision of the Board. While the current Board will assess an administrative penalty in a given situation that might well vary from the penalty assessed by a future board, the standards stated will assure uniformity in application of the penalties to a reasonable degree.

82. It was suggested at the hearing that the statutory right to a hearing for administrative penalties in excess of \$500 should be indicated in the rule. The Board agreed in its post-hearing comments, Ex. D, and has proposed inserting the following sentence in subp. 6 following the first

sentence:

A fine exceeding \$500 is subject of a contested case hearing under Minnesota Statutes Section 326.3387

This change is reasonable and would not be a substantial change. Again, it is noted that it has been suggested that the term "administrative penalty" be used instead of "fine."

83. At the hearing, the Administrative Law Judge asked the Board to further address the question of whether the two-tier schedule of fines fulfills the statutory mandate of Minn. Stat. 326.338 to establish a graduated schedule of administrative penalties. In its post-hearing comments, the Board provided the following additional comments:

The board contends that the administrative penalties within the rule do fulfill the legislative mandate for two reasons.

First the administrative penalties do not consist of the two-tier schedule of fees alone, but include license revocation and suspension as well.

Secondly, the board would like to offer as additional evidence the rule of the Minnesota Racing Commission. That commission's rule was used as a model for the board's rule. The commission's rule reads as follows:

7897.0130 SCHEDULE OF FINES.

Subpart 1. Imposition of fines, The commission may impose a civil fine upon any licensee for a violation of laws related to horse racing or the commission's rules after a determination of the severity of the violation. The stewards may impose a fine upon a class C licensee.

Subp. 2. Categories of violations. The commission or stewards shall assign a violation to one of the following categories:

A. A "serious violation" is a failure to comply with law or rule when the failure has a substantial adverse effect on the integrity of pari-mutuel horse racing, public welfare, health, or safety.

B. A "violation" is any failure, other than a serious violation to a comply with a law or rule.

Subpart 3. Assignment of categories. In assigning a violation to a category, the commission or stewards shall consider the following factors:

A. inherent severity of the conduct as indicated by the potential harm to person, property, or the integrity of racing;

B. culpability of the violator;
C. frequency of the violator's failure to comply with law or rule;
D. actual harm caused to person, property, or the integrity of racing; and
E. any other factors related to the seriousness of violations which the commission or stewards deem crucial to assignment as long as the same factors are considered with regard to all violators. The commission or stewards, in making a determination, shall consider both the number of factors applicable to a violation and the degree to which each applies.

Subp. 4. Serious violation. Violations of Minnesota Statutes, section 240.25, misrepresentation of the identity of a horse, possession of a firearm on the racetrack premises except by authorized security officer, and setting or attempting to set a fire on the racetrack premises, shall be deemed per se serious violations.

Subp. 5. Amount of fines. The fine for a serious violation of law or rule shall be \$500 to \$5,000. The fine for other violations shall not exceed \$499. The commission may impose a fine in excess of \$5,000 but no more than \$200,000 against a Class A, B, or D licensee as necessary to enforce parts 7870.0430, 7870.0450 to 7870.0470, or 7870.0500.

Subp. 6. Timetable for paying fees. All fines imposed by the stewards or commission must be paid within 72 hours of the date of the ruling imposing the fine. Failure to pay the fine within the required time is grounds for suspension.

It was reasonable for the board to model its rule after the commission's because the legislative mandates are nearly identical. The board's mandate is as follows:

M.S., section 326.3388 Administrative Penalties.

The board shall, by rule, establish a graduated schedule of administrative penalties for violations of sections 326.32 to 326.339 or the board's rules. The schedule must include minimum and maximum penalties for each violation and be based on and reflect the culpability, frequency, and severity of the violator's actions. The board may impose a penalty from the schedule on a license holder for a violation of sections 326.32 to 326.339 or the rules of the board. The penalty is in addition to any criminal penalty imposed for the same violation. Administrative penalties imposed by the board must be paid to the general fund.

The commission's mandate reads as follows:

M.S., section 240.22 Fines.

The commission shall by rule establish a graduated schedule of civil fines for violations of laws related to horse racing or of the commission's rules. The schedule must include minimum and maximum fines for each violation and be based on and reflect the culpability, frequency and severity of the violator's actions. The commission may impose a fine from this schedule on a licensee for a violation of those rules or laws related to horse racing. This fine is in addition to any criminal penalty imposed for the same violation. Fines imposed by the commission must be paid to the commission and forwarded to the state treasurer for deposit in the general fund. A fine in excess of \$2,000 is a contested case under the administrative procedures act.

84. The use of the two-tier structure complies with the statutory mandate which is still allowing the Board the flexibility in determining sanctions that it desires. While the statutory language reference to a "graduated schedule" would allow, and probably encourage, a schedule with more than two steps, the addition of the standards for assessing penalties within the two broad ranges does in fact provide for a graduated schedule where any appropriate level of administrative penalty may be imposed depending upon the particular circumstances of the case. Therefore, the statute has been complied with.

85. Subp. 7 requires all fines to be paid within ten days of a imposition and that failure to pay within the required time is grounds for suspension. This provision is reasonable for reasons given by the Board. However, the Board may wish to consider a longer period for the following reasons. In the case of a fine over \$500 where there has been a contested case hearing held, the licensee has a right to appeal an unfavorable decision for up to thirty days after the final decision of the Board. The proposed rule makes no provision for such a circumstance. Moreover, there were comments to the effect that ten business days was too short a time in some circumstances to gather sufficient cash to pay a significant administrative penalty. These items suggest that it may be more appropriate to require all administrative penalties to be paid within thirty days of the final order imposing the administrative penalty.

86. Subp. 8 states that imposing a penalty under this rule does not affect any criminal liability on the part of the affected party. Jerry Soderberg and Sims Security suggested that it should not affect civil liability either. The intent of the Board was to restate the provision of Minn. Stat. 326.338 that such penalties are in addition to any criminal penalty imposed for the same violation. The Board also stated that the purpose of this rule is to clarify and emphasize the scope of these rules. In its post-hearing comments, Ex. D, the Board stated again that it was inappropriate to add a reference to civil liability to the subpart and

suggested that, in the alternative, it would be willing to drop this subpart entirely. The Board may do so, but as the Board originally noted, the rule is helpful in providing additional notice that penalties imposed under the rules

are in addition to any criminal penalty. Therefore, the rule is necessary and reasonable and the Administrative Law Judge would suggest that it be retained. However, under the proposed language, it is possible that some confusion would be created by not precisely restating the statute. The Administrative Law Judge would suggest that subp. 8 be modified to state as follows:

As provided in Minn. Stat. Sec. 326.338 imposing a penalty under this part is_in addition, to_Any criminal-penalty imposed for the same violation

Minn. Rule 7506.0180 License Reinstatement

87. This rule states that the Board shall reinstate a suspended license when the suspension period has expired or the conditions of the suspension have been satisfied and all applicable fines have been paid. It states that the Board shall reinstate a revoked license when the revocation period (two years) has expired, all applicable fines have been paid and a new license has been applied for, the statutory requirements and license qualifications have been met and the applicable licensing fee has been paid.

88. At the hearing, Jerry Soderberg suggested that this rule was too rigid because it required the suspension or revocation periods to expire in every case. He suggested that there may be situations, such as a change in ownership of a company, that might justify reinstating the license prior to the expiration of the suspension or revocation. The Board replied that it was not inclined to accept that suggestion because it would open the door to too many requests and because the Board desires to make fully-informed and rational determinations when it imposes sanctions and not have to constantly review them. The rule is reasonable as proposed by the Board.

89. Any particular rule provision not addressed in the Findings is found to be in compliance with all substantive requirements of law and necessary and reasonable.

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

CONCLUSIONS

1. That the Board gave proper notice of the hearing in this matter.
2. That the Board has fulfilled the procedural requirements of Minn. Stat. 14.14, and all other procedural requirements of law or rule.
3. That the Board has documented its statutory authority to adopt the proposed rules, and has fulfilled all other substantive requirements of law or rule within the meaning of Minn. Stat. 14.05, subd. 1, 14.15, subd. 3 and 14.50 (i) and (ii).

4. That the Board has demonstrated the need for and reasonableness of the proposed rules by an affirmative presentation of facts in the record within the

meaning of Minn. Stat. 14.14, subd. 2 and 14.50 (iii).

5. That the additions and amendments to the proposed rules which were suggested by the Board after publication of the proposed rules 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. 14.15, subd. 3, Minn. Rule 1400.1000, Subp. I and 1400.1100.

6. That any Findings which might properly be termed Conclusions and any Conclusions which might properly be termed Findings are hereby adopted as such .

7. That 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 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 consistent with the Findings and Conclusions made above.

Dated this day of December, 1990.

STEVE M. MIHALCHICK
Administrative Law Judge