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8/13/90

STATE OF MINNESOTA
OFFICE OF ADMINISTRATIVE HEARINGS

In the Matter of the Proposed Amendments to Rules Governing Administrative Rulemaking Hearings, Contested Case Hearings, Revenue Recapture Act Hearings, Power Plant Siting and Power Line Routing Hearings, Minn. Rules Chapters 1400 and 1405.

STATEMENT OF NEED AND REASONABLENESS

I. INTRODUCTION

The Office of Administrative Hearings proposes to amend a number of its existing rules. These amendments affect one or more rules in each of the major sets of rules governing the Office's work: rulemaking, contested case, Revenue Recapture Act, and power plants/power lines. None of these amendments affect workers' compensation hearings. As explained more fully below, these changes are primarily housekeeping. They are, for the most part, an attempt to update the Office's existing rules to remove obsolete references, changed addresses, and inaccurate citations. There are a handful of substantive amendments, however, so interested persons are advised to look through all of the proposed amendments.

The Office published a Notice of Solicitation of Outside Opinion on February 12, 1990, at 14 S.R. 2012.

The Office is still open to suggestions for improvements on these proposals. Readers are urged to submit their ideas for improving these amendments at anytime until the end of the comment period.

II. STATUTORY AUTHORITY

The Office's statutory authority to adopt these amendments is set forth in Minn. Stat. §§ 3.764, 14.51 and 116C.66 (1988). The main source of authority, section 14.51, provides, in pertinent part:

> The chief administrative law judge shall adopt rules to govern the procedural conduct of all hearings, relating to both rule adoption, amendment, suspension or repeal hearings, contested case hearings, and workers' compensation hearings, and to govern the conduct of voluntary mediation sessions for rulemaking and contested cases other than those within the jurisdiction of the Bureau of Mediation Services. . . . The procedural rules for hearings shall be binding upon all agencies and shall supersede any other agency procedural rules with which they may be in conflict.

Authority to adopt and amend rules relating to power plant siting and power line routing (hereinafter "power plants/power lines") is contained in Minn. Stat. § 116C.66 (1988). Authority for the attorney's fees rule amendment is in Minn. Stat. § 3.764.

III. NEED AND REASONABLENESS FOR EACH AMENDMENT

Each of the amendments is discussed below, with the exception of those which are self-explanatory because they constitute nothing more than renumbering or other housekeeping matters.

Rulemaking Hearings

Proposed Rule 1400.0250, subp. 2 allows documents to be filed by facsimile transmission under certain conditions. When a statute or rule requires that a document be served upon the judge or upon the Office, there is currently no provision for the use of facsimile transmission. The purpose of this rule is to add facsimile transmission as a method of filing with the Office or a judge.

The Office acquired a facsimile transmission machine in April of 1989, and it has been in continuous use since then. It has proven to be a valuable tool for the receipt and transmission of time-sensitive documents. More importantly, it has been entirely reliable. The Office is unaware of any instances in which a person claims to have sent something to us which was not received. Similarly, there have been no reports of persons who have not received documents which a judge has sent to them. We believe that the use of facsimile transmission will only increase, and that it is important to recognize it in the Office's rules.

The Rules of Civil Procedure for the District Courts were amended, effective January 1, 1989, to allow persons to file documents with the district courts by facsimile transmission, so long as certain conditions were met. This followed an experimental trial period that began in September of 1987 in selected judicial districts. The experiment proved to be a success, and so the Supreme Court amended the rules to allow it on a statewide basis. The court required that within five days after receipt of a facsimile transmission, the party filing the document must forward a $5.00 transmission fee and the original signed document to the court. Assuming that that is done, however, filings are deemed complete at the time that the fax transmission is received by the court. The filed facsimile is given the same force and effect as the original. The Office of Administrative Hearings considered this court rule carefully, and determined that there was no reason to impose any sort of transmission fee, at least at the current time. Otherwise, it was followed.

Existing Part 1400.0300, subp. 1a(C)(6) requires agencies to include, in their notice of hearing, a statement advising interested persons that lobbyists must register with the State Ethical Practices Board. The rule goes on to require the inclusion of the definition of a lobbyist as it existed some years ago. The statutory definition has since been amended, and the definition is now different. There is obviously a need to deal with the change in the statute. The Office has chosen to deal with it by deleting the statutory language entirely, and leaving only a warning and the address and telephone number where persons can seek additional information.

This choice is reasonable because it avoids the problem of future statutory changes, and it also follows the Legislature's directive to minimize duplication

of statutory language (Minn. Stat. § 14.07, subd. 3). In addition, the current statute is substantially longer, in length, than the old one and the burden on agencies publishing notices, and readers reading them, outweighs the benefit, particularly where there is a much easier alternative available.

Requiring agencies to determine the current address and telephone number of the Ethical Practices Board, and include them in the notice, is not unduly burdensome to the agencies. The Office could have specified, in the rule itself, the current address and telephone number of the Board, but that alternative was rejected in order to avoid making the rule obsolete when the Ethical Practices Board moves, or its telephone number changes again.

Existing Rule 1400.0300, subp. 1a(C)(7) requires that the notice of hearing contain a paragraph advising persons that written materials may be submitted into the hearing record after the public hearing is concluded. It is proposed to amend it to specify that written materials must be received at the Office of Administrative Hearings no later than 4:30 p.m. on the final day of the comment period.

This rule is needed because experience has shown an unfortunate number of cases where commentators mailed their comments on the last day of the comment period. These comments would then be received a day or two later, and would be late. It is believed that this has happened because persons assume that so long as their submissions were postmarked by the last day, they would be valid. In fact, that has never been the practice of the Office. There is a need to specify this, so that persons who desire to have their comments considered are aware of the specific deadlines involved.

Requiring this warning in the notice of hearing will assure that it appears not only in the State Register, but also in the notices which are mailed to interested persons. While the Office is proposing to adopt a separate rule stating that all comments must be received by 4:30 p.m. on the final day in order to be considered (see below), that separate rule will not necessarily provide meaningful notice to the public. Inserting it in the notice will make it more likely that commentators will become aware of the requirement and avoid the problems of late-filed comments, yet it will not substantially increase any burdens on an agency or persons who read these notices.

Proposed Rule 1400.0500, subp. 1a(G) requires any agency setting or changing fees through the rulemaking process to file a statement, together with the Notice of Hearing, that the agency has complied with Minn. Stat. § 16A.128, subd. 2a. Requiring this statement will serve to notify agencies engaged in rulemaking of the requirements of the statute. Since many agencies use the Notice of Hearing requirements as a "checklist" of the actions required prior to publication of the Notice of Intent to Adopt Rules, including this provision at this point in the Office's rules will notify agencies of the statutory requirement in a timely fashion. The only instance in recent rulemakings where Minn. Stat. 16A.128, subd. 2a applied, the agency was unaware of the requirements of that statute. Although the failure to comply was not found to be a defect in that instance, the proposed item is needed to assure prospective compliance with the statute. Since the effect of the proposed item is merely to require a statement from the agency that it has complied with the statute, there will be no substantial increase in the burden carried by agencies in their rulemaking processes.

Existing Rule 1400.0500, subp. 1 is being amended for the same reasons as Proposed Rule 1400.0300, subp. 1a(G). No substantive change is intended.

Existing Rule 1400.0500, subp. 3 is being amended solely to improve the grammar of the first sentence. No substantive change is intended.

Existing Rule 1400.0850 is being amended in a manner to parallel the "must be received at the Office by 4:30 p.m." amendment discussed in connection with the notice of hearing. It is appropriate to include that requirement in this rule as well as in the notice, so that persons looking in the rules to determine the deadline would find it in a logical place.

The requirement that documents be received by the close of business on the final comment day has been the practice of the Office since it opened for business in 1976. Hearing examiners and administrative law judges have always attempted to mention this policy in their oral opening statements at the start of a rulemaking hearing, and it has always been included in the Office's handout distributed at each rulemaking hearing. Nonetheless, it makes sense that it be set forth in this rule so that there is no debate about enforcibility, and so that somebody looking for it will find it easily.

Contested Cases

Existing Rule 1400.5100, subps. 4 and 5, have created confusion. They define two types of contested cases: "conference contested cases" and "formal contested cases". They appear in the rules only because of an historical accident. There is only one place in the entire contested case rules where the terms are used. Yet their definitions, placed as they are at the start of the contested case rules has caused many people to seek (in vain) for the operative rules where they would make a difference.

During the 1984 revision of the contested case rules, the Office proposed that a number of the existing rules be modified to reflect a less formal approach to contested cases. These less formal procedures were to be used in "conference contested cases". However, during that proceeding, the ALJ ruled that the Office did not have authority to classify cases, and participants were unable to agree to any voluntary classification system. Therefore, the Office withdrew its proposed procedural rules for "conference contested cases". But the definitions were left in place. In a later proceeding, relating to rules to implement the Equal Access to Justice Act, the term "conference contested case" was used, once. However, the retention of these definitions at the start of the contested case rules has caused a great deal of confusion and wasted time. Persons call the Office with some frequency to inquire about where they can find the "conference contested case rules". They report that they have searched in vain through the existing rules and have not been able to find them. These definitions need to be removed. The only rule where they matter (part 1400.8401, subp. 5b) is being proposed for amendment in this proceeding, so there will no longer be any need for the definitions.

Existing Rule 1400.5100, subp. 9 defines "service" and "serve". It deals with personal service, service by mail or overnight express mail service, service upon people confined to institutions, and similar matters. What is missing from it, however, is a recognition of the growing use of electronic facsimile transmission devices or "fax machines". When a statute or rule requires that a document be served upon the judge or upon the Office, there is

currently no provision for the use of facsimile transmission. The purpose of this rule is to add facsimile transmission as a method of perfecting service upon the Office or upon the judge. The Office considered, but rejected, the idea of adopting a rule which would permit facsimile transmission as a way for one party to serve another. It was felt that there were too many problems with such a rule at the current time, and that it would be better for the Office to wait before legislating in that area.

The Office acquired a facsimile transmission machine in April of 1989, and it has been in continuous use since then. It has proven to be a valuable tool for the receipt and transmission of time-sensitive documents. More importantly, it has been entirely reliable. The Office is unaware of any instances in which a person claims to have sent something to us which was not received. Similarly, there have been no reports of persons who have not received documents which a judge has sent to them. We believe that the use of facsimile transmission will only increase, and that it is important to recognize it in the Office's rules.

The Rules of Civil Procedure for the District Courts were amended, effective January 1, 1989, to allow persons to file documents with the district courts by facsimile transmission, so long as certain conditions were met. This followed an experimental trial period that began in September of 1987 in selected judicial districts. The experiment proved to be a success, and so the Supreme Court amended the rules to allow it on a statewide basis. The court required that within five days after receipt of a facsimile transmission, the party filing the document must forward a $5.00 transmission fee and the original signed document to the court. Assuming that that is done, however, filings are deemed complete at the time that the fax transmission is received by the court. The filed facsimile is given the same force and effect as the original. The Office of Administrative Hearings considered this court rule carefully, and determined that there was no reason to impose any sort of transmission fee, at least at the current time. Otherwise, it was followed.

<u>Existing Rule 1400.5600, subp. 2(D.)</u> is changed to correct a minor wording error in the current rule.

<u>Existing Rule 1400.5700</u> provides for the filing of a notice of appearance. The first sentence of the rule requires that a notice be filed with the judge <u>and</u> served upon all other known parties. The second sentence indicates the filing must be within 20 days of the date of service of the notice of and order for hearing, but suggests by its wording that the notice only has to be filed with the judge, not the other parties. Some individuals have focused upon this second sentence, ignored the first sentence, and failed to file with the other parties. This creates wasted time, and occasional surprise. Therefore, the Office is proposing to amend the second sentence to make it clear that the filing must be both with the judge and with the other known parties.

The notice of appearance serves a number of purposes, one of which is to facilitate communication between parties and counsel. It is important for all parties to have an up-to-date service list and knowledge of representation of other parties. It is reasonable, therefore, to make this addition to the rule to make it clear that the notice of appearance must be served upon both the judge and all other known parties.

Existing Rule 1400.5900, subp. 2(C.) deals with the initiation of mediation. It currently provides that no matter shall be ordered for mediation if the agency or any party is opposed to mediation. It is proposed to be amended to provide that mediation may be initiated so long as at least two parties, including the agency, have agreed to mediation.

This rule was initially proposed in 1984, and adopted in 1985. The Office's experience with formal mediation under this rule is still limited. However, enough experience has been garnered to justify making changes to this rule.

In two-party cases, it is impossible to mediate a dispute without both parties involved. However, in multi-party cases, it is possible to have a successful mediation without all of the parties agreeing to its outcome. In a multi-party mediation setting, the participation of some parties is essential, while the participation of others is not essential. The Office has had situations occur where all but one of the parties in a multi-party dispute wanted to at least try a mediation. In that particular case, the objecting party was essential to the process, so mediation was not initiated. But what if all of the essential parties want to mediate a matter, but one minor party does not. Should that prohibit the use of mediation? The Office believes it should not if the judge, the agency and the remaining parties believe it would be fruitful to attempt mediation, even in the absence of the objecting party. The Office has chosen to amend this rule to allow the chief judge to initiate mediation. If the mediation is successful, the objecting party may decide to adopt the result, or may not. The law has mechanisms for dealing with that decision.

Existing Rule 1400.5950, subp. 5 provides that a mediation process terminates when any party, any directly affected person, or the agency announces its unwillingness to continue. The Office has been lucky enough to avoid the actual termination of a mediation process as a result of this rule, but judges within the Office who conduct mediations have, on a few occasions, raised concerns that literal application of this rule could result in an unfortunate termination of mediation.

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In two-party cases, it is impossible to continue a mediation without both parties involved. However, in multi-party cases, it is possible to have a successful mediation without all of the parties agreeing to its outcome. In a multi-party mediation setting, the participation of some parties is essential, while the participation of others is not essential. The Office has had situations occur where all but one of the parties wanted to continue an ADR process. The one party determined it had greater political leverage by making a dramatic withdrawal from the process and holding a press conference to condemn it. Should a mediation process automatically terminate in such a case? The Office believes it should not if the judge, the agency and the remaining parties believe it would be fruitful to continue the process, even in the absence of the withdrawing party. The Office has chosen to amend this rule to allow the remaining parties to determine whether or not the mediation ought to continue. If the mediation is successful, the withdrawing party may decide

to adopt the result, or may not. The law has mechanisms for dealing with that decision.

Existing Rule Part 1400.5950, subps. 3 and 5 both include the concept of a "directly affected person". A review of the rulemaking record at the time this rule was adopted illustrates that this concept was introduced into the rule in order to allow the rule to be used for both contested cases and rulemaking. As originally proposed back in 1984, the rule applied to both contested cases and rulemaking. In that proceeding, it was concluded that the Office had authority to adopt the rule for contested cases, but that the Office lacked statutory authority to adopt the rule for rulemaking proceedings. Therefore, the rule was modified by deleting most of the language which applied to rulemaking proceedings. In rulemaking proceedings, there are no "parties" as such. In order to have a mediation in a rulemaking proceeding, it was felt necessary to include, as participants in the mediation, interested persons. These were defined as "directly affected persons". When the rules were modified after the hearing to delete the references to rulemaking proceedings, not all the references to "directly affected persons" were deleted. This was either an oversight, or a mistake of judgment. Whichever it was, it is appropriate to correct it at this time. The Office has been asked to involve itself in a number of environmental mediations, for example, where the number of directly affected people is very large. There is no need for the concept of "directly affected person" in the rule when it applies only to contested cases.

Existing Rule 1400.6000 deals with defaults. It defines what constitutes a default, and sets forth the consequences of default. The Office is proposing that the rule specify that a default occurs not only when a party fails to appear at a hearing, but also when a party fails to appear at a prehearing conference or settlement conference without the prior consent of the administrative law judge.

Existing Rule 1400.6700, subp. 1(A) deals with discovery, and provides that each party must disclose the names and addresses of all witnesses that it intends to call upon demand by another party. The proposed amendment would require that the disclosure also contain a brief summary of the testimony of the witness.

Individual judges have received complaints suggesting that the wording of the existing rule creates unnecessary paperwork when a party is given merely a list of the names and addresses of proposed witnesses, without any indication of their employment affiliation or other "clues" regarding the topic of their testimony. In order to be safe, parties are often forced to use another discovery tool to determine what the witness is going to testify about. The frequency of complaints is low, but it is better to eliminate them than to have a rule which forces unnecessary paperwork.

There are a number of options for solving the problem. One option is that chosen above, requiring a brief summary of testimony. Another option would be to require disclosure of the employment affiliation of the witness. Yet another option would be to require disclosure of the subject matter of the testimony and the substance of the facts and/or opinions to be elicited. There are advantages and disadvantages of each. The Office chose to require a brief summary of the testimony because it appeared to represent the most reasonable balance between providing a meaningful idea of who the witnesses were and what they were going to say on the one hand, and, on the other hand, the burden upon the party who must answer the discovery request.

Existing Rule 1400.7100, subp. 2 deals with necessary preparation, and requires a party to have all evidence be presented, both oral and written, available on the date set for hearing. A problem which has arisen in the past, and has resulted in interruptions of hearings and wasted time, occurs when parties do not have adequate copies of their exhibits available for other counsel. At present, there is no rule requiring this, and while most attorneys are prepared with adequate copies, not all are, nor are many pro se persons who are unfamiliar with common lawyering practice. When there are an insufficient number of copies, either some parties go without one, or, more commonly, the hearing is interrupted while adequate copies are made. This interruption could be avoided if there were wider knowledge of the practice of having adequate copies available at the hearing.

The approach chosen by the Office is a reasonable one because it attempts to solve the problem without putting undue burden on parties. The Office considered adopting a rule requiring the parties to supply all other parties with a copy of each and every exhibit offered, regardless of size or need. That, however, was rejected as excessive. Consideration was also given to adopting a procedure similar to that proposed in the Minnesota Civil Trialbook, whereby each party is required to prepare a list of exhibits to be offered, and exchange the list with other counsel, and then, prior to the commencement of trial, make all documents on the list available by the proponent for examination and copying by the other parties. That was rejected as being unduly burdensome for simple cases. The Office also considered some of the local rules adopted by various judicial districts around the State. While they vary, generally they require that all exhibits be made available for inspection by opposing counsel prior to trial. Some require that exhibits be made available for examination and copying no less than 14 days prior to the date the case is scheduled to be called for trial. The local rules clearly anticipate that the identification, inspection and copying of exhibits will take place before a trial, rather than during it.

The Office has chosen not to focus upon prehearing disclosure and production, but instead has elected to require that copies be supplied at the hearing. In larger cases where experienced attorneys are involved, it is expected that discovery (either formal or informal) will be the mode for document production and copying. Distribution of copies at the hearing will be unnecessary in those cases. The proposed rule makes provision for that. In smaller cases, however, where discovery is not used or attorneys are not involved, the rule will come into play. The rule is not intended to foreclose discovery or prehearing production of documents, but in cases where that has not occurred, the rule will require copies.

Existing Rule 1400.7400, subp. 1 provides that the official record of each contested case shall be sent to the agency upon issuance of the judge's final report, except for the audiomagnetic recordings of the hearing. The recordings are kept by the Office. Nowhere in statute or rule is it specified how long the audiomagnetic (hereinafter "tape") recording should be maintained by the Office. The proposed amendment fills that gap by specifying a retention time.

At the present time, the Office is maintaining all tapes until a decision is made on this rule. This has resulted in the retention of a very large number of tapes. They consume space, and, more importantly, they represent assets which are tied up and unavailable for reuse. The Office has experimented with

a variety of ways to solve this problem. In the past, the Office has routinely sent out letters approximately three years after the end of a hearing, asking the Special Assistant Attorney General who participated in the hearing or the agency head whether or not the tapes could be erased. This proved to be quite burdensome, both for the Office and the persons who replied to the letters. The Office believes that a uniform retention time, with provisions for exceptions, would be less burdensome.

Five years was selected as a reasonable time to maintain tapes based upon the Office's experience when it was sending out those inquiries. There were only a few situation in which there has been a request to keep tapes of hearings longer than that. It is not necessary to set an absolute maximum, however, because the rule allows an agency to request that tapes be maintained for a longer period, so long as they make their request on a case-by-case basis. It is not anticipated that agencies will file "blanket" requests. However, in the unusual case that an agency would desire to have a record maintained for longer than that, the rule allows them to do so.

Existing Rule 1400.7500 provides for continuances, and set forth standards for determining what constitutes "good cause" for a continuance. One of the bases for granting a continuance is that the parties have agreed to a settlement of the case. There is no mention in the rule of a situation where the parties need more time to reach a settlement. The existing rule contemplates that settlement talks will have been completed prior to requesting a continuance. Experience has shown to the contrary: that oftentimes, settlement talks have not been completed, but are far enough along to suggest that there is a reasonable likelihood of settlement if the parties are given more time. Clearly, settlements are to be encouraged. This amendment will allow for continuances to allow for the completion of settlement talks.

The existing rule takes a "hard line" on continuances. When it was adopted, the Office made a showing that continuances waste time and money for all participants when they are granted too liberally. That is still true. However, given the judicial (and societal) attitude encouraging settlement of civil matters, the existing rule has been frequently waived by ALJs who have granted continuances when it appeared to them that settlement talks were serious, and reasonably likely to result in a settlement. This amendment will permit that to continue. It contains sufficient safeguards to avoid abuse, yet should allow parties an opportunity to complete serious settlement talks.

Existing Rule 1400.8300 provides that in those cases (such as Human Rights and OSHA) where the judge's decision is binding on the agency, a petition for reconsideration or rehearing shall be filed with the judge. The rule is silent as to what standards the judge should use in granting or denying such a petition. Judges have often looked to the Rules of Civil Procedure for the District Courts when the Office's rules are silent, but the absence of any rule for administrative proceedings leaves doubts in the mind of attorneys, parties and judges as to exactly what standards should be used. It is appropriate for there to be a rule that specifies the standards, in order to eliminate that confusion and to also eliminate the risk of inconsistencies between judges.

The standards selected are taken from the Rules of Civil Procedure, both Rule 59 and Rule 60. Rule 59 contains the grounds for the granting of a new trial, while Rule 60 contains the grounds for granting relief from a decision. The Office considered using only one or the other, but in the interest of having a complete rule, it was thought best to select provisions from both.

It is reasonable to use standards from the Rules of Civil Procedure, as they have been interpreted over the years by courts, and guidance is available in attempting to determine whether or not a particular standard applies in a particular case. It is important, however, to recognize that administrative proceedings are different from court proceedings in a number of ways relevant to this rule. For one thing, an agency is being billed for every hour spent deciding a motion and for every hour spent in rehearing all or part of a proceeding. That expense must be weighed against the severity of the grounds alleged in the petition, so that agencies are not burdened with unnecessary costs. On the other hand, if there is a serious error in the initial proceedings, it is important to all parties that the error be corrected as quickly and cheaply as possible. The Office considered a procedure whereby all such requests would be forwarded to the agency required to pay for any rehearing, but rejected that option because it gave too much power to the agency and because the ALJ who heard the case is in a far better position to evaluate the merits of the petition. The use of the standard "inconsistent with substantial justice" is designed to prevent rehearings or reconsideration for harmless errors or immaterial matters.

The limitation of time, based upon the time for appeal of the underlying action, is based upon a balancing of (a) a moving party's right to obtain complete justice and (b) a nonmoving party's right to freedom from seemingly endless litigation. Presumably, the appeal periods contained in statute and rule represent an appropriate balancing of those interests. Moreover, they areeasily ascertainable and have been interpreted so as to provide guidance to judges faced with questions.

Existing Rule 1400.8401, subp. 3 is part of the contested case rule relating to the payment of expenses and attorney's fees pursuant to the Equal Access to Justice Act, Minn. Stat. §§ 3.761 to 3.765. The law directs the Chief Administrative Law Judge to adopt rules to "establish uniform procedures for the submission and consideration of applications for an award of fees and expenses in a contested case". Pursuant to that directive, the Office did, in 1987, adopt this rule. The rule provides that a party seeking an award must submit an application "within 40 days of a final disposition in the contested case". The rule makes it clear that the application must be received at the Office no later than 4:30 p.m. on the 40th day.

The 40-day limit for filing an application does not comport with the decision of the Court of Appeals in the case of Leisure Hills of Grand Rapids v. Levine, 366 N.W.2d 302, rev. denied (Minn. App. 1985). The gist of that case is that when the Legislature has not placed a limit on an agency's jurisdiction to review a matter after a given time period, an agency cannot limit its jurisdiction by adopting a rule setting a time limit. The Leisure Hills rule has been reaffirmed in Matter of Emmanuel Nursing Home, 411 N.W.2d 511 (Minn. App. 1987), rev. denied (Minn. 1987).

In one of the few cases brought to date under the Equal Access to Justice Act, an application for fees was filed more than 40 days after the agency's final decision. In reviewing the facts of that case, and applying the rule of Leisure Hills, the Administrative Law Judge determined that the 40-day rule was invalid, and could not bar the claim. In the Matter of the Occupational License of Jack Haymes, OAH Docket No. RACE-87-003-AK, 6-2600-1000-2, reversed on other grounds, 427 N.W.2d 248 (Minn. App. 1988), reversed on other grounds, 444 N.W.2d 257 (Minn. 1989). Neither of the appellate decisions addressed the Leisure Hills issue.

While public policy favors having a reasonable limitation on filing of claims, Leisure Hills requires that limitation to be imposed by the Legislature, not the Office. Therefore, the Office is proposing to repeal the references to 40 days which currently exist in Part 1400.8401.

Existing Rule 1400.8401, subp. 5b (C) contains a reference to "the procedural rules governing conference contested cases". As explained above, in connection with the amendment proposed for existing Rule 1400.5100, subp. 4, there are no rules for "conference contested cases". Retaining this reference only creates unnecessary confusion and wasted time. It is appropriate, therefore, to change the reference to refer the reader to the rules for the Revenue Recapture Act hearings, which are Parts 1400.8510 through 1400.8612. Those are the rules which currently apply. This is not a substantive change, but rather only changes the reference to an existing version of the rules. The amendment also clears the way to delete the definition of "conference contested case", which, as explained above, has been troublesome for the public and practitioners.

Existing Rule 1400.8402 provides that the Equal Access to Justice Act rules apply to contested cases pending on or commenced after August 1, 1986. The rule is no long needed, and it is reasonable to repeal it in the interest of efficiency. No substantive change is intended by this repeal.

Revenue Recapture Act Hearings

Existing Rule 1400.8510, subp. 4 contains a definition of "service" or "serve". For exactly the same reasons as were given for amendment to 1400.5100, subp. 9 relating to allowing the use of fax machines for service or filing upon the Office or an administrative law judge, the Office is proposing exactly the same language for this provision. The discussion in this Statement relating to that rule is hereby adopted as the justification for this rule as well.

Existing Rule 1400.8560 relates to defaults. It is being amended so that it conforms to the proposed rule on defaults in contested cases. The substance of the change is to provide that a default occurs when a party fails to appear, without the consent of the administrative law judge, at a prehearing conference or a settlement conference. The reasoning set forth as justifying the change in the contested case rules is equally applicable here, and is incorporated at this point.

Existing Rule 1400.8601, subp. 2 provides for witness fees in Revenue Recapture Act cases. It refers to the fee applicable to district courts pursuant to Minn. Stat. § 357.22 as being $10.00 per day and $.12 per mile. In fact, that statute now provides for witness fees of $10.00 per day and $.24 per mile. The purpose of the change proposed for this rule is to refer to the statute, without explicitly detailing the dollar amounts. This is being done in order to avoid having to amend these rules every time the statute is amended. Consistency with the statute is important, to avoid confusion.

Existing Rule 1400.8604, subp. 1 deals with preparation for a Revenue Recapture Act hearing, and requires parties to have all evidence available on the dates set for hearing. It is proposed for amendment to conform it to the contested case rule being amended in this proceeding so that both of

them require that parties have an adequate number of copies of exhibits available for use at the hearing. The reasons given for the change in contested case rules are the reasons which the Office uses to justify this change as well.

Existing Rule 1400.8609, subp. 1 relates to the record being sent back to the agency, except for the tape recordings, which will be maintained at the Office. The Office is now proposing to amend that rule in the same way as it is proposing to amend the contested case rules -- that the Office is required to keep the tapes for five years, unless the agency specifically requests a longer retention period on a case-by-case basis. The justification given for the contested case rules is the same justification that applies here.

Existing Rule 1400.8613 is a severability clause. The most recent version of the Minnesota Rules Drafting Manual, published by the Office of the Revisor of Statutes, suggests that such a clause is unnecessary under normal circumstances. The Office is, therefore, proposing to repeal it as unnecessary. The Office has no intent to change the substance of the rule by this action, and is doing so in reliance upon Minn. Stat. § 645.20, which makes the provisions of all laws severable, which is, in turn, applicable to rules as a result of Minn. Stat. § 645.001.

Power Plant Siting/Power Line Routing Rules

Existing Rule 1405.0200, subp. 6 defines "service" and "serve". The Office is proposing to amend this rule to provide for facsimile transmission on the Office. The language proposed here is the same language proposed for the contested case rule, Part 1400.5100, subp. 9, and the justification for its need and reasonableness in this instance is the same as there.

Existing Rule 1405.0300 sets forth the scope and applicability of these rules. It currently provides that the rules apply to the siting of large electric generating plants, the routing of high voltage transmission lines, and the route exemption process contained in Minn. Stat. § 116C.57, subd. 5. In 1989, the Legislature enacted Laws of Minnesota 1989, ch. 346, § 1, which adds an exemption process for certain large electric generating plant sites similar to the process for certain routes. This exemption process allows the Board to exempt a site for a proposed plant with a capacity of between 50 and 80 megawatts from the requirements of the Power Plant Siting Act. In order to ensure that there is no question about the applicability of these rules to the new site exemption process, it is necessary to add a provision to these rules that specifies that they apply to the site exemption process. It is appropriate that these rules do apply to those sites because the Board's proposed rules state that for both site and route exemptions the Board may, pursuant to Minn. Stat. 116C.06, order a public hearing as prescribed in these rules to determine if the proposed facility will cause significant human or environmental impact.

Existing Rule 1405.1400 is proposed for amendment as a result of proposed changes to the rules of the Environmental Quality Board in its Environmental Review Rules (Minn. Rules, chapter 4410) relating to large electric generating plants and high voltage transmission lines and in its Power Plant Siting Rules (Minn. Rules, chapter 4400). The Board is proposing that the environmental

impact statement process requirements for large electric power facilities now in the Environmental Review Rules be incorporated into the Power Plant Siting Rules as an alternative form of environmental review pursuant to Minn. Rule part 4410.3600. An environmental impact assessment is a component of the alternative review and is prepared in place of the draft and final environmental impact statement. The existing Office rule requires that the record remain open so long as it is necessary to receive the final environmental impact statement. Because of the changes proposed by the Board, it is necessary to amend this rule so the at the record will remain open for the sole purpose of receiving the Board's responses to relevant comments received on the environmental impact assessment. This change will make the rule consistent with the procedures defined in the Board's proposed rules. This change assumes that the Board's changes will, in fact, be adopted. If the Board's proposed rules are not adopted, then the Office will withdraw this proposed change and leave the existing rule intact.

Existing Rule 1405.1800, subp. 3 provides for the tape recording of hearings unless the Chief Administrative Law Judge determines that a court reporter is more appropriate. It says nothing about how long the tapes should be retained after the record is returned to the agency. For the same reasons set forth in connection with the change to the contested case rule, the Office is proposing the same change here -- that the tapes be maintained for five years from the date that the record is returned to the agency, unless the agency requests a longer retention period on a case-by-case basis.

Existing Rule 1405.1800, subp. 5 relates to draft environmental impact statement being entered into the record of the hearing process, along with comments and responses. As explained under "Existing Rule 1405.1400", the Environmental Quality Board has proposed changes in its rules to require that an environmental impact assessment be prepared as a component of alternative review for large electric power facilities in place of a draft environmental impact statement. It is therefore necessary to amend the Office's rule to require that the environmental impact assessment be entered into the hearing record at a point during the hearing process which will allow all persons an opportunity to review and comment on the material. This change will make the Office's rule consistent with the procedures of the Board's proposed amendments to the Power Plant Siting and Environmental Review rules. This change assumes that the Board's proposed changes will, in fact, be adopted. If the Board's proposed rules are not adopted, then the Office will withdraw this proposed change and leave the existing rule intact.

Existing Rule 1405.2800 is a severability clause, and it is proposed for repeal, for the same reasons as given above in connection with existing Rule Part 1400.8613. No substantive change is intended.

IV. CONCLUSION

Most of the amendments proposed are expected to be noncontroversial because they are housekeeping matters of no substance. A few of the proposed changes are substantive. The Office is open to suggestions for improvements in all of these proposals, and hopes that readers will come forward with ideas for improvements. The Office believes it has justified its proposal as both needed and reasonable, but recognizes that there may be even better ways to solve the problems it has identified. Readers are urged to submit their ideas.

3-2403-4832-2

STATE OF MINNESOTA
OFFICE OF ADMINISTRATIVE HEARINGS

FOR THE MINNESOTA PRIVATE DETECTIVE AND PROTECTIVE AGENT SERVICES BOARD

DeWitt Investigative Services, Inc.

vs.

ORDER OF DISMISSAL

Minnesota Private Detective
and Protective Agent Services Board

This matter came on for hearing before Administrative Law Judge Allen E. Giles on August 14, 1990 at 9:30 a.m. at the Office of Administrative Hearings, 310 Fourth Avenue South, Minneapolis, Minnesota pursuant to Notice of and Order for Hearing issued by the Minnesota Private Detective and Protective Agent Services Board, (hereinafter "Board"). Prior to the beginning of the hearing the parties indicated that they had reached a resolution of the contested issues in the Notice and Order for Hearing. Upon being so advised the Administrative Law Judge cancelled the hearing and directed the parties to put in writing the terms of the settlement agreement.

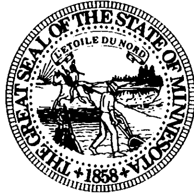
On August 20, 1990 the Administrative Law Judge received a Settlement Agreement and Waiver of Hearing signed by the parties. The Settlement Agreement and Waiver of Hearing is attached to and is incorporated herein as a part of this Recommended Order. Upon review of the Settlement Agreement and Waiver of Hearing and based upon the file and records contained in this docket, the Administrative Law Judge finds and concludes that dismissal of this case is appropriate and in the public interest. Being advised of the premises the Administrative Law Judge makes the following:

RECOMMENDED ORDER

That the Settlement Agreement and Waiver of Hearing be accepted by the Board as resolution of the contested issues in this proceeding and that the Notice and Order for Hearing be DISMISSED.

Dated: August ____, 1990.

ALLEN E. GILES
Administrative Law Judge



STATE OF MINNESOTA

OFFICE OF ADMINISTRATIVE HEARINGS

FIFTH FLOOR, FLOUR EXCHANGE BUILDING
310 FOURTH AVENUE SOUTH
MINNEAPOLIS, MINNESOTA 55415
(612) 341-7600

August 20, 1990

Maryanne Hruby, Director
Legislative Commission to Review
Administrative Rules
55 State Office Building
St. Paul, Minnesota 55155-1201

Re: Statement of Need and Reasonableness

Dear Director Hruby:

Please find enclosed the Statement of Need and Reasonableness being make available to the public relating to the proposed amendments to the rules of the Office of Administrative Hearings. I have also enclosed a copy of the rules as proposed, certified by the Revisor's Office. The only notable differences between the final draft of the Statement of Need and Reasonableness and the one you reviewed in May are located in the plant siting portion of the document. These changes were made in consulation with the Environmental Quality Board to conform with a rulemaking process the Board is presently undertaking. Please contact me if you have any questions regarding the Statement of Need and Reasonableness or any other aspect of our rulemaking process.

Sincerely,

MICHAEL W. LEWIS
Administrative Hearings
Staff Attorney

Enclosures

AN EQUAL OPPORTUNITY EMPLOYER