MINNESOTA OCCUPATIONAL SAFETY AND HEALTH REVIEW BOARD

STATEMENT OF NEED AND REASONABLENESS

GENERAL PROVISIONS

8 MCAR §1.7250

General Changes

The number system is changed to conform with the MCAR system, making it easier to locate the rules of the Review Board.

It is desirable to add citations to particular Minnesota statute sections in the Act to facilitate the researcher's task.

The word "period" is changed to "date" to be consistent with 8 MCAR §1.7280 which deals with an employer's right to petition for modification of an abatement "date." In light of statutory changes in terminology, this change is reasonable.

Specific Rule Changes

A. Definitions (pp. 1-2)

2. The word "Commission" is changed to "Board" to conform to the change which occurred in a 1975 amendment to the Act. (Minn. Stat. §182.651(3)). (p.1)

3. The word "chairperson" replaces "chairman" to avoid sex discrimination. (p.1)

4. The word "Clerk" is changed to "Executive Secretary" for clarity and appropriateness of title. "Executive Secretary" is the term used by the Federal Review Commission at 29 C.F.R. §2200.1 (d). For the purpose of this Act, the Executive Secretary refers to the Executive Secretary of the Minnesota Occupational Safety and Health Review Board and is the administrative contact person for the Board. (p.1)

5. Minn. Stat. §14.50 (1982) now provides that Hearing Examiners be assigned by the chief hearing examiner of the Office of Administrative Hearings. The change in the Review Board rules is necessary since the Chairperson of the Review Board no longer assigns Hearing Examiners. (p.1)

6. The term "affected employee" is changed to mean one who, in the scope of his employment, is exposed to hazards. Recent cases hold that an employee need not actually be exposed to a hazard to be affected. If an employee is, will be, or has been in "zones of danger" during the course of his duties, he is considered affected. See Sec. of Labor v. Gilles & Cotting, Inc., 1975-76 CCH, OSHD para. 20,448 (Rev. Comm. 1976), Sec. of Labor v. J.R. Simplot Co.,

1978-79 CCH, OSHD para. 23,050 (Rev. Comm. 1979), and the Minnesota Occupational Safety and Health Review Board in Commissioner v. Standard Storage Battery, Docket No. 1057, filed February 18, 1981. (p.1)

7. "Authorized employee representative" is expanded to entitle non-union employees the same right to representation as union employees. (p.1)

8. "Representative" is expanded to show that a representative may, or may not, be by legal counsel. (p.1)

14,15, & 16. The words "party," "intervenor," and "person" are used throughout the board rules. To provide clarity and consistency in the interpretation of the rules, it is necessary to define these terms. The definitions provided are in accordance with the Office of Administrative Hearings' rules. (p. 2)

B. Scope of Rules (p.2)

The Office of Administrative Hearings is required under Minn. Stat. §14.48 to hear all agency contested cases, and it has promulgated its own set of rules to use while presiding over these hearings. Thus, it is necessary to incorporate those rules by reference into the board rules.

For the same reason, MOSH 253 and 254 are obsolete and are stricken from these rules.

C. Construction of Terms (p.2)

This section is now covered in Minn. Stat. §182.664. It is reasonable to strike it from the rules to eliminate repetition.

D. Computation of Time (p.2)

This section is now covered in Minn. Stat. §182.664. It is reasonable to strike it from the rules to eliminate repetition.

C. Extensions of Time (p.3)

The three-day-in-advance limitation is appropriate to avoid surprise and/or prejudice. It allows for a time extension to be granted or denied before the original due date.

E. Service and Notice (pp. 3-8)

It is desirable to reorder, and add a clearer numbering system to the service requirements to clarify for the employer and employee (represented and unrepresented) what procedures each is responsible for regarding service of notice and certification. (pp. 3-8)

E.4. - (p.5) It is desirable to change the word "proof" to "certification" since this accurately reflects the title of the required document.

E.5., E.6. - (p.6) To account for employers having remote locations for posting and/or serving, it is desirable to extend the period for posting and/or serving from two days to five days. This additional time is reasonable to allow an employer adequate time to post and/or serve notice on affected employees.

E.7. - (p.6) Since all cases are initially heard by the Office of Administrative Hearings (Minn. Stat. §14.50), it is necessary to strike the words "before the Occupational Safety and Health Review Commission" from this rule. This is a reasonable method of achieving compliance with State law.

E.7. - (p.6) Since the Review Board may change location at some future date, it is necessary to add the phrase "or any other address that the Review Board has."

E.7. - (p.6) According to Minn. Stat. §175.001, the new title is Commissioner of Labor and Industry. Thus, it is necessary to add the words "and Industry" to this rule to achieve compliance with State law.

E.9. - (p.7) The addition of this rule requiring certification by the employer of completion of the posting requirement in paragraph E.7 is necessary as an incentive for employers to inform affected non-union employees. This requirement is reasonable since it is easy to comply with, and it places a small burden on the employer to fulfill an important responsibility.

E.12. - (p.7) The certification requirement, applying to affected union employees, is added here for the same reasons stated above in E.9.

E.14. and E.16. - (pp.7-8) This certification is necessary as an added incentive to the employer to fulfill the requirement of service of the notice of hearing requirement of paragraphs E.13 and E.15, and to prove to the Board that affected employees have been notified. It is a reasonable request since it places only a small added burden on the employer.

E.15. - (p.8) The addition of the words "if any" is necessary to accomodate the situation when the employee has no authorized representative.

E.21. - (p.9) Since settlement is allowed under 8 MCAR §1.7254 of these rules, it is necessary to add a provision setting forth the requirements for service of the settlement agreement. The provisions supplied are in accordance with 29 C.F.R. §2200.100 of the Federal Rules and are thus a reasonable way to accomplish this need.

F. Filing (pp.9-10)

Since the Chairperson of the Review Board is not a full-time position, and since he does not maintain a permanent office, it is desirable to change the provision by requiring the filing of

papers with the Executive Secretary. The Executive Secretary is the Board's administrative contact person, is a full-time position, and maintains a permanent office. Thus, it is reasonable to require papers to be filed with this person. (p.9).

The new exception to filing papers after the case has been assigned to a hearing officer is necessary to assure compliance to the certification requirements in paragraphs E.14 and E.16. Since the Review Board is the authority making sure the certification requirements are met, it is reasonable to require filing of such certifications with the Board's Executive Secretary. (p.9)

PARTIES AND REPRESENTATIVES

8 MCAR §1.7251

A. Party Status (pp.10-11)

1. Since 8 MCAR §1.7250 A.14 defines "party" to include intervenors, it is necessary to combine party status and intervention to be consistent with this definition. To accomplish this clarification, it is reasonable to include the provisions for intervention since an intervenor attains party status. Thus, Part B of 8 MCAR §1.7251 becomes redundant and should be deleted. (p.10)

   The formalized notice requirements for becoming a party are necessary and reasonable to give the hearing examiner ample time to organize the hearing. Also, it gives all parties ample notice of who will be their adversaries. (p.10)

2. In accordance with Minn. Stat. §182.661 (3) and Minn. Stat. §182.664 (3), it is necessary to broaden the employer's ability to elect party status so as to be equal with the employee's ability to contest. (p.10)

PLEADING AND MOTIONS

8 MCAR §1.7252

A. Form (pp.11-12)

1. To have the parties identify clearly all documents for the case, it is necessary for them to include the Board's and the Hearing Examiner's docket numbers. This will achieve the goal of proper processing of documents and will assure that the parties receive proper copies.

B. Caption: Titles of Cases (pp.12-13)

3. This addition is an appropriate change since it illustrates cases handled, and it shows the correct way to title cases. Also, it places no extra burden on the filing party.

5. Since the Executive Secretary assigns docket numbers, it is necessary to have the rule reflect that practice.

C. Notice of Contest (p.13)

In order to have hazards abated in a speedy fashion and to run the judicial process efficiently and quickly, the rule is changed from allowing the commissioner 30 days in which to transmit the notice of contest to the Board to a 7-day period. This change also mirrors the Federal requirement (29 C.F.R. §2200.32).

D. Employer Contests (pp.13-14)

2. Notice to Respondent

Since the hearings are conducted by the Office of Administrative Hearings, this section is added to outline and clarify to the employer his rights and duties. The wording of this rule conforms to the rules of the Office of Administrative Hearings (9 MCAR §2.204), and it is a reasonable way to inform parties of these rights and duties. (p.14)

E. Petitions for Modification of Abatement Date (pp.14-15)

It is necessary to add these new rules of procedure since they were adopted by Minnesota OSHA at 8 MCAR §1.7280, and they are in compliance with Federal Rules (29 C.F.R. §2200.34).

F. Employee Contests (pp.15-16)

To be in compliance with Minn. Stat. §182.661(3), this rule should be broadened to allow an affected employee, or an authorized employee representative, the same contestation grounds that are enjoyed by employers.

PREHEARING PROCEDURES AND DISCOVERY/HEARINGS

8 MCAR §1.7253 / 8 MCAR §1.7254

Incorporation of Office of Administrative Hearings rule hearing and contested case procedures:

See page 2 "Scope of Rules"

POST HEARING PROCEDURES

8 MCAR §1.7253

A. Decisions of Hearing Examiners (p.16)

2. The word "issuance" is changed to "service" to provide clarity in the procedure.

B. Notice of Appeal (pp.17-18)

1. To expand a parties' right to appeal, the system of discretionary review has been abolished. Any aggrieved party has the right to appeal. Therefore, it is reasonable to change the basis for appeal, and rename the process "Notice of Appeal."

2. In a recent holding, the Review Board determined that parties must include in the Notice of Appeal all issues they wish to appeal. Thus, parties may not discuss issues not stipulated in the Notice of Appeal. See Commissioner v. Sarver Roofing, OSHRB Docket No. 509, filed June 29, 1979. Also, the proposed rules require that an original and four copies of the Notice of Appeal be filed with the Review Board since three Board members and the law clerk require a copy.

3. To conform with Minn. Stat. §182.664, Subd. 5, the changes from "25" to "30" days and from "receipt by the Commissioner" to "publication of the hearing examiner's findings and decision" are necessary.

4. It is necessary to add this 10-day provision to allow adverse parties time to cross-appeal.

(4.) "Failure to act on such petition within the review period shall be deemed a denial thereof." - This paragraph is removed since it is in conflict with the parties' automatic right to appeal. See Commissioner v. Gresser, Inc., OSHRB Docket No. 420, filed October 20, 1978.

5. It is necessary to add this requirement to assure that all parties are informed of the appeal.

C. Briefs (p.18)

It is necessary and reasonable to add this power to the Board to order briefs and/or memoranda from the parties. In many cases the matters are difficult in nature, and the arguments are unclear or poorly presented at oral argument. To insure that an informed and fair decision can be rendered, it is reasonable for the Board to order additional written material to clear up such confusions.

D. Stay of Order of the Hearing Examiner (p.18)

It is reasonable to strike paragraphs 1 thru 3, and to add "timely filing by any party of a Notice of Appeal to the Board stays the order of the Hearing Examiner." This simplifies the rule and conforms to other provisions of the proposed rules.

E. Oral Argument Before the Board (p.18)

The deletions and additions made in this section are necessary to conform to other provisions of the proposed rule. The Board's practice is to hear oral argument from each party, as requested,

to more clearly understand the case, ask questions of the parties, and arrive at the best decision possible.

SETTLEMENT

8 MCAR §1.7254

(p.19)

A. To avoid the necessity of a formal hearing to decide whether parties can come to a settlement agreement, it is reasonable and necessary to add these settlement provisions.

B, C. To assure compliance with 8 MCAR §1.7250 E.21 and to encourage employee involvement, it is necessary to require the employer to post the proposed settlement agreement and order for affected employees. Signing and dating the settlement agreement indicates service upon affected employees. The addition of this requirement is a reasonable way to assure compliance.

E. To comply with Minn. Stat. §182.661, Subd. 1, it is necessary and reasonable to restrict the settlement agreement to issues raised in the notice of contest only.

F. To avoid scheduling a hearing when settlement has been reached, it is necessary to require the contesting party to withdraw the notice of contest on modified items.

G, H. It is necessary to add these two provisions to allow the Office of Administrative Hearings, and the Review Board, an opportunity to review the settlement to assure compliance with the rules of both bodies.

I. To protect employees' rights, it is reasonable to allow affected employees to file with the Hearing Examiner an objection to a proposed settlement agreement within ten days of service of the agreement upon them. This practice is incorporated in the Federal rules of procedure at C.F.R. 29 §2200.100.

MISCELLANEOUS PROVISIONS

8 MCAR §1.7255

A. Settlement

Since the provisions for settlement are now contained in 8 MCAR §1.7254 it is redundant to include settlement under miscellaneous provisions as well. Thus it was both necessary and reasonable to delete this section. (p.19)

C. Ex Parte Communication (p.20)

2. Since the Office of Administrative Hearings has their own rules, it is necessary and reasonable to delete them from this paragraph.

D. Restrictions With Respect to Former Employees (pp.20-21)

1. Barring former members of the Board from appearing before the Board as attorney or representative for any party is necessary to avoid any bias of the Board toward or against such persons.

   The term "tenure" is added to refer to members of the Board who are restricted from appearing in the new provision. Since Board members' service is not a form of employment, but rather appointment, it is reasonable to add the term "tenure" when referring to them.

2. It is necessary to change the term "personally responsible" to "involved" to avoid the possibility of any bias from the Board. Since former employees or members may have worked on a case without being the primary person responsible, it is reasonable to change the term to avoid any possible bias.