STATE OF MINNESOTA
OFFICE OF ADMINISTRATIVE HEARINGS

In the Matter of the Proposed
Amendments to Procedural Rules
for Contested Case Hearings
Relating to Procedures for
Applications for Fees and Expenses.

STATEMENT OF NEED
AND REASONABLENESS

INTRODUCTION AND STATUTORY AUTHORITY

Minnesota Statutes, § 14.51, authorizes the Chief Administrative Law Judge to adopt rules to govern the procedural conduct of all hearings, relating to both rule adoption, amendment, suspension, or repeal hearings, contested case hearings, and workers' compensation hearings, and to govern the conduct of all voluntary mediation sessions for rulemaking and contested cases other than those within the jurisdiction of the Bureau of Mediation Services. To that end, over the past years, the Office of Administrative Hearings has adopted procedural rules relating to contested case hearings which are found at Minnesota Rules Parts 1400.5100 through 1400.8613.

During the 1986 Legislative Session, the Minnesota Legislature passed a bill which was subsequently signed by the Governor and has become law, which has been referred to as the "Equal Access to Justice Act". That Act is found at Laws of Minnesota 1986, Chapter 377. That Act authorizes the awarding of attorney's fees and expenses to prevailing parties in certain contested case hearings. At § 4 of that Act, at subdivision 1, the Chief Administrative Law Judge is required to establish uniform procedures for the submission and consideration of applications for an award of fees and expenses in a contested case proceeding. The procedures are to be adopted by rule.

Because the newly-enacted law involves and requires procedures for a process not contemplated at the time of the original adoption and subsequent amendment of the contested case rules, it is thus generally necessary to amend the existing procedural rules to establish a procedure for the awarding of these fees and expenses.

The provisions of Minnesota Laws 1986, Chapter 377, become effective on August 1, 1986, and apply to any contested case which is pending on or commenced on or after that date. Thus, contested case hearings which are presently pending in the Office of Administrative Hearings may come within the provisions of the 1986 legislation if the State agency for which the hearing is conducted has not yet issued a final order. Thus, there is a very short amount of time allowable to have rules adopted prior to the effective date of the law. It has therefore been determined that it is necessary to adopt some extremely basic procedural rules in order that any controversy regarding the procedures to be established will be avoided, thus allowing these rules to be adopted using the notice and comment provisions of the Minnesota Administrative Procedure Act (APA). At the same time, it is anticipated that the Office of Administrative Hearings will be subsequently adopting additional amendments which will make these procedural rules more comprehensive. It is the present intent of the Office of Administrative Hearings to propose more comprehensive rules but, because of their potential controversial nature, they will likely go directly to a rulemaking hearing.

IMPACT ON SMALL BUSINESSES

Minn. Stat. § 14.115 requires all State agencies to consider the impact of new rules or amendments to existing rules on small businesses as defined in that section. The definition of "small business" in Minn. Stat. § 14.115 is almost identical to the definition of "party" found at Laws of Minnesota 1986, Chapter 377, § 1, subd. 6. The entire purpose of adopting the "Equal Access to Justice Act" was to aid small businesses. Thus, the Act and therefore by implication these rules will impact on small businesses. They will reap the benefits of the Act and any procedures adopted to implement the provisions of the Act by allowing them a process to recoup fees and expenses from contested case hearings. Therefore, there can be no differentiation in the rules themselves between small businesses and large businesses because they only impact on small businesses. Therefore, the requirements of Minn. Stat. § 14.115, subd. 2, do not really apply. As an example, the Office can hardly exempt small businesses from the requirements of the rules since they are the only ones who will obtain the benefits from the rule. Likewise, the "less stringent requirement" parts of that statute are inapplicable. In lieu of those requirements, as will be seen by an examination of the rules, the procedures being proposed are an attempt to be as simple as possible and to allow a process which can be concluded very quickly and cost-effectively, and to create as little a burden as possible on those seeking to utilize the Act.

Additionally, in the Notice of Intent to Adopt Rules Without a Public Hearing we have included a statement that the rules will have a direct impact on small businesses. Additionally, the agency will be giving a direct notice to the Minnesota Association of Commerce and Industry, the National Federation of Independent Businesses, and to the Small Business Assistance Section of the Minnesota Department of Energy and Economic Development.

In terms of an impact on small businesses, it is to the advantage of small business to have procedural rules in effect because without them, there will be no well-defined process by which they can obtain reimbursement of attorney's fees and expenses necessarily expended by them in actions wherein the State agency was represented by an attorney. Thus, the impact on small businesses is "positive" as opposed to "negative".

SPECIFIC STATEMENT OF NEED AND REASONABLENESS

1400.8400, subpart 1. This subpart of the rule is a very general statement which describes the scope of the rules and discusses the types of cases for which this rule part applies. It is necessary to have a general "scope and purpose" type of section at the start of any rule so that interested persons will know whether or not they fall within the provisions of the rule without having to read further. The language in this subpart is virtually identical to the statute. The language in this subpart does not in any way expand or narrow the scope of the language of the statute. It is reasonable to paraphrase the statute in this rule because the various requirements of the statute are spread among a number of subdivisions. The gathering of the requirements and placing them in a short initial statement in these rules allows a person to be able to make a determination, almost immediately, as to whether or not the rule will apply to them. It also allows the reader the opportunity to make a determination without the necessity of having to look up the statute, which they might not otherwise have available to them at the time they are attempting to make an initial determination of

the applicability of the rule. The use of the discretionary word "may" in the first sentence in this subpart is identical to the language used in the statute and is necessary because persons must be aware that just because they are a party to a case and they have somehow prevailed against the State, does not necessarily mean that they will receive reimbursement of their fees and expenses. Rather, additional requirements of the law must be met which are discussed, very briefly, in the second sentence which then uses the mandatory word "shall". Thus, the use of the word "may" in the first sentence is necessary to point out these facts to the reader, because it is also duplicative of statutory language, and is reasonable because it is then made mandatory by use of the word "shall" in the second sentence wherein the statutory standards and criteria are quoted.

1400.8400, subp. 2 [Definitions.] This subpart of the rule lists certain terms and indicates their meaning or allows the reader the opportunity to know where they can go to find the specific definition. Laws of Minnesota 1986, Chapter 377, has an extensive definitional section found at § 1, subd. 6. The definitions in subpart 2 of the rule do not create new definitions. The words defined are the same words as are defined in the definitional part of the statute or in other parts of the statute. It is necessary to list these terms and to direct the reader to the appropriate definitions so that the reader of the rule will have an opportunity of looking to the exact language of the statute to determine whether or not they or their case fall within the purview of the statutory language. While some might argue that the terms should be fully defined in the rule so that persons need not refer back to the statute, experience of the Office of Administrative Hearings over the past ten-and-one-half years shows that the legislature, once it has passed a law, tends to modify the terms of the statute quite regularly. By citing the reader to the statute, the rules will not have to be amended each time the legislature changes a definition. Additionally, the APA at § 14.07, subd. 3(1), directs the Revisor of Statutes to minimize duplication of statutory language. Based on the foregoing, it is reasonable that a list of terms be given with citations to the appropriate statutes so that the parties will be able to make intelligent decisions relating to the applicability of this rule to their particular case.

1400.8400, subp. 3 [Application]. This subpart establishes the procedure by which a party seeking an award of expenses and attorney's fees may file an application and contains a listing of the items which must be included in any application together with time deadlines for their submission. In other words, this is the first section which goes directly to the procedures to be followed by a party once they have determined that they meet the other statutory requirements.

In the prefatory language as well as in the last sentence of this subpart, parties are required to file their application within 30 days of the final disposition in the contested case. The time limit of 30 days was selected for several reasons. First of all, it is identical to the time allowed a person aggrieved by a final decision in a contested case to seek judicial review of the agency decision. Thus, another new time deadline is not established which it easier for parties to remember. Secondly, up to 30 calendar days should be more than sufficient time for a prevailing party to put together their application and obtain all of the information necessary to include within the application. Finally, it is necessary to establish a deadline so that an agency can bring a final closure to a proceeding. Again, the 30-day deadline

for appeal was thought to be appropriate, for under present law, if no appeal was taken within 30 days, the agency can close its file for both internal procedures and for budgetary reasons. The budgetary reasoning is important because State agencies must pay the Office of Administrative Hearings for the conduct of contested case hearings. Once a contested case is initiated, the agency must open an encumbrance account to pay the Office of Administrative Hearings. It is necessary for agencies to close the specific encumbrances as soon as possible. Until an encumbrance is closed, the agency may not use any of the unused portion of the open encumbrance. In times of fiscal constraints, agencies must have the ability to utilize all available funding to pay for the programs which are mandated by the legislature. In order to avoid questions being raised concerning when the 30-day deadline commences and when it terminates, this subpart provides that the 30 days begins to run on the date of issuance of the final disposition and terminates on the 30th day following the date of issuance, by receipt of the application at the Office rather than by placing the application in the U. S. mail on the 30th day. This avoids the problems which occur when parties claim the rules are vague in provisions relating to deadlines. Also, if a party unilaterally chooses to utilize the United States mail for filing its application, that party will be required to suffer the consequences of any failure of the application to be received at the Office of Administrative Hearings within the 30-day time frame established. In short, it establishes a jurisdictional time frame without any discretion in the Administrative Law Judge to grant extensions.

It is the intent of this rule that most, if not all, of these applications will be determined without the necessity of a hearing. Thus, it is necessary that the application show that the party is the prevailing party and is eligible to receive an award under this party. This requirement is reasonable because it will cause the person filing the application to stop and think about the law, to read the various sections, knowing that they will have to present a sufficient statement which shows that they are qualified.

In order to carry out the intent of issuing these awards without a hearing, it is necessary that the application state, with some specificity, how much is being requested in the award and that it include an itemization in certain areas. By requiring an itemization, the Administrative Law Judge will be better able to determine the nature and extent of the services performed by the attorney or a witness, the date the services were performed, the relevance to the issues, and how the rates or fees were calculated. The amount of fees or expenses have a limitation imposed by statute and thus it is necessary to have a total itemization so that the proper calculations can be made by the Administrative Law Judge.

One of the crucial issues to be determined by the Administrative Law Judge in these cases is whether or not the position of the State agency in the hearing was substantially justified using the definition of that term as found in the statute. Thus, the applicant must state and show their reasoning in order that the Administrative Law Judge can make the proper determination.

Finally, a Proof of Service is required. This is necessary so that the Administrative Law Judge can determine that all other parties have had an opportunity to receive the application in order that they may prepare a response or objection as is allowed by a later part of the rule. This portion of the rule also requires that the application be signed and sworn to by the party and the attorney or other agency representative submitting the

application on behalf of the party, showing the address and phone number of all persons signing the application. Remembering that the intent of the rule is to allow for a determination without a hearing, the requirement that both the party and the attorney or other agent or representative actually preparing the document swear to the truth of its contents will assist in having parties submit true facts given the various implications of submitting false, sworn statements in administrative hearings. The proper address and phone number of the party is important so that any documents mailed by the Administrative Law Judge or other parties can be sent to the correct address. In order to expedite any problems which may arise by way of telephone conferences, it is necessary that the phone numbers of all parties be included.

1400.8400, subp. 4 [Response or objection to application.] This subpart allows a State agency or any other party to respond to an application or to object to all or any part of the application. This response must be in writing and for the same reasons given above must be sworn to by the person submitting the response or objection. By requiring the response or objection to be filed "with the judge" imposes the burden on the party submitting the response or objection to have it received within the 14 days, to be considered. The response includes much of the same information required by the application, including specifically pointing to the portions of the application being responded to or objected to and the specific reasons or facts to support the response or objection. In this way, general objections are not allowed, but rather, sufficient facts and reasons must be given. Again, this will allow the Administrative Law Judge to make a determination without the necessity of additional evidence or facts.

However, in this instance, the State agency is allowed to request a hearing. If a hearing is requested, the response or objection must include the hearing request. If a hearing is requested, like any other contested case, the State agency bears the responsibility of paying the costs of the Office of Administrative Hearings for the hearing. The agency must make a determination, up front, on whether the issues or amounts in controversy are sufficient to require the additional expenditure of State funds for a hearing. It is reasonable to require the hearing request to be included with the response or objection in order that the matter will not be delayed and may proceed as expeditiously as possible.

1400.8400, subp. 5 [Hearing on application.] This subpart requires a hearing on the application if requested by the State agency. Thus, there is no discretion in the Administrative Law Judge if the State agency has made an initial determination that it desires a hearing. However, the rule gives the judge discretion to order a hearing if the judge determines, after reviewing the application and response or objection, that a hearing is necessary to gather additional facts or evidence, or for a full and fair resolution of the issues arising from the application. In other words, if the parties have been less than sufficiently specific in the application and/or response and objection, and the judge is in doubt, the judge will have the discretion to call for a hearing but that decision will be based solely on the standards and criteria listed in the rule. It is reasonable to allow the judge discretion in this regard because none of the parties would want a judge to make a determination if the judge is in doubt or if sufficient facts have not been presented. The determination by the judge in this instance must be based upon the record before the judge. It is this record which parties will subsequently utilize if an appeal is taken from the award of costs and fees or expenses, or a determination to deny an award.

In order that there will be no further delays, this subpart mandates that if a hearing is to be conducted it is to take place on the first available date on the judge's calendar which is also agreeable to all parties. After ten-and-one-half years of experience in unilaterally setting hearing dates and being faced with requests for continuances for good and valid reasons, the Office has discovered that when setting a hearing it saves a lot of time, and thus expense, if the judge contacts the parties, usually by conference telephone call, to establish a mutually agreeable date for the hearing. At the same conference, the judge is usually able to determine the length of time which will be necessary for the presentation of the case by both parties and can set aside sufficient time for the hearing. This past practice has shown to be very effective and has resulted in the virtual elimination of requests for continuances except in exceptional circumstances.

Finally, this subpart requires that any hearings conducted under this rule shall utilize the procedures for conference contested case hearings. The conference contested case rules, Minnesota Rules Parts 1400.8510 to 1400.8613, establish a procedure for the conduct of hearings much like the procedural rules for small claims court in the various county courts across the state. They provide for the minimum due process requirements but also provide for an expedited hearing process. Again, past experience with these procedural rules has shown that their utilization has saved a considerable amount of hearing time which translates into expenses for all parties. Thus, under the authority of establishing procedures for the submission and consideration of applications under this new act, and to lessen any impact on the small businesses, which are the only ones directly affected by this rule, it is necessary to have the fastest and least expensive hearing process.

1400.8400, subp. 6 [Stay of proceedings pending appeal.] It is assumed that in many instances an appeal will be taken from an agency determination. In many instances an agency will make a final disposition adverse to a party. If the party is successful in overturning the agency determination in the courts, the final judicial determination will become a final disposition and the person would appear to be entitled, under the law, to submit an application for an award of costs, fees and expenses for the contested case as well as court expenses obtained from the court. It is necessary to establish a rule which stays all proceedings under the rule pending a final determination by the courts and to toll the running of any jurisdictional time limits imposed by the rule. This subpart accomplishes that process. It would be extremely counterproductive to require a party to file an application for an award of fees and expenses when the case is on appeal to the appropriate court. In many instances, unless the court reverses the agency determination, a person would probably not meet the definition of "prevailing party". Thus, it would not be able to show eligibility for an award under this rule until after a judicial determination. Additionally, there are other instances wherein the "final disposition" is the decision of the Administrative Law Judge. Such examples include determinations under the Minnesota Human Rights Act and determinations made under the Occupational Safety and Health Act. In both instances, the position of the State agency is represented by counsel. A party may receive a favorable determination against the State from the Administrative Law Judge and the State may be the appealing party. In those instances, it is reasonable to allow the requirements of this rule to be tolled when the State agency is the party appealing to the courts.

1400.8400, subp. 7 [Decision of the Administrative Law Judge.] From the inception of the Office of Administrative Hearings, it has been the policy of the Office that all decisions will be issued within 30 days of the close of the hearing record. The Minnesota Legislature adopted this policy for rulemaking proceeding. This subpart establishes a mandatory 30-day deadline for the issuance of the Administrative Law Judge's decision. It is necessary and reasonable to establish a deadline by which the Administrative Law Judge will complete the work on the case so that there will be the earliest possible resolution of the issues between the parties. On the one hand, it will facilitate the agency's closure of its file and open encumbrances as discussed previously. On the other hand, it will give certainty to the parties and, if they are to receive an award, will assist in recouping expenses incurred in the administrative process as soon as possible. In this way, it will add to the carrying out of the intent of the legislature to allow small businesses the opportunity to participate in the hearing process and to recoup, as soon as possible, its expenses, costs and fees, where appropriate. This subpart requires the Administrative Law Judge to issue a written "order". Laws of Minnesota 1986, Chapter 377, § 2(a) states: "If a prevailing party other than the state, in a civil action or contested case proceeding other than a tort action, brought by or against the state, shows that the position of the state was not substantially justified, the court or administrative law judge shall award fees and other expenses to the party unless special circumstances make an award unjust." Thus, it is clearly the intent of the legislature that the determination of the Administrative Law Judge in this position be a final determination and that jurisdiction for the awarding of fees be vested in the Administrative Law Judge and not the agency, even though in the contested case itself the Administrative Law Judge may have made only a recommendation to the agency. Further support can be found in § 2(b) of the same law, which states: "The decision of the administrative law judge under this section must be made a part of the record containing the final decision of the agency and must include written findings and conclusions." Thus, it is reasonable that the rule require the issuance of an "order" instead of a recommendation.

1400.8400 [Effective date.] This section is an effective date of these rules. The APA requires an effective date of five days after publication of the adopted rules in the State Register. However, it is anticipated that these rules will be published prior to that time so that they can be implemented on August 1, which is required by statute. The language if this subpart indicates that the rule applies to all contested cases which are pending on or commenced after August 1, 1986, which is an exact duplication of statutory language.

Generally. Throughout the rule, the implication is that the application and all of the documents are filed with the Administrative Law Judge. While the rule has not specifically so stated, it is obvious that the judge who issued a determination in the contested case which gives rise to the application is the judge who makes the determination on the application for costs, fees and expenses. This is to carry out the specified intent of the legislature. The legislature has used virtually identical language. It appears clear from the wording of the statute that the legislature intended that the Administrative Law Judge determining an application under this rule be the same judge who heard the case. It is also reasonable that the same judge make the subsequent determination because that judge is most familiar with the record and will be better able to determine the issues relevant to the application called for by this law and rule.

Dated: May 29, 1986.

DUANE R. HARVES
Chief Administrative Law Judge