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OCT 31 1995

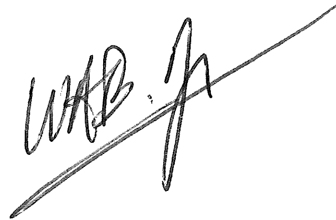
DEPARTMENT: Labor and Industry - *Helping Minnesota Work*

STATE OF MINNESOTA
OFFICE MEMORANDUM

DATE: October 30, 1995

TO: Maryanne Hruby---LCRAR

FROM: Bill Bierman DOLI Legal



PHONE: 296-6588

SUBJECT: Notice of Intent to Adopt Rule Amendments Without Public Hearing:
OSHA Administrative and OSHA Review Board Procedural Rules ---SONARS

Attached are two SONARS, one for the OSHA Administrative Rules and one for the OSHA Review Board Proccedural Rules. Both sets of proposed rules were published in today's edition of *State Register.*

Also enclosed are copies of the two sets of Rules, Chapters 5210 and 5215, for your convenience.

STATE OF MINNESOTA
DEPARTMENT OF LABOR AND INDUSTRY
443 Lafayette Road
St. Paul, Minnesota 55155

In the Matter of the Proposed Amendment and Adoption by the Minnesota Department of Labor and Industry of Rules Governing Administrative Procedure.

STATEMENT OF NEED AND REASONABLENESS

I. INTRODUCTION.

This Statement of Need and Reasonableness (SONAR) describes proposed amendments to existing Minnesota Occupational Safety and Health administrative rules and proposed new rules which reflect the legislative restructuring of contestation procedures for occupational safety and health citations.

II. STATEMENT OF COMMISSIONER'S STATUTORY AUTHORITY.

Minnesota Statutes § 182.657 authorizes the Commissioner of Labor and Industry "...to promulgate, in accordance with chapter 14, such rules as may be deemed necessary to carry out the responsibilities of this chapter..."

III. STATEMENT OF NEED AND REASONABLENESS.

Minnesota Statutes, Chapter 14, requires the Commissioner to make an affirmative presentation of facts establishing the need for and reasonableness of the rules as proposed. In general terms, this means that the Commissioner must set forth reasons for the proposal which are not arbitrary and capricious. However, to the extent that need and reasonableness are separate, need has come to mean that a problem exists that requires administrative attention, and reasonableness means that the solution proposed by the Commissioner is appropriate.

This rulemaking proposes changes in Minnesota Rules Chapter 5210 which includes the administrative rules of the Department of Labor and Industry, Occupational Safety and Health Division (MNOSHA).

The primary reason for the proposed new rules and amendments to existing rules is to implement statutory changes affecting contestation procedures. In 1991, the Minnesota Legislature transferred some authority and responsibilities of the Occupational Safety and Health

Review Board to the Commissioner of Labor and Industry in an attempt to streamline the contestation procedures. Specific changes included: (1) adding definitions for "affected employee," "authorized employee representative," and "respondent," to clarify to whom some of the appeal (contestation) provisions apply; (2) changing the time period for filing contestations from 15 working days to 20 calendar days to eliminate confusion among some employers concerning which days were to be counted as "working days;" (3) requiring contestations to be filed on a form provided by the Commissioner; (4) transferring responsibility for resolving contested matters by settlement agreement from the Review Board to the Commissioner (or in those instances where settlement cannot be reached, referring the case to an Administrative Law Judge or the Review Board); (5) requiring employers to serve a copy of the notice of contest and subsequent settlement agreement on unrepresented affected employees and authorized employee representatives on or before the date the notice is filed with the Commissioner; and (6) changing some responsibilities of the Review Board such as transferring the scheduling of hearings before Administrative Law Judges to the Commissioner; defining the Board's responsibility to review and decide appeals of final decisions and orders of the Commissioner, including decisions issued by Administrative Law Judges, petitions to vacate final orders and to review and decide petitions for decisions based on stipulated facts. [Laws of Minnesota for 1991, Chapter 233]

Many of the proposed amendments to existing rules reflect these legislative changes. Some rules, although new to this chapter (Minnesota Rules Chapter 5210,) are simply transferred from existing Occupational Safety and Health Review Board procedural rules (Minnesota Rules Chapter 5215). This transfer reflects the legislative intent to transfer responsibilities from the Review Board to the Commissioner of Labor and Industry. Relevant changes are also being proposed in the Review Board procedural rules in a concurrent, separate rulemaking.

Proposed modifications not directly affected by statutory changes can be categorized as necessary for one or more of the following reasons: (1) to clarify ambiguous language, (2) to remove duplicative statutory language, or (3) to correct gender-specific language.

In general, the proposed amendments are reasonable because the rules: (1) amend existing rules to reflect statutory and administrative changes, (2) remove ambiguous terms and requirements and make the rules easier to read and understand, and (3) remove language that is identical to, or paraphrases, statutory language. Further, the proposed amendments are reasonable because they place no additional burdens on employers or employees.

New rules and amendments to existing rules proposed for adoption as part of this rulemaking are described below:

MINNESOTA RULES PART 5210.0005 DEFINITIONS.

This proposed new Part adds definitions necessary to understand the proposed new rules and the amended existing rules.

Subpart 1 restricts the scope of application of the definitions in Part 5210.0005 to Minnesota Rules Chapter 5210. Although it is reasonable to assume that these definitions will apply throughout all MNOSHA rules and standards, rules of other agencies published elsewhere

in Minnesota Rules may define a term differently. Therefore, it is necessary to clarify that the definitions in Part 5210.0005 apply only to Chapter 5210.

Most of the terms are self-explanatory. Terms which have a statutory definition are included here with a reference to the statute (e.g., affected employee, authorized employee representative, commissioner, employee, employer, person, and respondent). It is necessary to include these terms in the rules so that readers know the intended meaning of these terms as they are used in these rules. It is reasonable to refer to the statute to avoid duplication of statutory language, to avoid paraphrasing that may mislead the reader, and to assure that the definition of terms is consistent in the rules and in the statute.

ADOPTION OF STANDARDS

MINNESOTA RULES PART 5210.0010, PURPOSE.

This existing rule is repealed because it repeats provisions in Minnesota Rules Part 5210.0020.

MINNESOTA RULES PART 5210.0020 SCOPE.

This Part is amended to correct a reference to 5210.0010 which is repealed in this rulemaking. The archaic term, "promulgating," is replaced by the more easily understood term, "adopting." This terminology change applies throughout Minnesota Rules 5210.0020 to 5210.0100.

MINNESOTA RULES PART 5210.0030, DEFINITIONS.

This Part, which defines the term, "standard," is repealed since it duplicates the statutory definition in Minn. Stat. § 182.651, subd. 11 and is unnecessary in these rules.

MINNESOTA RULES PART 5210.0040 PETITION FOR ADOPTION, MODIFICATION, OR REVOCATION OF A STANDARD.

The changes in this Part are necessary to replace the archaic term, "promulgation," with the term, "adoption," making the Part more easily understood. In addition, since the term "Commissioner" is defined in 5210.0005, subpart 8, it is not necessary to specify that the Commissioner referred to in this Part is the Commissioner of Labor and Industry.

MINNESOTA RULES PART 5210.0050 INITIATION.

The amendments to this Part reflect the changes that have occurred in the process followed by the agency in adopting occupational safety and health standards. The existing rule allows the Commissioner to initiate adoption of a standard by either requesting recommendations from the Occupational Safety and Health Advisory Council or by publishing a proposed rule in the *State Register*. The existing rule does not require the Advisory Council to be involved in the standards adoption process. Current practice is to publish all standards proposed for adoption in the *State Register*. The Advisory Council is provided with copies of the proposal at the time it is published and their recommendations, if any, are taken into consideration before the standard is finally adopted. Although the mission of the Advisory Council is to advise the agency in safety and health matters, the Council is no longer actively involved in the standards-

adoption process. This is due primarily to the fact that most of the standards which the agency adopts are Federal OSHA standards that are adopted by reference. These federal standards have already been through an extensive comment and public hearing process. Therefore, there is no longer a need for the Advisory Council to be as involved in the standards-adoption process as it was in the past. These amendments are reasonable because they more accurately reflect the standards-adoption process used by the agency and, additionally, make it clear that all proposed standards must be published in the *State Register* and must be open for comment for a period of 30 days.

MINNESOTA RULES PART 5210.0060 OBJECTIONS.

In subpart 1, the reference to Item B, subitem (3), of Minnesota Rules Part 5210.0050 is removed because proposed amendments to Part 5210.0050 have removed that subitem. The term, "objector," is replaced by "objecting party" in Item A. Item C is amended to remove the need for objections to specify "with particularity" the provision that is being objected to but clarifies that the reasons for the objection must be explained. This modification places no additional burden on employers or employees who file objections to a proposed standard that do not already exist under the current rule; the language changes make the intent of this subpart clearer.

Subpart 2 is amended to clarify the number of objections that must be filed to warrant a public hearing. The existing rule does not specify how many objections or requests for hearing are necessary before a hearing is required. As written, the existing rule could be interpreted to require a public hearing if only one request was received. The proposed amendment requiring "25 or more persons" to request a hearing is reasonable because it makes this rule consistent with the Administrative Procedures Act and removes the need to hold a public hearing if only one or two objections are filed. While the agency responds to all objections to seek resolution of the problems raised by the objecting parties, it is not necessary, in most cases, to hold a formal public hearing on the issues raised by one or two objecting parties.

Items A through C of Subpart 2 are unchanged. Item D is amended to remove awkward language and to clarify that a request for hearing must specify which issues need to be discussed at the hearing. The agency often publishes a notice proposing the adoption of several safety and health standards related to various issues. This rule, which requires the objecting party to specify the issues to be discussed at the hearing, is necessary to eliminate the need to hold a public hearing on all standards in a rulemaking proceeding when objections are filed with respect to only one or two of those standards. In addition, specification of the issues to be discussed at the public hearing provides notice to all parties and allows sufficient time for them to prepare their testimony. The language change clarifies the intent of this Item but does not place any additional burden on employers, employees, or other interested parties.

Wording changes in Item E of Subpart 2 clarify the intent using language that is more easily understood. The amendments do not place any additional burdens on employers, employees, or other interested parties that do not already exist under the current rule. Items F and G of this subpart remain unchanged.

Subpart 3 is amended to clarify that persons who file a notice of intention to appear at a public hearing are entitled to "testify" at the hearing. This change is necessary to clarify the intent of the existing rule which indicated that they would be allowed to "participate" at the hearing. The extent of that participation is unclear in the existing rule.

MINNESOTA RULES PART 5210.0070 CONDUCT OF HEARING.

This rule is amended by eliminating vague and awkward language. No new requirements are added nor are substantive changes made in the existing rule.

MINNESOTA RULES PART 5210.0080 POWERS OF PRESIDING OFFICER.

Items A to D and Item F remain unchanged. A minor change is made in Items E and G. The clause, "in the officer's discretion," is removed from Items E and G; the phrase is unnecessary since the Part gives the presiding officer the powers necessary or appropriate to conduct a fair and full hearing. It is understood that the exercise of such powers would be at the discretion of the presiding officer.

MINNESOTA RULES PART 5210.0090 CERTIFICATION OF HEARING RECORD.

The amendments to this part are non-substantive and are necessary to clarify the intent of this rule. The phrase, "certified by the presiding officer" does not clearly state the intent of the rule which is that the transcript is to be transmitted to the Commissioner.

MINNESOTA RULES PART 5210.0100 DECISION.

Amendments to Subparts 1 and 2 of this Part are minor, housekeeping changes (e.g., to correct a reference to a Part that is being repealed and replacing the archaic term, "promulgating," with "adopting" which is more easily understood. Subpart 3 remains unchanged. Subpart 4 is repealed. As noted in the discussion of amendments to Part 5210.0050, the Occupatoinal Safety and Health Advisory Council is no longer as extensively involved in the standards adoption process as it was when the Minnesota OSHA program was first established and the existing rule was adopted. This amendment is necessary to reflect changes in the Advisory Council's activities with respect to the adoption of safety and health standards.

DISCRIMINATION AGAINST EMPLOYEES

MINNESOTA RULES PART 5210.0200. AUTHORITY AND BACKGROUND.

This Part is repealed since it is unnecessary to include a rule defining the Commissioner's authority for adopting these rules. The Commissioner's authority to adopt rules which prohibit the discharge of, or discrimination against, an employee who exercises any rights granted under Minnesota Statutes Chapter 182 is found in Minn. Stat. § 182.657. Minnesota Rules Part 5210.,0210 cites the statutory provisions governing discrimination; it is redundant to repeat them in Part 5210.0200.

MINNESOTA RULES PART 5210.0210 PURPOSE AND SCOPE.

Changes in this Part are necessary to correct the reference to Minnesota Rules Part 5210.0200 (which is being repealed as part of this rulemaking) and to clarify the purpose of

Parts 5210.0210 to 5210.0340. These rules define how the agency will enforce the discrimination provisions of Minn. Stat. § 182.654, subdivisions 9 and 11, and § 182.669. The clause that is added at the end of this subpart is necessary to explain what Minnesota Statutes, § 182.654, subdivisions 9 and 11, and § 182.669 provide. It is reasonable to include this clause to further explain what these sections of the statute encompass and to assure the reader is aware of their existence.

MINNESOTA RULES PART 5210.0220, DEFINITION.

This rule is repealed. The definition of "act" is included in Part 5210.0005, subpart 2.

MINNESOTA RULES PART 5210.0230, OCCUPATIONAL SAFETY AND HEALTH COMPLAINTS.

This rule is repealed. The existing rule paraphrases some of the rights given to employees by Minnesota Statutes Chapter 182. Because an employee's rights are defined in the statute, there is no need to repeat them in the rules. No change is made in the rights granted to employees.

MINNESOTA RULES PART 5210.0240, REFUSAL TO WORK UNDER UNSAFE CONDITIONS.

This rule is repealed. The existing rule repeats the right to refuse to work that is granted to employees by Minn. Stat. § 182.654, subd. 11. The statutory language governing an employee's right to refuse to work was revised in 1985 (Laws of Minnesota for 1985, Chapter 130) to remove the employee's right to refuse to work with a hazardous substance if training had not been provided (subpart 3 of the existing rule). The rule language was not revised, creating confusion and misunderstanding among employers and employees. An employee's right to refuse to work under imminent danger or unsafe conditions (which includes working with a hazardous substance for which information and training has not been provided) is defined by Minn. Stat. § 182.654, subdivision 11, and is not affected by the repeal of this rule.

MINNESOTA RULES PART 5210.0250, INSPECTION PARTICIPATION.

This rule is repealed. The existing rule paraphrases statutory language and is unnecessary. An employee's right to participate in all aspects of an OSHA inspection is granted under Minn. Stat. § 182.659, subdivision 3, and Minnesota Rules 5210.0480. Repealing Part 5210.0250 does not affect the right of employees to participate in an inspection. This rule is unnecessary because Minn. Stat. § 182.654, subdivision 9, prohibits discrimination against employees who exercise any right granted under Minnesota Statutes Chapter 182.

MINNESOTA RULES PART 5210.0260, PROTECTION FOR TESTIFYING.

This rule is repealed. The existing rule paraphrases statutory language and is unnecessary. Repealing this rule will not affect the right of employees to testify at proceedings related to an action under Minnesota Statutes Chapter 182. This rule is unnecessary because Minn. Stat. § 182.654, subdivision 9, prohibits discrimination against employees who exercise any right granted under Minnesota Statutes Chapter 182.

MINNESOTA RULES PART 5210.0270, CONTEST BY EMPLOYEE.

This rule is repealed. An employee's right to contest a citation, proposed assessment of penalty, type of violation, or the time fixed for abatement in a citation issued to an employer is granted by Minn. Stat. § 182.661, subdivision 3, and Minnesota Rules 5210.0539.

Discrimination against an employee who files a Notice of Contest is prohibited by Minn. Stat. § 182.654, subdivision 9.

MINNESOTA RULES PART 5210.0280, INFORMAL CONFERENCES.

This rule is repealed. An employee's right to participate in an informal conference is granted by Minn. Stat. § 182.659, subd. 3. This rule is redundant and unnecessary. An employee's right to participate in an informal conference is not affected by this action.

MINNESOTA RULES PART 5210.0290, DISCIPLINE PERMITTED BY EMPLOYER.

This rule is repealed. The rule is unnecessary because an employer has certain rights with respect to the employment of individuals that are outside the jurisdiction of Minnesota Statutes Chapter 182. One of these rights is the right to discipline and/or discharge an employee for legitimate reasons in accordance with applicable statutes and rules. It is unnecessary to state that an employer may discipline an employee for activities that are not protected under Minnesota Statutes Chapter 182 when that right is granted by another authority.

MINNESOTA RULES PART 5210.0300 PARTICIPATION IN PROTECTED ACTIVITIES.

This Part is amended to incorporate language consistent with other statutory and case law language and to clarify its intent. Specifically, the rule clarifies that an employee's rights under Minnesota Statutes Chapter 182 will have been violated if the employee is discharged or otherwise disciplined because that employee participated in one or more of the protected activities prescribed by Chapter 182. The rule is further clarified to indicate that this protection extends to employees who exercise any right granted by Chapter 182 on behalf of other employees. For example, an employee who is a union steward or otherwise designated as a representative of employees may be called upon to exercise one or more of the rights granted by Chapter 182 on behalf of his/her co-workers. The employer is prohibited from disciplining or discharging the employee representative because of such activities. The last sentence is deleted because it is reasonable to assume that decisions and actions under Minnesota Statutes Chapter 182 must necessarily involve an analysis of the facts in each case.

MINNESOTA RULES PART 5210.0310 CLAIM PROCEDURES.

Subpart 1 is unchanged. Subpart 2 is amended to clarify that a written discrimination complaint must be filed in accordance with Minnesota Rule Part 5210.0554 (e.g., by mail, personal delivery, or facsimile). This eliminates a duplication of requirements, assures that appropriate information will be submitted, and allows the complainant several options for filing the discrimination complaint. Subparts 3 and 4 are repealed because they repeat statutory requirements that have been repealed.

MINNESOTA RULES PART 5210.0320 DEFERRAL OF ACTION ON DISCRIMINATION COMPLAINT.

This rule is amended to include the word "discrimination" to assure that the reader is aware that these rules apply only to discrimination complaints and not to any other type of complaint an employee may file under Minnesota Statutes Chapter 182. This change does not affect any rights afforded employees or employers under Minnesota Statutes Chapter 182 with respect to discrimination complaints.

MINNESOTA RULES PART 5210.0330 ACCEPTING OTHER DECISIONS AS FINAL DETERMINATION.

This rule is amended to include the word "discrimination" to assure that the reader is aware that these rules apply only to discrimination complaints and not to any other type of complaint an employee may file under Minnesota Statutes Chapter 182. Secondly, the rule is amended to clarify the conditions that must be met in order for the Commissioner to accept the decision of another entity as the final decision in the discrimination complaint filed under Minnesota Statutes Chapter 182. The change is reasonable because it indicates that the other proceeding must have dealt with "substantially" all of the factual and legal issues rather than requiring that the other decision must have dealt with "all" factual issues. Complaints of alleged discrimination may be filed simultaneously with several agencies; this rule allows the Commissioner to accept a decision from another agency as a final determination in the complaint filed with this agency. In some cases, a majority of the significant issues in the discrimination complaint have been considered by the other agency and there is no need for further review by the Commissioner. Lastly, the final sentence is removed since it is unnecessary to explain that another action that is dismissed without proper hearing is not an automatic dismissal under Minnesota Statutes Chapter 182. This rule allows the Commissioner to accept the results of other proceedings; a dismissal without proper hearing does not meet that condition. This amendment does not affect any rights already afforded employees or employers under Minnesota Statutes Chapter 182 with respect to discrimination complaints. It does, however, allow the Commissioner to accept a decision by another agency and thereby eliminate the need for further investigation and/or hearings by this agency to review the same facts and evidence dealt with by another government agency.

MINNESOTA RULES PART 5210.0340 ENFORCEMENT PROCEEDINGS.

Subpart 1 of this rule is repealed. In 1985, the Legislature amended Minn. Stat. § 182.669 to allow a discrimination case to be referred to an Administrative Law Judge for hearing rather than requiring it to be filed in District Court. This change allows the Commissioner to refer cases much more readily to an Administrative Law Judge for hearing, allowing for a quicker resolution of the discrimination complaint.

Subpart 2 is amended to clarify that the Commissioner may enter into a settlement agreement without first going before an Administrative Law Judge if a determination is made that a discriminatory act was committed. This modification is reasonable since it eliminates the need to immediately litigate a discrimination case before an Administrative Law Judge and allows involved parties to attempt to reach a settlement before formal proceedings are undertaken. This change allows a quicker settlement of discrimination complaints through mediation than would be possible if a hearing is required for every case. Subparts 3 and 4 of this part remain unchanged.

INSPECTIONS, CITATIONS, AND PROPOSED PENALTIES

MINNESOTA RULES PART 5210.0400 STATUTORY AUTHORITY.

This rule is repealed because it is unnecessary to cite statutory authority in these rules. Statutory authority is automatically identified in the Minnesota Rules publication.

MINNESOTA RULES PART 5210.0410 PURPOSE.

This rule is amended to correct references to Minnesota Rules that are either repealed in this rulemaking or are being renumbered. The rule is further amended to delete the phrase, "inspection, citation, and proposed penalty provisions." Amendments to this chapter expand the scope of these rules.

MINNESOTA RULES PART 5210.0420 POSTING OF NOTICES.

This Part is revised to clarify that the notice referred to in the rule is the "Safety and Health Protection on the Job" poster. This eliminates the confusion over what type of "notice" is needed. No new requirements or additional responsibilities are added for employers nor is the right of employees to have access to OSHA information compromised.

MINNESOTA RULES PART 5210.0430, AVAILABILITY OF RULES.

This part is repealed because it is unnecessary to have a rule that tells the reader where rules are available. Also, the existing rule, which requires an employer to make a copy of the rules available in the workplace "if" a copy had been obtained, has been misinterpreted by some employers. Some employers have interpreted the rule to mean that the employer need only make the rules available to employees if the employer had obtained a copy of the rules. Consequently, these employers believed that if they did not have a copy of the rules, there was no obligation to make the information available to employees. This is contrary to the statutory requirement that employers must inform employees of the requirements of applicable standards and to make those rules and standards available to employees.

MINNESOTA RULES PART 5210.0440, PENALTY FOR NON-COMPLIANCE.

This Part is repealed because Minn. Stat. § 182.66 and § 182.666 provide for citations and penalties if an employer violates any provisions of Minnesota Statutes Chapter 182 or the standards or rules adopted under that statute. This rule is repetitive and unnecessary.

MINNESOTA RULES PART 5210.0450 OBJECTION TO INSPECTION.

This Part is amended to remove the acronym "OSHI" and replace it with the word "investigator" which is defined in Minnesota Rules Part 5210.0005, subpart 13. The acronym is not widely known nor understood outside the Department of Labor and Industry and is confusing to readers. Additionally, this rule is amended to clarify the use of the words "inspection" and "investigation" which have been used interchangeably resulting in some confusion. "Inspection" is specific to the actual physical examination of the workplace which generally includes a walk-through or tour of the work areas to review working conditions. "Investigation" refers to the entire process from presentation of the investigator's credentials to the employer to the closing conference. An "investigation" encompasses the physical examination (or inspection) of the workplace. Lastly, the word "records" is amended to more accurately describe the materials investigators are permitted to review as part of an inspection. "Records" was misunderstood as referring only to such things as training records or injury records. The intent of this rule is to allow investigators access to not only the records of training and injuries but also to written safety programs, work procedures, and other work-related written information. "Documents" more clearly defines the information that must be made available to investigators. No additional burden is placed on employers or employees by these amendments.

Minnesota Rules Part 5210.0460 Waiver not Implied.

Amendments similar to those in Part 5210.0450 are also made in this Part. The changes are necessary for clarity and consistency.

Minnesota Rules Part 5210.0470 Investigations.

Subpart 1 is amended by removing the first statement which indicates that inspections will take place at such times and such places of employment as the Commissioner or OSHI directed. That statement is no longer true. The agency has established an inspection scheduling system which identifies high-hazard employers through several sources including, but not limited to, Workers' Compensation data and Experience Modification Rate data. The list of employers generated from this impartial data is the basis for scheduling investigations. Subpart 1 is further amended to clarify that investigators will present credentials "at the earliest opportunity upon entering the place of employment." This change is necessary to accommodate those instances when the employer or a representative of the employer is not readily available or easily found upon entering a workplace. The changes are reasonable since they more clearly reflect the actual practice followed by investigators and provide a more accurate notice to employers and employees of what to expect when an investigator visits their facility.

Subpart 2 is amended to specify other methods or means investigators are allowed to use in documenting an inspection, such as video tapes. When this rule was originally written, video tapes and some sampling and testing equipment were not available to investigators. The increased complexity of inspections has necessitated the use of more advanced technology to assure comprehensive inspections. This change is necessary to clarify to employers and employees that investigators may use other, previously unlisted, types of equipment or investigative techniques to document an inspection. The rule is reasonable because it allows investigators to use the best technical equipment available to them to document investigation findings, resulting in a more thorough, effective investigation.

Subparts 3 and 4 are repealed. Existing Subpart 3 explains that investigators will take reasonable precautions to ensure that flash and spark-producing equipment is not used in hazardous areas. Subpart 4 requires the inspection to be done without unreasonable disruption of the employer's operations. These subparts are unnecessary in Minnesota Rules. Minnesota Statutes § 182.659 requires investigations to be conducted during regular working hours and in a reasonable manner. Investigators' actions and responsibilities during investigations are further defined and clarified in the Minnesota OSHA Field Compliance Manual which provides more details than can be specified in a rule. Additionally, the investigators' actions may be changed due to new procedures, acquisition of new technologically advanced equipment, unusual circumstances, etc.

Subpart 5 is amended to reflect similar changes to those made in Minnesota Rules 5210.0450 and 5210.0460. The changes are necessary to assure clarity and maintain consistency.

Subpart 6 is repealed. It is unnecessary to state that compliance is required and that inspections will be conducted in accordance with these rules. Minnesota Rules Part 5210.0410

clearly defines the purpose of the chapter. Since the rules in this chapter define the investigation procedures, it is understood that these procedures will be followed for all investigations.

MINNESOTA RULES PART 5210.0480 REPRESENTATIVES OF EMPLOYERS AND EMPLOYEES TO ACCOMPANY INVESTIGATIONS.

This rule is amended to eliminate the "OSHI" acronym and to correctly refer to the investigation rather than the inspection, since employers and employees have rights throughout the entire investigation and not just during the walk-through inspection of the workplace. The rule further clarifies that the investigator is in charge of all aspects of the investigation. It is necessary to clarify this authority to assure an orderly, effective investigation that assures both the employer's and the employees' rights.

Subpart 2 is amended by removing the second paragraph which states that the employer and a representative authorized by employees shall be given an opportunity to accompany the investigator during the physical inspection of the workplace. This right is defined in Minn. Stat. § 182.659 and in Subpart 1 of this Part. It is unnecessary to restate that right in this Part.

Subpart 3 is amended to correct awkward language and to remove the redundant last sentence. The term, "authorized representative of employees," is changed to "representative authorized by employees." This change is necessary to correct a misunderstanding on the part of some employers and employees and to clarify that the employee representative need not be a representative from a bargaining unit (union) but may be an employee who is on the safety committee, who is selected by all employees as their representative, etc. This change is reasonable because Minnesota Statutes Chapter 182 does not require an employee representative to be a bargaining unit representative and allows all employees equal opportunity to participate in an investigation. The last sentence is repealed because it repeats the statutory requirement of Minn. Stat. § 182.659, subd. 3.

MINNESOTA RULES PART 5210.0490 CONSULTATION WITH EMPLOYER AND EMPLOYEES.

This Part is amended to remove the OSHI acronym and to clarify which "conference or discussion" is meant. All investigations include an opening conference (held before the inspection phase to acquaint attendees with the reason for the investigation, answer questions, etc.) and a closing conference (held after the inspection phase to discuss violations found during the investigation). An employee or employee representative is allowed, by statute, to participate in both conferences. In addition, the change in Minnesota Rules Part 5210.0480 concerning a representative authorized by employees is also made in this Part.

MINNESOTA RULES PART 5210.0500 EMPLOYEE RIGHTS DURING INSPECTION.

This Part is amended to clarify the statutory authority that assures employees no loss of payment or other privileges afforded by the employer because the employee participates in the physical inspection of the workplace or in the opening and/or closing conferences which are part of every investigation. The existing rule indicates that loss of any privilege or payment is a discriminatory act subject to sanctions but does not explain what those sanctions are. Adding a reference to Minn. Stat. § 182.669 clarifies the sanctions that are referred to by this rule.

MINNESOTA RULES PART 5210.0510 TRADE SECRETS.

Amendments are made in this Part to remove the OSHI acronym and to correctly refer to an employee representative as a "representative authorized by employees" rather than using the former reference to an "authorized employee representative" which has been misinterpreted to mean only a union or bargaining unit representative. This change is necessary to maintain consistency with changes made in other rules and to use the appropriate terminology in referring to an employee representative. An authorized employee representative may be a union representative but may also be an employee member of the company's safety committee, an employee elected by other employees as their spokesperson, etc. This rule is further amended to clarify that, for the purpose of protecting trade secrets, the employee representative for the purposes of the inspection shall be an employee who works in the area that contains the trade secret. If no employee is authorized by employees working in the area, or if the employer has an objection to an employee representative being in the area, the investigator will interview a reasonable number of employees working in the area to obtain information about safety and health conditions. This change is reasonable because it allows an employer to maintain the necessary confidentiality in certain areas while allowing an employee representative to participate in the inspection or for employees working in the area to be interviewed.

MINNESOTA RULES PART 5210.0520 INVESTIGATION NOT WARRANTED; INFORMAL REVIEW.

This Part allows an employee who files a complaint to request an informal review if the Commissioner or the Commissioner's authorized representative decides that an investigation is not warranted in response to the employee's complaint or if an inspection is conducted but no citation is issued. The existing rule allows an informal review only when the Commissioner determines that an inspection will not be conducted in response to a complaint. The statutory reference to Minn. Stat. § 182.659, subdivisions 4 and 5, clarifies the type of complaint that is covered by this Part. The existing rule requires an employee who filed a written statement of position concerning the complaint with the Commissioner to also provide a copy to the employer which makes it impossible for the employee to remain "anonymous," which is a right granted to employees under Minnesota Statutes Chapter 182. The additional language in this proposal clarifies that the employee must submit a copy of the position statement to the employer if the employee had previously not asked to remain anonymous when filing the complaint with the agency. If anonymity was requested, the Commissioner must summarize the position statement and send a copy to the employer. When the employer responds, the Commissioner is required to send a copy to the complaining party. The amended rule also allows the Commissioner to hold an informal conference with the complaining party and the employer, either together or separately. The existing rule did not allow for separate conferences. These changes are necessary to protect the identity of complainants who wish to remain anonymous while providing the employer with notice of the allegations and allow the employer time to respond. These amendments are reasonable because oftentimes employees withhold complaints fearing retaliation from their employer; thus, unsafe or unhealthful working conditions may continue to exist. Protecting the complainant's identity and allowing for separate conferences, when necessary, provides due process for each party without compromising the rights of either party.

MINNESOTA RULES PART 5210.0530 CITATIONS; POSTING.

All subparts of this Part are amended to remove references to "de minimis violations" because notices of de minimis violations are no longer issued. De minimis violations were

issued in the past for minor, technical violations of a standard; that is, the employer had not implemented safeguards that met the exact specifications of a particular standard. However, the safeguards implemented by the employer were as effective as those specified in the standard in providing employee protection, so no hazard existed. The agency stopped issuing de minimis violations since they carried no requirement for abatement nor any proposed penalty and were merely a written statement of a minor infraction that had no affect on the safety and health of the workplace. In addition, the title of the citation form (referred to in the existing rule) is amended to the new title. The new citation is a combination form that now includes the notification of penalty, which was formerly issued on a separate form.

Subpart 1 is amended to replace the "OSHI" acronym with "investigator" which is defined in Part 5210.0005, subpart 13. This subpart is further amended to clarify that a copy of the Citation and Notification of Penalty will be mailed to authorized employee representatives and to the next of kin if the next of kin requests it. The existing rule requires the Citation and Notification of Penalty to be issued by certified mail to authorized representatives of affected employees. However, bargaining units have requested that the agency stop sending their copies of citations by certified mail. In 1985, the Minnesota Legislature amended the statute removing the requirement that the copies to authorized employee representatives be mailed by certified mail; the statement was not removed from the rule until now.

The time frame within which citations must be issued is clarified in Subpart 1 to be no later than "six months following the completion of the investigation of the alleged violations." This is consistent with Minn. Stat. § 182.66, subdivision 1, which requires the citation to be issued "no later than six months following the inspection." The deleted language required issuance of a citation no later than six months following the "occurrence of any alleged violation." This is difficult, if not impossible, to determine since the violation will only have been discovered at the time of the investigation and there is no way to determine when the violation first occurred or how long it had been in existence prior to the investigation. The change is reasonable to assure consistency with the statute and to make it clear to the reader when the calculation of the allowed six months will begin.

Subpart 2, Item A, is amended to incorporate the correct title of the citation form. The second paragraph of Subpart 2, Item A, is repealed. This statement is unnecessary since the Citation and Notification of Penalty form itself includes a statement which indicates that the violations are "alleged" and that the citation does not constitute a final order unless and until it becomes final--that is, the employer does not file a Notice of Contest within the specified period of time.

Subpart 2, Item B, clarifies the content of a Notification of Failure to Abate to assure that the notice includes references to the original citation, penalty and issuance date as a point of reference for the employer who receives the Notification of Failure to Abate. This rule is necessary to assure that enough information is provided for the employer to identify the violation that is being cited as unabated. This rule is reasonable because it provides employers with the right to receive information they need to either contest the allegation or correct the identified hazard.

Subpart 3 is very similar to existing Minnesota Rules Part 5210.0550, subpart 1, with minor grammatical amendments. No substantive requirements were added or deleted, except that the existing reference to de minimis violations is not repeated, for the reasons specified in the discussion of Subpart 2, new Item A. Existing Minnesota Rules Part 5210.0550, subpart 1, is relocated into this Part because it directly affects the posting of the Citation and Notification of Penalty form.

Subpart 4 is similar to existing Minnesota Rules Part 5210.0550, subpart 2. A change to the existing rule requires the employer to continue to post a contested citation until the hearing date or earlier final disposition of the case. The existing rule simply requires posting until the violation is abated or for 15 days whichever is later. This allows an employer who contests the proposed penalty, for example, to remove a posted citation prior to the settlement of the contestation. The proposed change to this subpart is necessary to assure that the citation remains posted so that employees are kept informed of the nature of the citation during the contestation proceedings. Other rules require posting of the Notice of Contest and any settlement reached. Uncontested citations need only be posted for 15 days or until the violations are corrected, whichever is later, consistent with Minn. Stat. § 182.66, subdivision 2.

Subpart 5 is similar to existing Minnesota Rules Part 5210.0550, subpart 4, and clarifies that an employer who fails to post the Citation and Notification of Penalty is subject to penalty under Minn. Stat. § 182.666, subdivision 5, which allows for a penalty of up to $7,000. This rule is reasonable because it alerts employers to the consequences of failing to post a Citation and Notification of Penalty as required by these rules and Minnesota Statutes Chapter 182.

THE FOLLOWING DISCUSSION PERTAINS TO MINNESOTA RULES 5210.0533 TO 5210.0597:

Effective August 1, 1991, the Legislature restructured the contestation procedures for occupational safety and health citations. Prior to that date, the contestations were filed with the Commissioner who transferred them to the Occupational Safety and Health Review Board for hearing. The Board then handled all filings up to the point of hearing. When the matter was ready for hearing, the Board transferred the matter to an Administrative Law Judge who issued a decision on behalf of the Board. The judge's decision could be appealed back to the Board.

Under the revised statutory provisions set forth in Minn. Stat. § 182.661, the Commissioner will process all contestations up to the point of hearing. When the matter is ready for hearing, the Commissioner will transfer the matter to an Administrative Law Judge who will issue a decision. That decision may be appealed to the Occupational Safety and Health Review Board.

Because all of the filings prior to hearing will be through the Commissioner rather than the Review Board, it is necessary to amend all of the procedural rules to reflect that change. Because many of the procedural rules are under the Review Board's jurisdiction, it is necessary to transfer those rules to the Commissioner. Thus, most of the proposed new rules in Parts 5210.0533 to 5210.0597 are the existing procedural rules of the Review Board with appropriate modifications to reflect the new contestation process. The comparable existing Review Board

procedural rules (Minnesota Rules Chapter 5215) are being amended or repealed in a concurrent, separate rulemaking.

MINNESOTA RULES PART 5210.0533 NOTICE OF CONTEST AND CERTIFICATION OF SERVICE.

Part 5210.0533 describes the new Notice of Contest form which is intended to streamline the contestation process for employers and employees and eliminate the confusion about what constitutes a proper Notice of Contest. In the past, employers filed a Notice of Contest by letter without adequate guidance as to the content of that letter. A "Notice of Contest" form is now required that includes all information noted in this Part. This form was developed by the Commissioner in accordance with Minn. Stat. § 182.661, subd. 2. The Notice of Contest form, which includes blanks for all of this information and an explanation of the employer's rights and duties with respect to the contestation, is mailed with each citation so the employer has the information immediately available. An employee contest may still be filed by letter; an Employee Notice of Contest form is mailed to the employee to be completed in accordance with this Part. This rule is necessary to implement the statutory changes in Minn. Stat. § 182.661, subd. 2. This rule is reasonable because it provides employers and employees with more information than was previously provided and makes the procedure for contesting obvious and simpler to accomplish. In addition, it provides the agency with the reasons for the contestation facilitating a more rapid settlement of some cases during the informal conference process.

Items A through F specify the information that must be included if the contest is to be accepted as valid. This information is included on the Notice of Contest form.

Item A requires the employer's name and address and Item B requires the inspection number from the citation form--these two pieces of information identify the employer's case file.

Item C requires the contesting party to identify the citation number(s) and the item number(s) that are being contested. This information is necessary since any item that is not contested becomes a final order and the violation must be abated. Contested items need not be abated until the contestation is settled. Item C also requires the contesting party to indicate what part of the citation and notification is being contested for each item. Contestations may be filed objecting to the violation itself (e.g., alleging that it did not exist, was improperly cited, etc.), the type of violation (e.g., the violation was cited serious but the employer believes it was only a minor violation), the abatement date (e.g., an employee may contest that too much time was allowed for a violation to be corrected), or the penalty (e.g., the penalty is unfair, too high, etc.).

Item D requires the contesting party to indicate the reason for the contest; acceptable reasons are noted in the discussion of Item C.

Item E requires certification that the Notice of Contest was served on authorized employee representatives or on the employer in the case of an employee contest and that it was posted where the Citation and Notification of Penalty is posted. Lastly, a notarized sworn statement must be completed by the contesting party to assure that the contest is being filed in good faith.

MINNESOTA RULES PART 5210.0536 EMPLOYER CONTEST.

Subpart 1 combines two of the existing Review Board procedural rules which require posting of notices if employees are unrepresented (Minnesota Rules Part 5215.0711) and, if employees are represented, posting is not required but the notice must be served on authorized employee representatives (Minnesota Rules Part 5215.0721). This amended rule requires

employers to post a copy of the Notice of Contest on or before the time it is filed with the Commissioner and, if affected employees are represented by an authorized employee representative, to also serve a copy of the notice on the representative. This change is required by the 1991 legislation in Minn. Stat. § 182.661, subdivisions 3a and 3b, and is necessary to assure that employees are aware of the contestation and of their rights with respect to that contestation. Certification of service and posting required by this Part are expedited by the new Notice of Contest form developed by the Commissioner.

Subpart 2 clarifies that the employer's Notice of Contest form must be posted and served and received within 20 days of the employer's receipt of the citation as required by Minn. Stat. § 182.661, subdivisions 2 and 3b. Minnesota Statutes § 182.661, subdivision 2, changed the filing period from 15 working days to 20 calendar days to make it easier for employers to determine the filing deadline. The rule specifies how dates that fall on a Saturday, Sunday, or state holiday are to be addressed. To assure that employers and employees are aware of the significance of filing a notice of contest within the 20-day time period, the statutory provision is included specifying that a citation will "become a final order of the commissioner and is not subject to review by any court or agency." (Minn. Stat. § 182.661, subd. 2). This subpart allows a facsimile transmission as satisfactorily meeting the 20-day filing deadline, consistent with advancing technology and practice at the Office of Administrative Hearings and district courts.

MINNESOTA RULES PART 5210.0539 EMPLOYEE AND AUTHORIZED EMPLOYEE REPRESENTATIVES CONTESTS.

Employee and authorized employee representatives have been granted certain rights under Minnesota Statutes Chapter 182 since 1973. This rule is essentially the existing Review Board procedural rule, Minnesota Rules Part 5215.0730 amended to clarify employees' rights and responsibilities with respect to contested cases and to implement 1991 legislative changes in Chapter 182.

Subpart 1. Posting and Service.

Item A of this subpart requires the employee who files a Notice of Contest to serve the contest on the employer; the employer is required to post the Notice of Contest where the citation was posted and to keep it posted until the hearing or earlier disposition of the case. Service upon the employer is necessary to notify the employer that the contest has been filed since the employer controls the premises where the alleged violations have occurred and upon which posting is required.

Item B of this subpart requires other authorized representatives (bargaining unit/union representatives) to be served with the Notice of Contest. This may occur, for example, where more than one authorized representative is involved or where the contesting employee is not represented by a bargaining unit or union, but other employees in the workplace have such representation. In such cases, the authorized representatives must be served as required by Minn. Stat. § 182.661, subdivisions 3a and 3b.

Item C of this subpart requires that the certification of posting and service be indicated on the Notice of Contest form. This requirement is similar to the requirement in proposed rule 5210.0533, Item D, which governs employer notices of contest. This requirement is necessary

to assure that the required posting and/or service has been accomplished. It is reasonable in that the certification is accomplished by completing the statement included on all Notice of Contest forms, making it easy for employers or employees who file a notice of contest to comply.

Subpart 2. Filing

Item A of this subpart requires the employee or employee representative to file a letter of contest with the Commissioner within the 20-day time period allowed in Minn. Stat. § 182.661, subdivisions 1 and 2. This rule is necessary to assure that employees know that a letter of contest is an appropriate means of contesting the citation. Because employees do not receive a Notice of Contest form when the citation is mailed to the employer, it is reasonable to allow employees the right to contest by letter.

Item B of this subpart requires the Commissioner to send the employee an Employee Notice of Contest form and requires the employee to complete the form and return it to the Commissioner within seven days. This rule is necessary to assure that the employee filing the Notice of Contest is doing so for good cause and not as a means of harassment of the employer or for another purpose. This rule is reasonable because the employee has already had 20 days in which to file the initial letter of contest; the Notice of Contest form need only be completed, signed, notarized and returned to the Commissioner; a period of seven days is reasonable for this action to occur since the rule allows filing by mail, personal delivery, or facsimile transmission. A longer time period to return the form would unreasonably delay the contestation process.

Item C makes it clear that an employee letter of contest must be filed within 20 days of the date the employer receives the Citation and Notification of Penalty and the Employee Notice of Contest form must be returned within seven days of the date the employee receives the form or the Citation and Notification of Penalty becomes a final order. This rule is necessary to assure that employees are aware that once the 20-day and/or seven-day time periods have elapsed, the agency will not be able to accept their Notice of Contest. This rule is consistent with Minn. Stat. § 182.661, subdivisions 2, 3, and 3b, and places the same responsibilities on employees who contest a citation as are placed on employers who contest.

MINNESOTA RULES PART 5210.0540.

This existing Part number is repealed. The contents of subparts 1 through 7 of this existing rule are renumbered as new Part 5210.0542, subparts 1 through 6. Subpart 8 of existing Part 5210.0540 is repealed. Subpart 8 is redundant and unnecessary because it describes the contest process if objections are filed with respect to the petition for modification of abatement date; these requirements are covered in existing Minnesota Rules Part 5215.2100.

MINNESOTA RULES PART 5210.0542 PETITIONS FOR MODIFICATION OF ABATEMENT DATE.

This Part is essentially a renumbering of existing Minnesota Rules 5210.0540 (proposed for repeal). It is reasonable to provide for a procedure by which an employer may request additional time to abate a citation if the employer is not able to meet one or more of the abatement dates set at the time of the closing conference. This rule is necessary to advise employers of this right and to identify the procedures to be followed. The rule is reasonable because it provides a simple process to follow while assuring that employees are advised of the request.

Subpart 1, Right to File.

This subpart defines the employer's right to seek an extension of an abatement date and advises the employer that accessing this right requires a petition for modification of abatement date to be filed.

Subpart 2, Contents.

This subpart specifies the information that must be provided, in writing, so that a decision can be made concerning the request for more time to abate. The employer is required to provide information concerning the steps that have already been taken, the additional time that will be required, and the reason(s) why additional time is necessary. The employer must also certify that affected employees have been notified of the request either by serving a copy on their authorized employee representative or by posting a copy of the request in the workplace. The employer must also certify that employees have been informed of their right to file an objection to the petition with the Commissioner. This subpart is reasonable because it requires a minimum of information, which generally an employer can provide in a few sentences, and assures that employees are aware of the request since they have a right to object to the employer being given more time to comply.

Subpart 3, Time to File.

This subpart requires a petition for modification of abatement date to be filed with the Commissioner no later than the next working day following the date on which abatement was originally required. This rule is necessary to assure that employers remain aware of the time frames set for correcting a hazard and do not keep putting it off. In addition, it assures that some action is being taken to correct hazards from the day the citation is issued. If circumstances prevent completion of the abatement by the established date, the employer must request additional time by the end of the day following the set abatement date.

Subpart 4, Posting.

This subpart requires the petition for modification of abatement date to be posted in the workplace or served on an authorized employee representative. The petition must be posted for ten days to assure that employees are aware of it. This rule is necessary to assure that employees are notified and are aware of their right to object to the petition within ten days.

Subpart 5, Objections.

This subpart requires employees who file an objection to the petition to specify the reasons for the objection and to serve a copy of the objection on the employer. This rule is necessary to assure that the reasons for the objection are valid and that the employer is aware of the objection which will result in a delay in the agency's response to the employer's petition until the objections have been resolved.

Subpart 6, Approval or Denial of Petition.

This rule combines subparts 6 and 7 of existing Minnesota Rules Part 5210.0540 which prohibits the Commissioner from taking any action on an employer's petition until the expiration of ten days following the date on which the petition was served upon affected employees or their representative. This delay is necessary to accommodate the ten-day time period allowed for employees to file an objection to the petition. The rule requires the Commissioner to consider

several factors when deciding whether to deny or approve the petition. This rule is reasonable since it prohibits action on a petition until employees have had an opportunity to file an objection, if necessary, and it provides notice to employers and employees concerning the factors the Commissioner will consider in denying or approving a petition.

CONTESTED CASES HEARINGS

Parts 5210.0548 through 5210.0597 establish the procedures for contested case hearings under the revised statutory requirements governing contested cases. Previously, contested case hearings were under the jurisdiction of the Occupational Safety and Health Review Board. Many of the rules in Parts 5210.0548 to 5210.0597 are existing Review Board procedural rules (Minnesota Rules Chapter 5215) with some modifications to accommodate the revised statutory requirements for contested cases and to streamline the process for employers and employees. The existing Review Board procedural rules that are proposed for inclusion in Minnesota Rules Chapter 5210 are being amended and/or repealed in a concurrent, separate rulemaking.

MINNESOTA RULES PART 5210.0548 RECORD ADDRESS.

This rule is existing Review Board procedural rule Part 5215.0600 modified to accommodate the revised contestation process. It is reasonable to require persons who file a Notice of Contest or file as a party or intervenor to a contest to provide complete and accurate names, addresses, and phone numbers so that all parties can be promptly and properly notified of action related to the case. Parties who fail to comply with this rule waive their right to service and notice as required by Part 5210.0551. This is a reasonable consequence since failing to file a correct name and address will make it difficult, if not impossible, for the agency to serve required documents on the party.

MINNESOTA RULES PART 5210.0550.

This rule is repealed. The basic requirements for employers to post a copy of the citation have been streamlined and republished in Part 5210.0530, subpart 3.

MINNESOTA RULES PART 5210.0551 SERVICE AND NOTICE.

Subpart 1. Parties and Intervenors.

This subpart is similar to existing Review Board procedural rule, Part 5215.0700, subpart 1. This subpart places no additional burden on any party to a contested case and is necessary to assure that all parties in a contested case receive all appropriate documents.

Subpart 2. Representatives.

This subpart is similar to existing Review Board procedural rule, Part 5215.0700, subpart 2. This subpart places no additional burden on any party to a contested case and is necessary to assure that the appropriate person is served.

Subpart 3. Methods of Service.

This subpart is similar to existing Review Board procedural rule, Part 5215.0700, subpart 3. This subpart places no additional burden on any party to a contested case. It requires

service by first class mail or personal delivery; however, unlike the existing Review Board rule it no longer allows service to be accomplished by posting. The rule is necessary to assure that parties are properly served. It is reasonable to no longer allow service to be accomplished by posting since there is no way to assure that all parties will see and/or read the posting. Where documents and other pleadings are being filed in anticipation of a hearing, the parties are clearly identified and should be served directly.

Subpart 4, Proof of Service; Filing.

This subpart is identical to existing Review Board procedural rule, Part 5215.0700, subpart 4. This subpart is necessary to assure that the responsible person acknowledges that service has been accomplished and identifies how service was completed--by mail or personal delivery. The rule is reasonable in that it requires parties to a contested case hearing to accept responsibility for compliance with requirements. This rule places no additional burden on parties to a contestation that do not already exist under current rules.

MINNESOTA RULES PART 5210.0554 FILING; FACSIMILE.

Subpart 1, Filing by Mail and Personal Delivery.

This subpart clarifies that all pleadings and other documents in a contested case must be filed with the Commissioner. Existing Review Board procedural rule Part 5215.0800 required filing with the Executive Secretary of the Review Board; this requirement was changed by the 1991 Legislature. Once the case has been assigned to an Administrative Law Judge, all pleadings or other documents must be filed with the Administrative Law Judge. This rule is reasonable because the amendments to Minn. Stat. § 182.661, subd. 3, allow the Commissioner to hold an informal conference with the contesting party and attempt to resolve the issues and settle the case. If settlement is reached, a settlement agreement is written and, once the agreement is signed by all parties, the case is closed. If settlement cannot be reached, or if the contesting party refuses the informal conference and wants to go directly to hearing, the case is transferred to an Administrative Law Judge. This rule also clarifies that documents filed by personal delivery or by mail are considered to be filed on the postmark date or the date received by personal delivery.

Subpart 2. Filing by Facsimile.

Existing rules do not address the issue of filing by facsimile. With the advances in technology, many employers inquired about the acceptability of such filings. This rule clarifies that facsimile filings are accepted as meeting the requirements if the time for filing is met and the person filing by facsimile serves the Commissioner with the original signed document within five days. This is enough time to send the original document by mail. This rule is reasonable in that it allows affected parties an additional avenue for filing documents in a timely manner while setting achievable time deadlines. Faxed documents received after 4:30 p.m. are deemed received the next business day because Department of Labor and Industry business hours are 8 a.m. to 4:30 p.m.

Subpart 3, Time Computation.

This new subpart clarifies how the time frame allowed by these rules is computed. The rule is similar to the time computation requirements followed in civil procedures. The rule is

necessary to make it clear when the "day count" begins and ends and which days (e.g., Saturday, Sunday, and legal holiday) are included in the count. It is necessary to clarify this issue because employers and employees who want to file a Notice fo Contest need to be aware that Saturday, Sunday and state holidays are counted in the 20-day computation but if the twentieth day falls on a Saturday, Sunday, or holiday, the contesting party has until the next work day to file the notice.

MINNESOTA RULES PART 5210.0557 FORM OF PLEADINGS.

This proposed rule requires pleadings to meet the requirements of 1400.5100 to 1400.8401 of the administrative hearing rules. Existing Review Board procedural rules have no specific requirements for the form of pleadings. The rule is necessary to assure that pleadings and other documents in a contested case meet minimum requirements and include necessary information. This rule is reasonable in requiring pleadings under these rules to meet the minimum standards set for pleadings under other well-established Minnesota Rules.

MINNESOTA RULES PART 5210.0560, INFORMAL CONFERENCE WITH COMMISSIONER.

This existing rule is repealed. The rule allows the Commissioner to hold an informal conference if an employer or employee requests one. As amended by the 1991 Legislature, Minn. Stat. § 182.661, subdivisions 2 and 3, allows the Commissioner to settle contested cases if a mutually agreeable settlement agreement can be arranged. No specific rule is necessary to hold conferences to discuss the contested case.

MINNESOTA RULES PART 5210.0561 SIGNATURE ON PLEADINGS.

This rule is identical to existing Review Board procedural rule Part 5215.1600. The rule is necessary to assure that pleadings are properly signed and to assure that the signer is aware that the signature is a representation of truthfulness and good faith. The rule is reasonable in that it simply requires the filing party to confirm the fact that the document has been read, is understood, and is true--similar to factors attested to in other legal proceedings. This rule places no additional burden on parties to a contestation that do not already exist under current rules.

MINNESOTA RULES PART 5210.0564 REFUSAL OF PLEADING.

This proposed rule is similar to existing Review Board procedural rule Part 5215.1700 with the exception that it is modified to refer to the Commissioner and an Administrative Law Judge as authorized to refuse a pleading or document that does not meet the administrative hearings rules or these new contestation rules. This change is consistent with statutory changes to the contestation process. This rule places no additional burden on parties to a contestation that do not already exist under current rules.

MINNESOTA RULES PART 5210.0567 CAPTION; CASE TITLE.

This proposed rule is similar to existing Review Board procedural rule Part 5215.1800 with the exception that it has been amended to state that it applies only to pleadings following a Notice of Contest and to those cases involving a third party interest. Notices of contest and petitions for modification of abatement date have been eliminated from this rule. It is not necessary to cover these notices here since they are addressed elsewhere in the proposed rules and this rule governs pleadings where a contested case has been initiated in anticipation of a

hearing before an Administrative Law Judge. This rule places no additional burden on parties to a contestation that did not exist under current rules.

MINNESOTA RULES PART 5210.0570 COMPLAINT; NOTICE; ANSWER.

Subpart 1. Complaint.

This subpart is similar to existing Review Board procedural rule Part 5215.2000, subpart 1, with the exception that references to the Review Board and stated time limits are changed to be consistent with statutory changes set forth in Minn. Stat. § 182.661, subdivision 6. The rule and statute require the Commissioner to serve a formal complaint on the employer no later than 90 days after receiving the Notice of Contest and requires the employer to answer that complaint within 20 days after receiving it. Under existing rules, the Commissioner must file a formal complaint no later than 40 days after receiving the Notice of Contest; the employer has 15 days in which to respond. The change to 90 days for the Commissioner to file a complaint is necessary under the statutory changes in the contestation process which allow the Commissioner to attempt to settle the contestation through the informal conference process. The 40-day time limit does not allow sufficient time for informal conferences to be scheduled, held, and settlement agreements to be written and signed. This change is reasonable in that it accommodates the revised time frame allowed by statute and eliminates the unnecessary filing of formal complaints. The proposed rule also provides that the complaint may be amended without filing a motion and gives a reasonable time for parties to prepare where new issues are raised by an amendment to the complaint. A motion should not be necessary as long as parties are allowed enough time to prepare a response to any additional issues raised, and amendments may simply be of a clinical or clarification nature. A party is always free to object to an amendment or request additional time to prepare, so due process rights are not compromised. No other significant changes are proposed in requirements that presently exist under the Review Board rules.

Subpart 2. Withdrawal of Contest.

This subpart is similar to a provision in Review Board procedural rules, Part 5215.2000, subpart 1. The rule is necessary to assure that persons who file a Notice of Contest are aware of their right to withdraw that notice at any time. The rule is reasonable in that it accommodates those situations where circumstances change and the contesting party no longer wishes to pursue the contestation.

Subpart 3. Summons and Notice to Respondent.

This subpart specifies the information that must be included in the summons and notice to respondent. Items A to D are consistent with items in existing Review Board procedural rules Part 5215.2000, subpart 2, except for changes reflecting the changed statutory time frames and the Commissioner's, rather than the Review Board's, jurisdiction. The rule is reasonable in that it does not place any additional burden on the contesting party but, instead, specifies the information the Commissioner must include in the summons and notice to respondents that will assure they are aware of needed information such as the 20-day time frame for filing an answer, their right to be represented by legal counsel, where to obtain a copy of the rules that will govern the proceedings, and the name of the agency official or attorney general staff member who can facilitate the proceedings.

Subpart 4. Answer.

This subpart is similar to the existing Review Board procedural rule Part 5215.2000, subpart 3. The proposed rule differs from the existing rule in two areas: the time period for filing an answer is amended to 20 days rather than the existing rule's 15-day allowance to reflect the 1991 statutory change; and the proposed rule specifies that the answer must contain not only a statement denying those allegations the party intends to contest (as is required in the existing rule) but must also assert any and all affirmative defenses and that any affirmative defense not asserted is deemed waived. The existing rule does not require the answer to assert any affirmative defenses. This amendment is reasonable in that it is consistent with the rules of civil procedure in the district courts and is necessary to provide the Commissioner with adequate notice of the issues to be litigated.

Subpart 5. Failure to Serve or File.

This subpart is similar to existing Review Board procedural rule Part 5215.2000, subpart 4, with the exception that it allows the Administrative Law Judge to affirm or vacate the contested Citation and Notification of Penalty upon a motion by a party without the need for a hearing. The existing rule requires a hearing to be conducted on the motion before an Administrative Law Judge. The amended rule is necessary to allow an Administrative Law Judge to resolve a contested case where the complaint and/or answer is not filed within prescribed time limits. This will prevent cases from remaining on the open agenda for indeterminate periods of time. This rule is reasonable because it places no additional burden on any party to a contestation and treats all parties equitably. Failure on the part of any party to meet their filing obligations may result in the Administrative Law Judge entering an order in favor of the opposing party.

MINNESOTA RULES PART 5210.0573 PARTY STATUS.

Subpart 1. Affected Employees and Authorized Representatives.

This rule is similar to existing Review Board procedural rule Part 5215.1200 with amendments; however, the amended rule extends the time period for filing party status from five days before the start of the hearing to 45 days. This extension of time is necessary to allow adequate time for the Commissioner and employer to prepare for additional issues that may be raised by employees or employee representatives requesting party status and respond to, or make, discovery requests of the new parties. Five days before the hearing is simply not enough time to prepare for the addition of a new party. This rule is reasonable in that it allows all parties to a contested case hearing additional time for preparation. The remaining requirements from the existing rule covering the content of the notice requesting party status remain the same with the exception that the request must be filed with the Administrative Law Judge (if one has been assigned) or with the Commissioner (rather than the Review Board) in accordance with the 1991 statutory changes.

Subpart 2. Employers.

This subpart is similar to proposed Subpart 1 of this Part and applies the same conditions to employers who wish to file party status in a contested case filed by an employee or authorized employee representative. The filing time, required content of the notice of intent to participate as a party, and the appropriate official to whom filing must be made are the same as those

imposed by Subpart 1 on employees who wish to file party status when the employer contests. This rule is necessary to allow employers the same right to party status as that granted to employees and is reasonable in that it imposes the same requirements on employers that Subpart 1 imposes on employees or authorized employee representatives.

Subpart 3, Objection to Notice of Intent to Participate as Party.

This rule allows any party to a contested case proceeding to file a written objection to a notice of intent to participate as a party. The rule defines the grounds that must be alleged in making the objection. The objection must be filed with the Commissioner or Administrative Law Judge (if one has been assigned), served on all parties including the person requesting party status, and must be filed and served within ten days of the notice of intent to participate as a party was filed and served. The Commissioner is required to refer objections to party status to an Administrative Law Judge for determination of party status. This rule is necessary to define the grounds upon which parties to a contested case may object to someone filing for party status to avoid objections on a frivolous basis and to prevent parties from filing for party status who have no right to be a party. The rule is reasonable in that it allows parties affected by a contested case to object if persons not directly affected by the matter file for party status without just cause and have the matter resolved by an Administrative Law Judge.

Subpart 4, Intervention by Other Persons.

This subpart allows an Administrative Law Judge to allow other persons to intervene in accordance with the provisions of Minnesota Rules Part 1400.6200. This rule is necessary to be consistent with standard practice in cases heard under the Administrative Procedures Act. The rule is reasonable in that it allows the Administrative Law Judge to determine, on the merits of each case, whether or not a person should be allowed to intervene.

MINNESOTA RULES PART 5210.0576 REPRESENTATIVES OF PARTIES AND INTERVENORS.

This rule is similar to existing Review Board procedural rule Part 5215.1400. The requirements remain essentially the same as in the existing rule, except that outdated language stating that a representative is deemed to control all matters in the interest of the party is deleted. A representative by its nature represents the interests of the party and a specific statement is not necessary and may suggest that the party has no right to make decisions. This rule is necessary to make a party to a contested case aware that they may represent themselves or they may be represented by another person of their choice as long as the representation is not prohibited as the unauthorized practice of law. The rule is reasonable in that it does not require representation to be by an attorney or other legal representative and is consistent with the concept of an informal hearing, the process followed in contested case hearings.

MINNESOTA RULES PART 5210.0579 MOTIONS.

This rule is necessary to assure that all motions filed with respect to a contested case are done in a consistent, familiar manner. Requiring motions to be made according to the rules of the Office of Administrative Hearings is reasonable because the rules will govern the proceedings and are already established and well-known.

MINNESOTA RULES PART 5210.0583 CONSOLIDATION AND SEVERANCE OF CASES.

This rule is necessary to assure that consolidation and/or severance of contested cases is done in a consistent, accepted manner. Following the rules of the Office of Administrative Hearings is reasonable because the rules will govern the proceedings and are already established and well-known.

MINNESOTA RULES PART 5210.0589 PROTECTION OF TRADE SECRETS AND OTHER CONFIDENTIAL INFORMATION.

This rule is similar to existing Review Board procedural rule Part 5215.1100 with minor grammatical changes to make the rule more easily understood. The basic requisites of the rule remain unchanged.

MINNESOTA RULES PART 5210.0595 HEARING.

Subpart 1. Notice of Hearing and Order.

This subpart requires the Commissioner to serve on all parties a written notice and order of hearing in accordance with the rules of the Office of Administrative Hearings. The rule is necessary to assure that all parties are notified of the hearing date, time, and place. The rule requires the Commissioner to provide this notice and does not require any action on the part of other parties to a contested case. The rule further requires all proceedings to be conducted in accordance with the rules of the Office of Administrative Hearings. Following the rules of the Office of Administrative Hearings is reasonable because the rules will govern the proceedings and are already established and well-known.

Subpart 2. Notice of Hearing.

This subpart specifies the time period in which the Notice of Hearing must be posted or served on employees or authorized employee representatives and requires certification of the service and posting. The rule specifies that the consequence of failing to serve or post the notice of hearing may be a default judgment. This reflects the importance of giving employees and other interested parties the opportunity to declare party status or attend the hearing, and is consistent with the consequence of failure to serve the Notice of Contest. The rule is necessary to assure that all employees are aware of the scheduled hearing; certification of the posting or service assures the Commissioner and/or Administrative Law Judge that employees have been notified of the hearing. The rule is reasonable in that it makes notification of employees easy to accomplish while assuring that employees are advised of the hearing.

MINNESOTA RULES 5210.0596 SETTLEMENT; MISCELLANEOUS PROVISIONS.

This Part implements the statutory changes in Minn. Stat. § 182.661, subd. 5, and includes requirements similar to existing Review Board procedural rule 5215.0300.

Subpart 1. Service and Notice.

This subpart requires a settlement agreement to be posted where the Citation and Notification of Penalty are posted and served on authorized employee representatives. Posting and service is documented on the Notice of Contest form. This rule is necessary to assure that employees are aware of the resolution of a contested case. The rule is reasonable since it makes

notifying employees of the settlement as easy as posting the agreement or providing a copy to authorized employee representatives.

Subpart 2. Contents of Settlement Agreements.

This rule specifies the minimum information that must be included in every settlement agreement. The burden of assuring that this information is included rests with the Commissioner and places no burden on employers or employees.

Subpart 3. Objection to Settlement Agreement.

This rule allows employees or an authorized employee representative to file an objection to a proposed settlement with the Commissioner within ten days after posting and service of the agreement. If an objection is received, the Commissioner may renegotiate the settlement, may refer the agreement and objection to an Administrative Law Judge for resolution, or may withdraw the proposed agreement and allow the contestation to continue in accordance with established procedures. If no objections are filed, a settlement agreement is final only after the close of the ten-day posting period. This rule is necessary to allow employees to bring forth additional information if the settlement agreement is unacceptable. The rule is reasonable in that it does not allow a settlement agreement to become final for ten days, during which time employees are allowed time to review the settlement and to file objections if they so desire.

MINNESOTA RULES PART 5210.0597 EXPEDITED PROCEEDING.

This rule is similar to existing Review Board procedural rule Part 5215.5400 with the exception that references to the Review Board and the Executive Secretary are changed to reference the Commissioner in accordance with statutory changes. The rule allows accelerated hearings in those instances where necessary and allows the Administrative Law Judge to take whatever fair and reasonable steps may be necessary to expedite the case. The Commissioner is required to notify all parties if an expedited proceeding is ordered. The Commissioner may order an expedited proceeding, but the Administrative Law Judge assigned to the hearing will make all rulings concerning the time for filing pleadings and all other matters consistent with a fair and impartial hearing. This rule is necessary to accommodate those cases that may require quicker settlement via the hearing process. The rule is reasonable in that it gives the Administrative Law Judge the authority for decisions in matters related to the expedited hearing. No additional burden is placed on other parties to the contested case.

MINNESOTA RULES PART 5210.0650 ANNUAL SUMMARY.

Subpart 4 of this rule is amended to reference the correct Part. Minnesota Rules Part 5210.0440 that is referenced in the existing rule is being repealed as part of this rulemaking.

VARIANCES

MINNESOTA RULES PART 5210.0800 PURPOSE AND SCOPE.

This Part is revised to clarify that the rules in Parts 5210.0800 to 5210.0870 implement the variance provisions of Minnesota Statutes Chapter 182 and to include references to the appropriate statutory provisions.

MINNESOTA RULES PART 5210.0810 EFFECT OF VARIANCES.

This Part is amended to refer to the new contestation process and eliminate the statement concerning a citation that is pending before the Occupational Safety and Health Review Board since contestations are now filed with the Commissioner and only on appeal are brought before the Review Board. This rule, which allows the Commissioner the discretion of not considering a variance request for a standard for which an employer has already been cited and which is under contest, does not add any requirements or obligations for employers or employees. The contestation process is the avenue for resolution of any difficulties the employer or employees have in abating the cited violation or in seeking relief from the requirement of the standard that was cited.

MINNESOTA RULES PART 5210.0820 TEMPORARY VARIANCES.

Subpart 1, Application.

This subpart is amended to require an employer to file a written application for a temporary variance that includes the information required by Minn. Stat. § 182.655, subdivisions 5 and 7. The existing rule used the word "may" in error. The statute (Minn. Stat. § 182.655, subd. 5) states that an employer "may apply" for a temporary variance; however, the statute continues by stating that a temporary order "shall be granted only if the employer files an application which meets the requirements of subdivision 7..." Subdivision 7 states that "an application for a temporary order...shall contain..." thereby making the application contents mandatory.

Subpart 2, Contents; and Subpart 3, Additional Facts.

These subparts are repealed because they restate requirements that are already stated in Minn. Stat. § 182.655, subdivisions 5 and 7. These subparts are redundant and unnecessary.

Subpart 4, Hearing.

This subpart is amended to correct awkward language and to include authorized employee representatives of affected employees as individuals who must be given notice of a hearing if one is held on a variance application. The amendments place no additional burden on employers or employees that do not already exist under the current rule.

Subpart 5, Interim Orders; Application and Subpart 6, Interim Orders; Notice of Denial or Grant.

These subparts are repealed. The requirements of these existing subparts, along with subparts 4 and 5 of Minnesota Rules Part 5210.0830, have been amended and combined as one rule governing interim orders, new proposed Minnesota Rules Part 5210.0835. This consolidation eliminates excessive wordiness from these rules and makes the information governing interim orders more easily understood and accessible. No new burden is placed on employers or employees by these amendments.

Subpart 7, Temporary Variance Order.

This subpart is amended to make it clear that its provisions apply to temporary variance orders only and that the Commissioner will decide the merits of granting a temporary variance

in accordance with the requirements of Minn. Stat. § 182.655, subdivision 6. The deleted language in this subpart merely paraphrases the statutory requirements.

MINNESOTA RULES PART 5210.0830 PERMANENT VARIANCES.

Subpart 1. Application.

This subpart is amended to require an employer to file a written application for a permanent variance that includes the information required by Minn. Stat. § 182.655, subdivision 8. The existing rule used the word "may" in error. The statute (Minn. Stat. § 182.655, subd. 8) states that an employer "may apply" for a permanent variance; however, the subsequent requirements of the subdivision are stated as "shall" or mandatory requirements. This rule is reasonable because it provides reference to the statute which governs an employer's request for a variance and clarifies that the request must be in writing and provide the details necessary for a decision to be made.

Subpart 2. Contents.

This subpart is repealed because it restates the requirements of Minn. Stat. § 182.655, subdivision 8. This subpart is redundant and unnecessary.

Subpart 3. Hearing.

This rule is amended to correct awkward language and to include authorized employee representatives of affected employees as individuals who must be given notice of a hearing if one is held on a variance application. The amendments place no additional burden on employers or employees that do not already exist under the current rule.

Subpart 4. Interim Orders; Application and Subpart 5. Interim Orders; Notice of Denial or Grant.

These subparts are repealed. The requirements of these existing subparts, along with subparts 5 and 6 of Minnesota Rules Part 5210.0820, have been amended and combined as one rule governing interim orders, new proposed Minnesota Rules Part 5210.0835. This consolidation eliminates excessive wordiness from these rules and makes the information governing interim orders more easily understood and accessible. No new burden is placed on employers or employees by these amendments.

Subpart 6. Permanent Variance Order.

This subpart is amended to make it clear that its provisions apply to permanent variance orders only and that the Commissioner will decide the merits of granting a permanent variance in accordance with the requirements of Minn. Stat. § 182.655, subdivision 8. The deleted language in this subpart paraphrases the statutory requirements and is redundant.

MINNESOTA RULES PART 5210.0835 INTERIM ORDERS.

This rule is a consolidation of "interim order" provisions that were part of existing Minnesota Rules Parts 5210.0820 and 5210.0830. Rather than repeat the identical language in two separate rules, the requirements are combined as one rule that governs interim orders for permanent and temporary variances. No new requirements are added nor are any additional burdens placed on employers that do not already exist under the current rule.

MINNESOTA RULES PART 5210.0840 MODIFICATION, REVOCATION, AND RENEWAL OF RULES OR ORDERS.

This rule is repealed. The existing rule paraphrases the statutory requirements and is unnecessary. Employer and employee rights are not affected by this repeal.

MINNESOTA RULES PART 5210.0850 ORDER DENYING VARIANCE.

This rule is amended to correct awkward or unclear language to make it easier to read and understand. No additional burden is placed on employers or employees nor are any rights of employers and employees affected by this change.

MINNESOTA RULES PART 5210.0860 OBJECTION TO VARIANCE DENIAL.

The title of this Part as well as references in the rule to "contest" or "notice" are changed to "objection" to avoid confusion with the "Notice of Contest" that is required for contesting a citation but is not intended to be used in this situation. Opposition to the Commissioner's decision to deny a variance is referred to as an "objection." References to "Review Board" or "Board" are changed to "Administrative Law Judge" or "Commissioner" as appropriate to be consistent with the statutory change governing contested case hearings. No changes in employer or employee rights and responsibilities are proposed nor are existing rights and responsibilities affected by these amendments.

MINNESOTA RULES PART 5210.0870 MULTISTATE VARIANCES.

This rule is revised to clarify the intent and to make it easier to understand; no substantive changes are proposed. Employers who obtain a federal variance applicable in another state may apply that variance in Minnesota if they meet the criteria detailed in Items A to C of this rule. This eliminates the need for employers to file another variance request in Minnesota or to follow separate guidelines in Minnesota as opposed to another state in which the variance was granted. These amendments clarify the information an employer must file in order to obtain Minnesota acceptance of a federal or multi-state variance. The rule is reasonable because it allows the Commissioner to accept a variance granted by Federal OSHA or by another state OSHA program without requiring the employer to submit another application, eliminating duplicate filing on the part of the employer.

IV. SMALL BUSINESS CONSIDERATIONS.

Minnesota Statutes § 14.115 requires state agencies proposing rules that affect small businesses to consider methods for reducing the impact of the rules on small businesses and to incorporate into the proposed rules any of the methods that the agency finds to be feasible, unless doing so would be contrary to the statutory objectives that are the basis for the proposed rulemaking.

The adoption of the proposed amendments to existing rules and proposed new rules discussed in this Statement of Need and Reasonableness will have only minimal impact on small businesses. Primarily the rules implement statutory changes, simplify the contestation process, and clarify rights and responsibilities of employers and employees with respect to inspections,

No new major requirements are proposed for adoption. Most of the revisions clarify currently effective provisions, remove duplicative statutory language, or streamline the contestation process for employers and employees. Removing the ambiguous or repeated statutory language makes the rules easier for employers and employees to interpret and understand. The rules largely implement statutory procedures where an employer wants to challenge part or all of a citation or OSHA standard. Many of the rules are procedural and only apply in the event there is such a challenge. The rules are designed to require only the minimum information necessary to provide all parties with notice of the issues.

Therefore, an exemption or less stringent standard for small businesses pursuant to Minn. Stat. § 14.115, subdivision 2 (a) through (e) has been determined to be inappropriate, unwarranted, and unnecessary.

V. FISCAL IMPACT ON LOCAL PUBLIC BODIES.

The Commissioner has considered the fiscal impact of the adoption of these rules on local public bodies pursuant to Minn. Stat. § 14.11, subdivision 1 (1994), and has found none. No additional financial burdens are placed on local public bodies as the proposed changes will not affect the expenditure of public monies by local bodies.

Gary W. Bastian
Commissioner

Date: 10-30-95