REPORT

OF

REVISOR OF STATUTES

****

CONCERNING CERTAIN OPINIONS OF THE SUPREME COURT

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Submitted to the Legislature of the State of Minnesota

NOVEMBER 1986

Minnesota Legislature
Office of the Revisor of Statutes

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November 15, 1986

The Honorable Jerome M. Hughes
President of the Senate

and

The Honorable David M. Jennings
Speaker of the House of Representatives

State Capitol
Saint Paul, Minnesota 55155

Gentlemen:

Minnesota Statutes, section 3C.04, subdivision 3, requires the Revisor of Statutes to biennially report to the Legislature on statutory changes recommended or statutory deficiencies noted in opinions of the Supreme Court of Minnesota.

I am, therefore, pleased to transmit to you our report on opinions issued by the Supreme Court between September 30, 1984 and September 30, 1986.

Respectfully submitted,

Steven C. Cross
Revisor of Statutes
296-0949

SCC/at
cc: Chairman and Members,
Senate Judiciary Committee

Chairman and Members,
House Judiciary Committee

REPORT OF THE REVISOR OF STATUTES

TO THE

LEGISLATURE OF THE STATE OF MINNESOTA

CONCERNING CERTAIN OPINIONS OF THE SUPREME COURT

The Revisor of Statutes respectfully reports to the Legislature of the State of Minnesota, in accordance with Minnesota Statutes, section 3C.04, subdivision 3, which provides that the Revisor of Statutes shall:

> "Report to the Legislature by November 15 of each even numbered year any statutory changes recommended or discussed or statutory deficiencies noted in any opinion of the supreme court of Minnesota filed during the two-year period immediately preceding September 30 of the year preceding the year in which the session is held, together with such comment as may be necessary to outline clearly the legislative problem reported."

The opinions of the Supreme Court of Minnesota concerning statutory changes recommended or discussed, or statutory deficiencies noted during the period beginning September 30, 1984, and ending September 30, 1986, together with a statement of the cases and the comment of the court, are set forth on the following pages in numerical order, according to statutory section number.

In each instance where a practical remedy for the statutory defect is suggested by the Supreme Court or is otherwise readily apparent, the summary of the case concludes with a brief statement thereof. This statement is included in an attempt to make this report of more value to the user, and the remedies suggested are not, in most instances, intended to be exclusive. In addition, this report concludes with a bill containing amendments designed to remedy the defects. If a possible remedy

can be foreseen as causing substantial controversy, no remedy is suggested.

TABLE OF CASES

Section 169.121, Subdivision 4

PHILLIPPE v. COMMISSIONER OF PUBLIC SAFETY

Phillippe v. Commissioner of Public Safety, 374 N.W.2d 293 (Minn.App. 1985) (Sept. 17, 1985) involved an appeal from a revocation, denial, and cancellation of appellant's driving privileges. The question of statutory construction was whether a conviction for driving while intoxicated under a city ordinance should be counted for the purpose of determining penalties under Minn.Stat. § 169.121, subd. 4.

The Court of Appeals held that it should not, noting that section 169.121, subdivision 4, prior to a 1982 amendment (c. 423 s. 5) provided for penalties for:

> "Every person who is convicted of a violation of this section or an ordinance in conformity therewith * * * ." (Emphasis added)

Following the amendment, the subdivision now provides that:

> "A person convicted of violating this section shall have his driver's license or operating privileges revoked by the commissioner of public safety as follows * * * (Emphasis added)

After examining the 1982 amendment the Court stated:

> "Consequently, we agree with the appellant that the legislature determined that convictions under an ordinance should not be counted for the purpose of determining penalties under Minn.Stat. § 169.121, subd. 4. We recognize that this conclusion may seem contrary to the legislative policy to treat multiple DWI offenders more strictly. * * * However, we cannot add words to the statute which the legislature specifically deleted."

One might agree with the Court that the action in striking "or an ordinance in conformity therewith" is a bit inconsistent with a general policy of getting tough on drunken drivers. The Court observed that the same phrase was left in subdivision 3 of

section 169.121 which imposes criminal penalties when this subdivision was also amended by Laws 1982, section 4. Nevertheless the ruling of the Court appears quite correct and was apparently not appealed to the Supreme Court. Any action to reinsert the stricken phrase into subdivision 4 is for the legislature.

Section 176.011, Subdivision 2

HOUSER BY HOUSER v. DAN DUGAN TRANSPORT CO.

Houser by Houser v. Dan Dugan Transport Company, 361 N.W.2d 62 (Jan. 25, 1985) was a workers' compensation case wherein the issue was whether the grandchild of a decedent killed in an accident in the scope of his employment was a "child" within the meaning of Minn.Stat. § 176.011, subd. 2 (1982) and therefore entitled to dependency benefits.

The grandchild's father (son of decedent) and mother had been divorced some two years previously and the father awarded custody and duty of support. The father in fact provided little support, though employed, living nearby, and with reasonable earnings. Deceased and his wife in fact provided a home for their grandchild and substantially all necessities. At no time did they undertake to obtain legal custody of their granddaughter.

Minnesota Statutes, § 176.011, subdivision 2 reads:

> "Subd. 2. [CHILD.] "Child" includes a posthumous child, a child entitled by law to inherit as a child of a deceased person, a child of a person adjudged by a court of competent jurisdiction to be the father of the child, and a stepchild, grandchild, or foster child who was a member of the family of a deceased employee at the time of his injury and dependent upon him for support." (Emphasis added)

It was generally agreed that the granddaughter was a "member of the family" of the deceased. The more difficult question was whether she was "dependent" on the deceased for support. Despite the fact that the grandparents' support was gratuitous, the Court majority found that she was in fact dependent on her grandparents for support. This finding was

made despite findings that her father at all pertinent times possessed the monetary and physical capability to support her, as well as having both the legal custody and obligation to support his daughter. The opinion stated:

> "Relators assert, with some merit, that to allow the workers compensation system to be used as a means of child support in situations in which a grandparent, gratuitously or as a favor to an able, financially secure and independent son, and who partially supports the child, convolutes the meaning of "dependent." However, for the reasons stated, such concern should be addressed to the legislature which may or may not wish to "clarify" the statutory meaning of "dependent" as used in Minn.Stat. § 176.011, subd. 2." (Emphasis added)

Or, as stated in a dissenting opinion:

> "* * * the majority's result, on the facts of this case, is plainly at odds with any purpose that reasonably could be ascribed to the legislature. * * * This surely is not a situation where the child was without support unless given it by the grandparents. It was, more realistically, a situation where the parents did not ask reimbursement from the child's father and were making a gratuity to their son, relieving him of the obligation that was his, not theirs."

Insertion of the word "legally" as a modifier of the phrase "dependent upon him for support" in section 176.011, subdivision 2, would apparently adopt the dissenting view.

Sections 179A.20, Subdivision 4 and 197.46

AFSCME COUNCIL 96 v. ARROWHEAD REG. CORR. BD.

AFSCME Council 96 v. Arrowhead Regional Corrections Board, 356 N.W.2d 295 (Oct. 12, 1984) presented the question as to whether an employee who was a veteran and who was discharged from his employment was entitled to a hearing under the veteran's preference law (Minnesota Statutes, § 197.46) and also to arbitration of the dismissal under the collective bargaining provisions of the public employee's labor relations act (now Minnesota Statutes, chapter 179A).

The Supreme Court held that he was, stating:

> "Despite the equivalence of the two hearing procedures, when both are properly conducted, there are strong public policies which dictate allowing a veteran to elect both hearings."

The Court also cited what it termed "practical" reasons for allowing both hearings, including continued employment or pay during the hearing and union representation at the hearing.

This case would not be included in this report were it not for a concurring opinion by Justice Simonett, in which three additional justices concurred. The concurring opinion stated:

> "Consequently, even though Hammerberg has requested and received his Veteran's Preference hearing, it seems to me that the union is not precluded from pursuing its contract right to grievance-arbitration. The result is that Hammerberg gets two bites of the apple.
>
> The result, it seems to me, is wasteful and confusing. There is no need to have two separate, independent discharge proceedings. The basic issue involved, regardless of which hearing is held, is whether the public employer has just cause to discharge the employee. The public employer should not be required to prove its case twice. Even respondent in its brief says, "employees and unions are no more anxious to go through repeated procedures than are employers." It should be

possible to devise a legislative solution that both preserves the employee's right to choose his remedy for seeking reinstatement and recognizes the union's interest, without having duplicative procedures. * * *."

(Emphasis added)

Thus it appears that a provision could be inserted into section 179A.20, subdivision 4 and also possibly section 197.46 each precluding a hearing if a hearing was previously held under the other section. Presumably this would require a veteran-employee to elect his remedy.

Section 268.04, Subdivision 26

TUMA v. COMMISSIONER OF ECONOMIC SEC.

Tuma v. Commissioner of Economic Security, 386 N.W.2d 702 (May 9, 1986) was an appeal from a denial of extended unemployment benefits. At the time petitioner was terminated as an employee, he was owed $174 in wages for the three days immediately prior to the date of termination. These wages were not paid until Friday of the following week -- according to the employer's regular payment schedule. In between the dates of termination and payment the base period applicable to petitioner ended. Because the $174 could thus not be included in base period wages under the ruling of the commissioner as affirmed by the Court of Appeals, petitioner was left $60 short of the amount of earnings needed to qualify for extended benefits.

The 1983 legislature had amended the definition of "wage credits" from "wages due and payable but not paid" to "wages actually or constructively paid." (Laws 1983, C. 372, s. 5) This definition was the point of contention in this case. The Supreme Court stated:

> "We believe that the "actually or constructively paid" language in subdivision 26 is ambiguous. Although the meaning of "actually paid" is quite clear, it is difficult to determine just what the legislature intended by the phrase "constructively paid." The Commissioner interprets "constructively paid" to mean the point at which the employer has taken all steps necessary to accomplish payment. Another reasonable interpretation of "constructively paid," however, would view payment from the employee's standpoint, allowing wages to be constructively paid whenever the employee has done all that is necessary for him or her to receive payment. Because subdivision 26 is subject to two reasonable interpretations, it is ambiguous. We must therefore determine what the legislature intended by this language."

The Supreme Court proceeded with a brief discussion of legislative intent, centering on the need for liberal construction and the injustice in interpreting the definition of wage credits in a manner that would allow a base period of less than 52 full weeks. The Court concluded:

> "Our analysis leads to the conclusion that the language "actually or constructively paid" in the definition of "wage credits" was meant to include all wages earned by an employee within his or her base period, regardless of whether the wages are received during the base period. The ambiguity of the language, along with the legislature's preference for a broadly construed unemployment compensation law, require this conclusion. We therefore reverse the Court of Appeals and hold that Tuma is entitled to have his last paycheck of $174 included under Minn.Stat. § 268.071, subd. 3(3), when his extended benefits are calculated."

The Court appears to have reached an equitable conclusion. It might well be considered unjust that the possibility exists of being denied benefits solely due to the vagaries of an employer's pay system. The Legislature might wish, in effect, to affirm the Court's holding by inserting "or payable" into the definition of "wage credits" and also the definition of "credit week" in subdivision 29.

Section 268.06, Subdivision 5

NEW LONDON NURSING HOME, INC. v. LINDEMAN

New London Nursing Home, Inc. v. Lindeman, 382 N.W.2d 868 (Minn.App. 1986) (Mar. 4, 1986) was a challenge to the constitutionality of a statute (268.06, subdivision 5) requiring the nursing home's experience rating to be charged in part for unemployment compensation benefits paid to the respondent.

Respondent was a full-time employee of the Willmar AVTI. She also worked part time as a nurses aide at the nursing home, two eight-hour shifts on one weekend per month. She was laid off at the AVTI for budgetary reasons and claimed unemployment compensation. The nursing home was charged for a portion of her benefits, even though she continues to work there as before.

The applicable portion of section 268.06, subdivision 5 provides that:

> "benefits paid to an individual who earned base period wages for part-time employment shall not be charged to * * * the experience rating account of an employer if the employer (1) provided weekly base period part-time employment; (2) continues to provide weekly employment equal to at least 90 percent of the part-time employment * * * ." (Emphasis supplied)

The nursing home contended, and the Court of Appeals agreed, that if the part-time employment had been on a weekly basis rather than one weekend per month the statute would exempt the nursing home from payment of a portion of the benefits, and that the statute thus impermissibly discriminates between employers employing part-time workers on a weekly basis and those who employ part-time workers regularly, but not weekly.

The Court of Appeals stated:

"To charge (or, in effect to specially assess) Glen Oaks' account for a portion of Lindeman's unemployment compensation benefits as a result of another employer's actions and due to no fault of Glen Oaks, while not imposing that same burden under similar circumstances on an employer who provides weekly, part-time employment, violates the constitutional mandate requiring that those who are similarly situated be treated alike.

Minn.Stat § 268.06, subd. 5 (1984), as applied, violates relator's right to equal protection under the United States Constitution."

An amendment substituting a term such as "periodic" for "weekly" in subdivision 5 would appear in order.

Section 325B.15

JACOBSEN v. ANHEUSER-BUSCH, INC.

Jacobsen v. Anheuser-Busch, Inc., 392 N.W.2d 869 (Aug. 29, 1986) arose over the attempt of a beer wholesaler to sell and transfer his business and Budweiser franchise to another wholesaler.

In 1976 Jacobsen and Anheuser-Busch entered into a franchise agreement for the Duluth area. The agreement reserved to the brewer the right to approve or disapprove a change in ownership of the wholesale distributorship and to terminate the contract if it did not approve a transfer.

About nine months after execution of the franchise agreement the Minnesota Beer Brewers and Wholesalers Act (M.S. c. 325B) became effective. One provision of the Act (s. 325B.06) prohibited a brewer from unreasonably withholding consent to a transfer of a franchise if the proposed transferee met the brewer's reasonable qualifications and standards. The true point of controversy in the case was, however, section 325B.15, which provides:

> "The provisions of sections 325B.01 to 325B.17 shall cover agreements in existence on May 28, 1977, as well as agreements entered into after May 28, 1977." (Emphasis added)

The Supreme Court found that section 325B.15 constituted an impairment of contract and as such could be upheld only if it were found to serve a "significant and legitimate public purpose." Finding no such purpose served, the Supreme Court concluded:

"Accordingly, our answer to the certified question is that

> the Minnesota Beer Brewers and Wholesalers Act, Minn.Stat. § 325B.01, et seq. applied retroactively to a preexisting agreement between a brewer and a wholesaler as mandated by Minn.Stat. § 325B.15 does unconstitutionally impair the parties rights and obligations set forth in the preexisting agreement, U.S. Const. art I, § 10 and Minn. Const. art. 1, sec 11"

The defect in the statute could be remedied by striking from section 325B.15 the words "in existence on May 28, 1977, as well as agreements"

Section 340.941 (340A.501)

STATE v. GUMINGA

State v. Guminga, ... N.W.2d ... (Oct. 31, 1986) was a criminal prosecution of the owner of a licensed on-sale liquor establishment for the act of an employee in selling liquor to a minor. The statute under which the owner was charged was Minnesota Statutes 1984, section 340.941, which provided:

> "Any sale of liquor in or from any public drinking place by any clerk, barkeep, or other employee authorized to sell liquor in such place is the act of the employer as well as that of the person actually making the sale; and every such employer is liable to all the penalties provided by law for such sale, equally with the person making the same."

The question of the constitutionality of section 340.941 under the due process clauses of the state and federal constitutions was certified to the Supreme Court, which stated that:

> "We find that, in Minnesota, no one can be convicted of a crime punishable by imprisonment for an act which he did not commit, did not have knowledge of, or give expressed or implied consent to the commission thereof.
>
> The certified question is thus answered in the affirmative that we hold section 340.941 unconstitutional under the provisions of the Minnesota Constitution cited."

Though not mentioned by the Supreme Court and probably not material to a decision in the instant case, section 340.941 was repealed by the Legislature effective August 1, 1985. (Some four months after the alleged illegal sale was made) It was replaced by section 340A.501 which provides:

> "Every licensee is responsible for the conduct in the licensed establishment and any sale of alcoholic beverage by any employee authorized to sell alcoholic beverages in the establishment is the act of the licensee."

It is perhaps questionable as to whether or not the same

constitutional infirmity would be found in the new section 340A.501 as the Court found in the former section 340.941. If it is believed the problem still exists, perhaps an amendment could be inserted to limit the vicarious liability imposed to civil liability only.

Section 340A.801

KUIAWINSKI v. PALM GARDEN BAR

Kuiawinski v. Palm Garden Bar, 392 N.W.2d 899 (Minn.App. 1986) (Sep. 2, 1986), petition for review denied Oct. 29, 1986, was a dram shop action in which the action of the revisor of statutes in codifying a legislative enactment into a recodification of the liquor laws, including the dram shop law, was ruled improper.

The liquor laws were recodified by Laws 1985, c. 305. Article 10, section 1 of this act contained the substance of the former dram shop law (M.S. 340.95) codified as M.S. 340A.802. All sections of chapter 340, including 340.95, were repealed.

At the same session, Laws 1985, c. 309, s. 12 was enacted. Section 12 made substantive changes in section 340.95.

At the 1985 special session the legislature enacted section 3 of Special Session Laws, chapter 16, article 2, providing that:

> "Sec. 3. [CORRECTION.] Subdivision 1. [CHAPTER 340 RECODIFICATION; INSTRUCTION TO REVISOR.] If a provision in Minnesota Statutes, chapter 340 is amended by the 1985 regular session and H.F. No. 1145 is enacted by the 1985 regular session the revisor shall codify the amendment consistent with the recodification of chapter 340 by H.F. No. 1145 notwithstanding any law to the contrary.
>
> Subd. 2. [EFFECTIVE DATE.] Subdivision 1 is effective the day following its final enactment."

Acting under the legislative instruction, the revisor merged the substantive amendments contained in chapter 309 into section 340A.802 which is the recodified version of section 340.95. The law as thus written appears in the 1985 Supplement and Minnesota Statutes 1986.

The trial court ordered that section 340A.801 be revised

and rewrote the section by deleting material added by chapter 309 and reinserting a phrase deleted -- in effect nullifying the amendments made by chapter 309. The Court of Appeals affirmed, stating:

> "When construing statutes, the courts are to determine and give effect to the intent of the legislature. Minn.Stat. § 645.16. If the revisor has erred in codifying legislative enactments, it is the duty of the judiciary to give effect to the legislative intent and not to the letter of the law as codified because the revisor lacks the authority to make changes in the law. (Citation omitted)
>
> The trial court scrupulously scrutinized the legislation from the summer of 1985 as it pertained to the amendment of section 340.95. In doing so, the court determined, from chapter 16 of the first special session, that the intent of the legislature was to pass into law chapter 305 in toto and those provisions of chapter 309 that did not conflict with chapter 305. The action of the court in rewriting the statute is consistent with what the legislature intended; the revisor of statutes, as the trial court found, made a patent error when the amendments were codified. Therefore, we approve the trial court's revision of section 340A.801."

The Supreme Court denied a petition for review.

If the legislature wishes, it should be possible to devise language affirming the action of the revisor, and in that way preserving the substance of the amendment made to section 340.95 by chapter 309.

Section 466.03, Subdivision 2

BERNTHAL v. CITY OF ST. PAUL

Bernthal v. City of St. Paul, 376 N.W.2d 422 (Nov. 8, 1985) was a personal injury action brought against the city by a victim who had received workers' compensation benefits for the injury. At issue was the constitutionality of the statute (Minn.Stat. § 466.03, subdivision 2) granting immunity from liability to a municipality in the case of "any claim for injury or death of any person covered by the workers' compensation act."

The case was certified to the Supreme Court by the Court of Appeals (361 N.W.2d 146) on the constitutional issue, and the Supreme Court held that:

> "The municipal tort immunity provision of Minn.Stat. § 466.03, subd. 2 (1984), is void because it unconstitutionally discriminates between victims of municipal tortfeasors who are covered by the Workers' Compensation Act and those who are not."

The challenge to the statute was based upon the equal protection clauses of the United States and Minnesota Constitutions which require that all persons similarly situated be treated alike unless a rational basis exists for discriminating among them.

The Supreme Court speculated upon possible reasons for a distinction between a plaintiff covered by workers' compensation and one lacking coverage (even though covered by other insurance) but could discern no rational basis for the distinction and thus concluded:

> "We hold that subdivision 2 of Minn.Stat. § 466.03 violates the equal protection guarantees of the state and federal constitutions and is therefore void."

Absent a clear legislative expression of reasons for the distinction, a repeal of the offending subdivision may be in order.

Section 487.39, Subdivision 1

STATE v. PILLA

State v. Pilla, 380 N.W.2d 207 (Minn.App.1986) (Jan 21, 1986) represented an appeal of a speeding conviction from the County Court to the Court of Appeals. Section 487.39, subdivision 1 required the notice of appeal to be filed "with the clerk of court of the county in which the action was heard within 10 days * * * ." (Emphasis added)

Here the notice of appeal was filed with the county clerk of court within 10 days of the conviction. It was returned by the county court administrator with advice to file the notice with the Court of Appeals. The notice was subsequently filed with the clerk of appellate courts 19 days after the expiration of the time prescribed for appeal.

The Court of Appeals held that while the appeal was not filed with the Court of Appeals within 10 days of the judgment of conviction as required by Minn.R.Crim.P. 28, appelant's compliance with the statute constituted good cause for extending the filing time. The Court of Appeals stated:

> "For some unknown reason, the statute still contains old language directing appeals to the county clerk of court and was not changed when the court of appeals was established."

The statutory deficiency pointed out by the Court of Appeals in this case could probably best be remedied by a repeal of the entire section 487.39. The applicable Rule 28 of the Minnesota Rules of Criminal Procedure appears to cover all items included in section 487.39 quite comprehensively.

Section 514.05

R.B. THOMPSON, JR. LUMBER v. WINDSOR DEV.

R.B. Thompson, Jr. Lumber Company v. Windsor Development Corporation, 383 N.W.2d 362 (Minn.App. 1986) (Mar. 11, 1986) involved the foreclosure of a number of mechanic's liens and their conflicting priority with mortgages upon the property. The law governing the priority of mechanic's liens (Minn.Stat. § 514.05 provides that; "As against a bona fide purchaser, mortgagee, or encumbrances without notice, no lien shall attach prior to the actual and visible beginning of the improvement * * * ."

The 1974 legislature amended section 514.05 by adding:

> "Engineering or land surveying services with respect to real estate shall not constitute the actual and visible beginning of the improvement on the ground referred to in this section, except when such engineering or land surveying services include a visible staking of the premises." (Emphasis added)

In regard to the amendment the Court of Appeals stated:

> "Thus, it is clear that the 1974 amendment drastically extended the priority law by extending priority back to all reasonably visible preparatory work.
>
> It is just as clear that this result was not intended by the legislature. * * * (citing statements before the House Judiciary Committee) Unfortunately the unambiguous language of the 1974 amendment does not bear out this intent."

The Court points out the difficulties resulting from the uncertainty of allowing lien claimants to obtain priority for visible work done on a site even years before actual erection of the building, and concludes by stating:

> "Clearly the Minnesota legislature should act to alleviate this great uncertainty."

It appears that in accomplishing their goal of the right to a lien, the engineers and land surveyors went much further than they intended in securing the passage of the 1974 amendments. Possibly language to the effect that:

> "In the case of a lien for engineering or land surveying services performed only, the actual and visible beginning of the improvement includes a visible staking of the premises."

substituted for the above quoted language of the 1974 amendment would accomplish the goal without totally disrupting lien priorities.

Section 595.04

MATTER OF ESTATE OF AREND

In the Matter of the Estate of Mark L. Arend, Decedent, 373 N.W.2d 338 (Minn.App. 1985) (Aug. 20, 1985) was an action to construe a will, in which the admissibility of an attorney's conversations with the decedent were questioned.

Minnesota Statutes, section 595.04 provides:

> "It shall not be competent for any party to an action, or any person interested in the event thereof, to give evidence therein of or concerning any conversation with, or admission of, a deceased or insane party or person relative to any matter at issue between the parties, unless the testimony of such deceased or insane person concerning such conversation or admission, given before his death or insanity, has been preserved and can be produced in evidence by the opposite party, and then only in respect to the conversation or admission to which such testimony relates."

Minnesota Rules of Evidence 616 states:

> "A witness is not precluded from giving evidence of or concerning any conversations with, or admissions of a deceased or insane party or person merely because the witness is a party to the action or a person interested in the event thereof."

Of the conflict, the Court of Appeals stated:

> "The Dead Man's Statute, Minn.Stat. § 595.04 is superseded by Minnesota Rules of Evidence 616 which permits testimony from any witness regardless of whether that witness is a party or has an interest in the litigation."

It thus appears that a repeal of section 595.04 may be in order.

A bill for an act

relating to statutes; conforming various laws to judicial decisions of unconstitutionality and suggestions for clarity; amending Minnesota Statutes 1986, sections 169.121, subdivision 4; 176.011, subdivision 2; 179A.20, subdivision 4; 197.46; 268.04, subdivisions 26 and 29; 268.06, subdivision 5; 340A.501; 352B.15; and 514.05; repealing Minnesota Statutes 1986, sections 466.03, subdivision 2; 487.39; and 595.04.

BE IT ENACTED BY THE LEGISLATURE OF THE STATE OF MINNESOTA:

Section 1. Minnesota Statutes 1986, section 169.121, subdivision 4, is amended to read:

Subd. 4. [PENALTIES.] The commissioner of public safety shall revoke the driver's license of a person convicted of violating this section or an ordinance in conformity therewith as follows:

(a) First offense: not less than 30 days;

(b) Second offense in less than five years: not less than 90 days and until the court has certified that treatment or rehabilitation has been successfully completed where prescribed in accordance with section 169.126;

(c) Third offense in less than five years: not less than one year, together with denial under section 171.04, clause (8), until rehabilitation is established in accordance with standards established by the commissioner;

(d) Fourth or subsequent offense on the record: not less than two years, together with denial under section 171.04, clause (8), until rehabilitation is established in accordance with standards established by the commissioner.

If the person convicted of violating this section is under the age of 18 years, the commissioner of public safety shall revoke the offender's driver's license or operating privileges until the offender reaches the age of 18 years or for a period of six months or for the appropriate period of time under clauses (a) to (d) for the offense committed, whichever is the greatest period.

For purposes of this subdivision, a juvenile adjudication under this section, section 169.129, an ordinance in conformity with either of them, or a statute or ordinance from another state in conformity with either of them is an offense.

Whenever department records show that the violation involved personal injury or death to any person, not less than 90 additional days shall be added to the base periods provided above.

Any person whose license has been revoked pursuant to section 169.123 as the result of the same incident is not subject to the mandatory revocation provisions of clause (a) or (b).

Sec. 2. Minnesota Statutes 1986, section 176.011, subdivision 2, is amended to read:

Subd. 2. [CHILD.] "Child" includes a posthumous child, a child entitled by law to inherit as a child of a deceased person, a child of a person adjudged by a court of competent jurisdiction to be the father of the child, and a stepchild, grandchild, or foster child who was a member of the family of a deceased employee at the time of injury and <u>was legally</u>

dependent upon the employee for support.

Sec. 3. Minnesota Statutes 1986, section 179A.20, subdivision 4, is amended to read:

Subd. 4. [GRIEVANCE PROCEDURE.] All contracts shall include a grievance procedure which shall provide compulsory binding arbitration of grievances including all disciplinary actions. If the parties cannot agree on the grievance procedure, they shall be subject to the grievance procedure promulgated by the director under section 179A.04, subdivision 3, clause (h).

Employees covered by civil service systems created under chapter 43A, 44, 375, 387, 419, or 420, by a home rule charter under chapter 410, or by Laws 1941, chapter 423, or a veteran entitled to a discharge hearing under section 197.46, may pursue a grievance through the procedure established under this section. When the grievance is also within the jurisdiction of appeals boards or appeals procedures created by chapter 43A, 44, 197, 375, 387, 419, or 420, by a home rule charter under chapter 410, or by Laws 1941, chapter 423, the employee may proceed through the grievance procedure or the civil service or veteran's appeals procedure, but once a written grievance or appeal has been properly filed or submitted by the employee or on the employee's behalf with the employee's consent the employee may not proceed in the alternative manner.

This section does not require employers or employee organizations to negotiate on matters other than terms and conditions of employment.

Sec. 4. Minnesota Statutes 1986, section 197.46, is amended to read:

197.46 [VETERANS PREFERENCE ACT; REMOVAL FORBIDDEN; RIGHT OF MANDAMUS.]

Any person whose rights may be in any way prejudiced contrary to any of the provisions of this section, shall be entitled to a writ of mandamus to remedy the wrong. No person holding a position by appointment or employment in the several counties, cities, towns, school districts and all other political subdivisions in the state, who is a veteran separated from the military service under honorable conditions, shall be removed from such position or employment except for incompetency or misconduct shown after a hearing, upon due notice, upon stated charges, in writing.

Any veteran who has been notified of the intent to discharge the veteran from an appointed position or employment pursuant to this section shall be notified in writing of such intent to discharge and of the veteran's right to request a hearing within 60 days of receipt of the notice of intent to discharge. The failure of a veteran to request a hearing within the provided 60-day period shall constitute a waiver of the right to a hearing. Such failure shall also waive all other available legal remedies for reinstatement. A hearing under this section shall not be available to a public employee who elects or consents to contesting his discharge in a grievance procedure under section 179A.20, subdivision 4.

Request for a hearing concerning such a discharge shall be

made in writing and submitted by mail or personal service to the employment office of the concerned employer or other appropriate office or person.

In all governmental subdivisions having an established civil service board or commission, or merit system authority, such hearing for removal or discharge shall be held before such civil service board or commission or merit system authority. Where no such civil service board or commission or merit system authority exists, such hearing shall be held by a board of three persons appointed as follows: one by the governmental subdivision, one by the veteran, and the third by the two so selected. In the event the two persons so selected do not appoint the third person within ten days after the appointment of the last of the two, then the judge of the district court of the county wherein the proceeding is pending, or if there be more than one judge in said county then any judge in chambers, shall have jurisdiction to appoint, and upon application of either or both of the two so selected shall appoint, the third person to the board and the person so appointed by the judge with the two first selected shall constitute the board. The veteran may appeal from the decision of the board upon the charges to the district court by causing written notice of appeal, stating the grounds thereof, to be served upon the governmental subdivision or officer making the charges within 15 days after notice of the decision and by filing the original notice of appeal with proof of service thereof in the office of the court administrator of the district court within ten days

after service thereof. Nothing in section 197.455 or this section shall be construed to apply to the position of private secretary, teacher, superintendent of schools, or one chief deputy of any elected official or head of a department, or to any person holding a strictly confidential relation to the appointing officer. The burden of establishing such relationship shall be upon the appointing officer in all proceedings and actions relating thereto.

All officers, boards, commissions, and employees shall conform to, comply with, and aid in all proper ways in carrying into effect the provisions of section 197.455 and this section notwithstanding any laws, charter provisions, ordinances or rules to the contrary. Any willful violation of such sections by officers, officials, or employees is a misdemeanor.

Sec. 5. Minnesota Statutes 1986, section 268.04, subdivision 26, is amended to read:

Subd. 26. "Wage credits" mean the amount of wages actually or constructively paid or payable, wages overdue and delayed beyond the usual time of payment and back pay paid by or from an employer to an employee for insured work and tips and gratuities paid to an employee by a customer of an employer and accounted for by the employee to the employer except that wages earned in part-time employment by a student as an integral part of an occupational course of study, under a plan for vocational education accepted by the Minnesota department of education, shall not result in wage credits available for benefit purposes.

Sec. 6. Minnesota Statutes 1986, section 268.04,

subdivision 29, is amended to read:

Subd. 29. "Credit week" is any week for which wages or back pay, actually or constructively paid or payable, wages overdue and delayed beyond the usual time of payment, and back pay by or from one or more employers to an employee for insured work equal or exceed 30 percent of the average weekly wage computed to the nearest whole dollar. On or before June 30 of each year the commissioner shall determine the average weekly wage paid by employers subject to sections 268.03 to 268.24 in the following manner:

(a) The sum of the total monthly employment reported for the previous calendar year shall be divided by 12 to determine the average monthly employment;

(b) The sum of the total wages reported for the previous calendar year shall be divided by the average monthly employment to determine the average annual wage; and

(c) The average annual wage shall be divided by 52 to determine the average weekly wage.

The average weekly wage as so determined computed to the nearest whole dollar shall apply to claims for benefits which establish a benefit year which begins subsequent to December 31 of the year of the computation.

Sec. 7. Minnesota Statutes 1986, section 268.06, subdivision 5, is amended to read:

Subd. 5. [BENEFITS CHARGED AS AND WHEN PAID.] Benefits paid to an individual pursuant to a valid claim shall be charged against the account of the individual's employer as and when

paid, except that benefits paid to an individual who earned base period wages for part-time employment shall not be charged to an employer that is liable for payments in lieu of contributions or to the experience rating account of an employer if the employer: (1) provided ~~weekly~~ periodic base period part-time employment; (2) continues to provide ~~weekly~~ periodic employment equal to at least 90 percent of the part-time employment provided in the base period; and (3) is an interested party because of the individual's loss of other employment. The amount of benefits so chargeable against each base period employer's account shall bear the same ratio to the total benefits paid to an individual as the base period wage credits of the individual earned from such employer bear to the total amount of base period wage credits of the individual earned from all the individual's base period employers.

In making computations under this provision, the amount of wage credits if not a multiple of $1, shall be computed to the nearest multiple of $1.

Benefits shall not be charged to an employer that is liable for payments in lieu of contributions or to the experience rating account of an employer for unemployment (1) that is directly caused by a major natural disaster declared by the president pursuant to section 102(2) of the Disaster Relief Act of 1974 (United States Code, title 42, section 5122(2)), if the unemployed individual would have been eligible for disaster unemployment assistance with respect to that unemployment but for the individual's receipt of unemployment insurance benefits,

or (2) that is directly caused by a fire, flood, or act of God where 70 percent or more of the employees employed in the affected location become unemployed as a result and the employer substantially reopens its operations in that same area within 360 days of the fire, flood, or act of God. Benefits shall be charged to the employer's account where the unemployment is caused by the willful act of the employer or a person acting on behalf of the employer.

Sec. 8. Minnesota Statutes 1986, section 340A.501, is amended to read:

340A.501 [RESPONSIBILITY OF LICENSEE.]

Every licensee is responsible for the conduct in the licensed establishment and, in a civil action only, any sale of alcoholic beverage by any employee authorized to sell alcoholic beverages in the establishment is the act of the licensee.

Sec. 9. Minnesota Statutes 1986, section 325B.15, is amended to read:

325B.15 [COVERAGE.]

The provisions of sections 325B.01 to 325B.17 ~~shall~~ cover agreements ~~in-existence-on-May-28,-1977,-as-well-as-agreements~~ entered into after May 28, 1977.

Sec. 10. Minnesota Statutes 1986, section 514.05, is amended to read:

514.05 [WHEN LIEN ATTACHES; NOTICE.]

All such liens, as against the owner of the land, shall attach and take effect from the time the first item of material or labor is furnished upon the premises for the beginning of the

improvement, and shall be preferred to any mortgage or other encumbrance not then of record, unless the lienholder had actual notice thereof. As against a bona fide purchaser, mortgagee, or encumbrancer without notice, no lien shall attach prior to the actual and visible beginning of the improvement on the ground, but a person having a contract for the furnishing of labor, skill, material, or machinery for such improvement, may file for record with the county recorder of the county within which the premises are situated, or, if claimed under section 514.04, with the secretary of state, a brief statement of the nature of such contract, which statement shall be notice of that person's lien. In the case of a lien for engineering or land surveying services ~~with respect to real estate shall not constitute~~ only, the actual and visible beginning of the improvement ~~on the ground referred to in this section, except when such engineering or land surveying services include~~ includes a visible staking of the premises. No lien shall attach for engineering or land surveying services rendered with respect to a purchaser for value if the value of those services does not exceed $250.

Sec. 11. [REPEALER.]

Minnesota Statutes 1986, sections 466.03, subdivision 2; 487.39; and 595.04, are repealed.