OAH Docket No. 77-0300-12545-1

STATE OF MINNESOTA
OFFICE OF ADMINISTRATIVE HEARINGS

In the Matter of the Proposed Adoption of Rules of the Office of Administrative Hearings Governing Rulemaking Procedure, Contested Cases, And Revenue Recapture Rules, Minnesota Rules, Chapter 1400

STATEMENT OF NEED AND REASONABLENESS

I. Background and Introduction

In 1995, the legislature made several significant changes regarding state agency rulemaking. The legislation directed the Office of Administrative Hearings ("OAH" or "Office") to adopt new rules and to revise existing rules concerning review of rules when no hearing is held (uncontested rules).[1] OAH complied with the 1995 legislative directive and made changes to its rulemaking procedure rules, which became effective on February 5, 1996.[2] These changes were only to the rulemaking procedure rules;[3] no changes were made to rules governing contested case hearings[4] or revenue recapture act hearings.[5] OAH has not amended, repealed, or made any other modifications to its rules since 1996.

Minnesota Rules, parts 1400.2000 through 1400.2560 govern the procedure state agencies must follow when they adopt, repeal, or amend rules. These include, for example, the procedure for adopting rules without a public hearing, rulemaking hearings, and exempt rules. The rules also include mediation provisions, and recommended rulemaking forms. Most of the amendments to these rules are proposed for the purpose of bringing the rules into compliance with state statutes and clarify existing rules. OAH proposes new rules regarding the expedited rulemaking process.

The expedited rulemaking process became effective in 1997. The expedited process is covered in Minnesota Statutes, section 14.389. The only guidance provided to agencies using the expedited process is what is found in the statute. The proposed rules regarding the expedited rulemaking process are proposed in hopes of clarifying the process and include, for example, a list of

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[1] Minnesota Laws 1995 Ch. 233, Art. 2, [add section numbers]
[2] 20 S.R. 2058 (Publication of Adopted Permanent Rules Governing Rule Adoption Proceedings; publication date: January 29, 1996; effective date: February 5, 1996.)
[3] Minn. R. parts 1400.2000 through 1400.2560.
[4] Minn. R. parts 1400.5100 through 1400.8401.
[5] Minn. R. parts 1400.8510 through 1400.8612.

documents that must be filed for an administrative law judge's review and what standards of review a judge must use when reviewing expedited rules.

Minnesota Rules, parts 1400.5010 through 1400.8400 govern the procedure for contested case hearings at OAH. These rules include, for example, notice and order for hearing requirements, mediation provisions, motion and discovery rules, rules of evidence, rules regarding the administrative law judge's report, and reconsideration of hearing provisions. The amendments to the contested case hearing rules are proposed in order to provide needed clarifications and updates to the rules.

Minnesota Rules, parts 1400.8505 through 1400.8612 govern hearings conducted pursuant to Minnesota's Revenue Recapture Act.[6] These rules include, for example, notice of hearing requirements, prehearing conferences, motion and discovery rules, rules of evidence, rules regarding the administrative law judge's report, and rehearing rules. The amendments to these rules are proposed in order to make the rules more generic so that these simplified hearing procedures may be used by other state agencies.

Statutory Authority

The Chief Administrative Law Judge has general rulemaking authority under Minnesota Statutes, section 14.51. Section 14.51 states that:

> The chief administrative law judge shall adopt rules to govern: (1) the procedural conduct of all hearings, relating to both rule adoption, amendment, suspension or repeal hearings, contested case hearings, and workers' compensation hearings,[7] 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; and (2) the review of rules adopted without a public hearing.

With regard to exempt rules, the Chief Administrative Law Judge has specific statutory authority under Minnesota Statutes, section 14.386 and 14.388. Section 14.386 states, in relevant part, that the "chief administrative law judge shall adopt rules relating to the rule approval duties imposed by [Minnesota Statutes,] section [14.386] and section 14.388, including rules establishing standards for review."

Minnesota Statutes, section 15.474, subdivision 1 requires that the Chief Administrative Law Judge adopt rules establishing "uniform procedures for the submission and consideration of applications for an award of fees and expenses

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[6] Minn. Stat. §§ 270A.01 through 270A.12.

[7] The workers' compensation hearing rules, Minn. R. parts 1415.0100 – 1415.3500, are not being amended in any way in this rulemaking proceeding.

in a contested case proceeding." This rulemaking authority was used when the Office first adopted Minnesota Rules, part 1400.8401 in 1986.

Under the above statutes, the Chief Administrative Law Judge has the necessary statutory authority to adopt the proposed rules. All statutory authority was granted before January 1, 1996.[8]

Alternative Format

Upon request, this Statement of Need and Reasonableness (SONAR) can be made available in a different format, such as large print, Braille, or cassette tape. To make a request, contact Michael Lewis at the Office of Administrative Hearings, 100 Washington Square, Suite 1700, 100 Washington Avenue South, Minneapolis, MN 55401-2138; phone (612) 341-7610; fax (612) 349-2665; or e-mail Michael.Lewis@state.mn.us. TDD users may call the Office of Administrative Hearings at (612) 341-7346.

II. Regulatory Analysis Review and Other Statutory Requirements

Minnesota Statutes, section 14.131, requires that an agency, through reasonable efforts, include information about several regulatory factors. The required factors are listed below and include OAH's answer or analysis.

(1) A description of the classes of persons who probably will be affected by the proposed rule, including classes that will bear the costs of the proposed rule and classes that will benefit from the proposed rule.

An analysis of expected costs is discussed in the subsequent regulatory review (paragraph #2).

Rulemaking procedure rules: The changes proposed to these rules will affect state agency, board, or commission staff, particularly rule writers, rule coordinators, and other agency, board, or commission staff that have rulemaking responsibilities. Other interested persons are administrative law attorneys and lobbyists, as well as any person or business regulated by rules of a state agency.

Contested case hearing rules: The changes proposed to these rules will affect state attorneys general representing state agencies, boards, or commissions, private attorneys representing respondents in contested case hearings before Administrative Law Judges at the Office, regulated persons and businesses including respondents representing themselves pro se.

[8] Minn. R. part 1400.2070, subp. 1, item D, requires that if an agency's statutory authority was granted after January 1, 1996, the agency must include in its SONAR the effective date of the agency's statutory authority to adopt the rule.

Revenue recapture act hearing rules: The changes proposed to these rules will affect state and public agencies, boards, and commissions that bring claims to a tax refund under the Revenue Recapture Act. Changes to these rules will also affect the persons whose tax refunds are the subject of the claims under the Act, and attorneys representing those persons. Also affected will be the parties and counsel that use these rules for penalty order hearings.

Awards of attorneys fees and expenses (1400.8401): In the 2000 legislative session, a statutory change to Minnesota Statutes, section 15.471, subdivision 6, was made that substantially broadened the number of businesses eligible to make claims to recover attorney fees and expenses under the Equal Access to Justice Act.[9] This will have an impact on state agencies because they will have to pay those claims. The proposed changes to rule part 1400.8401 will have a lesser cost impact, but even without the statutes, the proposed rule changes would slightly broaden the number of claimants, and thus slightly raise the costs to state agencies. But the vast bulk of the total increased cost to agencies comes as a result of the statutory changes, not the proposed rule changes.

(2) The probable costs to the agency and to any other agency of the implementation and enforcement of the proposed rule and any anticipated effect on state revenues.

The Office of Administrative Hearing does not anticipate any implementation or enforcement costs to the Office or to any other agency associated with the proposed changes to the rulemaking procedure rules, the revenue recapture act hearing rules, or most of the contested case hearing rules. None of the proposed changes to these rules set or adjust fees in any way. The Office does not anticipate that the proposed changes to these rules will have an effect on state revenues.

It is possible that the proposed changes to Minnesota Rules, part 1400.8401, regarding the award of expenses and attorney fees, will have an effect on agency costs and on state revenue. It is impossible to determine, however, the probable costs to agencies associated with the proposed changes to part 1400.8401. Minnesota Statutes, sections 15.471 – 15.474 and Minnesota Rules, part 1400.8401 allow certain prevailing parties – other than the state – in certain types of contested case matters to apply for awards of expenses and attorney fees. Applications must be made to the administrative law judge, and the prevailing party must demonstrate that the state's position in the case was not substantially justified. If the prevailing party is successful in its claim under the applicable statutes and this rule part, the state agency must pay expenses and fees to the prevailing party. There have been very few applications for expenses or attorney fees, however.

[9] Minnesota Laws 2000, chapter 439, section 3.

Part 1400.8401 was first adopted in 1986. Since that time, however, the legislature has amended Minnesota Statutes, sections 15.471 – 15.474. It is therefore necessary to amend rule part 1400.8401 so that it conforms with the governing statutes. In order to comply with the governing statutes and the changes made by the legislature to the statutes, the Office proposes to repeal some of the procedural requirements in part 1400.8401. The effect of the repeal will be that more prevailing parties will be able to apply for an award of expenses and attorney fees. If more prevailing parties are successful in obtaining these awards under the statutes and part 1400.8401, the state agencies will incur more costs. The costs associated with the rule change would come from the actual award of expenses and attorney fees, as well as charges from the Office of Administrative Hearings for the judge's time spent on the case.

The Office anticipates that agencies may incur more costs as a result of the proposed changes to part 1400.8401. The proposed rule changes to part 1400.8401, however, are almost entirely made to conform to the governing statutes. Consequently, the vast bulk of any increase in costs associated with the rule changes are no more than what the legislature anticipated and presumably accounted for when it amended Minnesota Statutes, section 15.471 – 15.474.

(3) A determination of whether there are less costly methods or less intrusive methods for achieving the purpose of the proposed rule.

As mentioned above, the Office does not anticipate any costs associated with most of the proposed rule changes. Consequently, there are no less costly methods for achieving the purpose of most of the proposed rule changes. The proposed changes to 1400.8401 are made in order to conform to legislative amendments to Minnesota Statutes, sections 15.471 – 15.474. The Office finds, therefore, that there are no less costly methods for achieving the purpose of rule part 1400.8401.

Most of the proposed rule changes are made in order to clarify the rules or to update them so that they conform to the applicable statutes. The Office tried very hard to limit the rule changes to include requirements that are necessary for the Office to thoroughly review an agency's rules or to effectively and efficiently conduct contested case and revenue recapture hearings. It is the Office's determination that there are no less intrusive methods for achieving the purpose of the proposed rules.

(4) A description of any alternative methods for achieving the purpose of the proposed rule that were seriously considered by the agency and the reasons why they were rejected in favor of the proposed rule.

It is necessary to proceed through the rulemaking process because many of the proposed changes include updating the rules to comply with statutory changes.

Other proposed rule changes were made with the intent to help clarify the rules. In the Office's effort to clarify the rules, it considered and rejected rule language in several different rule parts. Several rule parts were modified after the Office received feedback from affected parties about the Office's originally proposed language. For example, the public feedback demonstrated that in some rule parts the originally modified language proposed by the Office created more confusion than clarification. As a result, the Office made many changes to the rules that were suggested by the affected parties.

The Office seriously considered including in the rulemaking procedure rules – part 1400.2230 – a provision specifically allowing submission of post rule hearing comments to the judge via e-mail. The Office, however, ultimately rejected including a specific provision for e-mail submissions. The Office decided that using e-mail as a filing system, at least at this point in time, creates more burdens than benefits. For example, the Office would need to adopt a procedural system regarding how e-mail filings would be handled. It would need to determine who would receive the e-mails (i.e., should the judge use his or her time receiving e-mails, or should it be designated to support staff personnel), how the e-mails become part of the record, and in what form do the e-mail messages get returned to the agency with the judge's report. Also, on at least one occasion the Office's e-mail system has been overloaded because so many messages were sent to the judge in a short period of time. As a result of the overload, several e-mail messages were lost. In addition, the Office determined that the rulemaking procedure rules do not prohibit a judge from deciding whether to allow e-mail comment submissions on a case-by-case basis. For these reasons, the Office rejected the idea of including in the rulemaking procedure rules a specific provision allowing e-mail submissions of post rule hearing comments.

There were no other alternative methods for achieving the purpose of the proposed rules seriously considered by the Office.

(5) The probable costs of complying with the proposed rule.

OAH does not anticipate that there will be any significant costs either to OAH or any other state agency or other affected party to comply with the proposed rule changes to the rulemaking procedure rules, the revenue recapture hearing rules, and for most of the contested case hearing rules.

The changes proposed to rule part 1400.8401, governing the award of expenses and attorney fees, are likely to result in additional compliance costs to state agencies. This is because the proposed changes broaden the scope of prevailing parties that may apply to receive an award of expenses and attorney

fees. A determination of the probable compliance costs associated with the changes to part 1400.8401, however, is extremely difficult to assess. The Office refers to its analysis above in paragraph (2).

(6) An assessment of any differences between the proposed rule and existing federal regulations and a specific analysis of the need for and reasonableness of each difference.

There are no federal regulations that govern rulemaking procedures for Minnesota state agencies that are adopting, amending, or repealing its rules through Minnesota Statutes, Chapter 14. There are no federal regulations that govern contested case hearings or revenue recapture act hearings before an administrative law judge at the Office of Administrative Hearings.

Performanced-Based Analysis

When developing rules, Minnesota Statutes, section 14.002 requires an agency to "emphasize superior achievement in meeting the agency's regulatory objectives and maximum flexibility for the regulated party and the agency in meeting those goals." Minnesota Statutes, section 14.131 requires an agency to describe in its Statement of Need and Reasonableness how it considered and implemented the policy in section 14.002.

Although the Office proposes to add a few new rules, most of the proposed changes are amendments to existing rules. Many changes are made in order to update the rules to conform to statute. Updating the rules for this reason achieves the policy outlined in Minnesota Statutes, section 14.002 because it attempts to clarify the purpose of the rules and any applicable procedure outlined in the rules. Updating the rules to conform to statutes should help remove conflicts and discrepancies between the existing rules and statutes.

In developing the proposed rule changes, the Office of Administrative Hearings tried to be very conscientious about including in the rules only that information that was needed in order to enable the Office to carry out its responsibilities in an effective and efficient manner. Information that the Office felt was not necessary for this purpose was not included in the rule changes. The Office considers the public input on the proposed rule changes an extremely valuable source of information. All comments that were received from interested and affected persons were seriously considered. As a result of the public comments received, many rule parts were modified. The Office will also seriously consider all comments received as a result of publication of the Notice of Intent to Adopt Rules. These steps in the rulemaking process were and will be done in an effort to achieve the policy outlined in section 14.002, namely that the proposed rules maximized flexibility for regulated parties while also meeting the Office's objectives.

Additional Notification Efforts by OAH

A Request for Comments on Planned Rules was published in the *State Register* on September 5, 2000. The Office mailed the Request for Comments to all individuals and organizations on the Office's rulemaking mailing list and posted it on its web page. At the time of Office published the Request for Comments, it did not yet have a draft of its proposed rule changes available. Several individuals requested a copy of the proposed changes when they became available. In early September, the Office obtained a Revisor's draft of its proposed changes to the rulemaking procedure rules. The Office sent a draft of these rules to those persons requesting a copy. The Office also the proposed rule changes to the rulemaking procedure rules on its web page. In early October, the Office obtained a Revisor's draft of its proposed changes to the contested case hearing rules, the revenue recapture hearing rules, and the rule governing awards of expenses and attorney fees. The Office sent a draft of these rules to those persons requesting a copy. The Office also posted the proposed rule changes to the contested case hearing rules, the revenue recapture rules, and the rule governing awards of expenses and attorney fees on its web page.

On September 27, 2000, an Administrative Law Judge and a Staff Attorney from the Office attended an Interagency Rulemaking Committee ("IRC") meeting to discuss the proposed changes to the rulemaking procedure rules. The IRC is comprised primarily of rule writers from various state agencies, boards, and commissions. The IRC meets on a regular basis to discuss issues relating to rulemaking. Committee members were able to retrieve a copy of the proposed rule changes from the Office's web page before the meeting. At the IRC meeting, committee members presented questions and made suggestions for changes to the rulemaking procedure rules. The Office subsequently made changes to the rulemaking procedure rules as a result of the meeting and the feedback obtained.

Minnesota Statutes, section 14.22, subdivision 1(a), requires an agency to publish its Notice of Intent to Adopt Rules Without a Public Hearing in the *State Register*. The statute also requires an agency to send the Notice via United States mail to all persons on the agency's rulemaking mailing list. The Office of Administrative Hearings will comply with section 14.22 by publishing its Notice of Intent to Adopt Rules Without a Public Hearing in the *State Register*, and by mailing the Notice to all persons on its rulemaking mailing list. The Office's mailing list consists of at least 125 interested persons, with the majority of registrants being state agencies, boards, or commissions, and attorneys. Other registrants on the Office's mailing list include businesses, associations, and legislators.

Minnesota Statutes, section 14.22, subdivision 1(a), also states that an agency must "make reasonable efforts to notify persons or classes or persons

who may be significantly affected by the rule by giving notice of its intention in newsletters, newspapers, or other publications, or through other means of communication." The statute also states that an agency "may, at its own discretion, also notify persons not on its [rulemaking mailing] list who may be affected by the rule being proposed." The Office of Administrative Hearings' efforts to notify affected persons or groups of the proposed rule changes will include sending Notice and copy of the changes to the following groups:

1. All individuals on the Interagency Rulemaking Committee mailing list. The Committee maintains an e-mail mailing list that includes all Committee members. OAH will send its Notice of Intent to Adopt Rules Without a Hearing and a copy of the proposed rule changes to all Interagency Rulemaking Committee members via e-mail;
2. The Administrative Law section of the Minnesota State Bar Association;
3. The Public Law section of the Minnesota State Bar Association;
4. The Public Utilities section of the Minnesota State Bar Association;
5. The Attorney General's Office

The Office will also post the Notice, a copy of the proposed rules, and a copy of the SONAR on its web site, at: ***www.oah.state.mn.us***.

Information Required by Other Laws or Rules

Minnesota Rules, Part 1400.2070, subpart 2, item D, states that the SONAR must include "information required by any other law or rule . . . or which the agency is required by law or rule to consider in adopting a rule." OAH submits that no other information is required in support of the proposed rules. For example, Minnesota Statutes, Section 16A.1285, subdivision 5,[10] is not applicable to the proposed rule changes. Minnesota Statutes, Section 14.111[11] is also not applicable to the proposed rule changes.

III. Rule-By-Rule Analysis

This section discusses the changes proposed to the rules. It also sets forth the circumstances that created the need for the changes and why the proposed changes are reasonable solutions for meeting the need.[12]

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[10] Minnesota Statutes, section 16A.1285, subdivision 5, requires that if agency rules set or adjust fees or charges, the SONAR must include the comments and recommendations of the Department of Finance. The rules proposed by OAH in this case do not set or adjust fees or charges.

[11] Minnesota Statutes, Section 14.111 states that if agency rules affect farming operations, the agency must provide a copy of the proposed rule changes to the Commissioner of Agriculture before the agency adopts the rules. The rules proposed by OAH in this case do not affect farming operations.

[12] See Minnesota Rules, Part 1400.2070, subpart 1.

Changes to the Rulemaking Procedure Rules

Part 1400.2000 Scope

The scope provision cites to the rule parts governing rulemaking proceedings that agencies must use when adopting rules. Because OAH is proposing to adopt new rules governing the expedited process, it is necessary and reasonable to broaden the scope of the rulemaking procedure rules to include these new proposed rules. Proposed rule part 1400.2570 is a recommended form for notice of intent to adopt an expedited rule without a public hearing. This proposed rule part is the last rule part in the rulemaking procedure rules. Part 1400.2000, therefore, needs to be amended to include proposed rule part 1400.2570.

Part 1400.2010 Definitions

Subpart 1. Scope. Subpart 1 states that the definitions apply to all the rulemaking procedure rules and cites to these rules. OAH is proposing to add new rules governing the expedited rule process. It is necessary and reasonable to broaden subpart 1 to include the new proposed rules.

Subpart 5. Legislative commission. Subpart 5 defines "legislative commission" as this term is used in the rulemaking procedure rules. The current rule states that "legislative commission" means the "Legislative Commission to Review Administrative Rules," or the LCRAR. The LCRAR was abolished in July 1996, and the Legislative Coordinating Commission, or the LCC, was given the LCRAR's legislative oversight of administrative rules.[13] It is necessary and reasonable to repeal subpart 5 because the LCRAR was abolished over four years ago. All references in the rulemaking procedure rules to the "legislative commission" have been changed to the "legislative coordinating commission."

Part 1400.2020 Assignment and Disqualification of Judge

Subpart 1. Assignment. This subpart states that the chief ALJ must assign an ALJ to a rule proceeding once the chief receives a request to schedule a rule hearing or a filing under parts 1400.2060, 1400.2300, 1400.2400, or 1400.2450. OAH is proposing to add new rules governing the expedited rule process. One new rule includes proposed part 1400.2410, which governs an administrative law judge's review of an expedited rule submitted to OAH. Similar to the filings listed above, an ALJ needs to be assigned to an expedited rule that is submitted to the Office for legal review. For this reason, it is needed and reasonable to amend subpart 1 to include proposed rule part 1400.2410.

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[13] 1995 Minn. Laws, ch. 248, art. 2, sec. 6. See Minnesota Administrative Procedure 385 – 99 (George A. Beck et al. eds., 2d ed. 1998).

Part 1400.2030 Counting Time and Filing Documents

Subpart 2. Paper size. This subpart states that all documents submitted to OAH must be submitted on standard paper size of 8 ½" by 11". The current rule lists three exceptions, which include the rules prepared by the revisor, handwritten comments from the public, and exhibits. The revisor's office now uses the standard paper size of 8 ½" by 11". OAH proposes to delete the exception regarding rules from the revisor's office. Deleting this exception is reasonable and necessary because it is no longer applicable to the way the revisor's office produces copies of proposed or adopted rules.

Part 1400.2040 Petition for Rulemaking

Subpart 1. Content of petition. The proposed changes to subpart 1 are needed and reasonable to clarify the rule. None of the changes alter the substance of the rule. Rather, the Office proposes to reorganize subpart 1 to include what needs to be in a petition for rulemaking. Some of the requirements listed are required under Minnesota Statutes, section 14.09, such as what action the petitioner wants the agency take. Other requirements are needed and reasonable because it is information an agency would need in order to effectively process a petition, such as the name and address of the petitioner.

Part 1400.2050 Request for Comments on Planned Rule

OAH proposes to change the title of this rule part to "Request for Comments on Possible Rule." It was suggested to OAH by a rule writer in another agency that OAH consider changing the full name for the Request for Comments to more accurately reflect the purpose and timing of the Request for Comments. The Request for Comments is the first official publication by an agency in a rulemaking proceeding. As required under Minnesota Statutes, Section 14.101, subdivision 1, "an agency . . . shall solicit comments form the public on the subject matter of a *possible rulemaking* proposal *under active consideration* within the agency . . . ."[14] The request for comments serves as a preliminary outreach by an agency to gather insight and suggestions by the public on rules that an agency may propose. There is no requirement that an agency proceed with the rulemaking process once it publishes a request for comments. It is not uncommon for an agency to publish its Request for Comments 12 to 18 months before it publishes its Notice of Intent to Adopt Rules. Often, agencies do not have prepared a draft of their proposed rules when they publish a Request for Comments.

The proposed name change is needed and reasonable because it more accurately reflects the language used to describe the request for comments in Minnesota Statutes, Section 14.101, subdivision 1.

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[14] Emphasis supplied.

Part 1400.2060 Approval of Notice Plan

OAH proposes to change the title of this rule part to "Approval of Additional Notice Plan." This rule part describes how agencies can obtain approval of their additional notice plans before publication of either the Request for Comments or the Notice of Intent to Adopt Rules. It is needed and reasonable to change the name of this rule part because it better reflects and clarifies the purpose of the rule part.

Subpart 1. Optional prior approval. The current rule states that "[a]n agency may ask the office for prior approval of its plan for additional notice of planned rulemaking under Minnesota Statutes, section 14.101, or of its plan for additional notice of proposed rules under Minnesota Statutes, section 14.131, 14.14, 14.22, and 14.23." OAH proposes to change subpart 1 so that it reads as follows: "An agency may ask the office for approval of its plan for giving additional notice of its request for comments on possible rulemaking under Minnesota Statutes, section 14.101, or of its plan for giving additional notice of proposed rules under Minnesota Statutes, section 14.131, 14.14, 14.22, and 14.23. The agency must request approval of its additional notice plan before it publishes the request for comments or the notice of proposed rules." Some of the proposed language is added in order to better clarify that agencies must make this request prior to publication. OAH proposes to add the word "giving" as an instructional term to the phrase, "[an agency's] plan for giving additional notice." Finally, the reference to the request for comments is changed to reflect the new name, Request for Comments on Possible Rule. None of the proposed changes alter the meaning or effect of the rule. Rather, the changes are for clarification purposes.

Subpart 2. Filing. This subpart describes the documents an agency must submit to OAH when the agency requests approval of its additional notice plan. One proposed change is to add the word "additional" before any reference to a notice plan. This change is needed and reasonable in order to clarify that the plan refers to the additional notice plan and so that the references are used consistently throughout the rule part. It is needed and reasonable to change the word "planned" to "possible" in paragraph (2) of item A of subpart 2 so that it remains consistent with the new name, Request for Comments on Possible Rule. For clarification purposes, the Office proposes to add to item B, paragraph 1, language allowing an agency to submit either a draft or certified copy of its proposed rule.

Subpart 4. Approval or Disapproval. The first sentence of this subpart reads as follows: "An approved notice plan is the office's final determination that the notice plan is adequate." OAH proposes to change this sentence so that it states: "An approved additional notice plan is the office's final determination that the notice plan is adequate if the agency implements the additional notice plan." The new language at the end of the sentence is proposed because there have

been situations in the past where an agency obtains approval of its additional notice plan by OAH, but the additional notice plan is not followed or fully implemented. For example, if the agency fails to provide notice to one or more of the organizations listed in its additional notice plan, then the approved additional notice plan has not been fully implemented. The proposed language is needed and reasonable in order to make it clear to an agency that if it does not fully implement the additional notice plan as approved by OAH, then the agency is not assured that the additional notice plan that was ultimately followed is adequate. It is needed and reasonable to add the word "additional" before notice plan in the first sentence in order to help clarify that the approval or disapproval refers to an agency's additional notice plan.

Part 1400.2070 Statement of Need and Reasonableness

This rule part lists requirements that an agency needs to include in its Statement of Need and Reasonableness (SONAR) in addition to the statutory requirements of Minnesota Statutes, Sections 14.131 and 14.23.

Subpart 1, item C. The proposed changes to Item C are needed in order to clarify the Office's interpretation of when an agency must list witnesses it intends to call at a rulemaking hearing. It is not necessary to require an agency to list witnesses if the agency is going to publish a Notice of Intent to Adopt Rules Without a Public Hearing. Requiring an agency to determine who will be available as a witness at a public hearing when a hearing is not planned for and no hearing date is set is unnecessary. If, in such a case, an agency ends up going to hearing on its proposed rules, then it must first publish a Notice of Hearing and would likely revise its SONAR in anticipation of the public hearing. Requiring that an agency list witnesses in its SONAR only when "a hearing is scheduled" is reasonable. This requires an agency to list witnesses if it publishes a Dual Notice or a Notice of Hearing. Both of these notices include a specific hearing date. If an agency publishes either a Dual Notice or a Notice of Hearing, it realizes that a public hearing is either likely or that it will occur. The agency, therefore, should know who is available to be a witness at the hearing.

The Office proposes to require an agency to list only non-agency witnesses. The proposed language is needed to clarify who must be listed on an agency's witness list. It is reasonable to limit the witness list to non-agency witnesses because it is assumed that agency staff or personnel will attend the public hearing to support the proposed rules.

The proposed language to Item C is a minimal requirement. An agency will not be penalized if it publishes a Notice of Intent to Adopt Rules Without a Public Hearing and includes a witnesses list in its SONAR. Neither will it be penalized if it includes agency staff in its witness list.

Subpart 1, item E. The proposed language requires that an agency's SONAR include the date it is made available for public review. It is necessary and reasonable to require this date on the SONAR because Minnesota Statutes, Section 14.131 requires that the SONAR be prepared and made available for public review before an agency orders publication of its notice of intent to adopt rules. Without a date on the SONAR, this Office cannot readily determine when the SONAR was prepared. Currently, most agencies already date their SONARs. Including the proposed language merely clarifies that a date is required on the SONAR. There is no need, however, to have the SONAR signed.

Subpart 3. Timing. This subpart reiterates that an agency's SONAR must be prepared before the agency orders publication of its notice of intent to adopt rules. The Office proposes to add the following language: "This subpart is satisfied if the statement and the notice are dated on the same day." In the past, there has been confusion about how much time "before" ordering publication an agency must have its SONAR prepared. The proposed language is needed and reasonable because it helps clarify that an agency may date its SONAR on the same day it dates its notice of intent to adopt. It is reasonable to include this requirement because all notices include a statement that the agency's SONAR is available for public review. When an agency signs its notice of intent to adopt, it is declaring that the SONAR is prepared and available for public review.

It is needed and reasonable to change the references to "Legislative Commission" to "Legislative Reference Library" in order to conform to Minnesota Statutes, Sections 14.131 and 14.23. It is no longer a requirement that agencies send a copy of the SONAR to the LCC.

Part 1400.2080 Notice of Proposed Rule

This rule part lists several items that an agency must include in any notice of intent to adopt rules it publishes.

Subpart 2, item I. The Office proposes to add the requirement that a notice of intent to adopt be dated as well as signed. It is necessary and reasonable to require that notices be dated because notices serve an important function during the rulemaking proceeding and become part of the official rulemaking record under Minnesota Statutes, Section 14.365. Also, it is being proposed that the SONAR be dated because of the requirement that the SONAR be prepared in conjunction with the agency's notice of intent to adopt. It is therefore reasonable to require that all notices be dated as well as signed.

Subpart 3, items A and B. The changes proposed to items A and B are needed and reasonable for clarification purposes. The new language is intended to clarify that an agency must include in its notice a date for the end of comment period that is at least 30 days after the date of publication of the notice in the

State Register. The existing rule language was ambiguous as to when the comment period should end.

Subpart 3, item G. The Office proposes to change item G so that it reads: "how persons must submit their comments or requests for hearing, including whether the agency will accept e-mail comments or requests for hearing." It is needed and reasonable to add the new language to item G because an agency may choose to allow interested persons to submit comments or hearing request via e-mail. If an agency allows e-mail submissions, then it should include this information in its notice.

Subpart 4, item F. OAH proposes to repeal item F, which states "that persons can obtain the statement of need and reasonableness from the office at the cost of copying." It is necessary and reasonable to repeal item F because often times OAH only has a draft copy – not a final copy – of an agency's SONAR in OAH's case file. OAH often receives the SONAR at the time the agency submits a notice of hearing or dual notice for a judge's review before publication. Subpart 5 of this rule part does not require that the agency submit a final draft of the SONAR. If a person calls the Office requesting a copy of the agency's SONAR and the Office does not have a final draft copy, the Office would refer the person to the agency. It would not be appropriate to distribute a draft copy of the agency's SONAR. It is also reasonable to repeal item F because OAH receives very few requests for copies of an agency's SONAR. In addition, more and more agencies are posting copies of their SONARs on the agency's web site.

Subpart 5. Scheduling of hearing, and approval of notice of hearing or dual notice. OAH proposes to make the following changes to subpart 5: "The judge must also advise the agency as to when, ~~and~~ where, and how many ~~the hearing~~ hearings should be held in order to allow for participation by all affected interests." These changes are needed and reasonable because there are times when more than one public hearing is necessary in order to reach affected parties. It is necessary and reasonable to add this language to clarify that the administrative law judge will advise the agency if the judge believes that more than one hearing is necessary.

Subpart 6. Timing. The Office proposes to add language at the end of this subpart allowing notices to be deposited in Minnesota's central mail system. It is needed and reasonable to add this language because many agencies currently deposit mail in the state's central mail system. The rule should reflect that this is an acceptable practice.

Subpart 7. Certificate of mailing and certificate of mailing list. The proposed changes to subpart 7, including changes to the title, are merely technical changes, not substantive changes. When an agency submits a rule to

a judge for review, it must submit a certificate of its rulemaking mailing list.[15] The certificate serves as a statement by the agency documenting that its rulemaking mailing list was current at the time the agency mailed its notice of intent to adopt rules. The name of this certificate is more appropriately described as a certificate of accuracy of an agency's rulemaking mailing list.

Part 1400.2085 Notice of Proposed Expedited Rule

Proposed rule part 1400.2085 is a new rule. It, in conjunction with two other proposed rule parts, is intended to clarify and flesh out Minnesota's expedited rulemaking process under Minnesota Statutes, section 14.389. Section 14.389 was established by the legislature in 1997.

An agency may use the expedited rulemaking process only if it is granted specific statutory authority to do so. Generally, the expedited rulemaking process involves what many rulemakers refer to as "notice and comment" rulemaking. An agency is required to publish a notice stating that it intends to adopt rules under the expedited process and that the public has at least thirty (30) days to comment on the proposed rules. Unlike the non-expedited rulemaking process, an agency is not required to prepare a Statement of Need and Reasonableness (SONAR) in support of its proposed expedited rules. At the end of the comment period, an agency must submit the proposed expedited rule to the Office of Administrative Hearings for review for legality similar to rules adopted under the non-expedited process. To date, the rules that have been adopted under the expedited process and submitted to this Office for review have been adopted without a public rule hearing. Minnesota Statutes, section 14.389, however, includes a provision allowing for the possibility of a public hearing.

Subdivision 5 of Minnesota Statutes, section 14.389, states the following:

> A law authorizing or requiring rules to be adopted under this section may refer specifically to this subdivision. If the law contains a specific reference to this subdivision, as opposed to a general reference to this section:
> (1) the notice required in subdivision 2 must include a statement that a public hearing will be held if 100 or more people request a hearing. The request must be in the manner specified in section 14.25; and
> (2) if 100 or more people submit a written request for a public hearing, the agency may adopt the rule only after complying with all of the requirements of chapter 14 for rules adopted after a public hearing.

If used, subdivision 5 serves a similar function of a dual notice under Minnesota Statutes, section 14.22, subdivision 2. In other words, if 100 or more people

[15] Minnesota Rules, Part 1400.2310, item G.

request a public hearing on the proposed expedited rules, an agency cannot adopt the rules unless it conducts a public hearing. An agency must also follow the procedural requirements in Minnesota Statutes, sections 14.131 through 14.20, which include preparing a SONAR and publishing a Notice of Hearing. So if a proposed rule initially starts out as an expedited rule but must go to hearing before adopted, then the rule is no longer an expedited rule because it is subject to all the procedural requirements for non-expedited rules that go to hearing.

Subdivision 2 of Minnesota Statutes, section 14.389, requires that an agency publish and mail out notice of intent to adopt an expedited rule. Subdivision 2 lists some items that the notice must include. Proposed rule part 1400.2085 is intended to provide more specificity to subdivision 2, similar to the way part 1400.2080 fleshes out Minnesota Statutes, sections 14.14 and 14.22.

Subpart 1. General content. As discussed above, the expedited rulemaking statute, section 14.389, includes subdivision 5, which is a provision allowing for the possibility of a public hearing. The statute requires that if subdivision 5 is used, then the agency must include in its notice a statement that if 100 or more people request a hearing a hearing will be held. If subdivision 5 is not used, then the agency's notice does not need to reference the possibility of a public rule hearing. In other words, notices of intent to adopt an expedited rule may take (at least) two different forms. Part 1400.2085 accounts for the two different forms, and subpart 1 informs agencies what subparts of part 1400.2085 are applicable to the two different notice forms. It is needed and reasonable to list at the outset of the rule which subparts are applicable to the notices that an agency must publish.

Subpart 2. Contents of expedited rule notices. This subpart lists items that all notices of intent to adopt an expedited rule must include. Minnesota Statutes, section 14.389 requires that certain information be included in an agency's notice, or that agencies take certain procedural steps. The statutory requirements are included in subpart 2 as items A, B, C, E, I, and L. It is needed and reasonable to add these items because they are specifically required by statute, or the items include information about the procedure that an agency must follow in order to adopt an expedited rule. The need and reasonableness of adding items A, B, C, E, I, and L is also supported on the grounds that the information in these items is information similar to what is required for notices of intent to adopt a non-expedited rule. For ease of conformance and simplicity, it is appropriate to keep notices of intent to adopt rules, whether expedited or non-expedited, similar in form and substance.

Subpart 2, items D, F – H, J, K, and M – O. It is needed and reasonable to require these items because they are all items required in other notices of intent to adopt. It is reasonable, then, that a notice of intent to adopt an expedited rule also includes these items. In addition, some of these items are natural extensions of the statutory requirements. For example, it is reasonable to

require an agency to include information in its notice about how a person must submit their comments and on what date the comment ends since the agency must allow for at least thirty days for public comment.

Subpart 3. Additional notice contents when agency accepts requests for public hearing. As noted above, a notice of intent to adopt an expedited rule may take two different forms. And subpart 3 lists additional requirements that the notice must include if a public hearing on the rule is a possibility. Subpart 3 is needed and reasonable because it informs the agency what it must minimally include in such a notice.

Items A, B, and E of subpart 3 are statutory requirements under Minnesota Statutes, section 14.389. Items C and D are needed and reasonable because they are items that are also required if an agency publishes a non-expedited notice of intent to adopt. It is reasonable to require item C because it is more helpful if a person requesting a hearing on the proposed rule articulates the changes the person would like to see made to the proposed rule instead of simply objecting to the rule. It is needed and reasonable to require item D because people requesting a hearing need to know how to submit their requests.

Subpart 4. Timing. Subpart 4 requires that a notice of intent to adopt an expedited rule be mailed out at least 33 days before the end of the comment period, and must be published at least 30 days before the end of the comment period. It is necessary to add a timing requirement because section 14.389 requires that an agency allow at least 30 days for public comment on a proposed expedited rule. Requiring that notices be mailed out at least 33 days before the end of the comment period is reasonable because it allows three days for mail delivery. This is adequate time to expect a mailed notice to reach the recipient while still allowing the recipient the full 30 days to comment. Requiring publication at least 30 days before the end of the comment period is reasonable on similar grounds. Also, these timing requirements are needed and reasonable because they are required for the non-expedited notices.

Subpart 5. Certificates of mailing and accuracy of mailing list. Adding subpart 5 is needed and reasonable to keep notification efforts for expedited rules similar to the efforts required for non-expedited rule notification. Minnesota Statutes, section 14.389 requires that an agency mail a notice of intent to adopt an expedited rule to people on the agency's rulemaking mailing list. It is needed and reasonable to require an agency to document when it mails the notice so that the Office has a record of compliance when an expedited rule is reviewed by a judge for legality.

Subpart 6. Procedure when a public hearing is required. If an agency intends to adopt a rule under the expedited rulemaking process but subsequently receives 100 or more requests for a public hearing, the agency may no longer adopt the rule under the expedited process. It is necessary to include subpart 6

because it sets forth the procedure an agency must follow when a public hearing is required. It is reasonable to add the procedures proposed in subpart 6 because they are required by Minnesota Statutes, section 14.389.

Part 1400.2110 Procedure to Adopt Substantially Different Rules

Subpart 2. Notice. The Office proposes to delete the phrase "rule proceeding" and replace it with "comment period." This change is needed and reasonable because it clarifies that an agency only needs to mail the required information to persons who commented during the comment period, not during the entire rule proceeding. The phrase "rule proceeding" is broad and may be misinterpreted to mean that an agency must contact all persons who commented on the agency's rules at any time, such as during the request for comment period. It is appropriate to change subpart 2 to better reflect the Office's interpretation of this requirement.

Part 1400.2210 Conduct of Hearing

Subpart 1. Registration of participants. The one change proposed in this rule part is a grammatical change that is needed and reasonable to make the rules more clear. The proposed change does not alter the substance of the rule.

Part 1400.2220 Agency Presentation at Hearing

Subpart 1, item E. The Office proposes to change the reference to the legislative commission to the Legislative Reference Library. Agencies are no longer required to send a copy of the SONAR to the legislative coordinating commission as the rule currently states. Instead, Minnesota law requires agencies to send a copy of the SONAR to the Legislative Reference Library. The proposed change is needed and reasonable in order for the rule to conform to Minnesota Statutes, Section 14.131.

Subpart 1, item F. OAH proposes to add language clarifying that if a dual notice was published – as opposed to a notice of hearing – the agency needs to file a copy of the dual notice with the judge at the hearing. Adding this language is needed and reasonable because it reflects current practice and it helps clarify that an agency must place a copy of the dual notice into the hearing record.

Subpart 1, item G. The change to item G is proposed so that it conforms to the proposed change to part 1400.2080, subpart 7.

Subpart 1, item H. The Office propose to modify item H so that it reads: "a certificate of additional notice if given or a copy of the transmittal letter." This change is needed and reasonable because it gives an agency the option of preparing a certificate of additional notice or, instead, providing a copy of the transmittal letter. A certificate may be preferred if, for example, an agency's

additional notice plan is extensive. But it may be easier to provide a copy of the transmittal letter if, for example, an agency's additional notice plan includes only a few mailings. It is also reasonable to add this option because under subpart 1, item E, the Office allows a copy of the transmittal letter as evidence that an agency sent a copy of its SONAR to the legislative reference library.

Subpart 1, item I. New language is proposed to be added at the end of item I so that it reads: "any written comments on the proposed rule received by the agency during the comment period." It is needed and reasonable to add this language because it clarifies the common practice. The Office has not required agencies to submit all comments received on proposed rules. Comments received by an agency after publication of the Request for Comments on Planned Rules, for example, may not be useful for the judge's review because an agency may have amended the rules after receiving these comments. In other words, the rules that are published in the State Register with the agency's Notice of Intent to Adopt may be different than earlier versions, and comments received before publication of the Notice of Intent to Adopt may no longer be relevant. The proposed change to item I clarifies that an agency is only required to place into the hearing record all comment received during the comment period.

Subpart 1, item J. The Office proposes to change the reference to "legislative commission" to "chief judge." Minnesota law now requires agencies to obtain approval from the Chief Administrative Law Judge to omit rule text from publication in the *State Register* rather than from the legislative coordinating commission. The proposed change to item J is needed and reasonable to conform to Minnesota Statutes, Section 14.14, subdivision1a (b).

Subpart 1, item K. The proposed change to item K does not alter the substance of the rule. Rather, it lists examples of some statutory provisions that an agency may need to consider when it is in the process of adopting rules. For example, Minnesota Statutes, Section 14.111 requires that an agency provide certain notice to the Commissioner of Agriculture if the agency's proposed rules affect farming operations. It is needed and reasonable to add examples of some statutory requirements to help assist agencies in the rulemaking process.

Part 1400.2240 Administrative Law Judge's Report

Subpart 4. Review by chief judge. The Office proposes to change the title of subpart 4 so that it reads: "Disapproval; review by chief judge." This change is needed and reasonable for clarification. The Chief Administrative Law Judge only reviews a rule already reviewed by an Administrative Law Judge if the Administrative Law Judge disapproves the rule.

The Office proposes to change the language in subpart 4 to clarify that an agency must resubmit a rule for the judge's review after the agency changes it. Minnesota Statutes, section 14.16, subdivision 2 requires that an agency

resubmit to the judge a rule that has been disapproved. It states that if the chief judge agrees with the reviewing judge's finding of a defect and the agency makes the changes to correct the defect, "[t]he agency shall then resubmit the rule to the chief administrative law judge for a determination as to whether the defects have been corrected." It is needed and reasonable to change subpart 4 so that includes the non-discretionary language similar to the statute. The phrase, "or actions," is also added to subpart 4. This addition is needed and reasonable because it helps clarify that a judge could require that the agency proceed through the process to adopt a substantially different rule under Minnesota Rules, part 1400.2110.

Subpart 6. Disapproval of need and reasonableness. Adding the word "coordinating" is needed and reasonable because it clarifies that it is the legislative coordinating commission to which an agency must submit a disapproved rule. Under Minnesota Laws 2000, chapter 469, section 2, an agency must submit a rule that has been disapproved based on need and reasonableness to the house of representatives and senate policy committees with primary jurisdiction over state governmental operations for review. The proposed rule change is made in order to conform to the new law.

Subpart 8. Withdrawal of rule. The Office is proposing to change subpart 8 so that instead of submitting a request to withdraw a rule, an agency must submit a notice of withdrawal. This change is needed and reasonable because it conforms with the power delegated to agencies under Minnesota Statutes, Section 14.05, subdivision 3. This statute allows an agency to withdraw a rule "any time prior to filing it with the secretary of state." There is nothing in section 14.05, subdivision 5, requiring an agency to submit to the Office a request to withdraw a rule. Withdrawing is appropriate unless the withdrawal of a rule or a portion of a rule makes the remaining rule substantially different than the rule in the agency's notice of intent to adopt. If a withdrawal makes the rule substantially different, then the agency must follow the procedure under Minnesota Statutes, Section 14.05, subdivision 2.

Subpart 10. Rule adoption. The changes proposed in subpart 10 are needed and reasonable for the same reasons set forth for the changes made to subpart 6 of rule part 1400.2240.

Under Minnesota Statutes, Section 14.16, subdivision 3, an agency is required to file three copies of an approved and adopted rule with the Secretary of State. The existing rule provides for only two copies, not three. It is needed and reasonable to change the rule to conform to the statutory requirement.

Part 1400.2300 Review of Rules Adopted Without a Public Hearing

Subpart 1. Applicability. The change from "to" to "and" is needed and reasonable because there are only two rule parts referenced.

Subpart 4. Withdrawal of rule. The proposed changes to subpart 4 are the same changes proposed to subpart 8 of 1400.2240. The changes to subpart 4 are needed and reasonable for the same reasons discussed in subpart 8 of part 1400.2240.

Subpart 5. Approval. The Office proposes to add language to the first sentence of subpart 5 so that it reads: "If the rule is approved either on initial review or on resubmission, the agency may publish notice of adoption of the rule in the State Register." This change is needed and reasonable because it clarifies when a rule approval can occur.

Under Minnesota Statutes, Section 14.26, subdivision 3(a), the Office is required to file three copies of an approved rule with the Secretary of State. The existing rule provides for only two copies, not three. It is needed and reasonable to change the rule to conform to the statutory requirement.

The existing rule also states that the Office must send a copy of the Administrative Law Judge's decisions to persons who requested a copy of the decision. This does not conform to the practice followed by the Office of Administrative Hearings. If persons have requested to be informed of when the judge's decision is available, the Office mails out a letter notifying these persons that the decision is available and may be obtained from the Office at the cost of reproduction. It is needed and reasonable to change part 1400.2300, subpart 5 so that it is consistent with the Office's practice. Also, providing notification that the judge's decision is available is consistent with the language in part 1400.2080, subpart 4, item G (item G under the existing rule; item H under the proposed rules).

The Office also proposes to add to subpart 5 a requirement that the Office send a copy of the Administrative Law Judge's rule approval to the Revisor's Office (OAH already sends a copy of the approval to the legislative coordinating commission and the attorney general). Once a judge approves a rule, the Revisor's Office produces a Notice of Rule Adoption for the agency. The agency publishes the Notice of Rule Adoption in the *State Register*. It is, therefore, helpful to send a copy of the judge's approval letter to the Revisor's Office so that it knows what rules the Office of Administrative Hearings has approved. It is needed and reasonable to make the proposed change for this reason.

Subpart 6. Disapproval. The Office proposes to add the following new language: "If the rule is disapproved, the judge must state in writing the reasons for the disapproval and recommend what changes or actions are necessary for approval." The proposed change is needed and reasonable because it helps clarify that a judge could require that the agency proceed through the process to adopt a substantially different rule under Minnesota Rules, part 1400.2110.

The Office also proposes to add similar language to subpart 6 regarding notification of availability of the judge's decision as in subpart 5 of this rule part. This addition to subpart 6 is needed and reasonable for the same reasons described above in "Subpart 5. Approval."

New language is added in subpart 6 requiring the Office to send the judge and chief judge's rule disapproval order to the house and senate governmental operation committees. This language in needed and reasonable because it is required under Minnesota Laws 2000, chapter 469, section 2. The office of the governor was also added as an office receiving a rule disapproval order. This language is needed and reasonable to create a mechanism to keep the office informed of rule disapprovals as it has requested.

Subpart 8. Resubmission. The Office proposes to change the language in subpart 8 to clarify that an agency must resubmit a rule for the judge's review after the agency changes it. Minnesota Statutes, section 14.26, subdivision 3(b) requires that an agency resubmit to the judge a rule that has been disapproved. It states that: "[a] rule may not be filed with the office of the secretary of state, nor published, until the chief administrative law judge determines that the defects have been corrected or, if applicable, that the agency has satisfied the rule requirements for the adoption of a substantially different rule." It is needed and reasonable to change subpart 8 so that it includes the non-discretionary language similar to the statute.

Changes to items A, B, and C in subpart 8 are added in order to clarify what an agency must file with the Office when it resubmits a rule for review. Item A of the current rule requires an agency to file all the documents it filed when it initially submitted the rule for review. This is often unnecessary for a resubmission review. In most cases, the chief administrative law judge needs only the following documents when reviewing a rule on resubmission: the rule initially proposed, the new rule including the agency's proposed changes, and an amended order outlining the changes made. It is necessary and reasonable to limit the filing requirements to what is minimally necessary. If the chief judge needs additional documents in order to conduct a review of a resubmitted rule, the new rule allows him to request the additional documents needed.

Subpart 8a. New modifications to rule. Subpart 8a is a new subpart to rule part 1400.2300. There are times when an agency may opt to make changes to its proposed rules that are not specifically recommended by the administrative law judge. It has been the Office's practice to allow these changes, pending the judge's approval. Subpart 8a is intended to clarify that an agency may make changes to its proposed rules other than the changes recommended by the judge. It is reasonable and necessary to add subpart 8a so that an agency knows what options are available when it wants to make changes to proposed rules.

Subpart 9. Disapproval of need and reasonableness. It is necessary and reasonable to add the word "coordinating" in this subpart so that it is clear that an agency must send a copy of the rule to the legislative coordinating commission.

New language is added in subpart 9 requiring an agency to send a copy of its rules to the house and senate governmental operations committees. This language in needed and reasonable because it is required under Minnesota Laws 2000, chapter 469, section 2.

Part 1400.2310 Documents to be Filed

The changes proposed to this rule part are intended to clarify what documents an agency must file with the Office when it submits a rule for review. The proposed modifications to items H and L are the only changes that alter what an agency must file. The Office proposes to add language to item H so that it reads: "a certificate of additional notice, if given, or a copy of the transmittal letter." This change is needed and reasonable for the same reasons set forth in part 1400.2220, subpart 1, item H. Item L currently requires that an agency file three copies of the adopted rule. The Office proposes to change this requirement so that an agency must only file one copy of the adopted rule. It is needed and reasonable to change item L because the administrative law judge only needs one copy of an adopted rule when reviewing it for legality.

The language added to item N is needed and reasonable because it specifies that an agency's order adopting the rule must comply with the requirements in part 1400.2090. Rule part 1400.2090 lists several items that an agency's order adopting a rule must include. The Office believes that including a citation to part 1400.2090 in item N will serve as a reminder that part 1400.2090 must be followed.

The changes proposed to items F, G, I, J, and P, are needed and reasonable for the same reasons set forth above for rule part 1400.2220, subpart 1, items E, G, I, J, and K.

Part 1400.2400 Review of Exempt Rules

Subpart 4. Approval. The Office proposes to restructure subpart 4 so that it lists the procedure followed when the Office approves an exempt rule. In making this change, the Office proposes to remove the term "disapproval" from the title of subpart 4. In turn, the Office proposes to add subpart 4a, which sets forth the procedure involved if the Office disapproves a rule submitted by an agency under the exempt rulemaking statute. The proposed new language to subpart 4 is needed and reasonable because it establishes what the Office must do when it approves an exempt rule. Currently, the Office follows the procedure in the new subpart 4. It is appropriate to clarify in this rule part that it is the

Office's responsibility to send three copies of the approved exempt rules to the Secretary of State (this is required under Minnesota Statutes, section 14.386 (a)(2)), and to send copies of the judge's decision to the same persons and groups that it does for non-exempt rules.

Subpart 4a. Disapproval. Subpart 4a is new in the sense that the current rule part 1400.2400 does not have a separate "disapproval" provision. The language in subpart 4a, however, is, for the most part, not new. Most of the language in subpart 4a is lifted from the existing rule language in subpart 4. The Office proposes to change "may" to "must." It is necessary and reasonable to make this change so that agencies know that any time they change an exempt rule, they must resubmit it to the judge for review and approval. Minnesota Statutes, section 14.386 (a)(3) states that a rule adopted under the exempt process does not have the force and effect of law until the rule is approved as to legality by the Office and the Office has filed three copies of the rule with the Secretary of State. Consequently, it is also needed and reasonable to make the change from "may" to "must" because using a non-discretionary term is more in line with the intent of Minnesota law. If an agency changes a rule adopted under the exempt process, it must resubmit it to the Office in order to obtain the judge's approval and for the Office to file three certified copies of the rules with the Secretary of State.

Part 1400.2410 Review of Expedited Rules Adopted Without a Public Hearing

This rule part is new. It sets forth the procedure followed when an agency submits for review a rule adopted under the expedited process. Much of the language proposed in this rule part is either identical or similar to the procedural language in rule part 1400.2300, Review of Rules Adopted Without a Public Hearing.

Subpart 1. Applicability. Subpart 1 sets forth the scope of part 1400.2410. It states that part 1400.2410 only applies to rules adopted under the expedited process that do not go to hearing. If a rule starts the adoption process under the expedited process but subsequently has to go to a public hearing, then it no longer follows the expedited process for adoption. It is necessary and reasonable to include subpart 1 to clarify that part 1400.2410 is the procedure for expedited rules that do not go to public hearing.

Subpart 2. Filing. This subpart lists all the documents an agency must file with the Office when it submits a rule adopted under the expedited process for review. None of the documents listed are unique; they are all documents required, for example, under rule part 1400.2310, except that part 1400.2310 is more extensive. Some of the documents included in 1400.2310 but not in subpart 2 of 1400.2410 are not applicable to rules adopted under the expedited process. For example, under the expedited process an agency is not required to

publish a Request for Comments or prepare a Statement of Need and Reasonableness (SONAR). It is needed and reasonable to require submission of the documents in subpart 2 because the Office needs these documents to determine whether the agency has followed the appropriate procedure in adopting rules under the expedited process. It is also needed and reasonable to require these documents because it keeps the filing requirements substantially similar to rules adopted under the non-expedited process.

Subpart 3. Review. Subpart 3 states that the administrative law judge has 14 days to review a rule adopted under the expedited process. It is necessary and reasonable to add this provision so agencies know the procedure involved when they submit a rule to the Office for review. It is reasonable to give the judge 14 days to review an expedited rule because this time period is established in Minnesota Statutes, section 14.389, subdivision 4. In addition, this time period is the same for rules adopted without a public hearing and exempt rules.

Subpart 3 also states what standards of review the judge will apply when determining the legality of a rule adopted under the expedited process. It is necessary and reasonable to inform agencies of the review standards used by an administrative law judge. Minnesota Rules, part 1400.2100 sets forth the standards of review used by a judge when the judge reviews rules for legality. The only standard in part 1400.2100 that is not applicable to rules adopted under the expedited process is a demonstration by the agency that its rules are needed and reasonable. No SONAR is required when rules are adopted under the expedited process. Subpart 3 of part 1400.2410, therefore, does not include as a standard of review a showing of need and reasonableness. It is necessary and reasonable to include in subpart 3 all other review standards listed in part 1400.2100 because they are all applicable to rules adopted under the expedited process.

Subpart 4. Withdrawal of rule. Subpart 4 sets forth the process used if an agency wants to withdraw an expedited rule. It is necessary to add this provision because Minnesota Statutes, section 14.05, subdivision 3 authorizes agencies to withdraw proposed rules any time prior to filing with the Secretary of State. Subpart 4 is reasonable because it is the same process used to withdraw non-expedited rules. This provides for procedural consistency throughout the rulemaking process.

Subpart 5. Approval. Subpart 5 establishes the procedure an agency must follow if its expedited rule is approved by an administrative law judge. It is necessary and reasonable to add subpart 5 so agencies know the procedure involved when an expedited rule is approved. Also, much of the procedure set forth in this subpart is required by Minnesota Statutes, section 14.389, subdivision 3. For example, the statute requires that if an agency adopts a rule that differs from the rule originally published it must publish the changes when it

publishes the Notice of Rule Adoption in the *State Register*. The statute also makes it the agency's responsibility to file a copy of the expedited rule with the Governor's Office. It is reasonable to require the Office of Administrative Hearings to file three copies of the expedited rule with the Secretary of State because the Office takes this responsibility for all other rules that are adopted without a public hearing. The last sentence in subpart 5 is needed and reasonable because, under Minnesota Statutes, section 14.389, subdivisions 1 and 4, an agency must submit an expedited rule to OAH for approval before the rule has the force and effect of law.

Subpart 6. Disapproval. This subpart sets forth the procedure followed if the judge disapproves an expedited rule. It is necessary and reasonable to include subpart 6 so agencies know what steps to take to get an expedited rule approved if the rule is initially disapproved. It is reasonable to include the procedures in subpart 6 because they are consistent with the process used when a non-expedited rule is disapproved.

Subpart 7. Administrative law judge's decision. Subpart 7 sets forth several responsibilities of the Office when the judge's decision becomes available. It is necessary and reasonable to require that the judge's decision be sent to the legislative coordinating commission, the revisor of statutes, and the attorney general because these offices have particular interest in the adoption of agency rules. In addition, the Office sends a copy of the judge's decision to these three parties in all other rules that are adopted that do not go to public hearing. It is reasonable to keep the expedited rulemaking process substantially similar to the non-expedited rulemaking process.

Subpart 8. Review by chief judge. This subpart allows an agency to request the chief administrative law judge to review a rule that has been disapproved by a judge. It is necessary to add subpart 8 because it gives an agency an opportunity to have its expedited rule reviewed by the chief judge if the agency does not agree with the judge's rule disapproval. It is reasonable to add the process outlined in subpart 8 because it is the same procedure an agency may follow if a judge disapproves an exempt rule under Minnesota Rules, part 1400.2400, subpart 5. The Office believes it is reasonable to use the same review process as used for exempt rules because expedited rules are similar to exempt rules in that they are exempt from the normal rulemaking process, including, for example that no SONAR is required under the expedited process.

Part 1400.2450 Mediation

Subpart 5. Subsequent sessions. The proposed change in subpart 5 is needed and reasonable because it clarifies that it is the administrative law judge that gives notice of future mediation sessions.

Part 1400.2510 Recommended Request for Comments on Planned Rule

The proposed changes to part 1400.2510, including the title, are needed and reasonable because they incorporate the changes proposed to rule part 1400.2050. It is necessary and reasonable to allow agencies to include the e-mail address of the agency contact person if an agency chooses to allow submission of public comments via e-mail. It is necessary and reasonable to change "will" to "may" in the last sentence of this rule part because an agency may opt to include in the formal rulemaking record comments received in response to publication of the Request for Comments.

Part 1400.2520 Recommended Notice of Intent to Adopt a Rule Without a Public Hearing

It is necessary and reasonable to add the few changes proposed to part 1400.2520 because they either incorporate the changes proposed to rule part 1400.2080, Notice of Proposed Rule, or help clarify existing requirements. For example, part 1400.2520 includes a sentence in the "Agency Contact Person" paragraph that an agency may include in its Notice if the agency opts to allow e-mail submissions. The change proposed in the "Subject of Rule and Statutory Authority" paragraph is reasonable because it helps clarify the existing requirement in part 1400.2080, subpart 2, item D.

Part 1400.2530 Recommended Notice of Hearing

The changes proposed to this rule part are necessary to help make part 1400.2530 more similar to other recommended notices. The addition of including an agency contact person's e-mail address in the Notice is necessary and reasonable because an agency may opt to invite public communication via e-mail in addition to other traditional methods. It is necessary and reasonable to update the "Lobbyist Registration" paragraph because the Ethical Practices Board is now called the Campaign Finance and Public Disclosure Board.

Part 1400.2540 Recommended Dual Notice

OAH proposes to add language to the "Introduction" paragraph citing the rules of the Office that an agency must follow when adopting rules without a public hearing. It is appropriate to add this language because it better informs the public about the procedure an agency must follow when adopting non-controversial rules. The change proposed to the "Agency Contact Person" paragraph is needed and reasonable because it puts the rule into compliance with the proposed changes to rule part 1400.2080, subpart 3, item G. The change proposed to the "Subject of Rule and Statutory Authority" paragraph is needed and reasonable because it helps clarify the existing requirement in rule part 1400.2080, subpart 2, item D. It is necessary and reasonable to change the statutory citations for the hearing process in the "Notice of Hearing" and "Hearing

Procedure" paragraphs from section 14.14 to section 14.131 because it is Minnesota Statutes, sections 14.131 to 14.20 that govern public rule hearings. The change proposed in the "Statement of Need and Reasonableness" paragraph is needed and reasonable because it puts the rule into compliance with the proposed change to rule part 1400.2080, subpart 4, item F.

Part 1400.2550 Recommended Certificates

Most of the changes proposed to this rule part are needed and reasonable because they help clarify the purpose of the certificate; the changes do not create new substantive requirements. For example, the Office proposes to delete the heading. This is needed and reasonable because it does not include all the certificates included in this rule part and is, therefore, more confusing than helpful. The Office proposes to change some of the certificate titles to better reflect what they are, such as "certificate of accuracy of the mailing list," and "certificate of giving additional notice." It is necessary and reasonable to change the reference from "legislative commission" to "Legislative Reference Library" because Minnesota Statutes, sections 14.131 and 14.23 now require agencies to send a copy of the SONAR to the library, not the legislative commission.

The Office proposes to add a recommended certificate of mailing the notice and the statement of need and reasonableness to legislators. It is necessary and reasonable to include this recommended certificate because, under Minnesota Statutes, section 14.116, an agency is required to sent a copy of its Notice and SONAR to interested legislators at the time the agency mails its Notice to those on its rulemaking mailing list. The new certificate of mailing is not specifically required in the rulemaking procedure rules, but it serves as a useful document for agencies to use to establish that they have complied with section 14.116. It is reasonable to include the information in the recommended certificate because it covers the information required in section 14.116. The certificate includes what documents were mailed (the Notice and SONAR), the date they were mailed, to whom the documents were mailed, and that the mailings were done to comply with section 14.116.

Part 1400.2570 Recommended Notice of Intent to Adopt Expedited Rule Without a Public Hearing

This rule part is a recommended form an agency may use when it prepares a Notice of Intent to Adopt an Expedited Rule under Minnesota Statutes, section 14.389, subdivision 2. Adding the recommended notice is needed for rule consistency. The Office provides recommended notices for other non-expedited rule notices in its rules, including a Notice of Intent to Adopt a Rule Without a Public Hearing (part 1400.2520), Dual Notice (part 1400.2540), and Notice of Hearing (part 1400.2530). It is reasonable to include the information and provisions in the proposed recommended notice because it is

information required by section 14.389 and it is similar to the information included in other non-expedited rule notices.

The proposed recommended notice includes provisions if the agency is accepting requests for a public hearing under section 14.389, subdivision 5. It should be noted that if an agency does receive 100 or more requests for a public hearing, section 14.389, subdivision 5, paragraph 2 requires the agency to subsequently publish a Notice of Hearing. In other words, the recommended notice for an expedited rule does not serve the same function as a dual notice, which includes a hearing date, the procedure followed if a hearing is required, and other information relevant to a public rule hearing. Because an agency would have to publish a Notice of Hearing if a hearing is required, it is not necessary to include information about the hearing process in this recommended form.

Changes to the Contested Case Hearing Rules

Part 1400.5010 Scope; Conversion of Contested Case

The existing rule governing the scope of contested case proceedings is set out in part 1400.5200. OAH proposes to delete language in the part that references the alternative procedures for expedited cases (primarily Revenue Recapture appeals), since those procedures are separate, clearly defined processes. Revisions to the expedited case rules contain the option for parties, with the approval of the ALJ, to use those rules for contested cases. Deletion of rule language to conform to other rule changes is both needed and reasonable.

Part 1400.5100 Definitions

Terms used in the contested case hearing rules are defined in part 1400.5100.

Subpart 1. Administrative law judge or judge. OAH proposes to make a punctuation change to subpart 1. This change does not alter the substance of subpart 1.

Subpart 3a. Filing. The Office proposes to revise the definition for "filing." The new definition is needed to define the term that is added to other parts in the proposed rules. There is a need to clarify how a document must be filed with OAH, since attorneys have often contacted OAH for advice on this process. The rule is reasonable because the definition conforms with the normal and ordinary usage of the term in legal circles.

Subpart 8. Person. "Person" is defined in subpart 8 to include individuals, various types of businesses, associations, societies, and governmental entities other than courts of law. The Office proposes to amend

the definition of "person" in order to simplify the term included. The proposed changes to subpart 8 are needed and reasonable because it has become increasingly difficult to attempt to list, for example, all the different types of businesses organizations and entities.

Subpart 9. Service; serve. Subpart 9 defines "service" as that term is used in the rules. At the suggestion of the Revisor of Statutes, the portions of the existing definition that relate to processes were removed from the definition section and proposed for adoption as part 1400.5550. The remaining language in subpart 9 consists entirely of existing language.

Part 1400.5300 Request for Administrative Law Judge

The process to be followed by any agency requesting assignment of an Administrative Law Judge is set out in part 1400.5300. The Office proposes to clarify the language in the rule part. The judge assignment function has been delegated by the Chief Administrative Law Judge to the docket coordinator, who handles the case management system. OAH seeks to conform the rule to the current practice. Similarly, the existing rule requires that the proposed notice of hearing be filed before the Administrative Law Judge is assigned. This requirement created an unnecessary duplication of work for agencies. OAH proposes to delete the requirement for a proposed notice of hearing. The rule adds a reference to prehearing conferences when an agency sets on a hearing, since some agencies do not set the hearing date in the notice of hearing. The changes are needed to make the notice of hearing process more efficient. The resulting rule is needed to relieve agencies from an inefficient practice. The change is reasonable because the fundamental information of time, date, and place for the hearing or prehearing conference is retained in the rule.

The Office proposes new language to require that agencies consider the location of the parties, witnesses, and other participants to maximize convenience and minimize costs arising from attending the hearing. This language is intended to discourage agencies from scheduling hearings for locations that are convenient for the agencies, but create hardships for the others participating. The new language does not impose an absolute requirement, since predicting how the balance of cost and inconvenience will be achieved is impossible. The proposed rule sets clear standards to direct agencies when hearings are being requested. The rule is needed and reasonable to make clear to agencies that participants will not be excluded from the hearing process by locating the hearing in a remote location.

Part 1400.5400 Assignment of Administrative Law Judge

Part 1400.5400 requires the Chief Administrative Law Judge to assign an Administrative Law Judge to a matter within ten days of an agency request. Consistent with the change to part 1400.5300, OAH proposes to delete the

existing language that allows the Administrative Law Judge to advise the agency as to the hearing date, time, and location. In its place, OAH proposes to expressly require the Chief Administrative Law Judge to set the time, date, and place of the hearing. In doing so, the new language requires the Chief Administrative Law Judge to consider the agency's requested time, date, and place. The rule is needed to clarify who has the authority to choose the time, date, and location. The rule is reasonable because the Chief Administrative Law Judge will consider both the agency's request and the cost and inconvenience to participants.

Part 1400.5500 Duties of Administrative Law Judge

Part 1400.5500 sets out the duties required of Administrative Law Judges conducting contested case hearings.

Item H. The proposed change to item H is needed and reasonable to improve readability.

Existing items M and N. Existing items M and N are being re-lettered to retain their places at the end of the list of duties in part 1400.5500.

Existing item O. Item O is being re-lettered as item M and modified to allow substitution of numbers as well as letters where the identity of persons must be protected. The use of numbers is more useful than initials to maintain confidentiality. The practice of some agencies, such as the Board of Medical Practice, has been to identify patients by number to maintain confidentiality. The use of numbers is needed to ensure persons are not improperly identified in ALJ reports. The use of numbers has been proven in practice to be a reasonable means of accomplishing that end.

New item N. New item N allows the ALJ to appoint an interpreter where needed to provide a fair hearing. The new language codifies as a rule a practice that has developed as the need for interpreters has become apparent. The rule is needed to ensure that each person participating in the hearing, whether party or witness, can understand the proceedings and provide testimony. The rule is reasonable since there is no viable option to having an interpreter present when a non-English speaker is participating in a contested case proceeding.

New item O. New item O allows the ALJ to place reasonable time limits on testimony. The limit must consider the requests of the parties. This provision affords express authority for the ALJ to ensure that due process is not thwarted by hearing tactics, including the presentation of repetitive testimony, or delving into matters of limited relevance to the ultimate issues in the hearing. This practice can increase the costs of participation in contested case hearings and does not help to create a relevant hearing record. Allowing the ALJ to place time limits on testimony is needed to prevent parties from abusing the hearing process. Allowing the ALJ the discretion to set these limits is reasonable to

ensure that clearly relevant testimony is not arbitrarily excluded solely on the basis of time.

Item P. This paragraph allows the ALJ to change the location of the hearing based on a party's request. Setting the original hearing location is often done without input from one of the parties. In some cases, the hearing location can work a hardship on a litigant. Item P is needed to prevent the hearing location from becoming a hardship. Allowing the ALJ the discretion to move the hearing is reasonable to ensure that no litigant is prejudiced in presenting a case, based on the hearing location. The rule codifies current practice.

Part 1400.5550 Service Procedure

As discussed above, the definition of "service" in part 1400.5100, subpart 9, was modified to remove the portion of the existing rule relating to process. Part 1400.5550 is proposed as the rule to govern how service is accomplished in contested cases. With minor grammatical and clarification changes, the process of service in part 1400.5550 contains the same or substantially similar language to that contained in the existing definition of service in part 1400.5100, subpart 9. Regulating the process of serving documents is needed to ensure that those documents are transferred by means that assure timely delivery. The proposed rule is reasonable to govern the process, since the standards set out in that part have been used by OAH for many years and are parallel to the processes used in the District Courts of Minnesota.

Part 1400.5600 Notice and Order for Hearing

Contested case hearings are initiated by service of a notice and order for hearing. Part 1400.5600 sets out the requirements for each notice and order for hearing.

Subpart 2. Contents of notice and order. Subpart 2 requires that the notice of and order for hearing be served on the parties and sets out the standards for what must be included in the notice of and order for hearing. The body of subpart 2 is proposed for modification to require the notice of and order for hearing be filed with the Office. This addition is needed to eliminate confusion as to whether the notice of and order for hearing must be filed. The new language is reasonable to ensure that the notice of and order for hearing is available to the ALJ and contained in the official record of the contested case. The new language codifies an existing practice and does not place any undue burden on litigants.

The lettered items in subpart 2 set out what is required in the notice of and order for hearing.

Item F. Item F currently requires that the notice of and order for hearing contain information on how to obtain any applicable statutes or rules. OAH proposes to modify that item to clarify that both print and online sources of that

information must be identified. Recently, agencies have provided information through the Internet on each agency's website. This information includes statutes and rules applicable to contested case proceedings. In the experience of OAH, making this information available on-line (meaning through the Internet) has greatly enhanced the ability of litigants to meaningfully participate in contested case hearings. When available online, litigants are able to access that information much more conveniently and at lower cost than other through other methods. Requiring agencies to identify the locations of that information is both needed and reasonable to ensure that litigants can obtain the benefits of on-line information sources, or access print resources if that option is desired.

Item L. Item L advises litigants that failure to appear at the hearing is grounds for taking a default against the non-appearing party. But the default rule, Minnesota Rules. part 1400.6000, sets out more grounds for default than are required in the notice of and order for hearing. To ensure that no litigant is misled about why a default can be taken, the language of item L is proposed to be modified. The new language adds that failure to appear at prehearing and settlement conferences and failure to comply with any order of the ALJ are grounds for default. The new language is needed to eliminate potential confusion. The language is reasonable because it conforms to the existing rule on defaults.

Item M. Item M sets out the impact of admitting information into the hearing record of a contested case. In the experience of OAH, parties have clearly not understood that information becomes public when submitted into the hearing record. Additionally, the impact of the Minnesota Data Practices Act (Minnesota Statutes, Chapter 13) has not been adequately addressed in the existing rule. The language proposed for item M advises litigants that the Data Practices Act keeps some data not public and requires all parties to inform the ALJ when not public data is being offered into the hearing record. These modifications are needed to alert all litigants about the impact of the Data Practices Act and provide the ALJ an opportunity to address the appropriate handling of such data, when it is offered. Informing litigants in the notice of and order for hearing is reasonable, since information is often provided for the matter prior to the hearing. The notice of and order for hearing is the earliest opportunity for advising all participants about the potential for sensitive information to become public when entered into the record of a contested case.

Item N. Item N requires inclusion of a statement advising litigants and their counsel that the Minnesota Rules of Professional Conduct and the Professionalism Aspirations of the Minnesota State Bar Association (MSBA) apply to proceedings before the Office of Administrative Hearings. The need for adherence to standards of decorum and ethical practice are just as important for contested case proceedings as cases in the District Courts of Minnesota. Judges have had to admonish litigants and counsel regarding the limits of acceptable behavior when appearing before the ALJ or in correspondence,

briefs, and motions filed with the Office. Failure to insist on adherence to these standards can, in particular cases, result in an impairment of due process for litigants and imposition of professional discipline for attorneys. From a policy perspective, failure to adhere to these standards can result in a reduction in public confidence in the fairness of the contested case process. Since the Rules of Professional Conduct and the MSBA Professionalism Aspirations are based on the common understanding of what constitutes appropriate conduct, there should not be any undue burden on unrepresented litigants participating in the contested case process.

Items O and P. New items O and P require that the notice of and order for hearing contain statements regarding making needed accommodations, appointing a qualified interpreter, and requiring prompt notice if an interpreter is to be appointed. The new items are needed to conform to the standards of the Americans with Disabilities Act and ensure that litigants are aware of the availability of interpreters. Item P, requiring prompt notice of the need for an interpreter, is reasonable to ensure that the services of an interpreter can be obtained without rescheduling the hearing.

Subpart 3. Service. Subpart 3 establishes the requirements for service of the notice of and order for hearing. The only modification proposed to this subpart is to add the requirement that the notice of and order for hearing be filed with the Office at least 30 days prior to the hearing (except where a different time is required by statute). The new language is needed to ensure that the ALJ has the notice of and order for hearing in time to address issues that arise in contested case proceedings. Requiring filing within the same time frame as service is reasonable, because no significant burden is put upon the parties to comply with the rule.

Subpart 4. Publication. Subpart 4 sets out the requirements for publication of the notice of and order for hearing, where such a requirement exists in statute. The subpart is being repealed, since the rule adds nothing to the publication requirements set out in statute. Since most statutes requiring publication of the notice of and order for hearing are very detailed, subpart 4 is unnecessary and may conflict with some statutes.

Subpart 5. Amendment. Subpart 5 sets forth the procedures for amending the notice of and order for hearing. The existing rule allows an agency to amend the notice of and order for hearing at any time prior to the close of the hearing, subject only to the hearing being extended to allow a reasonable time for response. In practice, some agencies have taken advantage of this rule to introduce new charges as a basis for that agency's action in the matter. This can result in undue burdens being placed on persons contesting an agency action. In some instances, the new charges involved matters that could have been disclosed prior to the hearing. In some instances, the charges appear to have been brought to fit testimony already received. Such practices can potentially

work to deny the fundamental reason for requiring a notice of and order for hearing, that is to afford persons prior notice of what they are accused of and a reasonable opportunity to respond.

To address the problems experienced under the existing rule, OAH proposes to modify subpart 5 to require agencies to amend the notice of and order for hearing prior to the start of the hearing, rather than the close of the hearing. To clarify what hearing is meant, the term "evidentiary hearing" is added, to distinguish the ultimate hearing in the matter from prehearing conferences and motion hearings. For those instances where amending the notice of and order for hearing is appropriate after the hearing has begun, the rule affords agencies this opportunity subject to the ALJ's approval. These modifications are reasonable to address problems that have been encountered in hearings when late amendments to the notice of and order for hearing have been made that prejudice a respondent and prevent an orderly proceeding.

Part 1400.5700 Notice of Appearance

When a contested case is initiated, there can be confusion as to who is appearing at the hearing and if anyone is participating in prehearing proceedings on behalf of a party. To remove this potential for confusion, the Office has required that a notice of appearance be filed on behalf of a party seeking to appear at the hearing or any prehearing proceeding. The rule parallels Rule 104 of the Rules of Practice for District Courts, which requires filing of a certificate of representation and parties. The notice of appearance requires that persons identify themselves, their address, telephone number and the same information for any attorney appearing on a party's behalf. That portion of part 1400.5700 is unchanged from the existing rule.

New language is being added to the rule part to require that the notice of appearance be filed "as soon as possible" when the hearing date is less than twenty days after commencement of the contested case. The existing rule can be interpreted to not require a notice of appearance in expedited cases. In practice, ALJs have experienced the need for the contact information contained in the notice of appearance, even where only a short period exists before the hearing. Requests for continuances, motions for discovery, and motions to compel the attendance of witnesses are examples of actions that could require the information contained in the notice of appearance. Requiring that the document be filed with OAH is needed to ensure that the ALJ has adequate contact information to address controversies and scheduling crises prior to the hearing. Adopting the "as soon as possible" standard is reasonable, since quickly scheduled hearings preclude imposing rigid filing deadlines and facsimile filing is allowed.

The experience of attorneys withdrawing from representation of parties is reflected in the new language proposed for addition to part 1400.5700. When an

attorney withdraws from representation, the management of a contested case is disrupted. Minnesota Rule of Professional Conduct 4.2 prohibits contact between a represented party and opposing counsel. This rule prohibits even the service of documents directly to a party represented by counsel. The Office proposes to add language that requires attorneys seeking to withdraw from representation to do so only after submitting the contact information for the party. That information can be supplemented by the contact information for new counsel, if the party will be represented by another attorney in the contested case.

The last sentence to be added to part 1400.5700 informs the parties that withdrawal of counsel does not create any right to a continuance. It has been some judges' experience that parties in contested case hearings may engage in delaying tactics to avoid adverse agency actions. Occasionally a party may discharge the attorney on the eve of the hearing. In some instances, withdrawal of counsel is needed and granting a continuance is appropriate. By adopting language that ensures parties are aware that a continuance will not be granted as a matter of right, OAH is afforded the means of policing the hearing practices engaged in by parties while retaining the discretion to grant continuances where appropriate. The changes to part 1400.5700 are needed to address existing problems in the contested case process. The new language reasonably assures flexibility to grant continuances where needed and deny continuances where such requests are made for an improper purpose.

Part 1400.5800 Right to Counsel

An important due process protection is the right of a party to seek representation when appearing before a tribunal. The existing rule part 1400.5800 clarifies that parties in contested case hearings may represent themselves, or may choose another to represent them, subject only to the prohibitions against the unauthorized practice of law.

With the representation of parties by non-attorneys, difficulties have arisen regarding conduct of the non-attorney when appearing at a contested case hearing, or with regard to the contents of documents filed with OAH. To a great extent, these difficulties arise from representatives being unaware of the standards for appropriate conduct in contested case proceedings. To address these problems, OAH proposes to add language clarifying that all persons appearing on behalf of parties in contested case hearings must adhere to the standards for attorneys and that failure to conform to those standards may be sanctioned by the ALJ. Specifically, the ALJ may exclude the person from participation in the contested case proceeding for failure to conform to the appropriate standards. The new language is needed to clarify what standards all representatives, whether or not admitted to the practice of law, must be complied with when appearing in contested case proceedings. The rule affords judges the

ability to impose reasonable sanctions when experiencing conduct detrimental to the due process rights of parties in the contested case process.

Part 1400.5900 Consent Order, Settlement, or Stipulation

Consistent with the doctrine of judicial efficiency, settlement of contested case matters is encouraged by OAH. Part 1400.5900 expressly affords parties the ability to settle particular issues or the entire contested case at any point in the proceedings. Parties need to inform the ALJ when a matter has been settled to allow for the orderly closing of the file with OAH. Situations have arisen when parties in a contested case matter fail to inform the administrative law judge when the case settles. In a few instances, the failure to promptly inform the ALJ of settlement has resulted in unnecessary work on the case by the ALJ that is then billed to the agency. To address the need for finality and promote the orderly management of settled cases, the Office proposes to add language requiring prompt notification when contested cases are settled to allow the case file to be closed. The language is needed and reasonable to address the timeliness problems that have been experienced.

Part 1400.6200 Intervention in Proceedings as a Party

Subpart 3. Order. In some contested case proceedings, interests are affected that are not represented by the persons participating as parties. Where non-parties are affected by proceedings and those persons desire to participate, part 1400.6200 sets out the standards for obtaining the status of intervenor in the contested case proceeding. The Office proposes to substitute two references to "intervenor" with "petitioner" in subpart 3. This change is needed, since the person participating at that stage has petitioned for intervention and not yet been granted intervenor status. Accurately describing the status of participants is reasonable to avoid confusion.

Part 1400.6400 Administrative Law Judge Disqualification

The standards for administrative law judges to withdraw from participation in contested cases are set out in part 1400.6400. The purpose of the rule is to ensure that an ALJ who cannot participate in a matter due to bias, a conflict of interest, or appearance of impropriety can decline to participate. Where a party perceives the ALJ to be disqualified, an affidavit of prejudice can be filed requesting removal of the ALJ from the matter. Due to the nature of administrative hearings, similar matters are often presented to the same judges and often the same attorneys appear in these matters.

OAH proposes to add the requirement that a judge must be removed upon an affirmative showing of prejudice or bias. The rule is further clarified by adding language prohibiting removal solely due to prior rulings on cases. This new language reflects case law relating to bias and prejudice. The added language

does not prevent an ALJ from withdrawing due to an appearance of impropriety or belief that there exists some bias. The prohibition against removal based on prior rulings applies only to the filing of an affidavit of prejudice. The new language is reasonable to clarify what standard should be met and what does not meet that standard. The language requiring that there be an affirmative showing of prejudice is the same standard as set forth in the Minnesota Rules of Civil Procedure for the removal of district court judges.

Part 1400.6500 Prehearing Conference

Subpart 1. Purpose. The prehearing conference is an important tool in effective case management. Part 1400.6500 sets out the purposes and procedures for those conferences. Judges have found the prehearing conference to be the appropriate time to discuss whether the hearing will be tape-recorded or transcribed by a court reporter, or whether special accommodations are necessary, such as an interpreter. Another topic that has arisen during prehearing conferences in recent years is whether time limits can be set for the presentation of evidence. OAH has proposed language that includes all these topics as items for consideration in prehearing conferences. The proposed rule language is both needed and reasonable to conform the rule to the existing practice during prehearing conferences.

The Office proposes to delete the existing reference to final settlements reached during prehearing conferences. In practice, parties reaching agreement at a prehearing conference lack the ability to reduce the agreement to writing and make the document part of the record. The requirements regarding settlement in part 1400.5900 are sufficient to assure prompt closure of the OAH file when a contested case has been settled. It is therefore needed and reasonable to delete the reference to settlement agreements.

Subpart 2. Procedure. Subpart 2 addresses the procedures for conducting prehearing conferences. To accommodate the needs of parties and counsel, OAH has offered the opportunity to participate in prehearing conferences by telephone. The option to participate by telephone has been frequently requested by counsel and there have not been any complaints received about the procedure. To clarify that this option exists, OAH proposes to amend subpart 2 to indicate that the prehearing conference may be held by telephone. The option is being left to the discretion of the judge since there may be instances where telephone participation is inappropriate. The new language is needed and reasonable to clarify an existing practice in contested cases.

Part 1400.6600 Motions

Motion practice is a vital part of the contested case process. Disputes regarding evidence, witnesses, and the existence of genuine issues of material fact are common subjects of motions made as part of contested case

proceedings. Administrative Law Judges have experienced an increase in the length of memoranda filed in support of motions. Submission of voluminous memoranda can impair the time available to the ALJ to assess the parties' arguments and prepare orders on motions. Rule 115.05 of the Rule of Practice of the District Courts sets a page limit on memoranda, subject to modification by the judge. OAH proposes to address this problem by prohibiting submission of memoranda exceeding twenty-five pages in length without the permission of the judge. The rule is needed to promote efficiency in the resolution of motions. The rule is reasonable since twenty-five pages is ample for most contested case motions and the judge can approve longer memoranda where the complexity of a particular case warrants.

The current rule allows for motions to be resolved without a hearing, based on the submissions of the parties. At the request of a party, the ALJ may set a hearing on for the motion if needed to develop the record on the motion for a proper decision. As with prehearing conferences, counsel have requested to participate in these hearings by telephone and OAH has accommodated those requests. Telephone participation has been successful in allowing counsel to participate in motion hearings in spite of scheduling conflicts. No objections or complaints have been received by OAH about the procedure. OAH is proposing to expressly include hearing motions by telephone as an option. The suggested language is needed to clarify that the option exists and is reasonable to meet the needs of parties who would otherwise not be able to participate in hearings on motions.

Part 1400.6700 Discovery

Subpart 1. Witnesses; statement by parties or witnesses. Items C and D. The conduct of discovery prior to hearing is important to the efficient use of time by counsel, parties, witnesses, and the ALJ. Conflicts have arisen in recent years regarding how the discovery provisions are intended to work. Parties have made discovery demands for documents to be filed as exhibits well in advance of the hearing date and then complained that the response to discovery was not provided in a timely fashion. OAH proposes to add item C, which requires that a demand for discovery be in writing and that production of exhibits introduced at the hearing is not required prior to one week before the hearing unless the judge orders otherwise. The rule does not allow a party to refuse to timely produce a document requested in discovery. The modification to the rule merely clarifies that a discovery request for exhibits does not require a party to begin hearing preparation based on that discovery request. Where the exhibits are requested, that preparation must be completed and the exhibits delivered to the other party no later than one week prior to the hearing. Item D is amended to provide the sanction of excluding exhibits not provided prior to the hearing, when the party could reasonably have done so. The proposed rule changes are needed to address an existing problem in prehearing discovery.

The changes are reasonable to meet the needs of parties preparing for hearing, while not requiring exhibit preparation far in advance of the hearing date.

Subpart 4. Protective orders. This subpart is amended to afford an ALJ the same authority provided in district court to protect a person from embarrassment, undue burden or undue expense in the discovery process. The rule codifies existing practice. The new language also adds "not public" data to the material to be protected as is contemplated under Chapter 13.

Part 1400.6950 Exchange of Witness Lists and Exhibits

Subpart 1. Order. To ensure the parties' readiness for hearing, judges have issued prehearing orders in contested cases to require the exchange of witness lists and written exhibits. This helps to ensure an orderly hearing. Subpart 1 incorporates this existing practice into the contested case rules.

Subpart 2. Objection to foundation. This rule requires that any objection to the foundation of a document received pursuant to a judge's order be made at least two working days prior to the hearing or the objection is waived. By requiring this deadline for raising objections to foundation, the contested case process can be handled much more efficiently. Only witnesses clearly needed will be required to be called to provide the foundation for the admission of the document. The rule is reasonable since parties are afforded ample opportunities to address foundation issues.

Part 1400.7100 Rights and Responsibilities of Parties

Subpart 4. Copies. The existing rule requires that if a party is submitting documents to the ALJ, the party must also send a copy of the documents to the other parties to the proceeding. The current rule, however, makes an exception for subpoena requests. It is current practice that parties submit copies of subpoenas requesting discovery and other documents, but not for subpoenas requesting the attendance of a witness. There is, however, no logical reason to make this exception since parties must ultimately disclose to other parties the witnesses intended to testify at the contested case hearing. Consequently, OAH proposes to change subpart 4 of Minn. Rule 1400.7100 to require that copies of all subpoena requests be submitted to the other parties. Changing the rule in this fashion is reasonable and necessary because it conforms the rule to existing practice and provides appropriate notice to another party of subpoena requests.

Subpart 6. Communication with judge. Communications between a party and the judge over substantive matters are a violation of the ethics code governing ALJ conduct. Subpart 6 is proposed for addition to the rule to restate that parties cannot communicate with the ALJ on the merits of the matter without affording all parties the ability to participate. The restating of this prohibition is

needed and reasonable since avoiding improper communications is a duty that rests first with the party that would initiate that communication.

Part 1400.7400 Hearing Record

Subpart 2. Transcript. The administrative law judge is responsible for maintaining the contested case hearing record, including the recordings of witness' testimony. The two means used to accomplish this responsibility are tape-recording the hearing or employing a court reporter. Where a transcript of the hearing is prepared, subpart 2 sets out the process to obtain the transcript and the financial responsibilities of the parties involved. When this rule was first adopted, OAH employed court reporters. Since that time, OAH has changed its practice to rely exclusively on independent court reporters, contracting with the State. In response to the change in practice the Office proposes to change the rule to simplify the language and to reflect the current practice. The entity requesting a transcript is responsible for the cost. The parties can agree to divide the cost. In some instances, the Chief ALJ may order that a hearing be transcribed, in which case the agency for whom the hearing is conducted will bear the cost.

The proposed rule conforms to the existing practice regarding reporting of hearings. The rule is needed to accurately advise parties of their responsibilities when requesting a transcript.

Part 1400.7700 Administrative Law Judge's Conduct

Subpart 1. Communication with parties. The existing language of part 1400.7700 is contained in the new subpart 1. No changes to the existing rule language are proposed. It is needed and reasonable for clarity and organizational purposes to retain the existing language as subpart 1.

Subpart 2. Ex parte communication. Subpart 2 sets forth the standards for permitted ex parte communications. The subpart identifies scheduling, administration, and emergencies that do not relate to the substance of the contested case as being communications acceptable for being done ex parte. The subpart also requires the judge to promptly notify the other parties of the substance of the communication and provide them the opportunity to respond. The rule reflects the current practice of the administrative law judges at OAH. The rule is needed and reasonable to establish standards for governing ex parte contacts and to assure parties are fully informed about communications with the judge. It is a restatement of the Code of Judicial Conduct

Subpart 3. Other communication. OAH proposes to add subpart 3 to address communication by the administrative law judge with non-parties that can occur in a contested case proceeding. The first is communication with a disinterested expert. The rule requires that the ALJ give prior notice to the

parties of the person to be consulted and allows parties an opportunity to object. If the advice of a disinterested expert is obtained, the judge must notify the parties of this fact and allow parties an opportunity to respond. While rare, there are occasions where the complexity of a case renders the assistance of a neutral expert important to help resolve the case.

The second type of communication is between the judge and other judges or subordinate staff. These communications are part of the collegial environment employed by OAH to assure that decisions are both fair and consistent. Staff attorneys also provide significant assistance in handling contested case matters. The ALJ establishes the degree of assistance needed on a matter and the work done by subordinates is limited to the record established in the contested case and subject to full oversight by the ALJ.

The third type of communication is communicating with the parties to facilitate alternative dispute resolution. This would only be done with the consent of the parties. The current practice at OAH is to have one judge engaging in such communications and a different judge preside at the hearing and issue the recommendation, which is why the proposed rule refers to part 1400.5950, subpart 7.

The fourth type of communication allowed is where the judge is expressly authorized by law to initiate or consider ex parte communication. There are contested cases that allow for public comment periods where there is no meaningful opportunity for the parties to significantly question or cross-examine the persons submitting those comments. In such instances, the ex parte rule of OAH must give way to the statutory requirement.

The language in subpart 3 is needed to clarify how communications relating to a contested case, but falling outside the traditional definition of ex parte contacts, are handled by the ALJ. It is a restatement of the Code of Judicial Conduct. The rule is reasonable to include the parties in matters of concern to them. The communications between judges and subordinate staff are no different from discussions between District Court judges and law clerks. Ex parte communications allowed by law cannot be restricted by rulemaking.

Subpart 4. Code of conduct. The Office proposes to add subpart 4, which informs parties in a contested case matter that administrative law judges are subject to the provisions of the Code of Judicial Conduct. Adding this language is needed and reasonable because Minnesota Statutes, section 14.48, subdivision 3(d) now requires that administrative law judges be subject to the provisions of the Code of Judicial Conduct (Minnesota Laws 2000, Chapter 355, section1). It is therefore appropriate to inform contested case parties of this requirement.

Part 1400.7800 Conduct of Hearing

Item A. The Office proposes to delete the existing language that requires the administrative law judge to briefly state the facts alleged in the notice of and order for hearing, and any money claim being made. It is unnecessary to include this requirement in a rule because the parties are already aware of the factual disputes. In addition, reciting one party's version of the facts can suggest that the ALJ is not impartial.

OAH proposes to add language to item A directing the judge to have parties note their appearances at the hearing and explain the contested case procedure to parties appearing with counsel. This is the current practice of judges and serves to ensure a complete record is made and that parties needing to be advised of the process get that advice. This change is needed to conform the existing rule language to the current practice in opening contested case hearings. The new language has been demonstrated to work in hearings and is reasonable.

Item B. In item B, paragraph (1), the existing rule allowed for the party whose witness is being cross-examined to request that the judge make a ruling to prevent repetition and irrelevant questioning. OAH proposes to delete this language. The ALJ has the authority to make all evidentiary rulings in contested cases. The need to prevent repetition, irrelevant questioning, and otherwise expedite the hearing applies equally to direct testimony and cross-examination. The language is unnecessary and therefore deleting that language is appropriate.

Item H. OAH proposes to add language to item H allowing the ALJ to limit the length of written memoranda. The reason for limiting such documents is the same as for limiting the length of memoranda submitted in support of motions as in part 1400.6600. Any limitation to be imposed is left to the discretion of the ALJ. Since the decision to allow any post-hearing memoranda is discretionary with the ALJ, there is no undue discretion afforded to the ALJ to limit the length of those memoranda.

Changes to Part 1400.8401: Awards of Expenses and Attorneys Fees to Prevailing Parties

Introduction

Minnesota Statutes, sections 15.471 – 15.474 comprises Minnesota's Equal Access to Justice Act (EAJA). During the 2000 legislative session, Minnesota Statutes, sections 15.471 and 15.472 were amended by the adoption of Chapter 439. These amendments conflict with some of the provisions in existing Minnesota Rules, part 1400.8401, rendering the rule provisions obsolete and invalid. It is necessary, therefore, that those parts of the rule in direct conflict with the statute be amended or repealed. In addition, rule part 1400.8401 was

first adopted in 1986, and substantially amended in 1987. More than ten years of experience in administering the rule has demonstrated that some of the fears and concerns that motivated the early provisions were unfounded, and that there is no need to perpetuate some of those rule provisions.

Specific Repeals and Changes

Subpart 1. Authorization. Subpart 1 is a very general "scope and purpose" type provision that is not necessary. It was initially justified as needed to orient interested person to the basic outlines of the rule. However, in order to make it a complete and accurate statement, so many details, provisos and exceptions would have to be added that it would no longer achieve its intended purpose. To avoid confusion, it is better to delete this subpart, and let the actual details of the rule (and statute) speak for themselves.

Subpart 2. Definitions. Subpart 2 contains definitions, most of which refer the reader to the statutory definitions, which is an unnecessary duplication. The existing definitions are all proposed for deletion.

Subpart 3. Application. This subpart deals with the application and consideration process. Much of it is being repealed, either because of the new statute or because experience has shown the provision to be unnecessary or unreasonable.

The first provision to be repealed, **subpart 3, item A (1)(b)**, would require the aggregation of all entities affiliated with the applicant for purposes of determining whether the revenue and employee limitations had been met. For example, a family partnership might own all of the stock in two separate corporations. One might be a small resort, while the other might be a large automobile dealership. The resort only generates gross revenues of $500,000 per year, but the automobile business generates revenues of $8,000,000 per year. The existing rule would aggregate the two businesses together, so that if an agency took action against the resort that was later determined to be not substantially justified, the resort could not benefit from the EAJA because the gross revenues of the *combined* businesses would exceed $7,000,000. The situation would be even more inequitable if there were minority owners in the resort who owned, for example, 40% of the stock in the resort business. The resort would be precluded from claiming any of its fees and expenses, to the detriment of not only the 60% majority owners, but also the 40% minority owners. To avoid this inequity, the affiliate subpart is proposed for repeal. This repeal does not leave the state unprotected against the (remote) possibility that someone might establish or take advantage of separate corporations to avoid the EAJA's revenue and size limitations, Minnesota Statutes, section 15.472 (a) empowers an ALJ to deny an award where "special circumstances make an award unjust." This provision offers protection against the evils that the rule was attempting to avoid.

The next subpart to be repealed, **subpart 3, item A (1)(d)**, provides that an applicant who participates in a contested case on behalf of one or more other persons or entities that would be ineligible is not itself eligible for an award. This was initially justified as needed to prevent abuse in the following situation. An agency brings an unjustified action against a large business that is ineligible because it has too many employees or revenues. The large business finds a small business that does meet the revenue and employee limits and persuades it to intervene in the contested case and incur fees and expenses on behalf of the larger entity. The smaller business then recovers the fees and expenses under the act, thereby essentially subverting the limitations established by the legislature. Experience to date has not revealed any suggestion of this scenario, and thus the rule is proposed for repeal. Again, the state is still protected by the general prohibition against unjust awards noted above.

Subpart 3, item A (2) contains three standards for determining who is a "prevailing party". One of the existing standards, **item A (2)(b)**, is proposed for repeal. It provides that no award may be granted to a party who has been "penalized, fined, or enjoined". That means that even if an applicant has been successful on the central issue, or received substantially the relief requested, it can not collect if it has been fined for any violation, however small. This can be unjust in a case where an agency alleges a number of violations, some of which are serious while others are not. If the alleged violator succeeds in showing that the serious violation did not occur, and, in addition that the agency was not substantially justified in bringing the action, it ought to be able to collect. But if there was a violation of a just one minor matter, which does result in a small fine, then the entire claim is barred by the existing rule. That is unreasonable, and subpart 3, item A(2)(b) is thus proposed for deletion.

One of the changes made in the 2000 legislation was the explicit allowance for reimbursement of the "reasonable cost of any study, analysis, engineering report, test, or project". Very similar language was included in **subpart 3, item B** of the rule. There is no longer any need to have the language included in the rule now that it is in the statute. The rule requires documentation of *all* fees and expenses. Singling out one type of expense in the rule raises questions about whether some different kind or level of documentation is needed for it. All expenses must be documented, and the language is no longer needed in the rule.

Subpart 3, item B of the rule currently requires an affidavit itemizing the services performed by attorneys, agents, or expert witnesses, the number of hours and the hourly rate. The rule also requires a statement of "the hourly rate which is billed and paid by a majority of clients during the relevant time periods". The Office is proposing to amend the rule to require a statement of "the hourly rate which is billed and paid by a majority of clients *for similar services* during the relevant time periods." This addition is needed to be sure that any hourly rate comparison is based on comparisons of rates for similar services. Especially

when there is a claim for an hourly rate grater than the statutory rate ($125 per hour), it is reasonable that the attorney disclose whether the hourly rate charged is the same as the rate charged others for similar services.

Subpart 6. Applications when appeal is filed. Subpart 6 sets forth the procedures for applying the fees and expenses in situations when the decision in the underlying contested case has been appealed to a higher court. This issue is covered by Minnesota Statutes, section15.474, subdivisions 1 and 3, and the existing rule adds nothing to the statute. Therefore, subpart 6 is proposed for repeal.

Changes to the Revenue Recapture Act Hearing Rules

Part 1400.8510 Scope

This set of rules sets out a simplified procedure for contested cases. Before amendment the rules were specifically designed to be used for Revenue Recapture Act hearings. The rules are being revised so that they may be easily used by agencies in addition to the Department of Revenue. Some agencies, such as the Department of Health and the Pollution Control Agency, have already statutorily provided for certain hearings to be conducted under these rules. The citations to the authority for these hearings are contained in the rule as amended. The changes to the Scope section make the language more generic so that these rules can be used by other agencies. Now unnecessary language concerning application to hearings other than the Revenue Recapture Act hearings, is deleted.

Part 1400.8520 Definitions

Subpart 1. Agency, claimant agency. The definition of agency is amended to make it more generic.

Subpart 2. Debtor. The definition of debtor is eliminated since these rules no longer apply only to the Revenue Recapture Act and the debtor is covered under the definition of "party".

Subpart 3. Party. This definition is also amended to make it more generic. The Office also proposes to add language to subpart 3 to clarify that "party" includes the agency, except when the agency participates in a neutral or quasi-judicial capacity. This language is needed and reasonable because it keeps the definition similar to that used in the contested case hearing rules. It is also appropriate to include this language because it informs agencies and other parties when an agency is considered a party in a case and when it is not.

Subpart 3a. Person. A definition of "person" is added to the rules to parallel that contained in the contested case rules. Rather than stating all of the various types of businesses or government agencies, the definition is amended to be more general by simply referencing businesses and governmental entities.

Subpart 4. Service; Serve. This definition was modified because the existing rule language describes service procedure rather than defining "service" or "serve." Upon the Revisor of Statute's suggestion, service procedure is set forth in new rule part 1400.8545. The Office added language defining "service" and "serve." It is the same definition as used in the contested case hearing rules. Defining "service" in the rule is needed to ensure that a party is not failing to transfer documents that must be submitted to other parties or the ALJ. The language proposed is reasonable because it follows the common understanding of the term and the longstanding application of the practice at OAH.

Part 1400.8530 Waiver

This waiver provision is changed only to make it clear that it applies to this set of simplified contested case rules and to correct statutory cites.

Part 1400.8540 Administrative Law Judge Assignment

Subpart 1. Request for assignment. This subpart is amended to make it clear that agencies should first contact the docket coordinator to request an ALJ assignment. It is also amended to provide for a prehearing conference date in addition to the hearing date. Finally, criteria for proposing a hearing location is shifted from subpart 2 to this subpart so that the factors must be taken into account by the agency in proposing a location, rather than by the Administrative Law Judge in offering advice.

Subpart 2. Assignment. This subpart is modified to make it clear that OAH will set the time, date and place for the hearing, taking into account the agency's request. Given the limited number of Administrative Law Judges this authority is, practically speaking, already exercised by OAH. The criteria for location of the hearing is moved to subpart 1.

Part 1400.8545 Service Procedure

This new rule contains language that was formerly located in the definition of "service" in rule part 1400.8510. The language is relocated based upon the advice of the Revisor of Statutes since it is more procedural and not, strictly speaking, a definition. Some language is rearranged and added to lend clarity.

Part 1400.8550 Notice of Hearing

The first paragraph is amended to include a sentence making it clear that the agency, whether a state agency or a local unit of government, is responsible for issuing the Notice of Hearing. This has not always been clear to local government agencies in the past.

Item C. Item C of the rule is amended to make the Notice more generic by referring to alleged violations of statute or rule rather than events creating a debt.

Item E. Item E is amended to acknowledge that these rules will be online and to encourage accessing the rules online.

Item I. New item I alerts the reader of the Notice to the parties right to an accessible hearing location and a qualified interpreter, if necessary.

Item L. New item L adds a statement, already present in the contested case rules, that alerts parties to the possibility that not public data may become public in the course of a hearing unless a party objects and asks for relief. It is needed to make the parties aware that the provisions of the Minnesota Government Data Practice Act may affect the status of evidence presented at the hearing.

Part 1400.8560 Default

This rule is also made more generic by removing the words "claimant" and "debtor" and substituting words such as "agency" and "party".

Part 1400.8580 Prehearing Conference

A reference in the first paragraph to holding a prehearing conference only if the amount in controversy exceeds $1,000.00 is deleted, since this language was specific to Revenue Recapture Act cases. The first sentence is reworded for clarity. In the second paragraph, three items are added, namely, the time, date and place for the hearing, the exchange of documentary evidence, and whether accommodations such as an interpreter are necessary. These additions are needed because they are items commonly considered at a prehearing conference. Consequently, it is reasonable to add the items to this rule part. In the last paragraph, a sentence is added to recognize that the prehearing conference may be conducted by telephone, as is commonly the case.

Part 1400.8590 Prehearing Motions

The changes to this rule improve the readability of the rule but do not change the substance.

Part 1400.8600 – Prehearing Discovery

The changes to this rule are intended to state in plain English the consequence for a failure to disclose requested discovery. The substance of the rule is not affected.

Part 1400.8601 Subpoenas

Subpart 1. Requests. The changes to this subpart are intended to improve readability without affecting substance.

Subpart 3. Objection to a subpoena. The changes to this subpart are intended to improve the readability without any substantive changes.

Part 1400.8603 Conduct of Hearing

Item A. Item A deletes language specific to Revenue Recapture Act cases and adds items that are normally dealt with at the beginning of a hearing, namely, the appearance of counsel and an explanation of the hearing procedure.

Item C. Item C is amended to delete a reference to a "claimant agency". The provision is made more generic by stating that the party with the burden of proof will begin presentation of the evidence, but it also recognizes that in some cases the ALJ will order otherwise. This occasionally happens when one party is pro se or one party is in possession of most of the evidence.

Part 1400.8604 Responsibilities and Rights of Parties

Subpart 3. Copies. Before amendment this subpart did not require requests for subpoenas to be served upon other parties. It is amended to indicate that this will be done where the subpoena is essentially a discovery request. This conforms the rule to current practice at OAH. It appropriately provides the party not requesting the subpoena with notice of attempted discovery.

Subpart 4. Representation by counsel. The language in this subpart is amended to eliminate the "he/she" language and to make the subpart more readable.

Part 1400.8606 Administrative Law Judges

Subpart 1. Impartiality. This subpart is amended to delete a repetition of the statutory language in favor of a requirement that the ALJ be impartial, objective and even-handed. The amendment requires the ALJ to withdraw if unable to conduct a proceeding in an impartial manner. The new language is more easily applied by parties and the judge. Additionally the language from the contested case rules concerning an affidavit of prejudice against an ALJ is added

to this rule so that the simplified contested case rules also allow for removal by the Chief ALJ upon an affirmative showing of prejudice or bias. The new language also reflects case law holding that a judge cannot be removed merely because of rulings on prior cases so that parties have advance notice of this rule. The language requiring that there be an affirmative showing of prejudice is the same standard as set forth in the Minnesota Rules of Civil Procedure for the removal of district court judges.

Subpart 2. Communications. This subpart is amended to specify when ex parte communication is authorized with the ALJ. It is permitted for scheduling and in administrative matters that do not deal with the merits of a case. It also clarifies that any ALJ may consult with OAH personnel and acknowledges that communication expressly authorized by law is permitted. The proposed language is needed and reasonable because it sets forth the situations when ex parte communication with the judge is appropriate and allowed. It is consistent with the Code of Judicial Conduct.

Subpart 3. Duties. A few changes are made to this subpart to improve its readability.

Part 1400.8608 Burden of Proof

This rule is amended to delete language specific to Revenue Recapture Act cases and to state the general rule that the party with the burden of proof must support its case by a preponderance of the evidence. A party with an affirmative defense has the burden to prove that defense by a preponderance of the evidence.

Part 1400.8609 Hearing Record

Subpart 3. Closing record. This subpart is amended to distinguish the hearing record, that is, that portion of the case conducted by the Administrative Law Judge, from the full case record.

Subpart 4. Transcript. The amendment to this subpart seeks to restate the requirements of the subpart in plain English and acknowledges that the parties may agree to divide the cost of the transcript.

Part 1400.8610 Administrative Law Judge's Report

The amendments make the rule clearer and more readable.

Part 1400.8611

Subpart 2. Recordings. The amendments clarify that the ALJ normally keeps the official recording of a case, but may direct a party to provide its recording in the event equipment fails.

Dated: April 24, 2001

Kenneth A. Nickolai
Chief Administrative Law Judge