STATE OF MINNESOTA
OFFICE OF ADMINISTRATIVE HEARINGS

In the Matter of the Proposed Adoption of Amendments of Rules of the Office of Administrative Hearings Governing (1) Applications for Fees and Expenses Under the Equal Access to Justice Act; (2) Rulemaking; and (3) Contested Case Proceedings.

STATEMENT OF NEED AND REASONABLENESS

INTRODUCTION AND STATUTORY AUTHORITY

Minnesota Statutes § 14.51 authorizes the Chief Administrative Law Judge to adopt rules to govern the procedural conduct of all hearings, relating to both rule adoption, amendment, suspension or repeal hearings, contested case hearings, and workers' compensation hearings, and to govern the conduct of voluntary mediation sessions for rulemaking and contested cases other than those within the jurisdiction of the Bureau of Mediation Services. Minnesota Statutes § 14.06 requires each agency to adopt rules, in the form prescribed by the Revisor of 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. To those ends, over the past years, the Office of Administrative Hearings has adopted procedural rules relating to rulemaking proceedings, contested case hearings, workers' compensation hearings, revenue recapture act hearings, hearings relating to the routing of high voltage transmission lines and the siting of large electric generating facilities.

During the 1986 Legislative Session, the Minnesota Legislature passed a bill which was subsequently signed by the Governor and has thus become law which has been referred to as the "Equal Access to Justice Act" (EAJA). That Act is found at Laws of Minnesota 1986, Chapter 377. That Act authorizes the awarding of attorney's fees and expenses to prevailing parties in certain contested case hearings. At § 4, subd. 1, of that Act the Chief Administrative Law Judge is directed as follows: "The chief administrative law judge shall by rule establish uniform procedures for the submission and consideration of applications for an award of fees and expenses in a contested case proceeding." Pursuant to that direction, procedural rules were adopted and the notice of adoption published at 11 S.R. 334, August 25, 1986. The rules have been codified in Minnesota Rules at Minn. Rule 1400.8401.

Minnesota Statutes, Chapter 363, relates to the Minnesota Department of Human Rights and cases brought by the department under that chapter. Minn. Stat. § 363.071, subd. 1, provides that any hearings to be conducted under that Act "shall be heard as a contested case" and that it is to be conducted in accordance with "Minnesota Statutes 1985, §§ 15.0418, 15.0419, 15.0421, 15.0422." Minnesota Statutes, § 363.071, subd. 1.a., provides as follows:

> At any time after 180 days from the filing of a charge, if there has been neither a finding of probable cause or of no probable cause, the charging party may file a request with the commissioner to appear at a hearing on his own behalf or through a private attorney. Upon receipt of the request, the commissioner shall review the documents and information held in the department's files concerning the charge and shall release to the charging party and respondent all documents and information that is accessible to the charging party and respondent under sections 13.01 to 13.87. The commissioner shall forward the request for hearing to the office of administrative hearings, which shall promptly set the matter for hearing. If the charging party prevails at this hearing, the hearing examiner may require the respondent to reimburse the charging party for reasonable attorney's fees.

With respect to the EAJA, the provisions of Minnesota Laws 1986, Chapter 377, became effective on August 1, 1986, and applied to any contested case which was pending on or commenced on or after that date. Thus, contested case hearings which were pending in the Office of Administrative Hearings on that date came within the provisions of the 1986 legislation if the State agency for which the hearing was being conducted had not yet issued a final order. Obviously, there was a very short time available to adopt rules prior to the effective date of the law. It was therefore determined that it was necessary to adopt some extremely basic procedural rules in order that any controversy regarding the procedures to be established would be avoided, thus allowing the rules to be adopted using the notice and comment provisions of the Minnesota Administrative Procedure Act (APA). At the same time, it was anticipated that the Office of Administrative Hearings would be subsequently adopting additional amendments which would make those procedural rules more comprehensive. It was the then-intent of the Office of Administrative Hearings to propose more comprehensive rules but, because of their potential controversial nature, it was proposed that they would go directly to a rulemaking hearing. Notice of that intent was given in the Statement of Need and Reasonableness dated May 29, 1986, when the initial rules were proposed for adoption under the EAJA.

IMPACT ON SMALL BUSINESSES

Minn. Stat. § 14.115 requires all State agencies to consider the impact of new rules or amendments to existing rules on small businesses as defined in that section. The definition of "small business" in Minn. Stat. § 14.115 is almost identical to the definition of "party" found at Laws of Minnesota 1986, Chapter 377, § 1, subd. 6. The entire purpose of adopting the EAJA was to aid small businesses. Thus the Act, and therefore by implication the rules, absolutely impact on small businesses. Small businesses will reap the benefits of the EAJA and any procedures adopted to implement the provisions of the EAJA by allowing them a process to recoup fees and expenses from contested case hearings. Therefore, there can be no differentiation in the rules themselves between small businesses and large businesses because they only impact on small businesses. Thus, the requirements of Minn. Stat. § 14.115,

subd. 2, do not really apply as they relate to the amendments to the EAJA rules. As an example, the office can hardly exempt small businesses from the requirements of the rules since they are the only ones who will benefit from the rules. Likewise, the "less stringent requirement" parts of that statute are inapplicable. In lieu of those requirements, as can be seen by the existing rules and an examination of the proposed amendments, the procedures previously adopted and the amendments being proposed are an attempt to be as simple, clear and concise as possible to provide adequate notice "up-front" to small businesses as to whether or not the Act applies to them, to allow a process which can thus be concluded very quickly and cost effectively, and to create as little a burden as possible on those seeking to utilize the Act.

Likewise, the amendments proposed to allow mediation in rulemaking are aimed at providing a vehicle whereby an agency can actually meet with opponents to a proposed rule prior to the initiation of a rulemaking proceeding in an attempt to "iron out" any potential problems. Again, this will benefit small businesses because they will be able to meet, on an informal basis, directly with the agency with a neutral third party present and thus save the time and cost of having to "fight" the agency through a public hearing process. It must be remembered that negotiating rules is a voluntary situation which can only be initiated by the agency. However, the procedures will be in place to implement such procedures if the agency so chooses.

With respect to the amendments relating to discrimination cases, we have considered whether or not the requirement of filing an answer is an unreasonable imposition on small businesses. However, because of the other requirements of the Human Rights Act and, more specifically, those provisions which require the pleading of affirmative defenses prior to the hearing, we could find no feasible way to exempt small businesses from the requirement of filing an answer to charges under the law. The law itself, Minn. Stat. Ch. 363, contains some provisions relating to smaller businesses, but not once a charge has been filed. Thus, the office is somewhat limited in what it can do under that Act. Additionally, the existing rules at the Department of Human Rights require all respondents to file an answer. The proposed rule will make the procedures under a specific type of case identical in both respects. Thus, it will actually make it easier for a small business because the procedures will be identical regardless of whether the department issues the charges or if the Order and Notice for Hearing is issued by an Administrative Law Judge. Uniformity of procedures is the goal and it will lessen the impact on small businesses.

In the Notice of Hearing, we have included a statement that the rules will have a direct impact on small businesses. Additionally, we have given direct notice to the Minnesota Association of Commerce and Industry, the National Federation of Independent Businesses, and to the Small Business Assistance Section of the Department of Energy and Economic Development. Other associations which represent small businesses are registered with the office for the purpose of receiving notice of all rulemaking and thus were included with the general mailing. We also sent a copy of the Notice to Joe Blade who writes a column in the business section of the Minneapolis Star and Tribune on State government. However, we have no control over whether or not Mr. Blade publishes the Notice, and only hope that he will do a story.

In terms of an impact on small businesses, it is to the advantage of all small businesses to have procedural rules in effect because without them there will be no well-defined process by which they can obtain reimbursement of attorney's fees and expenses necessarily expended by them in actions where the State agency was represented by an attorney. The rules which were previously adopted spelled out the minimum procedures but did not contain any criteria or standards. The adoption of criteria or standards by which decisions will be made will aid small businesses in making an initial determination as to whether or not they will be eligible for an award of fees or expenses. Thus, the impact on small businesses of the adoption of the amendments to the rules under the EAJA will be "positive" as opposed to "negative".

Finally, we have provided for an evening hearing so that small business persons, unable to get away from their business on a weekday morning, will have an opportunity to testify or to give their comments and views directly to the Administrative Law Judge rather than being forced to submit their comments solely by mail or other written methods. The Notice of Hearing specifically gives notice that the evening hearing is intended primarily for those persons who are representatives of small businesses who would be unable to attend a Friday morning hearing. Conducting the evening hearing at the Minnesota State Capitol is also an attempt to provide a place which is known to all small businesses, has ample parking and is absolutely accessible to all persons, including the handicapped. The State Capitol is also on several major bus lines.

SPECIFIC STATEMENT OF NEED AND REASONABLENESS

1400.1300 (Mediation). This is an entirely new part to be added to existing rules of the Office of Administrative Hearings which relate to procedures for rulemaking under the APA. Laws of Minnesota 1985, First Special Session, Chapter 13, § 87, amended Minnesota Statutes 1984, § 14.51 by adding, to the rulemaking authority of the Chief Administrative Law Judge, the mandate to adopt procedural rules to govern the conduct of voluntary mediation sessions for both rulemaking and contested cases other than those within the jurisdiction of the Bureau of Mediation Services. Minn. Stat. § 14.51 states that the Chief Administrative Law Judge "shall" adopt rules. Therefore, this is a mandate from the legislature requiring the Chief Administrative Law Judge to adopt rules. Thus, in general, the statute provides the need to adopt a rule relating to voluntary mediation for rulemaking proceedings. A rule relating to procedures for mediation of rulemaking, also known as negotiated rulemaking, is needed to provide a procedural framework within which all interested persons will be able to fairly and expeditiously participate in a negotiated rulemaking proceeding should the State agency determine that it desires to mediate its rules.

Because of the time and cost involved in the rulemaking process under the APA, it has been shown to be necessary to find alternative methods of resolving disputes over proposed rules in some type of proceeding short of the formal rulemaking proceeding. It has been shown by many agencies that if the agency can reach agreement with interested parties prior to formally proposing a rule for adoption, it will be able to proceed to rulemaking utilizing the notice and comment provisions of the APA rather than being compelled to go to a formal hearing which takes more time and costs more money. The legislature has recognized this fact when it authorized the Chief Administrative Law Judge to adopt rules relating to mediation of both rulemaking and contested cases.

As proposed, the rule does not further define any terms or attempt to establish any substantive requirements. Rather, it only establishes the procedure whereby an agency may request the assignment of an Administrative Law Judge to serve as a mediator in a negotiated rulemaking process. It should also be pointed out that this process will be "triggered" only by an agency once it voluntarily determines that mediation may be a step which they can utilize to save time and money in the overall rulemaking process. The "voluntariness" of the process must be pointed out and highlighted. This is not a "mandate" by the Office of Administrative Hearings but rather it is a procedural rule which allows an agency the option of utilizing the office.

The office is presently involved in many mediations involving contested cases but has not, as of the date of the preparation of this document, been asked to mediate any rules. The mediations conducted by the office have been conducted pursuant to procedural rules adopted previously and under the auspices of a mandate of the legislature in 1983 whereby a pilot program was coordinated by the Executive Director of the Legislative Commission to Review Administrative Rules in cooperation with the Attorney General's Office, the State Planning Agency, and the Office of Administrative Hearings.

Because of the potential that the office might be called upon by an agency to mediate a disputed rule, it is necessary that specific procedures be adopted so that all agencies will be able to look at the rule and make their request, knowing in advance the procedures that they are to follow and that subsequently will be followed in the process. At the same time, having a rule relating to the procedures adopted and published also allows members of the public an opportunity to determine what procedures are to be followed once an agency has determined to "trigger" the mediation process.

In order that a proper file can be established within the office and to continue uniformity with the other previously-adopted rules, it is necessary that an agency submit a written request for the assignment of an Administrative Law Judge. This same mandate is found in previously-adopted rules of the office. Likewise, the Chief Administrative Law Judge has ten calendar days following receipt of the request to assign an Administrative Law Judge to serve as a mediator and to notify the agency of the name, address and telephone number of the judge assigned. Again, this is identical to existing provisions in other rules, both for rulemaking and for contested cases.

Unlike the formal rulemaking process where the agency submits a Notice of Hearing and the rules proposed to be adopted, all that is submitted in this instance is a request for an assignment of an Administrative Law Judge. Therefore, in order to get the process initiated, it will be necessary for the Administrative Law Judge, once assigned, to contact the agency representative who made the request so that a date, time and place for the first session can be established and to provide whatever assistance may be requested in ensuring compliance with all notice requirements. In order for mediation to be successful, and because there is a potential that the mediation will fail and a formal rulemaking proceeding may be required, it is necessary to have a rule which prohibits the Administrative Law Judge who is assigned to the mediation from communicating to any persons not part of the mediation process relating to any facts or issues which are discussed in the mediation process. In this way, if the Office of Administrative Hearings is subsequently required to conduct the rulemaking hearing, it can do so fairly and impartially without having previously heard anything about what was discussed during the mediation

session. Likewise, this rule would prohibit the Administrative Law Judge from speaking to other persons, such as the press, unless all parties to the mediation process agreed. This is a double-edged sword. In the first instance, it assures the parties to the mediation that the Administrative Law Judge will have no outside communications and thus disclose anything which might be damaging to their position in the mediation. On the other hand, it relieves the Administrative Law Judge from the necessity of attempting to explain to people why the Judge cannot talk about the mediation process. This rule will simply prohibit the communications by the Judge. It is necessary to prohibit outside communications by the Judge in order that the integrity of the process will be preserved and so that persons will feel free to discuss anything and raise any issues or problems directly with the Administrative Law Judge without fear that their position might be jeopardized by outside communications.

Even though the mediation process is voluntary, it is necessary to establish certain notice requirements to ensure that all interested persons will have an opportunity to participate. Thus, subpart 3 of the rule has been proposed so that the agency must give written notice of the first mediation session by utilizing the same notice requirements as would be required if it were proposing to adopt a rule. In this way, all persons registered with the agency or who subscribe to the State Register in lieu of registering with the agency will get notice of these mediation sessions and thus an opportunity to participate. Because there may not always be a rule proposal "on the table" at the time of notice, and because the first mediation session may end up being only a discussion of procedures to be followed in future sessions, it is not generally necessary to have the same length of time for the notice as is required if the agency were proposing a rule. The amount of preparation necessary to participate in a mediation session is believed to be substantially less than would be required if an agency were going to formal rulemaking. Also, while sufficient time must be given to persons to clear their calendar to prepare for mediation, the time must be kept as short as possible so that the rulemaking process will not be unnecessarily delayed. Therefore, it was thought that one-half of the time necessary for normal rulemaking would be sufficient for the purpose of mediation. Also, since the State Register is published every Monday, two full weeks notice was thought to be necessary plus one additional day so that the first mediation session could be held on a Tuesday rather than a Monday in the event persons need to arrive from out of town. For both of these reasons, the 15-day notice requirement is thought to be necessary. Other than the foregoing, there is no "magic" to the 15-day requirement.

In most instances, there will need to be more than one mediation session. Therefore, it is necessary to establish a procedure whereby the parties and the Administrative Law Judge can determine when the next session will occur. Subpart 4 of the proposed rule provides for the date, time and place to be established through agreement of all participating persons. However, because in some instances the participants may not be able to agree or for one reason or another, one participant may desire to delay the process and thus refuse to agree to a reasonable date, it is necessary to have a rule allowing the establishment of a date by a neutral person such as the Administrative Law Judge. Thus, the rule provides for the voluntary agreement to the date or, if agreement cannot be reached, for the establishment of the date of a future session by the Administrative Law Judge. Notice of any future sessions need not be given in the same manner as would be given in the initial mediation

notice. Rather, those persons present at the proceeding can be given oral notice. It would appear that those persons interested in the rule will be present at the mediation session and thus they will have notice. However, because some persons might not be able to be present but desire to receive notice of all future sessions, they can indicate their desire to have written notification under this proposed rule. The burden of giving this additional written notice is put on the agency for the sole reason that in so doing the agency can save itself the costs which it otherwise would have to pay to the Office of Administrative Hearings for the time of issuance of this notice by the Administrative Law Judge.

Each mediation proceeding will bring its own uniqueness to the bargaining table. Therefore, it is felt that it would be inappropriate to attempt to establish procedures which would be binding in all instances through these rules. Rather, it is believed that the parties to the proceeding, given the voluntariness of the proceeding at the outset, should be free to establish the guidelines and procedures they want to follow when they get together for the first time. Obviously, the Administrative Law Judge, having been trained in the mediation process, will be able to come to the mediation session with some proposed guidelines and procedures for the parties to look at, discuss and ultimately either adopt or modify. However, the role of the mediator in this instance is not to dictate but rather to suggest. Having the parties establish their own guidelines and procedures makes them easier to enforce.

Mediation is a voluntary process. Thus, when the person who has initiated the mediation process determines that they no longer wish to voluntarily continue, there is no reason to continue. Also, the authority to terminate mediation should not rest with the Administrative Law Judge as long as the initiating party is still willing to participate. Because the agency is the initiating party, and because there is nothing in the law or present rules which would mandate that they continue the process once it is started, there is no authority to have any rule other than providing for the termination upon the withdrawal of the agency from the process. On the other hand, if agreement has been reached, the termination of the mediation process should be concluded with the signing of a written agreement which spells out, in detail, what has been agreed upon by all participants. In this way, there can be no doubt raised at a later time if all parties have "signed off" on the agreement. As an example, in a recent mediation conducted for the Department of Human Services by the Chief Administrative Law Judge, a second session was necessary because an oral agreement had been reached but, when the agreement was being carried out, there was a difference of opinion as to the meaning of the oral agreement relating to the question of whether one party would get an opportunity to approve a letter to be sent out by the other party. This caused a breakdown and required a second mediation session which was, fortunately, successful or the matter would have had to go to a formal hearing. Therefore, it is necessary and reasonable to have the parties reach a written agreement and sign it.

As indicated previously, if the mediation is not successful, it may result in a formal rulemaking proceeding conducted before the Office of Administrative Hearings. If this unfortunate circumstance occurs, it is appropriate that the Administrative Law Judge assigned as mediator not communicate with anyone in the office so that all of the rest of the Administrative Law Judges in the office will remain free from any information which might impair, or appear to impair, their ability to conduct the

rulemaking hearing in anything but a totally impartial manner. For the same reasoning and because mediation requires openness and willingness of all parties to "lay their cards on the table", it would be inappropriate for the mediator to serve as a fact-finder and ultimately rule on the propriety of a specific proposed rule should a rulemaking proceeding be necessary. Decisions must be based upon the rulemaking record. It would be very difficult for a mediator to totally expunge any information obtained in a mediation session from the mediator's mind during a formal rulemaking proceeding. It is thus necessary and reasonable to prohibit a mediator from becoming the Administrative Law Judge assigned to the rulemaking proceeding. Such prohibition will not bring any difficulties on the Office of Administrative Hearings in terms of personnel available for assignment. The inclusion of this prohibition will not add any costs to the formal rulemaking proceeding because, under the existing circumstances, a rule comes to the office and is assigned to an Administrative Law Judge who picks it up "cold". The same will occur under the proposed rule.

Finally, it is necessary and reasonable to include a provision in these rules reminding the agency that nothing in these rules can absolve it from any statutory responsibilities imposed on it by the APA in the rulemaking process. Thus, the mere fact that all interested persons have agreed to a rule does not allow the agency to adopt the rule without compliance with the rulemaking provisions of the APA. While this fact probably "goes without saying", it is believed necessary to spell this provision out in the rule rather than leaving the question open in anyone's mind. It is not believed that this rule adds or detracts anything from existing law.

1400.5600 (Notice and Order for Hearing.) This subpart is an entirely new addition to the Notice and Order for Hearing rule under the existing contested case rules of the Office of Administrative Hearings. In 1984, as part of amendments to the Minnesota Human Rights Act, Minnesota Statutes Chapter 363, and in response to a complaint that the Minnesota Department of Human Rights was taking too long to initiate the hearing process following the filing of a complaint alleging discrimination, the Legislature passed what has now been codified as Minn. Stat. § 363.071, subdivision 1.a. (See Laws of Minnesota 1984, Chapter 567, § 4.) That section allows a charging party to request that their case be sent directly to the Office of Administrative Hearings if the Department of Human Rights has failed to issue either a probable cause determination or a no probable cause determination within 180 days following the filing of the charge. At the present time, we have received four of these cases from the department and have been informed that there might be up to 200 additional cases presently pending in the department wherein the 180 days have elapsed or will soon elapse and parties have the right to file with our office.

What has been discovered is that under the existing rules of the Department of Human Rights as well as the statutes, following the issuance of a probable cause determination, the Commissioner has issued a complaint which includes a Notice and Order for Hearing. This document has been in compliance with the rules of the Office of Administrative Hearings. However, those rules also require the filing of an answer by the respondent, within 20 days of the service of the complaint. Under existing caselaw, there are several defenses to charges of discrimination which must be included in an answer to the charges. It is reasonable to require these responses so that the issues will be narrowed and all parties will know exactly what the issues to be heard actually are before the hearing. To do otherwise would result in chaos in

terms of lengthy hearings. In short, it would be a return to the "good old days" of pigeon-hole pleading by attorneys expecting to operate out of ambush at the time the hearing is commenced, without allowing the other side to know what the case is all about. We have come so far from that process at the present time so that not much further needs to be said in that regard. Judicial economy requires that the issues be narrowed as much as possible prior to a hearing so that all parties will be able to move as expeditiously as possible toward a final resolution, including settlement negotiations if at all possible.

Since the existing rules of the Department of Human Rights already provide for the filing of an answer, and since the department will no longer be issuing the Notice and Order for Hearing under the new provision of law quoted above, it is necessary to establish a procedure whereby the Administrative Law Judge assigned to the case actually issues a Notice and Order for Hearing. Thus, the proposed amendment as subpart 7 of Minn. Rule Part 1400.5600. The rule requires the Administrative Law Judge to prepare and issue a Notice of and Order for Hearing upon notification of the assignment to the case. The rule requires the Judge to incorporate the charge or charges which were filed by the charging party which, again, would then bring the Notice of and Order for Hearing into compliance with the existing rules. All other provisions of the existing requirements under this rule part would also have to be followed. The one addition to existing rules will be the requirement that the Notice contain a provision requiring the filing of an answer, by the respondent, within 20 days after service of the Notice. This mandate would then bring the procedures for these cases into a process which is identical to that which would exist if the department had issued the Notice. Thus, the rule is both needed and reasonable for all of the reasons stated above.

1400.8401 (Expenses and Attorney's Fees.) The rule part which is the subject of these amendments is the rule which was adopted as published at 11 S.R. 334, August 25, 1986, pursuant to the authority found at Laws of Minnesota 1986, Chapter 377, § 4, also referred to as the "Equal Access to Justice Act" (EAJA). Those were the rules which have been referred to as "basic" procedural rules required to be adopted so as to implement the provisions of the EAJA which became effective on August 1, 1986. Because it became obvious that it would be necessary to adopt rules containing more specificity, which could also be more controversial, the decision was made to draft those "basic" procedures and to proceed, at the same time, to solicit outside opinion on the drafting of more comprehensive rules. To that end, a Notice of Intent to Solicit Outside Opinion, pursuant to the provisions of Minn. Stat. § 14.10, was published at 10 S.R. 2418 on Monday, June 2, 1986 (see SONR Exhibit A). Subsequent to that publication, written comments were received from Julie Brunner, Director of the Appeals and Regulations Division of the Minnesota Department of Human Services (SONR Exhibit A-1), Daniel J. McInerney, Jr., Assistant Commissioner of the Minnesota Department of Health as Chairman of the Executive Branch Administrative Law Committee (SONR Exhibit A-2), and Charles I. Wikelius, Assistant Attorney General, on behalf of the Administrative Law Committee of the Attorney General's Office (SONR Exhibit A-3).

On Monday, June 9, 1986, at 10 S.R. 2446, a Notice of Intent to Adopt Rules Without a Hearing was published in the State Register. Pursuant to that notice, responses and comments on the proposed rules were received from Linda C. Johnson, Commissioner of Human Rights; Mike Hickey of the National

Federation of Independent Business; Barbara J. Blumer, Esq., of the law firm of Broeker, Mihalchick and Blumer; Daniel J. McInerney, Jr., Assistant Commissioner of the Minnesota Department of Health; and Andrew J. Tourville, Jr., Special Assistant Attorney General, on behalf of the Administrative Law Committee of the Attorney General's Office. Those comments were received and reviewed and resulted in modifications to the rules as originally proposed and which were subsequently adopted as previously discussed. (See OAH official record of rule adoption.) All of the comments referenced above have been reviewed and considered both in the adoption of the original "basic" procedural rules and in the proposed amendments to those rules which are the subject of this proceeding. In addition to consideration given to those comments, we have noted that a similar act has been adopted by the United States Congress [see Public Law No. 96-481, Title II §§ 201-208, 94 Stat. 2321, 2325-30 (1980) codified as amended at 28 U.S.C. § 2412(d)(1)(A) (1982) and 5 U.S.C. § 504 (1982)]. Pursuant to the Congressional action, several federal administrative agencies have adopted rules to implement the provisions of that Act. These include rules of the Federal Communications Commission (47 SFR, Ch. 1, subpart k, §§ 1.1501-1530), the United State Environmental Protection Agency (40 SFR, Ch. 1, part 17, §§ 17.1-17.29), and the Office of the Secretary of Transportation (49 SFR, Subtitle A, part 6, §§ 6.13-6.39). Because there is an existing federal law which is nearly identical to the Minnesota EAJA, it was felt, in proposing these amendments, that bringing the Minnesota rules into as much conformity and uniformity as the previously adopted federal rules as possible would lead to ease of application as well as to ease of understanding by small businesses that might apply for fees and expenses under both the federal enactment and the state EAJA. Additionally, because the federal statute and rules have been in place for some time, there has been litigation involving the interpretation of provisions of the Act as well as of the adopted rules, thus giving us a body of caselaw to rely upon when adopting our rules or interpreting the provisions of the statute or the rules. It is believed that by utilizing similar provisions the ease of application will aid all persons affected by the rules in applying the rules and in determining whether or not they will be eligible for fees and expenses. Thus, many of the provisions of the proposed amendments are identical to the rules of the federal agencies listed above, which also was a recommendation of the Attorney General's committee and of Ms. Julie Brunner.

While it is recognized that merely stating that the rules are identical to federal rules is not sufficient to establish either the need for or the reasonableness of our proposed rules, we do urge a finding that copying those rules, which have had an opportunity to be tested in the courts, will be an aid to the overall understanding and uniformity as well as the obvious benefit of having similar rules applying to similar parties whether they be in a federal or state proceeding will aid toward the ultimate finding of necessity and reasonableness of the particular provisions of the rules.

"Party". The amendment to the definition of "party" in subpart 2 of 1400.8401 is an attempt to respond to the concerns expressed by Commissioner Linda C. Johnson of the Minnesota Department of Human Rights (see OAH official record of first rule adoption). In her letter of June 30, 1986, Commissioner Johnson raised the issue of the applicability of the EAJA to the Minnesota Department of Human Rights and to discrimination cases in general. There is no specific exemption in the EAJA for cases brought under the Minnesota Human Rights Act. However, Minnesota Statutes § 363.071, subd. 1, provides that any hearings to be conducted under Chapter 363 "shall be heard as a contested

case". It further provides that any hearings will be conducted in accordance with "Minnesota Statutes 1985, §§ 15.0418, 15.0419, 15.0421, 15.0422. The Commissioner contends that cases brought under the Human Rights Act are actually cases brought under Chapter 363 and are thus not "contested cases" but rather are merely discrimination cases which are required to be conducted pursuant to the contested case provisions of the APA. Some doubt remains in my mind regarding this particular problem. It is clear that the Chief Administrative Law Judge is without authority to create any exemptions to the EAJA. We have also not been provided with any Legislative history to show the intent of the Minnesota legislature as it relates to the application of the EAJA to the Department of Human Rights. Therefore, it would appear that the ultimate determination of this issue may have to be made through a contested case proceeding and subsequent decision by the Administrative Law Judge or on appeal to the judicial branch of government. However, in order to clarify the definition of "party" so that this issue can be raised, the definition of "party" has been amended to conform more closely to the requirements of the APA and the EAJA by adding language to indicate that these rules apply to contested cases initiated pursuant to the provisions of the APA. Whether or not a case brought pursuant to Minnesota Statutes Chapter 363 is initiated pursuant to the provisions of Minnesota Statutes Chapter 14 is an issue which may have to be litigated if the Department of Human Rights contends that it is not included within the EAJA.

The second amendment to this definition is to include a specific citation to subclauses (a), (b) and (c) of the definition section of the EAJA. This is a result of a request by Daniel J. McInerney, Jr., Assistant Commissioner of the Minnesota Department of Health on behalf of that department, in his written comments submitted in the original rulemaking record (see Exhibit D of the OAH original rulemaking record). Mr. McInerney recommended, and I agree, that the definition of "party" be more specific so that the exemptions in the EAJA for the Departments of Health and Human Services are explicitly listed in the rules so that parties will read all sections of the definitions of the EAJA before they bring an action. I agree with the analysis by Mr. McInerney and have thus amended the rule. It is reasonable to list all of the definition sections because EAJA itself is somewhat difficult to read due to the several definition sections and because of the obvious manner in which certain exceptions were made through the amendment process in the legislature. Rather than being able to go to one clause to see all of the exemptions, one has to read the Act in its entirety. Thus, if a reader of the Act were only to look at one clause, that individual might believe that they would be covered. However, if they turn the page, they would see another clause where an exemption might be found to be applicable. Directing their attention to all of the sections before they file an application will obviate the need for a motion for dismissal based on an exemption, which would only delay the process and add costs.

Subpart 3 (Application.) Several amendments are proposed for this subpart. First, the time for the filing of an application is changed from 30 days to 40 days. In the final adoption of the "basic" procedural rules, the time for filing of an application in a subsequent subpart was changed from 30 to 40 days. Through an oversight, this first paragraph of subpart 3 remained at 30 days. Thus, the change from 30 to 40 days in this proceeding is to make the rules uniform. The purpose of changing from 30 to 40 days was a direct result of the considerations given to additional time for filing beyond the time for filing of an appeal. Appeals from final determinations by an agency

may be taken within 30 days. Thus, parties may wish to wait until the time for appeal has expired before filing their application. This procedure was adopted in order to maximize judicial economy. As stated, this amendment is necessary to conform this section to the intent of the amendments previously made to this rule upon its initial adoption.

The second part of the amendments to subpart 3 relates to the requirements for an application, the establishment of standards and criteria for the Judge to utilize when determining who is an eligible party, and then, when is an eligible party also a prevailing party. The impetus for these changes came as a result of comments made by Ms. Julie Brunner (SONR Exhibit A-1) and the Attorney General's committee (SONR Exhibit A-3). The first issue to address at this juncture is the question of whether or not the Chief Administrative Law Judge is authorized to adopt rules which might be classified as interpretive rules. The establishment of standards and criteria by which determinations will be made by Judges are or may be called interpretive rules. In the statutory language authorizing the adoption of rules, the EAJA states that the Chief Administrative Law Judge "shall by rule establish uniform procedures for the submission and consideration of applications for an award of fees and expenses in a contested case proceeding" (emphasis added). While it may be argued that the word "procedures" might be somewhat limiting, the inclusion of the word "consideration" in the rule requires that there be overall procedures and notice to the public of the standards and criteria by which applications will be judges. It is well established that administrative agencies which are required by statute to administer any particular law have implicit in that requirement the authority to adopt interpretive rules. This issue was raised by the Attorney General's comments (SONR Exhibit A-3). The same issue was raised when the Office of the Attorney General proposed adoption of rules by which that office would review and approve or disapprove agency rules which had been adopted using the emergency procedures or the notice and comment procedures of the APA. In that rulemaking proceeding, the same issue was raised before Administrative Law Judge George Beck. The Attorney General's office argued quite convincingly for the proposition that the authority and responsibility for administering a law included with it the authority to adopt interpretive rules. That issue was fully argued in that proceeding and the rules are in the process of final adoption as of the date of the final preparation of this SONR.

The standards which are part of subpart 3.A. are virtually identical to the provisions contained in the rules adopted by the three federal agencies cited previously in this SONR. They are aimed at further defining or clarifying the term "party". The definition of "party" under section 1, subdivision 6(a) of the EAJA is based in part on the number of persons employed by the entity. However, the statute does not state specifically whether all employees, including part-time employees, should be counted. At least two of the federal agencies which have adopted rules to implement the federal EAJA have concluded that all employees should be included. For example, the Environmental Protection Agency rules concerning the EAJA state: "Employees of an applicant include all persons who regularly perform services for remuneration under the applicant's direction and control. Part-time employees shall be included." [See 40 S.F.R. § 17.5(e) (1985).] The Department of Labor has adopted an almost identical rule. [See 29 S.F.R § 16.105(e) (1985).] It is reasonable to include only the number of employees which would be equivalent to full-time equivalent positions (FTE) under this part of the definition. As an example, a small business which would otherwise

meet the definition of a small business could fall outside of that definition if all of its employees were part-time but when you added up the total number of hours worked by the part-time employees, they would only equal one-half of the total number actually employed. In other words, utilizing FTEs as the appropriate number is not only reasonable but much more fair to the small businesses.

The definition of "party" under § 1, subd. 6(a) of the EAJA is based on "annual revenues" of the entity. In light of the purposes of this legislation - to protect small businesses - it is clear that annual revenue is intended to mean the entities gross revenue, not its net revenue. Otherwise, even huge corporations grossing hundreds of millions, or even billions, of dollars could qualify under the EAJA in years in which they lost money or had sufficient expenses to offset all but $4 million of their revenues. Such corporations are clearly not small businesses entitled to the protection of the EAJA. It is useful to clarify this issue by the adoption of these rules which specify that "annual revenues" mean an entity's annual gross revenues.

An issue which is addressed by several federal agency rules implementing the federal EAJA, but not specifically mentioned in the Minnesota legislation, is the status of an entity which is one of a number of affiliated entities. An example might be a corporation with 40 employees and annual revenues of $3 million which is the subsidiary of a holding company which controls companies which have 40,000 employees and $3 billion in revenue. Does such an entity qualify as a "party" under the EAJA? I think not. Such a corporation clearly is not a small business of the kind contemplated by the Minnesota EAJA. That type of corporation has enormous resources at its disposal to defend itself against State action. Therefore, the amendment to this part is patterned on rules of the Environmental Protection Agency [40 C.F.R. § 17.5(f) (1985)] and the Department of Labor [29 C.F.R. § 16.105(f) (1985)]. Those rules provide that the number of persons employed by an applicant's affiliates, and the financial size of its affiliates, must be aggregated and included in determining the applicant's eligibility under the EAJA. We are proposing language to rectify this problem accordingly.

Another issue relating to the definition of "party" concerns the status of individuals, i.e. natural persons, under the Act. The definition of "party" under § 1, subd. 6(b) of the EAJA accords individuals the status of a "party" but only to a very limited extent. Specifically, to qualify as a "party" an individual must be "a partner, shareholder, member or owner of an entity described in [§ 1, subd. 6] (a) clauses 1 and 2." In other words, an individual must own or control an entity which is itself a "party" under subdivision 6(a), i.e. an entity which is a party to a contested case, and has 50 or fewer employees and $4 millions or less in annual revenues. If the entity is not itself a "party", then neither are its partners, officers, shareholders, members or owners.

The Attorney General's committee, in its comments, reviewed the legislative history of the Minnesota EAJA in this regard. A review does shed light on this matter. The legislative history of the EAJA, according to the Attorney General's committee, including tapes of a hearing before the Senate Judiciary Committee on February 24, 1986, indicates that individuals were not intended to be eligible to recover under EAJA. Therefore, in view of the Attorney General's committee's comments and in my own view, it is appropriate to clarify by rule that the EAJA applies only to proceedings against small

businesses, that the status of partners, officers, shareholders, members and owners as parties under § 1, subd. 6(b) of the EAJA is derivative of the status of the entities they own or control, and that individuals, i.e. natural persons, may only assert claims under the EAJA to the extent the entity which they own or control can assert such claims. Therefore, subpart 3.A.1. (f) is proposed for adoption in this proceeding.

Clause (d) of subpart 3.A.1. prohibits one who participates in a contested case on behalf of one or more other persons who are ineligible from himself being eligible for an award. In other words, if an eligible small business intervenes in an action wherein the State is a party, but the intervention is on behalf of other businesses which would not be eligible, and not for itself, this intervening party would not be eligible for an award merely because it participated. It would have to show that it participated on its own account and not on behalf of other persons who would otherwise be ineligible. This prevents the possibility of ineligible businesses or persons circumventing eligibility requirements by using an eligible business as their "shill".

Subpart 3.A.1.(e) prohibits an applicant who appears pro se from recovering an award of attorney's fees. It is clear from the Act that costs incurred by a small business are to be reimbursed. These are actual costs that might be incurred rather than simply reimbursing someone for time spent. Thus, to be eligible for an award of attorney's fees, it is reasonable that an attorney actually be hired and the expenses incurred before the entity would be eligible for recovery of the attorney's fees under the Act. On the other hand, other expenses incurred are obviously not affected solely because a small business appears without benefit of counsel. These are expenses which would be incurred regardless of the hiring of an attorney. It is reasonable to interpret the EAJA as a desire on the part of the legislature to reimburse small businesses for actual expenses incurred in a contested case. Any award of expenses under the auspices of attorney's fees to a pro se litigant would be totally speculative as the pro se litigant would not, under normal circumstances, be able to determine the exact amount of time that an attorney would have spent on the case. Thus, this prohibition, which is also found in the federal rules, is necessary and reasonable.

Subpart 3.A.2. establishes standards and criteria to be used in determining when an eligible party is also a "prevailing party". The determination of who is the "prevailing party" in a contested case hearing is of prime importance in a motion for attorney's fees and expenses. As pointed out by Julie Brunner (SONR Exhibit A-1), the term "prevailing party" should be defined as "...a litigant who is successful on the central issue raised in the proceeding and who receives substantially the relief requested." A definition along those lines is supported by federal caselaw interpreting the term as used in the federal EAJA.

> "Federal caselaw indicates that to be a 'prevailing party' a litigant 'need not succeed on every issue raised.' Hanrahan v. Hampton, 446 U.S. 754, 757 (1980). See also United States for Heydt v. Citizens State Bank, 668 F.2d 444 (8th Cir. 1982). However, the litigant must have at least been 'successful on the central issue', Martin v. Heckler, 773 F.2d 1145 (11th Cir. 1985); United States v. Lochamy, 724 F.2d 494 (5th Cir. 1984); or 'received substantially the

relief requested' Martin, supra; Word v. Schweiker, 562 F.Supp. 1173 (W.D. Mo. 1983). The standard articulated in Martin v. Heckler varies somewhat from the standard of what is a 'prevailing party' under the Civil Rights Attorney's Fees Act of 1976 (42 USC § 1988). The test for attorney's fees under the federal EAJA has been found to be more onerous than the test applied under the Civil Rights Attorney's Fees Act. See Clay v. Harris, 583 F.Supp. 1314 (N.D. Ind. 1984). The Nadeau test (581 F.2d 275) used in Civil Rights actions permits an award of fees if a party succeeds on 'any significant issue in litigation which achieves some of the benefit...sought in bringing suit' (emphasis in Exhibit A-1). By contrast, the test for 'prevailing party' under the federal EAJA focuses on whether the party seeking fees succeeded on the central or crucial issue in the case and whether the party received substantially, not merely some, of the relief requested. I believe that the more onerous standard is probably less appropriate in the case (sic) attorney's fees than under civil rights enforcement. The state's interest in civil rights enforcement is greater than the state's interest in awarding attorney's fees to successful litigants.

Under the federal EAJA, courts have looked at whether success was tied to a central issue. In United States v. Rubin, 590 F.Supp. 1029 (D.C. Clo. 1984), a defendant in a fraud action brought by the United States succeeded in defending an action for a preliminary injunction. The court found that the defendant could not obtain attorney fees because the injunction did not relate to the central issue in the case and did not significantly determine any of the defendant's rights. Winning a procedural right or issue without also winning the main issue in controversy is inadequate to support a claim for fees. See Kitchen Fresh, Inc. v. N.L.R.B, 729 F.2d 1513 (6th Cir. 1984)." (See SONR Exhibit A-1.)

Based on the foregoing, clause (a) has been proposed for adoption in this proceeding.

Comments received from the Attorney General's committee (SONR Exhibit A-3) point out that a respondent in an action cannot be a "prevailing party" in a contested case if the state agency that initiates the proceeding has succeeded in imposing a penalty, and requiring that the respondent pay compensation or damages, or in obtaining an order for injunctive relief. A respondent who is penalized, fined or enjoined has not "prevailed" in the case; the respondent has lost. This parallels the Brunner comments (SONR Exhibit A-1) and I agree with their comments. As pointed out by the Attorney General's committee:

> Inevitably, in such contested cases, the agency will not have proved each and every one of its allegations. We expect that in those instances the losing party, may claim to be the "prevailing party" because the party did not lose on all issues. In our view, such a contention would be contrary to the statute. The EAJA is designed to compensate the prevailing party, not the losing party. As previously indicated, a respondent which is penalized, fined, or enjoined is the loser, not the winner, in the proceeding. Moreover, the statute is designed to protect small businesses that are wrongfully subjected to the expense of a contested case proceeding. If a state agency proves that respondent violated state statutes or rules, and therefore should be penalized, fined or enjoined, it is the respondent not the agency that is the wrongdoer. Similarly, where a contested case proceeding is settled pursuant to terms requiring a respondent to agree to a penalty, to pay a fine or some form of compensation, or to injunctive relief, the respondent should not be deemed to be a prevailing party, thereby entitled to compensation from the State agency. Even if there is no admission of wrongdoing, in such circumstances the State agency has succeeded in obtaining relief from the respondent and the agency, not the respondent, is the prevailing party. (SONR Exhibit A-3.)

I support the argument of the Attorney General' Office and adopt it as my own, as I have adopted in previous paragraphs the arguments of the Attorney General's committee and Ms. Julie Brunner. Thus, clause (b) has been added to subpart 3.A.2.

Finally under this subpart, clause (c) has been added which states: "No presumption arises that the agency's position was not substantially justified simply because the agency did not prevail." This is a provision which is found in the rules of federal agencies. The concept of "substantially justified" is a difficult one to grasp. The EAJA has defined this term and has left any further interpretation to the Administrative Law Judge or, in the case of judicial actions, to a Judge of the judicial branch. As recommended by the Attorney General's committee, there has been no attempt, in these rules, to further define the phrase "substantially justified". However, it is appropriate to point out that the burden of proving that the agency's position was not substantially justified is on the applicant who is requesting the award of attorney's fees or expenses. A state agency may bring an action based upon good intentions and a reasonable belief that they are correct. The decision may be made on either credibility of witnesses, which must be determined by a trier of fact, or on an interpretation of an unclear law. In either instance, the case may have been initiated for good and valid reasons and merely because the final determination went against the state does not, in and of itself, mean that it was not substantially justified. Under normal circumstances in any contested case or derivative action from a contested case, the burden of proof is by a preponderance of the evidence and is on the person initiating the proceeding. In this instance, the person initiating the

proceeding is the person requesting the fees. Thus, the burden of proof would be on that person to not only establish that they are an eligible and prevailing party, but that the agency was not substantially justified in bringing the action. However, as a matter of practice, once it establishes a prima facie case, the burden would probably shift to the agency to prove that it was substantially justified in bringing the action. As with many of the terms or phrases under the EAJA, federal caselaw has and may, in the future, give us some guidance in further defining this term. However, it is something which must be determined on a case-by-case basis and would be difficult, if not impossible, to define in sufficiently specific, yet general terms, to cover all cases.

Subpart 3.B. is amended to provide a more detailed statement of what is required to be submitted with an application. The intent of these amendments is to require sufficient documentation for all requested fees and expenses so that additional proceedings, such as a time consuming and expensive hearing, will not be required. Requiring the parties to put sufficient time and effort into the preparation of an application will result in judicial economy by saving time for all parties and the Judge if the matter can proceed to a determination based upon the papers submitted rather than an oral proceeding. The requirements contained in this subpart are identical to those found in the federal rules and thus will be easier for small businesses to follow whether they be applying under state or federal law.

With respect to attorney's fees, the rule would require "an affidavit be filed by each attorney, agent or expert witness representing or appearing on behalf of the applicant, stating the actual time expended and the rate at which fees have been computed and describing the specific services performed." This means that attorneys will have to submit time records which relate to the specific activities performed. Most, if not all, attorneys are keeping detailed time records on cases if they are billing their client for these services. The rule is not intended to require a duplication of these billings but requests solely that the records be kept in such a manner so that they can be allocated to each service. As an example, the amount of attorney's fees to be awarded is ultimately the determination of the Administrative Law Judge. If it is determined that part of the charges of an attorney were related to items not even in dispute in the case, the Administrative Law Judge may choose not to award fees to the attorney in that area. In other words, the EAJA was not intended to provide a "golden egg" to attorneys for all legal fees in a case. Rather, it must be shown that the time they spent was actually attributable to the case and to the issues which were actually in controversy. If a party is applying for reimbursement of fees and expenses, it is assumed that they have been billed for these expenses and have paid the bills. Thus, the documentation should not be difficult to provide. On the other hand, if they are expected to pay certain fees or expenses but have not yet been paid, it is reasonable to anticipate that, 40 days after a final determination in the case, they would have received a billing from the person or other association who has charged them for their services. Thus, the documentation of the actual billing should not be difficult. Common business practice would be to expect an itemized billing rather than a summary billing showing, for example, "For Services Rendered - $500." A prudent business person should not pay a bill unless it is itemized. Administrative Law Judges should act, in the awarding of fees and expenses, as prudent persons. Thus, they should be provided with an itemization of the services performed so that a proper determination of the actual amounts to be awarded can be made.

The determination of the actual amount of fees and expenses may be the most difficult part of the Judge's responsibilities under this Act. The Judges should not, and hopefully will not, merely issue an award based upon a "bottom line" amount submitted. Rather, it is expected that they will analyze all of the statements submitted to determine whether or not they are justified, and what amounts are actually justified given the situations in the case.

Therefore, it is necessary that the Administrative Law Judge have a full itemization and documentation of all expenses. It is also reasonable to expect that persons requesting reimbursement of expenses which they have either paid or are expected to pay will have received an itemized statement and thus have it available for submission 40 days after a final disposition in a contested case, keeping in mind that the contested case probably occurred at least 60 days prior to the time of the final disposition.

Subpart 3.C. adds "no presumption arises that the agency position was not substantially justified simply because the agency did not prevail" to the requirement previously adopted. This is a repetition of the language previously added to subpart 3.A.2. and is reasonable and necessary for the same reasons previously given.

Subpart 4. (Response or Objection to Application.) The amendments to this subpart are copied from the federal rules. Under the rules as previously adopted, the agency was required to state, in their response or objection, that they requested a hearing. The rule previously adopted required rather general statements. The amendments require a more specific response. The purpose of requiring a more specific response is so that the Administrative Law Judge can, if possible, make a determination of the issues without the necessity of an oral proceeding. It is also reasonable to expect the agency, when responding or objecting, to identify facts relied on in the record to support its objection. On the other hand, if the response or objection is based on alleged facts not already reflected in the record of the proceeding, it is reasonable to expect supporting affidavits to be included with the response or a request for further proceedings. In many instances, there may be facts in the agency's possession which were not presented at the record in the hearing which may show that the agency was substantially justified in bringing the proceeding. Thus, it is reasonable to give the agency an opportunity to present these facts so that the Judge can make a legal conclusion on the question of "substantially justified" after a presentation of all facts necessary to reach that conclusion. The agency must be given ample opportunity to present all of these facts. It must be kept in mind that it is the intent of these rules that these matters be determined without the necessity of an oral proceeding. Thus, the applicant and the agency are both being required to submit a very detailed application or response specifying facts relied upon to support their respective positions. If one assumes that the applicant has prevailed and meets all of the other criteria, even though the rules prohibit a presumption against the agency on the question of "substantially justified", the agency must still be given a full opportunity to explain its actions and to bring forth any facts it has in its possession on this issue.

Subpart 5.a. (Settlement.) This is an entirely new section. The Attorney General's committee alludes to the question of settlements in its comments (SONR Exhibit A-3). There is no question but that parties to a contested case

proceeding are entitled to and must be given an opportunity to settle any and all issues in dispute. It has been and continues to be the position of the Office of Administrative Hearings that parties should be encouraged to settle as many issues of law and fact as are possible in any proceeding. This provision merely repeats the fact that parties may agree on a settlement before final action. However, the law does require the issuance of an order by the Administrative Law Judge. Therefore, it is reasonable to provide a provision whereby the settlement is submitted to the Judge for the issuance of an award. However, past experience in the area of workers' compensation shows that if the Judge is given discretion to approve or disapprove a settlement, the parties are left to the whims of the particular Administrative Law Judge in any given case. In any settlement, parties give and take in order to reach a compromise. It is assumed that part of the compromise will be the establishment of the amount of fees or expenses to be awarded. It is reasonable to expect that the agency will play "hardball" because any fees or expenses paid will come from the agency's budget. To then allow a third party, who has not been privy to the negotiations and who has no knowledge of the reasons on either side for reaching a compromise, to impose his or her judgement is inappropriate. Experience in the workers' compensation field has shown that allowing such to occur results in further appeals of decisions to higher authorities, dissatisfaction with the system, ultimate amendments to the law by the legislature, and delays in the issuance of the awards after receipt of the settlement. Thus, the rule provides that once a stipulation for settlement coupled with a proposed order is received, the Administrative Law Judge is to sign the order. The rules do not give the Judge any authority or discretion to approve or disapprove the settlement. It is reasonable to require all parties to be served, for obvious reasons. It is reasonable to serve the Chief Administrative Law Judge with a copy because the EAJA requires the Administrative Law Judge to keep track of all such awards and to make an annual report to the legislature. The final award is also to be served on the agency because the agency must include it as part of the record from which the final disposition in the case had been issued.

Subpart 5.b. (Extension of Time and Further Proceedings.) This entirely new subpart replaces the language previously found in subpart 5. Subpart 5 spoke to a hearing on an application and allowed a hearing only if the state agency requested the hearing or the Judge determined that a hearing was necessary, giving certain standards. In order to maintain more uniformity with the federal procedures, the previous subpart has been repealed and language from the federal rules inserted instead. Subpart 5.b.A. allows the Administrative Law Judge to grant an extension of time for anything except the initial filing of an application for fees and expenses. The filing of an application for fees and expenses is a jurisdictional requirement. It must be remembered that the filing of such an application must occur within 40 days after the issuance of a final disposition of a contested case. The Judge is allowed, under this rule, to grant extensions for responding to the application or other required filings. This section would also allow the Judge to grant continuances if further proceedings had originally been set but there was a necessity for a continuance. The standard which the Judge must utilize in exercising discretion to grant or deny a continuance is that of good cause. It also must be determined only after the filing of a motion by a party. The Judge cannot, sua sponte, extend any timeframes. Thus, because existing contested case rules require the filing of all motions in writing and an opportunity to respond, all parties will have a chance to argue the motion and to present facts or arguments to the Judge on whether or not good cause

has actually been shown. While "good cause" is a rather general standard, it is a standard which is generally acceptable by the courts and is one which is familiar to persons practicing in the field of law. It is impossible to determine or to list in these rules every situation which might create good cause for an extension. If the "good cause" standard were to be applied in anything other than a request for an extension, I believe that it would be too broad. However, extensions of time for filing an answer or for the hearing are rather innocuous. It must also be remembered that an Administrative Law Judge has a very tight calendar and is under internal pressures to expedite cases and to keep the calendar moving. Thus, Judges traditionally have looked at any requests for extensions quite negatively. History shows that there must be a very strong showing of reasons why extensions can be granted before Administrative Law Judges from the Office of Administrative Hearings have granted extensions or continuances. The philosophy of the OAH has been, when faced with a motion for a continuance or motions of the type contemplated by this rule, to: "Think deny!" On the other hand, there may be good and valid reasons why agencies or other parties may need additional time to compile the necessary information to file objections or responses to an application for fees or, on the other hand, for an applicant to gather the necessary additional materials if required by the Judge. Thus, some flexibility must be given to provide for those unforeseen circumstances.

Subpart 5.b.B. discusses the previously-expressed philosophy that under most circumstances the determination of an award is to be made on the basis of the written record rather than an oral proceeding. However, this part of the rule allows the Judge or any party to request an order from the Judge allowing further filings or other action such as informal conferences, oral argument, additional written submissions, or an actual evidentiary hearing. As in any situation, we cannot foresee all of the possible ramifications of this rule. This part of the rule is modeled after the federal rules. Discussions with federal Administrative Law Judges have shown that they have found it necessary to conduct additional proceedings, either oral argument or evidentiary proceedings in many major cases because the record made at the original adjudicative proceeding does not contain any facts relating to the issues of attorney's fees or costs and the applications submitted have been incomplete. Also, the question of "substantially justified" is one which has become infamous in Washington, D. C., for the amount of litigation it has created, at least at the administrative hearing level, according to the same sources. Thus, it is reasonable to provide a procedure whereby additional proceedings can be accomplished. As indicated previously, this is part of an amendment which replaces the originally adopted subpart 5 which provided for hearings on applications. This part establishes standards to be applied by the Judges when determining whether further proceedings should be allowed. That standard is the standard of: "When necessary for a full and fair resolution of the issues arising from the application." In other words, as in all cases before an Administrative Law Judge, the Judge must make a determination whether justice requires further proceedings in order to give all parties a full opportunity for a fair and impartial hearing. This is a standard which has become the norm for Administrative Law Judges. Again, past history indicates that Judges has been quite reticent about utilizing this standard, in most cases, to grant continuances or the like. Obviously, there are exceptions such as when individuals have indicated that continuances or extensions of time will assist in settlement. In those instances, because we encourage settlement of disputes, more leeway has been given by the Judges. In all other instances, a very tough application of the standard has been the norm.

Administrative Law Judges recognize that with the exception of settlements, anything such as continuances or additional hearings creates havoc to their schedules. Thus, they would much rather make a determination of any matter on the record before them and without the necessity of creating an entirely new oral record.

If further proceedings such as an oral hearing of any kind are necessary, the rule provides that they are to take place on the first available date on the Judge's calendar which is also agreeable to all parties. This is to ensure that cases will be expedited and heard as soon as possible so that they will not drag on. Thus, when a request is made, the Judge need only look at his/her calendar for the first available date and start working forward from that date to find a date agreeable to the parties. This is much easier, as history has shown, than trying to get the parties to agree at the outset and then trying to match their calendar with the Judge's calendar.

Finally, it is necessary that any motions for further filings or other action specifically identify the information which is sought to be obtained on the disputed issues and give a full explanation of why further proceedings are necessary. Again, we need specificity in the written filing so that the Judge can make a determination on any motions or requests without the necessity of an oral argument or other proceeding to determine the motion. Thus, it is reasonable to require the parties to put forth all of their arguments at the time of their request or objection to someone else's request. It is also reasonable to ask parties to "lay their cards on the table" at the time they make a request or an objection rather than holding a "trump card" to play at some oral proceeding. As stated in the past, these proceedings are not games but are adjudicative proceedings conducted in the area of administrative law by public officials of the State of Minnesota. They are important to the parties and cannot be treated lightly by any participants. Thus, all participants must be open and honest from the outset and are thus given, under usual circumstances, only one shot at making their best argument in instances such as this.

Subpart 7. (Decision of the Administrative Law Judge.) This existing rule is being amended to specifically enumerate six items which are required to be contained in any Administrative Law Judge decision under the Act. The items listed are virtually identical to those found in the rules of the United States Environmental Protection Agency at 40 C.F.R. § 17.26 (1985). Minn. Stat. § 3.762 requires a written decision by the Administrative Law Judge and requires that it contain findings and conclusions. History has shown that if the parties know the elements which must be proven, they prepare their case accordingly and it makes the entire proceeding go much more quickly. Parties are encouraged to present their evidence in a sequential order based on a listing of the elements in some statute or rule. Because the statutory elements are rather spread out in the statute, listing the elements in the rule will give guidance to the parties to the proceeding. They will thus know, up front, what they need to prove. Item E is a standard which is to be applied by the Judges when determining the amount of fees and expenses to be awarded. Obviously, if an applicant has protracted the proceedings unnecessarily, requested attorney's fees and expenses will be much higher and it would be unfair to make an award of 100% of the request when they are at fault. Item F requires an explanation, by the Judge, of any difference between the amount sought and the amount awarded. It is reasonable to require a Judge to explain the decision so that a reviewing court will have a full opportunity to review the thinking behind the decision and the Judge's basis for the decision.

(Effective date.) The amendments to these rules will become effective for those cases where an application has not previously been filed. It would not be reasonable to attempt to apply these to cases where an application had already been filed.

Dated this 15th day of September, 1986.

DUANE R. HARVES
Chief Administrative Law Judge

SONR EXHIBIT A

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Department of Labor and Industry

Occupational Safety and Health Division

Adopted Revisions to the Occupational Safety and Health Standards

Pursuant to Minn. Stat. § 182.655 (1984) notice was duly published in the *State Register*, Volume 10, Number 42, dated April 14, 1986 [10 S.R. 2157] specifying the modification of certain Occupational Safety and Health Standards; specifically, the revisions to Occupational Exposure to Cotton Dust standard (29 CFR 1910.1043).

No objections, comments or written requests for public hearing have been received; therefore, this Occupational Safety and Health Standard is adopted and is identical in every respect to its proposed form.

Steve Keefe
Commissioner of Labor and Industry

OFFICIAL NOTICES

Pursuant to the provisions of Minn. Stat. § 15.0412, subd. 6, an agency, in preparing proposed rules, may seek information or opinion from sources outside the agency. Notices of intent to solicit outside opinion must be published in the *State Register* and all interested persons afforded the opportunity to submit data or views on the subject, either orally or in writing.

The *State Register* also publishes other official notices of state agencies, notices of meetings, and matters of public interest.

Office of Administrative Hearings

Outside Opinion Sought Concerning Rules to Implement the Equal Access to Justice Act

Pursuant to the provisions of Minnesota Statutes, § 14.10, notice is hereby given that the Minnesota Office of Administrative Hearings will be seeking information or opinions in preparing to propose the adoption of amendments to the procedural rules for contested case hearings.

The primary reason for the solicitation of information is to determine whether it is necessary or appropriate to adopt additional rules to implement the provisions of the Equal Access to Justice Act, Minnesota Laws 1976, Chapter 377. However, interested persons should feel free to submit their thoughts and ideas relating to any other parts of the contested case rules which may be in need of amendment, especially if there are amendments which would aid in making the contested case hearings move more expeditiously and at less costs to all participants.

A very brief set of procedural rules to implement the Equal Access to Justice Act is being proposed in this same issue of the *State Register*. However, the office believes it may be appropriate to adopt additional interpretive rules to establish standards and criteria for determinations of attorney's fees, to further define terms such as "prevailing party" and "substantially justified". The office is looking at rules adopted by Federal agencies such as the Department of Labor, the Department of Transportation, the Federal Communications Commission and the Environmental Protection Agency for guidance.

Persons interested in submitting any information, ideas, opinions or thoughts should submit them, in writing, by July 3, 1986. The submissions are to be sent to:

Duane R. Harves
Chief Administrative Law Judge
Minnesota Office of Administrative Hearings
400 Summit Bank Building
310 - 4th Avenue South
Minneapolis, Minnesota 55415
612/341-7640

All written submissions received shall become part of the rulemaking record in the event amendments are proposed.

SONR EXHIBIT A

STATE OF MINNESOTA
DEPARTMENT OF HUMAN SERVICES
444 LAFAYETTE ROAD
ST. PAUL, MINNESOTA 55101

July 2, 1986

Mr. Duane Harves
Office of Administrative Hearings
400 Summit Bank Building
310 4th Avenue South
Minneapolis, Minnesota 55415

Dear Mr. Harves:

I am writing in response to your solicitation of information on rules implementing the Equal Access to Justice Act, Minnesota Laws 1986, Chapter 377. I appreciate the opportunity to comment on the procedural rules being proposed and to provide suggestions for additional interpretive rules.

Comments On Proposed Rule Relating to Awards of Expenses and Fees in Contested Cases

Part 1400.8401, Subpart 3.B.

I suggest that the information required to be submitted in an application for attorneys fees be more detailed than proposed in subpart 3.B. The Environmental Protection Agency's (EPA) rules require "an affidavit from any attorney, agent or expert witness representing or appearing on behalf of the party stating the actual time expended and the rate at which fees and other expenses were computed and describing the specific services performed." 40 CFR, Pt. 17.13(b). These same EPA rules go on to explicitly require the affidavit to itemize in detail "the services performed by the date, number of hours per date, and the services performed during those hours. In order to establish the hourly rate, the affidavit shall state the hourly rate which is billed and paid by the majority of clients during the relevant time periods." There is also a requirement that any expenses for which reimbursement is sought be described in detail and "a statement of the amounts paid and payable by the applicant or by any other person or entity for the services provided." 46 CFR, Pt. 7.13 (c). The EPA rules permit the presiding officer to require the applicant to provide vouchers, receipts or other substantiation for expenses claimed.

It is not uncommon for a proceeding to consider multiple issues. Prevailing parties are entitled to reimbursement but it is not reasonable to reimburse a party for expenditures on issues on which they do not prevail. A more detailed accounting of time spent on specific services will permit the administrative law judge to properly allocate costs between issues. I believe that this will also encourage parties to raise the most legitimate issues in a case and discourage parties from pursuing frivolous claims which have no merit and which the state or other party should not be required to reimburse.

Part 1400.8401, Subpart 4.

The proposed rule allows the state agency only 14 days following the service of the application to file a response or objection to the application. This is not an adequate time period considering the complexity and length of some proceedings for which attorney fees will be requested. I suggest that this time period be set at 30 days, which is the time period permitted a party applying for expenses and attorneys fees and the time period available to the administrative law judge to prepare the order.

The additional time will permit more careful review of the application and give the state agency or other party responding or objecting adequate time to prepare a complete response.

Part 1400.8401, Subpart 5.

It may be advisable to permit the judge to identify evidence or facts that are missing and permit the parties to make submission prior to the hearing. Would the proposed rule permit parties to stipulate to factual issues and have the judge issue an order without convening a hearing if the parties agreed? If this is permissible, the rule should state that authority explicitly.

Comments on Proposed Interpretive Rules to Implement
The Equal Access to Justice Act

The proposed interpretive rule is also of great interest to the Department of Human Services (DHS) because of the large number of cases the agency is involved in and the nature of those cases.

The determination of who is the "prevailing party" in a contested case hearing is of prime importance in a motion for attorneys fees and costs. I would suggest that the term "prevailing party" be defined as a litigant who is successful on the central issue raised in the proceeding and who receives substantially the relief requested. This definition is supported by federal case law interpreting the term as used in the federal Equal Access to Justice Act (EAJA).

Federal case law indicates that to be a "prevailing party", a litigant "need not succeed on every issue raised." Hanrahan v. Hampton, 446 U.S. 754, 757 (1980). See also United States for Heydt v. Citizens State Bank, 668 F. 2d 444 (8th Cir. 1982). However, the litigant must have at least been "successful on the central issue", Martin v. Heckler, 773 F. 2d 1145 (11th Cir. 1985); United States v. Lochamy, 724 F. 2d 494 (5th Cir. 19874); or "received substantially the relief requested", Martin, supra; Ward v. Schweiker, 562 F. Supp. 1173 (W.D. Mo. 1983).

The standard articulated in Martin v. Heckler varies somewhat from the standard of what is a "prevailing party" under the Civil Rights Attorney's Fees Act of 1976 (42 USC Section 1988). The test for attorney fees under the federal EAJA has been found to be more onerous than the test applied under the Civil Rights Attorney's Fees Act. See Clay v. Harris, 583 F. Supp. 1314 (N. D. Ind. 1984). The Nadeau test (581 F. 2d 275) used in Civil Rights actions permits an award of fees if a party succeeds on "any significant issue in litigation which achieves some of the benefit ... sought in bringing suit" (emphasis added). By contrast, the test for "prevailing party" under the federal EAJA focuses on whether the party seeking fees succeeded on the central or crucial issue in the case and whether the party received substantially, not merely some, of the relief requested. I believe that the more onerous standard is probably less apprpriate in the case attorneys fees than civil rights enforcement. The state's interest in civil rights enforcement is greater than the state's interest in awarding attorney's fees to successful litigants.

Under the federal EAJA, courts have looked at whether success was tied to a central issue. In United States v. Rubin, 590 F. Supp. 1029 (D.C. Colo. 1984), a defendant in a fraud action brought by the United States succeeded in defending an action for a preliminary injunction. The court found that the defendant could not obtain attorney fees because the injunction did not relate to the central issue in the case and did not significantly determine any of the defendant's rights. Winning a procedural right or issue without also winning the main issue in controversy is inadequate to support a claim for fees. See Kitchen Fresh, Inc. v. N.L.R.B., 729 F. 2d 1513 (6th Cir. 1984).

I would also suggest that the administrative law judge's award should be limited by the extent of the prevailing party's success. This position is consistent with the federal EAJA of attorney fees and costs under which the prevailing party is entitled only to fees allocable to the claim on which he prevailed. Matthews v. U.S., 713 F.2d 677 (11th Cir. 1983). In awarding costs and fees, therefore, the administrative law judge should be required to exclude those hours and expenses spent on unsuccessful claims.

Thank you again for the opportunity to comment on these rules. If you have any questions, please contact me directly.

Sincerely,

Julie Brunner

JULIE BRUNNER, DIRECTOR
Appeals and Regulations Division

JB:bg

SONR EXHIBIT A-2

minnesota department of health
717 s.e. delaware st. p.o. box 9441 minneapolis 55440
(612) 623-5000

July 3, 1986

Mr. Duane R. Harves
Chief Administrative Law Judge
Minnesota Office of Administrative Hearings
400 Summit Bank Building
310 Fourth Avenue South
Minneapolis, Minnesota 55415

RE: Notice of Intent to Solicit Outside Opinion Concerning Rules to Implement the Equal Access to Justice Act

Dear Mr. Harves:

I am writing concerning the above-described topic in my capacity as Chairman of the Executive Branch Administrative Law Committee, which, as you know, is a group of senior state governmental officials concerned with the improvement of administrative law and process in Minnesota.

The Committee appreciates the opportunity to provide recommendations to the Office of Administrative Hearings (OAH) on this important matter. While we are quite doubtful as to whether the Equal Access to Justice Act confers anything more than procedural rulemaking authority upon OAH (the notice of intent appears to take the position that the act confers interpretive rulemaking authority upon OAH), we do wish to work closely with you in the early design of the relevant administrative process. To that end, we strongly suggest that OAH engage in explicit consultation with affected interests (including the State and the Attorney General) prior to drafting; further, we urge that, after drafting, but before formal proposal, draft rules be circulated to interested parties for their review and comment.

It has been our experience that the early involvement of affected interests leads to superior and less controversial rules, and is most consistent with the spirit of Minnesota's Administrative Procedure Act. We believe that, had such consultation occurred, with respect to last year's revisions to OAH's rules a good deal of the controversy surrounding those revisions would have been avoided.

I will be calling you in the near future to arrange a meeting to discuss how best we might participate in this rulemaking proceeding.

Thank you.

Sincerely,

Daniel J. McInerney, Jr.
Assistant Commissioner
Chairman, Executive Branch
Administrative Law Committee

DJM:bam

cc: Committee Members

SONR EXHIBIT A-3

STATE OF MINNESOTA

OFFICE OF THE ATTORNEY GENERAL

ST. PAUL 55155

HUBERT H. HUMPHREY, III
ATTORNEY GENERAL

ADDRESS REPLY TO:
1100 BREMER TOWER
SEVENTH PL. AND MINNESOTA ST.
ST. PAUL, MN 55101
TELEPHONE: (612) 296-9412

July 3, 1986

The Honorable Duane R. Harves
Chief Administrative Law Judge
Office of Administrative Hearings
400 Summit Bank Building
310 Fourth Avenue South
Minneapolis, Minnesota 55415

Dear Judge Harves:

This letter is written on behalf of the Administrative Law Committee of the Attorney General's office and sets forth some of our preliminary thoughts and views with respect to your proposal to adopt additional rules implementing the Minnesota Equal Access to Justice Act, Minn. Laws 1986, ch. 377 (the "EAJA"). You stated in your notice soliciting outside opinion that you believe it may be appropriate to adopt interpretive rules to establish standards and criteria for determinations of attorney's fees and further define terms, such as "prevailing party" and "substantially justified".

In our view, the authority of the chief administrative law judge to adopt such rules is not altogether clear. Section 4, subd. 1 of the EAJA states that the chief administrative law judge "shall by rule establish uniform procedures for the submission and consideration of applications for an award of fees and expenses in a contested case proceeding." (Emphasis added.) Arguably the legislature intended to grant the chief administrative law judge the authority to establish only procedural rules, not substantive or interpretive rules.

Nevertheless, if you conclude that you do have the authority to adopt substantive and interpretive rules, we believe those rules should include a clarification of the definition of the term "party", as well as the term "prevailing party".

The meaning of the term "party" could benefit from clarification in several respects. First, the definition of "party" under section 1, subd. 6(a) is based in part on the number of persons employed by the entity. However, the statute does not state specifically whether all employees, including part-time employees,

should be counted. At least two federal agencies which have adopted rules to implement the federal Equal Access to Justice Act have concluded that all employees should be included. For example, the Environmental Protection Agency rules concerning the Equal Access to Justice Act state: "The employees of an applicant include all persons who regularly perform services for remuneration for the applicant under the applicant's direction and control. Part-time employees shall be included." 40 C.F.R. § 17.5(e) (1985). The Department of Labor has adopted an almost identical rule. See 29 C.F.R. § 16.105(e) (1985). We believe a similar rule would be appropriate in Minnesota.

Secondly, the definition of "party" under Section 1, subd. 6(a) is based on the "annual revenues" of the entity. In light of the purposes of this legislation--to protect small businesses--it is clear that annual revenue is intended to mean the entity's gross revenue, not its net revenue. Otherwise, even huge corporations grossing hundreds of millions, or even billions, of dollars could qualify under the EAJA in years in which they lost money or had sufficient expenses to offset all but $4 million of their revenues. Such corporations are clearly not small businesses entitled to the protection of the EAJA. It would be useful to clarify this issue by adopting rules which specify that "annual revenues" mean an entity's annual gross revenues.

Third, an issue which is addressed by several federal agency rules implementing the federal Equal Access to Justice Act, but not specifically mentioned in the Minnesota legislation, is the status of an entity which is one of a number of affiliated entities. An example might be a corporation with 40 employees and annual revenues of $3 million which is the subsidiary of a holding company which controls companies that have 40,000 employees and $3 billion in revenue. Does such an entity qualify as a "party" under the EAJA? We think not. Such a corporation clearly is not a small business of the kind contemplated by the EAJA. It has enormous resources at its disposal to defend itself against state action. We suggest, therefore, that a rule be adopted which is patterned on rules of the Environmental Protection Agency (40 C.F.R. 17.5(f) (1985)) and the Department of Labor (29 C.F.R. § 16.105(f) (1985). Those rules provide that the number of persons employed by an applicant's affiliates, and the financial size of its affiliates, must be aggregated and included in determining the applicant's eligibility under the Equal Access to Justice Act. We propose language such as this:

> The annual revenues and the number of employees of the applicant and all of its affiliates shall be aggregated to determine eligibility as a "party". Any person directly or indirectly

> controlling, controlled by, or under common control with the applicant shall be considered an affiliate of the applicant for purposes of this part. In addition, the administrative law judge may determine that financial relationships of the applicant other than those described herein constitute special circumstances that would make an award unjust.

Finally, another issue relating to the definition of "party" concerns the status of individuals, i.e., natural persons, under the Act. The definition of "party" under section 1, subd. 6(b) of the EAJA accords individuals the status of a "party", but only to a very limited extent. Specifically, to qualify as a "party" an individual must be "a partner, shareholder, member or owner of an entity described in [section 1, subd. 6] paragraph (a), clauses 1 and 2." In other words, an individual must own or control an entity which is itself a "party" under subdivision 6(a); i.e., an entity which is a party to a contested case, and has 50 or fewer employees and $4 million or less in annual revenues. If the entity is not itself a "party", then neither are its partners, officers, shareholders, members or owners.

Although resort to the legislative history of the EAJA should be unnecessary on this issue, since the language of the act is clear, we have nevertheless reviewed the history of the EAJA to see if it sheds any light on the matter. It does. The legislative history of the EAJA, including tapes of a hearing before the Senate Judiciary Committee on February 24, 1986, clearly indicates that individuals were not intended to be eligible to recover under EAJA. Therefore, in our view it would be appropriate to clarify by rule that the EAJA applies to only proceedings against small businesses, that the status of partners, officers, shareholders, members, and owners as parties under section 1, subd. 6(b) of the EAJA is derivative of the status of the entities they own or control, and that individuals, i.e. natural persons, may only assert claims under the EAJA to the extent the entity which they own or control can assert such claims.

The other term which needs clarification is "prevailing party". This term is a crucial one under the EAJA, but is undefined in the statute. It is our view that a respondent cannot be a "prevailing party" in a contested case if the state agency that initiates the proceeding succeeds in imposing a penalty, in requiring that the respondent pay compensation or damages, or in obtaining an order for injunctive relief. A respondent which is penalized, fined or enjoined has not "prevailed" in the case; the respondent has lost.

Inevitably, in such contested cases, the agency will not have proved each and every one of its allegations. We expect that in those instances the losing party, may claim to be the "prevailing party" because the party did not lose on all issues. In our view, such a contention would be contrary to the statute. The EAJA is designed to compensate the prevailing party, not the losing party. As previously indicated, a respondent which is penalized, fined, or enjoined is the loser, not the winner, in the proceeding. Moreover, the statute is designed to protect small businesses that are wrongfully subjected to the expense of a contested case proceeding. If a state agency proves that respondent violated state statutes or rules, and therefore should be penalized, fined or enjoined, it is the respondent not the agency that is the wrongdoer. Similarly, where a contested case proceeding is settled pursuant to terms requiring a respondent to agree to a penalty, to pay a fine or some form of compensation, or to injunctive relief, the respondent should not be deemed to be a prevailing party, thereby entitled to compensation from the state agency. Even if there is no admission of wrongdoing, in such circumstances the state agency has succeeded in obtaining relief from the respondent and the agency, not the respondent, is the prevailing party.

For these reasons, it is our view that it would be appropriate for the rules to specifically define "prevailing party" to exclude any party to a contested case which is in any manner penalized, ordered to pay a fine or compensation, or enjoined, whether the sanctions be imposed by settlement agreement or after hearing and completion of judicial review.

Finally, we do not believe that it is necessary to further define the term "substantially justified". In our view the statutory definition is clear and needs no further clarification.

I appreciate your consideration of our views with regard to the implementation of the Equal Access to Justice Act. If your office decides to proceed with the drafting of additional rules under the Act we would appreciate the opportunity to continue to have input in that process.

Sincerely,

Charles I. Wikelius

CHARLES I. WIKELIUS
Assistant Attorney General