

STATE OF MINNESOTA
COUNTY OF RAMSEY

BEFORE THE MINNESOTA OCCUPATIONAL
SAFETY AND HEALTH REVIEW BOARD

IN THE MATTER OF PERMANENT RULES
OF PROCEDURE RELATING TO THE
OCCUPATIONAL SAFETY AND HEALTH
REVIEW BOARD, MINNESOTA RULES,
PARTS 5215.0100 TO 5215.6100.

STATEMENT OF NEED
AND REASONABLENESS

The Minnesota Occupational and Health Review Board (hereinafter "OSHRB"), pursuant to Minnesota Statutes, sections 14.05 through 14.12 and 14.22 through 14.28, presents facts establishing the need and reasonableness of amendments to rules relating to the OSHRB rules of procedure, Minnesota Rules, parts 5215.0100 to 5215.6100.

In order to adopt the proposed amendments, the OSHRB must demonstrate that it has complied with all the procedural and substantive requirements of rule making. Those requirements are as follows: (1) there is statutory authority to adopt the amendments; (2) all necessary procedural steps have been taken; (3) the amendments are needed; (4) the amendments are reasonable; and (5) any additional requirements imposed by law have been satisfied. This statement demonstrates that the OSHRB has met these requirements.

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1. STATUTORY AUTHORITY

The statutory authority of the OSHRB to amend rules is found in Minnesota Statutes, sections 14.06, 182.661, subdivisions 3 and 3a, and 182.664, subdivision 3.

Section 14.06 provides as follows:

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

Section 182.661, subdivisions 3 and 3a, provide as follows:

Subdivision 3. If the employer notifies the commissioner that the employer intends to contest the citation or the proposed assessment of penalty or the employee or the employee representative notifies the commissioner that the employee intends to contest the time fixed for abatement in the citation issued under 182.66, the citation, the type of alleged violation, the proposed penalty, or notification issued under subdivisions 1 and 2, the board shall conduct a hearing in accordance with the applicable provisions of chapter 14, for hearings in contested cases. The rules of procedure prescribed by the board shall provide affected employees or representatives of affected employees an opportunity to participate as parties under this subdivision.

Subdivision 3a. As prescribed in rules issued by the board, each notice of intent to contest the citation, proposed assessment of penalty, or period of time fixed in the citation for correction of the violation shall be prominently posted at or near each place a violation referred to in the citation occurred or served on affected employers, employees, and employee representatives. If the contesting employer, employee, or employee representation [sic] fails to post or serve the notice of intent to contest the citation, the proposed assessment of penalty, or the period of time fixed for correction of the violation within the time prescribed in rules issued by the board, the board may render a default judgment in favor of the commissioner.

Section 182.664, Subdivision 3, provides in pertinent part as follows;

Subdivision 3...The rules of the board shall provide affected employers, employees or their representatives an opportunity to participate as parties provided they file notice at least five days before the start of the hearing.

2. COMPLIANCE WITH PROCEDURAL RULE MAKING REQUIREMENTS

The OSHRB has determined that the amendment of the rules in parts 5215.0100 to 5215.6100 is non-controversial and has elected to follow the procedures set forth in Minnesota Statutes, sections 14.05 through 14.12 and 14.22 through 14.28 which provide for the adoption of non-controversial administrative changes without the holding of a public hearing.

Pursuant to Minnesota Statutes, section 14.23, the OSHRB has prepared this statement of need and reasonableness which is available to the public. The OSHRB will publish in the **State Register** a notice of intent to adopt the amendments without public hearing and will mail copies of the notice and proposed amendments to persons registered with the OSHRB pursuant to Minnesota Statutes, sections 14.14, subdivision 1a and 14.22. The notice will include the following statements: (a) that the public have 30 days in which to submit comments on the proposed amendments; (b) that no public hearing will be held within the 30-day comment period; (c) giving information pertaining to the manner in which persons shall request a hearing or submit comment; (d) that the amendments may be modified if the modifications are supported by the data and views submitted; and (e) other information required by Minnesota Statutes, section 14.22.

If 25 or more persons submit to the OSHRB a written request for a hearing on the proposed amendments, the agency shall proceed under the provisions of Minnesota Statutes, sections 14.131 through 14.20, and notice of the hearing shall be published in the **State Register**.

If no hearing is required, the OSHRB will submit the proposed amendments and notice as published, the amendments as proposed for adoption, any written comments which have been received, and this statement of need and reasonableness to the Attorney General for approval.

These amendments shall become effective five working days after publication of a notice of adoption in the **State Register**.

3. STATEMENT OF NEED

The function of the OSHRB, as stated in Minnesota Statutes, section 182.664, subdivision 2, is to "review contested citations issued under section 182.66, contested monetary penalties assessed under section 182.666 that are not precluded from review by section 182.661 and all final orders of the Commissioner in contested cases. The board may affirm, modify, or revoke a citation, monetary penalty or any contested order of the commissioner."

The OSHRB has adopted rules of procedure for contested cases. The rules have provided the board and its litigants the mechanism necessary for effective dispute resolution. Amendments to the rules are now needed for the following reasons. First, a decision of the Minnesota Court of Appeals invalidated parts 5215.0710, subpart 1, 5215.0720, subpart 1, and 5215.2000, subpart 3. Keefe v. Cargill, 393 N.W.2d 425 (Minn. App. 1986) rev. den. Nov. 26, 1986. The decision in Keefe v. Bor-Son, No. C6-86-1568 (Minn. App. Feb 17, 1987), invalidated parts 5215.0710, subpart 2 and 5215.0720, subpart 2. In response to these two decisions, the 1987 Legislature amended Minnesota Statute 182.661 by adding subdivision 3a to give the Board explicit authority to dismiss contested cases when the contesting employer, employee, or employee representative fails to post or serve the notice of intent to contest the citation, the proposed assessment of penalty, or the period of time fixed for correction of the violation within the time prescribed in rules issued by the Board. Act of April 30, 1987, Ch. 46, section 3, 1987 Minn. Laws 69.

Moreover, the Cargill decision indicated that the board should assess fines when the posting/service requirements have not been met. Cargill, 393 N.W.2d at 426. The legislature subsequently also amended section 182.666 to explicitly clarify that the Board may not impose civil, monetary sanctions, since the Board's function is in part to review monetary sanctions imposed by the Commissioner of Labor and Industry. Act of April 30, 1987, Ch. 46, sections 4 - 6, 1987 Minn. Laws 69 - 70. Therefore, the Board's proposed amendments reflect the 1987 Legislative changes which effectively overrule Cargill and Bor-Son.

Second, the experience gained through working with the rules has provided the OSHRB with the opportunity to evaluate the overall clarity and effectiveness of the rules. Changes are needed to enhance the efficiency of the procedural aspects of the OSHRB.

The proposed rule amendments are necessary to respond to Cargill, Bor-Son, and the legislative changes and to increase the efficiency of the existing rules. It is the OSHRB's intention that the changes will eliminate misunderstandings that have resulted by their use. In addition to minimizing any misunderstandings of the rules, the amendments will serve to enhance the effective and the efficient resolution of the disputes before the OSHRB.

The reasonableness of each specific amendment is addressed in the amendment-by-amendment justification.

4. STATEMENT OF REASONABLENESS

The proposed amendments to the rules of procedure of the OSHRB are intended to increase the efficiency and effectiveness of the OSHRB.

Many of the amendments may appear to be insignificant. However, the amendments provide the OSHRB litigants with more precise statements of the intended design of the original rules. In addition, the amendments serve to promote efficiency in dispute resolution by placing more emphasis on parties' timely filing of documents with the OSHRB.

For the above-listed reasons, these rule amendments are reasonable. The amendment-by-amendment justification will further provide a basis for a determination of reasonableness.

5. AMENDMENT BY AMENDMENT JUSTIFICATION

General Changes: All references to hearing examiner contained in the rules have been changed to administrative law judge in order to make the rules consistent with Minnesota Statutes, Ch. 14.

5215.0700, subpart 7. POSTING MAINTAINED

For purposes of organizational clarity, Minnesota Rules, part 5215.0740, is renumbered as part 5215.0700, subpart 7.

5215.0710, subpart 1 and 5215.0720, subpart 1. NOTICE OF CONTEST

These rules were invalidated by the Cargill decision and have therefore been deleted.

5215.0711, subpart 1 and 5215.0721, subpart 1. NOTICE OF CONTEST

This new language replaces part 5215.0710, subpart 1, and 5215.0720, subpart 1. These parts refer to service of the notice of contest by the employer on both represented and unrepresented employees.

Following the issuance of a citation, an employer has, by statute, 15 days to contest the citation, penalty or abatement dates. The employer must send a letter stating an intent to contest to the Department of Labor and Industry. The Department must forward the notice of contest to the OSHRB in 7 days. When the notice of contest is received by the OSHRB, the executive secretary issues a letter acknowledging the contest and advising the employer of the requirement to post and/or serve the notice of contest upon affected employees and/or employee representatives (a certificate of service, notice to employees and filed copy of the notice of contest are enclosed with the letter). Under the Board's procedures in former part 5215.0710, subpart 1 and 5215.0720, subpart 1, if an employer failed to meet the 5-day time frame for certifying that posting and/or service of the notice of contest, the Board issued an order dismissing the employer's notice of contest.

Under 5215.2530, the employer could file a request for reinstatement of the notice of contest. The Board would review the request along with any written submissions or testimony. The Board would grant or deny the request. If denied, the dismissed employer could appeal the Board's decision to the Minnesota Court of Appeals under Minnesota Statutes, section 14.63.

The proposed rule revision would change this procedure. First, the rule has been expanded to explain to employers how to comply with posting/service requirements when their employees work in physically disperse operations, such as construction, installation, repair or service activities, and do not report to any fixed establishment on a regular basis. It also explains the procedures necessary to comply with the posting/service requirements when the cited worksite has been closed down or the employer is no longer working at that cite and the affected employees have been reassigned to other jobs or have left the employment of the cited employer.

Second, the new language indicates that if the employer fails to certify that it has posted and/or served the notice of contest within 5 days, the Board will issue an order to show cause. The order to show cause will direct the employer either to certify that the notice of contest has been posted and/or served or to show cause why the notice of contest should not be dismissed.

In cases where the employer consistently fails to abide by these procedures the employer would be required to certify that the notice of contest has been been posted or served and show cause why the contest should not be dismissed.

If the employer fails to certify the posting and/or service in response to the order to show cause the matter will be referred to an administrative law judge for hearing on the order to show cause. The administrative law judge can dismiss the employer's notice of contest. This dismissal can be appealed to the Board.

Thus, the proposed rule allows for dismissal of contesting parties who fail to comply with the posting and/or service request. The hearing and the order to show cause provide notice and opportunity to be heard prior to any dismissal.

There are two public policies behind this objective. The first is to ensure that employee or employee representatives are provided an opportunity to participate in contested matters in compliance with Minnesota Statutes, Section 182.661, subdivision 3 (1986). The second policy is to bring contested matters to a speedy resolution, because while the citation is pending, the cited conditions at the workplace continue unabated and workers continue to be exposed to hazards.

5215.0710, subpart 2, and 5215.0720, subpart 2. NOTICE OF HEARING

As noted above, these rules were invalidated by the Bor-Son & Cargill decision and therefore have been deleted.

5215.0711, subpart 2, and 5215.0721, subpart 2. NOTICE OF HEARING

These parts replace 5215.0710, subpart 2, and 5215.0720 subpart 2. These subparts refer to the requirements for posting and/or service of the notice of hearing upon employees or employee representative by the employer.

Under the Board's old procedures, when one of the parties filed a note of issue indicating readiness for hearing, the Board's executive secretary would arrange for an administrative law judge to hear the case and serve a notice of hearing on all parties. The notice of hearing informed the employer of the requirement to post/serve the notice of hearing on affected employees and/or employee representatives. The employer was then required to certify that he had complied with this requirement by filing a certificate of service with the administrative law judge and sending a copy to the executive secretary.

If the employer did not certify the posting or service in 5 days, the administrative law judge was required by part 5215.0710 or 5215.0720 to dismiss the notice of contest.

The proposed rule would change this procedure in that a copy of the certificate of service verifying the posting/service of the notice of hearing must be filed with the commissioner, thereby, notifying the commissioner that the posting/service requirements have been met. If the employer does not certify the posting/service as required, the rules would allow the judge to issue a default judgement in the matter either on the judge's motion or on motion by one of the parties. The new language also allows parties an opportunity to be heard.

There are two public policies behind this objective. The first is to ensure that employees or employee representatives are provided an opportunity to participate in contested matters in compliance with Minnesota Statutes, section 182.661, subdivision 3 (1986). The second policy is to bring contested matters to a speedy resolution, because while the contested citation is pending, the cited conditions at the workplace continue unabated and workers are exposed to hazards.

5215.0740. Posting Maintained.

This part, for organizational purposes, becomes subpart 7 under part 5215.0700

5215.0750. Service and Notice of Settlement Proposals.

The OSHRB proposes that the entire part be deleted here and incorporated as amended into part 5215.5300, subpart 2.

5215.2000, subpart 4. Failure to File.

In response to the Cargill decision, the language indicating that the Board could dismissed the action for untimely pleading is replaced by the language in subpart 4.

5215.2530. Reinstatement.

Requests for reinstatements will no longer be needed. As discussed above, parts 5215.0711 and 5215.0721 provide that notice and opportunity to be heard will be given through motions and orders. All orders will be made through motions and; therefore, there will be no need for a reinstatement hearing. The rationale is the same as discussed above with reference to parts 5215.0711, subpart 1, and 5215.0721, subpart 1.

5215.2560. Hearing.

Subpart 1. Notice of Readiness for Hearing

The words "Upon receipt of the notice of readiness for hearing, the board shall schedule a hearing", incorporates into this subpart the current procedures for requesting that a contested case be scheduled for hearing.

Subpart 2. Notice of Readiness Not Filed.

The OSHRB's concern for expedient dispute resolution has led them to adopt the proposed changes in the time frame for parties who have not filed a notice of readiness. Instead of requiring that a notice of readiness be filed prior to scheduling a hearing, the new proposed amendment simply allows the board to schedule a hearing within 45 days of receipt of the respondent's answer.

Subpart 3. Notice of Hearing and Order.

The proposed amendment clarifies that jurisdiction over contested case hearings is found in Minnesota Statutes, Chapter 14, as well as advising the employer of the posting/service requirements located in 5215.0711, subpart 2, and 5215.0721, subpart 2.

5215.5300. Settlement.

The OSHRB maintains its firm stance in encouragement of settlements. However, it does not desire for settlement negotiations to delay the dispute resolution process before it.

Subpart 2. Service and Notice.

This proposed amendment seeks to ensure that all parties having an interest in the settlement agreement either sign or have service upon them. The existing rule only indicates that settlement agreements must be signed and dated by each party. Thus, the proposed amendment provides more detail with regard to how service and notice should be effectuated.

Subpart 3. Content of Settlements Agreements and Orders.

The OSHRB has established this rule requiring that any settlement contain an affirmative statement that the Notice of Contest was posted/served as required under parts 5215.0711 & .0721 to reinforce the importance of the posting/service requirements. This subpart also informs parties that any settlement agreement must include provision stating that the agreement has been posted/served, the notice of contest is being withdrawn and how the settlement affects the contested citation.

Subpart 6. Withdrawal of Notice of Contest.

This amendment is required in order for the language of this subpart to be consistent with the language under subpart 2 of 5215.5300.

5215.6100. Penalties.

The Board has no jurisdiction under Minnesota Statutes to impose civil penalties. The decision in Cargill stated that the Board has the authority to impose fines. However, the Cargill decision was overruled by the legislative amendment section 182.166, subdivision 6. Therefore, the new language clarifies and affirms the legislative intent that the Board only reviews the fines imposed by the Commissioner.

6. Small Business Considerations

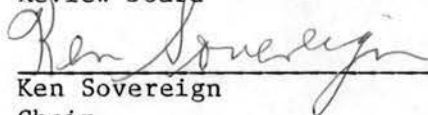
These proposed amendments will affect small businesses as defined by this section. The OSHRB has considered each of the following methods for reducing the impact of the rule changes on small business:

- (a) The establishment of less stringent compliance or reporting requirements for small businesses;
- (b) The establishment of less stringent schedules or deadlines for compliance or reporting requirements for small businesses;
- (c) The consolidation or simplification of compliance or reporting requirements for small businesses;
- (d) The establishment of performance standards for small businesses to replace design or operational standards required in the rule; and
- (e) The exemption of small businesses from any or all requirements of the rule.

The OSHRB is unable to incorporate any of these methods because doing so would be contrary to the statutory objectives that are the basis of the proposed rule-making.

Dated: Oct 11, 1988

State of Minnesota
Occupational Safety and Health
Review Board



Ken Sovereign
Chair