STATE OF MINNESOTA
OFFICE OF ADMINISTRATIVE HEARINGS

FOR THE MINNESOTA DEPARTMENT OF HEALTH

In the Matter of Proposed Permanent Rules of the Minnesota Department of Health Relating to Clean Indoor Air, Minnesota Rules, parts 4620.0050 to 4620.1500.

REPORT OF THE ADMINISTRATIVE LAW JUDGE

The above-entitled matter came on for hearing before Administrative Law Judge George A. Beck on June 13, 1994, at 9:00 a.m. in Room 10, State Capitol Building, St. Paul, Minnesota.

This Report is part of a rulemaking proceeding held pursuant to Minn. Stat. §§ 14.131 to 14.20, to hear public comment, to determine whether the Minnesota Department of Health ("the Department") has fulfilled all relevant substantive and procedural requirements of law applicable to the adoption of the rules, to consider whether the proposed rules are needed and reasonable and to determine whether or not modifications to the rules proposed by the Department after initial publication are impermissible substantial changes.

Paul Zerby, Assistant Attorney General, 525 Park Street, Suite 500, St. Paul, Minnesota 55103-2106, appeared on behalf of the Department. The Department's hearing panel consisted of Laura Oatman, Supervisor of the Department's Indoor Air Quality Unit; Mary Zetterlund, Health Program Representative of that Unit; and Jane Nelson, Rules Coordinator.

Thirty persons attended the hearing. Eighteen people signed the hearing register. The hearing continued until all interested persons, groups or associations had an opportunity to be heard concerning the adoption of these rules.

The record remained open for the submission of written comments for seventeen calendar days following the date of the hearing, to June 30, 1994. Pursuant to Minn. Stat. § 14.15, subd. 1, five working days were allowed for the filing of responsive comments. At the close of business on July 8, 1994, the rulemaking record closed for all purposes. The Administrative Law Judge received written comments from interested persons during the comment period. The Department submitted written comments responding to matters discussed at the hearings and suggesting changes in the proposed rules.

The Department must wait at least five working days before it takes any final action on the rule(s); during that period, this Report must be made available to all interested persons upon request.

Pursuant to the provisions of Minn. Stat. § 14.15, subd. 3 and 4, this Report has been submitted to the Chief Administrative Law Judge for his approval. If the Chief Administrative Law Judge approves the adverse findings of this Report, he will advise the Department of actions which will correct the defects and the Department may not adopt the rule until the Chief Administrative Law Judge determines that the defects have been corrected. However, in those instances where the Chief Administrative Law Judge identifies defects which relate to the issues of need or reasonableness, the Department may either adopt the Chief Administrative Law Judge's suggested actions to cure the defects or, in the alternative, if the Department does not elect to adopt the suggested actions, it must submit the proposed rule to the Legislative Commission to Review Administrative Rules for the Commission's advice and comment.

If the Department elects to adopt the suggested actions of the Chief Administrative Law Judge and makes no other changes and the Chief Administrative Law Judge determines that the defects have been corrected, then the Department may proceed to adopt the rule and submit it to the Revisor of Statutes for a review of the form. If the Department makes changes in the rule other than those suggested by the Administrative Law Judge and Chief Administrative Law Judge, then it shall submit the rule, with the complete hearing record, to the Chief Administrative Law Judge for a review of the changes before adopting it and submitting it to the Revisor of Statutes.

When the Department files the rule with the Secretary of State, it shall give notice on the day of filing to all persons who requested that they be informed of the filing.

Based upon all the testimony, exhibits, and written comments, the Administrative Law Judge makes the following:

FINDINGS OF FACT

Procedural Requirements

1. On March 24, 1994, the Department filed the following documents with the Chief Administrative Law Judge:

(a) a copy of the proposed rules certified by the Revisor of Statutes;
(b) the Notice of Hearing proposed to be issued;
(c) the Order for Hearing in this matter;
(d) a statement of the anticipated length of the hearing and the expected attendance at the hearing; and,
(e) the Statement of Need and Reasonableness (SONAR).

2. On April 28, 1994, the Department mailed the Notice of Hearing to all persons and associations who had registered their names with the Department for the purpose of receiving such notice and to all persons given discretionary notice by the Department.

3. On April 28, 1994, the Department mailed the SONAR to the Legislative Committee to Review Administrative Rules.

4. On May 2, 1994, a copy of the proposed rules were published at 18 State Register 2334.

5. On May 19, 1994, the Department filed the following documents with the Administrative Law Judge:

(a) the Notice of Hearing as mailed;
(b) a photocopy of the pages of the State Register containing the Notice of Hearing and the proposed rules;
(c) a copy of the Notice of Solicitation of Outside Opinion together with all materials received in response to that notice;
(d) the Department's certification that its mailing list was accurate and complete as of April 26, 1994;
(e) the Affidavit of Mailing the Notice to all persons on the Department's mailing list and to those persons receiving discretionary notice; and,
(f) the names of persons who will represent the Department at the hearing.

6. The Department certified its mailing list as accurate and complete two days prior to the date of mailing the Notice of Hearing to that list. The purpose of the certification is to ensure that all persons on the list receive notice of the rulemaking. Providing certification of the mailing list on the day of mailing is the correct way to demonstrate that the notice was properly served. The Department's failure to certify its mailing list on the same day as mailing constitutes a procedural error.

Under Minn. Stat. § 14.15, subd. 5, harmless errors arising out of a failure to comply with the procedures for rulemaking must be disregarded if:

(1) the failure did not deprive any person of the opportunity to participate meaningfully in the rulemaking process, or

(2) the agency has taken corrective action to cure the defect.

There is no evidence that the error deprived any person of the opportunity to participate in the hearing. The mistake in certifying the mailing list is a harmless error. The error must be disregarded by operation of Minn. Stat. § 14.15, subd. 5.

Nature of the Proposed Rules and Statutory Authority.

7. a. The Minnesota Clean Indoor Air Act (MCIAA) establishes prohibitions on smoking in some areas and restrictions on smoking in other areas. Minn. Stat. § 144.417, subd. 1, authorizes the Commissioner of Health to "adopt rules necessary and reasonable to implement the provisions of sections 144.411 to 144.417, except as provided for in section 144.414." Minn. Stat. § 144.414, subd. 1 contains a rulemaking authorization "where the close proximity of workers or the inadequacy of ventilation causes smoke

pollution detrimental to the health and comfort of nonsmoking employees."

b. Minnesota Rule Chapter 4620 is the rule adopted by the Department to implement the MCIAA. The proposed rules amend definitions, alter the prohibitions and restrictions on smoking in public places, designate the signs that must be posted, and set compliance standards. Specific provisions are made for office buildings, factories, warehouses, restaurants, bars, health care facilities, retail stores, common areas, and elevators. The Department has the statutory authority to adopt these rules.

Small Business Considerations in Rulemaking.

8. Minn. Stat. § 14.115, subd. 2, provides that state agencies proposing rules affecting small businesses must consider methods for reducing adverse impact on those businesses. In its SONAR, the Department considered easing reporting requirements, less stringent compliance schedules, consolidation of reporting requirements, establishing performance standards in lieu of design or operational standards, and exempting small businesses from the proposed rules. The Department concluded that the rules have no reporting requirements and that the portions of the rules with the greatest impact on small businesses have delayed compliance schedules. SONAR, at 3. Performance standards are in the existing rules in place of design or operational standards. The Department considered exempting small businesses from the requirements of the rule, but concluded that the customers and employees of such businesses should have the same public health protection as persons in other businesses. SONAR, at 4. The Department has considered how the rules will affect small businesses and how the impact of the proposed rules on those businesses can be reduced. The Department has complied with Minn. Stat. § 14.115, subd. 2.

Fiscal Notice.

9. Minn. Stat. § 14.11, subd. 1, requires the preparation of a fiscal notice when the adoption of a rule will result in the expenditure of public funds in excess of $100,000 per year by local public bodies. The notice must include an estimate of the total cost to local public bodies for a two-year period. In both its Notice of Hearing and its SONAR, the Department stated that the proposed rules will not require expenditures by local bodies of government of greater than $100,000 in the two years immediately following promulgation of the rules. No one disagreed. No fiscal notice is required in this rulemaking.

Impact on Agricultural Land.

10. Minn. Stat. § 14.11, subd. 2, imposes additional statutory requirements when rules are proposed that have a "direct and substantial adverse impact on agricultural land in this state." The statutory requirements referred to are found in Minn. Stat. §§ 17.80 to 17.84. The rules proposed by the Department will have no substantial adverse impact on agricultural land within the meaning of Minn. Stat. § 14.11, subd. 2.

Reasonableness of the Proposed Rules.

11. a. The question of whether a rule is reasonable focuses on whether it has a rational basis. The Minnesota Court of Appeals has held a rule to be reasonable if it is rationally related to the end sought to be achieved by the statute. Broen Memorial Home v. Minnesota Department of Human Services, 364 N.W.2d 436, 440 (Minn.App. 1985); Blocker Outdoor Advertising Company v. Minnesota Department of Transportation, 347 N.W.2d 88, 91 (Minn.App. 1984). The Supreme Court of Minnesota has further defined the burden by requiring that the agency "explain on what evidence it is relying and how the evidence connects rationally with the agency's choice of action to be taken." Manufactured Housing Institute v. Pettersen, 347 N.W.2d 238, 244 (Minn. 1984). An agency is entitled to make choices between possible standards, so long as the choice it makes is a rational one. When commentators suggest approaches other than that suggested by the Agency, it is not the appropriate role of the Administrative Law Judge to determine which alternative presents the "best" approach and require the Agency to adopt it. Instead, the role of the Administrative Law Judge is to determine whether or not the alternative which the Agency has selected has been demonstrated to be a reasonable one. The Agency itself is obligated to consider all public suggestions.

b. In support of the adoption of the proposed rules, the Department has prepared a Statement of Need and Reasonableness (SONAR). In addition to the SONAR, the Department made a presentation at the hearing. The Department's written comments following the hearing supplemented that presentation. This Report will not discuss each rule part, or each change proposed by the Department from the rules as published in the State Register. The Report will focus on those provisions that the Administrative Law Judge or members of the public questioned. Persons or groups who do not find their particular comments in this Report should know that the Administrative Law Judge has read and considered each and every suggestion. A rule part not commented on in this Report is hereby found to be needed and reasonable and does not exceed the statutory authority for the promulgation thereof. It is further found that on those parts not commented on, the Department has documented its need and reasonableness with an affirmative presentation of facts.

c. The Administrative Law Judge must also consider whether a rule "has been modified in a way which makes it substantially different from that which was originally proposed." Minn. Stat. § 14.15, subd. 3. In determining whether a proposed final rule is substantially different, the Administrative Law Judge is to "consider the extent to which it affects classes of persons who could not have reasonably been expected to comment on the proposed rules at the rulemaking hearing, or goes to a new subject matter of significant substantive effect, or makes a major substantive change that was not raised by the original notice of hearing in such a way as to invite reaction at the hearing, or results in a rule fundamentally different in effect from that contained in the notice of hearing." Minn. Rules Part 1400.1100. Any modification not commented upon is found not to constitute a substantial change.

Proposed Rule 4620.0050 - Scope and Purpose

12. Proposed Rule 4620.0050 is all new material. The proposed rule expressly limits Minn. Rules 4620.0050 to 4620.1450 to applications involving the MCIAA. Any other laws, ordinances, regulations, or orders are expressly not affected by the proposed rules. The Department has used existing language from Minn. Rule 4620.0200 to ensure that no conflicts arise between these rules and prohibitions on smoking under the jurisdiction of other authorities. No objections were raised to the new language. The rule is needed and reasonable as proposed.

Proposed Rule 4620.0100 - Definitions

13. Proposed rule 4620.0100 establishes definitions of terms used in these rules. Subpart 1, establishing the scope of the rule part, deletes superfluous language which purported to require the terms in the MCIAA to have the meanings attributed to them. The other changes to subpart 1 conform the rule to the new numbering arising from this rulemaking. Subpart 1 is needed and reasonable as proposed.

Subpart 2 - Acceptable Nonsmoking Area

14. a. Subpart 2 defines what is an "acceptable nonsmoking area." Most of the subpart remains unchanged except to replace the former term "smoke-free" with "nonsmoking." Smoking must be prohibited over a minimum 200 square foot area, together with either a physical barrier at least 56 inches high separating smoking from nonsmoking areas, a buffer space of at least four feet between the areas, or meet a ventilation requirement. The ventilation requirement in the existing rule is six air changes per hour according to State Building Code 6007(c)(3). The Department proposes to replace the existing ventilation requirement with an outdoor air requirement of at least 15 cubic feet per minute (cfm) per person. The Department pointed out that the State Building Code standard no longer exists. SONAR, at 13.

b. John E. Janssen, P.E., objected to the 15 cfm ventilation standard as being in conflict with Minnesota Energy Code. William Super, Vice President of Manufacturing for Snappy Air Distribution Products, objected to the 15 cfm per person ventilation standard as too low. Bruce Nelson, Senior Engineer of the Minnesota Department of Public Service, also objected to this standard. Both Janssen and Nelson suggested adoption of ASHRAE Standard 62-1989. The ASHRAE standard would require a minimum of 20 cfm per person for office spaces and dining rooms, 30 cfm per person for bars, and 60 cfm per person in smoking lounges. Nelson Letter, May 27, 1994, Table 2.

c. The Department considered the ASHRAE standard when the proposed rules were drafted. Enforcement problems from multiple ventilation standards and the use of a different manual of standards for industrial settings convinced the Department that a single standard was appropriate. SONAR, at 14. The 15 cfm per person standard is in use by the Minnesota Department of Labor and Industry and applicable to any workroom. See Minn. Rule 5205.0110, subp. 1.

d. The Minnesota Energy Code does not apply to all buildings. Rather, only new construction and renovations are required to meet Energy Code standards. The MCIAA applies to many buildings that do not yet meet the Energy Code's stricter standards. Where a building does meet the applicable ASHRAE standard, the 15 cfm per person standard will necessarily be met, since the lowest ASHRAE ventilation standard is 15 cfm per person. There is no conflict between the proposed standard and the Energy Code. The proposed subpart 2 has been shown to be needed and reasonable.

Subpart 4 - Bar

15. a. The Department's existing definition of a "bar" in subpart 4 is "any establishment or portion of an establishment where one can purchase and consume alcoholic beverages." That language is unchanged. The facilities excluded from the definition are modified by the Department's proposed rule. As proposed, the rule would read:

> "Bar" means any establishment or portion of an establishment where one can purchase and consume alcoholic beverages. A bar excludes any such establishment or portion of an establishment that:
>
> A. has table and seating facilities for more than 50 people at one time; and
>
> B. has, in consideration of payment, food service, other than licensure as a limited food service establishment as defined in part 4625.2401, subpart 22, that requires licensure under Minnesota Statutes, chapter 157.

b. The wording "a bar excludes" is confusing because it is grammatically incorrect. This confusion does not rise to the level of a defect since everyone likely to fall under the application of these rules is conscious of the outcome intended by the subpart. Should the Department wish to clarify this subpart to ensure confusion is minimized, the Administrative Law Judge suggests the following language:

> "Bar" means any establishment or portion of an establishment where one can purchase and consume alcoholic beverages. Any such establishment or portion of an establishment is not considered a "bar" for the purposes of these rules if it has: A) table and seating facilities for more than 50 people at one time; and B) licensed food service provided in consideration of payment excluding licensed limited food service establishments as defined in part 4625.2401, subpart 22.

The definition of "bar" in subpart 4 is needed and reasonable. Altering the definition to clarify the rule would not constitute a substantial change.

Subpart 4a - Environmental Tobacco Smoke

16. a. A new term, "environmental tobacco smoke," is proposed in subpart 4a. The term is defined as "A. smoke from the burning end of a cigarette, pipe, cigar, or other lighted smoking equipment; and B. exhaled

smoke from a smoker." The Department uses the term in the rules and followed the recommendation of its advisory committee in proposing this definition. SONAR, at 15. Environmental tobacco smoke (ETS), sometimes described as secondhand smoke, is the subject of inquiry and regulation by the U.S. Environmental Protection Agency, the U.S. Department of Health and Human Services, and the National Institute for Occupational Safety and Health (NIOSH).

b. The Department's definition includes smoke emitted from the burning end of smoking equipment (e.g. cigarette, cigar, pipe) and smoke returned to the air from a smoker's lungs. However, there is often a third source of smoke which is the unlit end of lighted smoking equipment. After puffing on a cigarette, cigar, or pipe, smoke often continues coming out of the mouthpiece. A complete definition of ETS can be achieved by altering item A to read "smoke from a cigarette, pipe, cigar, or other lighted smoking equipment ..." This modification is not required since the Department's definition includes the major sources of ETS. The ETS definition suggested as an alternative is based upon the equivalent definitions from NIOSH and U.S. Health and Human Services. Either definition is needed and reasonable, and the suggested change is not a substantial change.

Subpart 8 - Office

17. "Office" is defined in subpart 8. The definition includes places of work for professional, clerical, and administrative activities. Sandy Sandell of the Association for Nonsmokers Minnesota suggested the inclusion of "telemarketing offices" within the definition. The Department agreed with this suggestion and changed the subpart accordingly. The definition is needed and reasonable as modified. The modification is not a substantial change.

Subpart 11 - Place of Work

18. Brian Johnson of Legal Resources, Inc. objected to the scope of subpart 11, that defines "place of work" for the MCIAA. Johnson asserted that the definition would restrict smoking in the homes of some persons, since they work or conduct business there. The Department responded that the MCIAA has been applied to such locations, where an employee has expressed a wish to be accommodated. The existing definition is modified in this rulemaking proceeding only in grammar and the addition of examples of a place of work. The proposed language is needed and reasonable.

Subpart 11a - Private Enclosed Office

19. a. A new definition has been proposed in subpart 11a. The definition of the term "private enclosed office" is "a room occupied by one person with floor to ceiling walls and a closeable door." Doug Kelm, a lobbyist who frequently represents the R. J. Reynolds Tobacco Company and the Tobacco Institute, objected to the requirement that such an office have walls higher than fifty-six inches high. Kelm urged a change in the proposed definition to keep office areas separated by removable fixtures (cubicles) within the definition of "private enclosed office."

b. The Department indicated in its posthearing response that complaints have been received about tobacco smoke arising from cubicles in office

settings. While a barrier of fifty-six inches in height is appropriate for separating smoking and nonsmoking areas, the minimum size of the nonsmoking area is 200 square feet. See Proposed Rule 4620.0100, subp. 2. Treating cubicles as private, enclosed offices could place smokers adjacent to every employee in the office area seeking accommodation. In such a case, there would be no contiguous space available to segregate ETS from nonsmoking employees. Helen F. Roemhild, Director of Corporate Planning for Worksite Wellness Programs, Inc., indicated that many complaints arise from nonsmokers about ETS from neighboring cubicles. Requiring floor to ceiling walls and a closeable door for an office to be considered private and enclosed is needed and reasonable. The Department's interpretation of private, enclosed office as requiring floor to ceiling walls is consistent with the MCIAA.

20. a. Kelm also objected to limiting occupancy of a private enclosed office to one person. The MCIAA excludes from its definition of a public place "private, enclosed offices occupied exclusively by smokers even though such offices may be visited by nonsmokers." Minn. Stat. § 144.413, subd. 2. The Department has consistently interpreted this provision to mean one smoker per office even though the existing rule is not unambiguous. The use of the plural "smokers" in the statute is explained by the Department as used because "offices" is plural. Department Posthearing Response, at 5. Multiple occupant smokers-only rooms in an office (separated by a floor to ceiling wall) would not be allowed under the Department's interpretation.

b. It's clear that the legislature intended to allow smoking in a private enclosed office. However, the statute is not completely clear as to whether or not the legislature intended to allow more than one smoker-occupant in a private enclosed office. The Department's long-standing interpretation is entitled to some deference, however, and is consistent with the purpose of the MCIAA. Furthermore, the word "private" connotes a one-person office. It is commonly defined as "secluded from the sight, presence or intrusion of others." American Heritage Dictionary (2d Ed. 1982). An office with 10 smoking employees, for example, could not reasonably be considered private. The Department's interpretation is reasonable and is not in conflict with Minn. Stat. § 144.413, subd. 2.

Subpart 16a - Retail Store

21. The Department defines "retail store" in subpart 16a as the customer area of a commercial occupancy. A noninclusive list of examples is provided in the definition. Larry Nowak suggested adding laundromats to the list. Roger Carlson of the Minnesota Environmental Health Association suggested replacing "market," one example on the list, with "retail food store." The Department made both of these changes. The subpart, as modified, is needed and reasonable to define retail stores. The changes do not constitute substantial changes. The Department may or may not choose not to adopt the subpart, however, due to the defect found in the rule on retail stores. Deleting the subpart would not constitute a substantial change.

Proposed Rule 4620.0300 - Smoking Prohibited Areas

22. The existing rule part 4620.0300 requires the person responsible for a public place or public meeting to arrange for an acceptable nonsmoking

area. Any adjacent smoking-permitted area must be designed to minimize ETS. Kent Rees, Chair of the Subcommitttee for Environmental Health and Ad Hoc Committee on Smoking of Community Health Services for St. Paul - Ramsey County, objected to the lack of specifics on direction of air flow. Rees also objected to the four-foot separation as inadequate. Part 4620.0300 is an existing rule. The proposed changes are grammatical only and conform to the language of the MCIAA. The four-foot separation standard is an existing rule. The Department has shown that the proposed amendments are needed and reasonable.

Proposed Rule 4620.0400 - Smoking-Permitted Area.

23. Minn. Rule 4620.0400 establishes standards for smoking-permitted areas. The existing rule allowed more than one smoking permitted area in rooms containing at least 20,000 square feet. The Department seeks to modify subpart 1 of that rule to allow one smoking-permitted area per 20,000 square feet in a room. This would clarify the rule to conform to the Department's intent. Subpart 1 is needed and reasonable, as proposed.

24. a. Subpart 5 is comprised of new language, expressly allowing smoking in a private, enclosed office if the door is kept closed while the occupant is smoking. Peter Jude, President of Jude Candy & Tobacco, Inc.; Ralph Smith, President of the Granite City Jobbing Co., Inc.; John Holthusen, Manager of the Thief River Jobbing Company; Jim and Tom Eidsvold of Henry's Foods, Inc.; James D. Houser, President of Boyd Houser Candy & Tobacco Co.; and Arnold Dass, President of Tyler Wholesale, Inc., objected to this provision as unnecessary government regulation of private behavior. The Department responded that it was statutorily prohibited from banning such smoking, but stated that the effect of ETS could be reduced on employees outside the private, enclosed office if the door was kept closed on private enclosed offices. Department Response, at 7.

b. Rees objected to allowing smoking in private, enclosed offices, even with the door closed, since most offices are under positive pressure and the ETS would be circulated throughout the ventilation system of most buildings. The MCIAA expressly permits smoking in private, enclosed offices. The Department cannot adopt a rule which is inconsistent with a statute.

c. Requiring that the door be closed on a private, enclosed office is consistent with the MCIAA. The intrusion on private behavior is minimal, since the door must be closed only while smoking is occurring, not whenever ETS is present. The smoker is in control of when the office door may be open, since the requirement is triggered only with the lighting of smoking equipment. Leaving the door open when that equipment is lit would render the office no longer enclosed and the statutory exemption would not apply. Subpart 5 is needed and reasonable as proposed.

Proposed Rule 4620.0500 - Signs

25. Proposed rule 4620.0500 sets the standards to be met by signage required under the MCIAA and these rules. Subpart 1 requires posting of signs. The content of "no smoking" signs is set out in subpart 2. The

placement of signs and size of lettering are governed by subparts 3 and 4. The proposed changes to subparts 1 through 4 are relatively minor and did not generate much comment.

26. a. Subpart 5 sets the requirements for signage in a bar. The Department proposes to add a requirement for bars with food service that states:

> All signs used to identify a bar with food service as specified in part 4620.0100, subpart 4, must have a sign stating, "This establishment is a smoking area in its entirety except when food service is available." or a similar statement.

b. The language of the rule is intended to provide signage for bars which provide food service when the bar is not exempt from the MCIAA. However, the rule purports to cover all bars with food service and identifies those bars as "smoking-permitted," except in certain circumstances. This language is somewhat misleading, since bars with food service may ban smoking of their own accord or establish nonsmoking areas. To correct this problem, the Administrative Law Judge suggests the following language:

> In a bar that has food service as specified in part 4620.0100, subpart 4, and that allows smoking in its entirety when food service is not available, all signs used to identify smoking-permitted areas must have a sign stating, "This establishment is a smoking area in its entirety except when food service is available." or a similar statement.

The proposed rule is needed and reasonable with or without the suggested modification. The suggested modification is not a substantial change.

Proposed Rule 4620.0750 - Lunchroom or Lounge

27. a. Proposed rule part 4620.0750 is composed of all new language. The rule part establishes the requirements for (employee) lunchrooms or lounges. The adjective "employee" was dropped at the hearing by the Department so that the general public would be included. The rule part is composed of five items. Item A requires the employer to provide an acceptable nonsmoking area in lunchrooms or lounges. A modification at the hearing clarified that amenities cannot be counted as part of non-smoking seating area. Item B requires either figuring demand for the smoking area or allowing the designation of a minimum of 70% of the area as nonsmoking. Under item C, one of the separation methods (barrier, four-foot zone, or ventilation) in Minn. Rule 4620.0100, subpart 2(B) must be used for lunchrooms or lounges that have smoking and nonsmoking areas. Where two or more facilities exist, subpart D allows one lunchroom or lounge to be designated as smoking permitted in its entirety so long as there is at least a one-for-one ratio of lunchrooms or lounges that are nonsmoking in their entirety for each smoking lunchroom or lounge. Where only one lunchroom measuring less than 200 square feet exists, item E allows the employer to alternate smoking-permitted and smoking-prohibited break times in that facility. When that option is chosen, employers cannot require nonsmoking employees to use the lunchroom or lounge during smoking-permitted break times.

b. Concerns over ETS were expressed by several commentators in regard to smoking in lunchrooms or lounges. Roger Carlson and Kent Rees pointed out that ETS would be remain in a lunchroom or lounge which alternates between smoking-permitted and smoking-prohibited. Rees also pointed out that the odor of tobacco smoke would linger in such a facility. The Department responded that it has allowed the practice in such facilities for several years. Accommodating smoking and nonsmoking employees in this manner where only one lunchroom or lounge is available is certainly not ideal as the comments point out. However, it is not arbitrary within the meaning of the case law set out at Finding of Fact No. 11 since it is a reasonable policy choice. When the facility is too small to effectively separate the two groups, alternating break times accomplishes a similar effect. While some ETS will be present after the smoking-permitted break time, there is no alternative consistent with the MCIAA other than to allow such accommodation. Allowing alternating use of the only lunchroom or lounge is reasonable given the statutory language.

c. Kelm objected to the degree of detail in this rule part, asserting that this constitutes an undue intrusion on the rights of employers to control the workplace. The structure of the rule provides employers wide latitude in structuring the workplace. If an employer chooses to ban smoking, it may do so. Similarly, if the employer chooses to allow smoking, it may do that. Where smoking is allowed, some form of separation must be provided just as in similar public places. The detailed rules only apply when the employer lacks multiple facilities or a facility of sufficient size to separate smokers and nonsmokers. As discussed in the foregoing paragraph, the accommodation of smokers and nonsmokers in lunchrooms and lounges is reasonable. Proposed rule 4620.0750 is needed and reasonable as proposed.

Proposed Rule 4620.0950 - Office Buildings

28. a. Proposed rule 4620.0950 prohibits smoking in office buildings, except in private, enclosed offices and designated smoking-permitted areas of lunchrooms or lounges. Kelm asserted that there is no reason to ban smoking in office buildings. He cited the data of Healthy Buildings International which indicates that in studies of 813 "sick buildings" only 2.8% of the pollutants found is ETS. The Department criticized the study as including only buildings for which the cause of the poor air quality is unknown. The Department argued that where tobacco smoke is present, the building's occupants are aware of the source of air quality problems and the occupants act on that knowledge. The Department maintains that such instances are necessarily excluded from any study on "sick building syndrome." The Department submitted a large amount of material, as did others, which generally asserts that environmental tobacco smoke or second-hand smoke is a health hazard. Although the accuracy of the U.S. EPA risk assessment was questioned by some participants in this process, the evidence in the record constitutes an affirmative presentation in support of the need for and reasonableness of a rule to regulate second-hand smoke.

b. Kelm also argued that a complete prohibition on smoking in office buildings outside of a private office or lunchroom unaccompanied by a statutory amendment is not authorized. He pointed out that an early working

draft provided for smoking-permitted work stations and argued that the Model Act does not prohibit smoking in office buildings.

c. The purpose of the MCIAA is declared by the Legislature to be to protect the public health "by limiting smoking in public places and at public meetings to designated smoking areas." Minn. Stat. § 144.412. The general statutory prohibition is that "No person shall smoke in a public place or at a public meeting except in designated smoking areas." Minn. Stat. § 144.414, subd. 1. Minn. Stat. § 144.413, subd. 2, includes in the definition of public place: "any enclosed, indoor area ... serving as a place of work, including, but not limited to ... offices ...." The authority to designate smoking areas is granted to:

> ... proprietors or other persons in charge of public places, except in places in which smoking is prohibited by the fire marshal or by other law, ordinance or rule.

Minn. Stat. § 144.415.

d. Although proposed rule 4620.0950 is supported in this record by facts showing its reasonableness, it negates the authority of "proprietors or other persons in charge" to designate smoking areas in office buildings. This authority is granted by statute and cannot be removed by rule. See Can Manufacturers Institute, Inc. v. State, 289 N.W.2d 416 (Minn. 1979); State v. Lloyd A. Fry Roofing Co., 246 N.W.2d 696, 699-700 (Minn. 1976); City of Morton v. Minnesota Pollution Control Agency, 437 N.W.2d 741, 746 (Minn.App. 1989). The proposed rule is defective to the extent it conflicts with the statute.

29. a. Some limitations are put upon designated smoking areas in the statute. In that regard, Minn. Stat. § 144.415 states:

. . .

> Where smoking areas are designated, existing physical barriers and ventilation systems shall be used to minimize the toxic effect of smoke in adjacent nonsmoking areas. In the case of public places consisting of a single room, the provisions of this law shall be considered met if one side of the room is reserved and posted as a no smoking area. No public place other than a bar shall be designated as a smoking area in its entirety. If a bar is designated as a smoking area in its entirety, this designation shall be posted conspicuously on all entrances normally used by the public.

The Department is authorized, pursuant to Minn. Stat. § 144.415, to restrict smoking in office buildings. However, any restriction placed on smoking in office buildings must be consistent with the MCIAA. Banning smoking except in private, enclosed offices and employee lunchrooms or lounges conflicts with the MCIAA, which allows proprietors to establish "designated smoking areas." Minn. Stat. § 144.415 expressly determines compliance with the MCIAA "if one side of the room is reserved and posted as a no smoking area." The definition of "acceptable nonsmoking area," setting a minimum size for that area, has already been adopted in a prior rulemaking. The effect of the proposed rule

is laudable, is supported by public opinion, represents the majority viewpoint of the advisory group and is based upon present day knowledge of second hand smoke. It is, however, beyond the legislature's 1975 enactment, which was presumably based upon the state of knowledge at that time. The rule goes beyond the Department's statutory authority and this constitutes a defect in the proposed rules. City of Morton, 437 N.W.2d at 746.

b. In order to correct the defect the Department could delete the proposed rule and rely upon the general requirements of parts 4620.0400 and 4620.0100, subp. 2, until statutory authority is obtained. It might also consider whether some portion of 4620.0800 should be retained. Or it could consider adopting in this section a modification similar to that which the Department has proposed to add as part 4620.0975 C. below.

Proposed Rule 4620.0975 - Factories, Warehouses, or Similar Places of Work

30. a. Proposed rule 4620.0975 establishes standards governing smoking at "factories, warehouses, or similar places of work." Subpart 1 requires employees in those locations to be provided 15 cfm of outdoor air ventilation and be stationed at least four feet apart. Under subpart 2, if the conditions in subpart 1 are not met, then smoking must be restricted to private, enclosed offices and the designated smoking-permitted section of any lunchroom or lounge. The rule would be clearer if the first line of subpart 1 read as follows:

> In a factory, warehouse, or similar place of work, smoke pollution will be deemed to be not detrimental to the health and comfort of non-smoking employees if the employees are:
>
> or
>
> In order to avoid the restriction set out in subpart 2, in a factory, warehouse, or similar place of work, employees must be:

This would avoid the initial impression that employees must be ventilated and stationed four feet apart in every factory and warehouse.

b. The MCIAA prohibits smoking in public places outside of designated smoking areas. With regard to factories, warehouses, or similar places of work, the MCIAA states:

> Furthermore, this prohibition shall not apply to factories, warehouses, and similar places of work not usually frequented by the general public, except that the state commissioner shall establish rules to restrict or prohibit smoking in those places of work where the close proximity of workers or the inadequacy of ventilation causes smoke pollution detrimental to the health and comfort of nonsmoking employees.

Minn. Stat. § 144.414, subd. 1.

c. The blanket inclusion of factories, warehouses, or similar places of work in the rule was questioned by Jude Candy & Tobacco; Granite City Jobbing; Thief River Jobbing; Tyler Wholesale; Thomas Briant, Legal Counsel for the Minnesota Candy and Tobacco Association, Inc.; John Rebrovich, President of Local Union 2705, United Steelworkers of America; Robert A. Rootes, Political Action Coordinator, United Steelworkers of America; Julie Anderson, Secretary-Treasurer of Local Lodge 1037, International Association of Machinists and Aerospace Workers (IAMAW); William C. Diesslin, Secretary-Treasurer of Twin Cities Automotive Lodge 737, Machinists Union of the AFL-CIO; Richard H. Savard, Secretary-Treasurer, Capitol City Lodge No. 459, IAMAW; Henry's Foods, Inc.; Boyd Houser Candy & Tobacco; and David C. Ring, Business Manager of Local Union 160, International Brotherhood of Electrical Workers and a large number of the people who requested a hearing.

d. Anne Joseph, M.D., for the U.S. Department of Veterans Affairs, supported inclusion of factories, warehouses, or similar places of work as correcting "an unintended loophole in the original version [of the MCIAA]." Public Exhibit 8. Sue Zuidema, President of the Smoke Free 2000 Coalition, supported the inclusion of factories, warehouses, or similar places of work as advancing the "right to be free from exposure to environmental tobacco smoke." Public Exhibit 6. Robert Russell, Chairman of the Affiliate Public Affairs Committee of the American Heart Association, and Dan Johnson of Blue Cross Blue Shield of Minnesota supported the rights of nonsmokers to a smoke-free environment in the workplace. Public Exhibit 6. Sandra D. Sandell, Executive Director of the Association for Nonsmokers-Minnesota, commented that:

> After the Minnesota Clean Indoor Air Act was adopted, many tried to meet the letter of the law by separating smokers from nonsmokers. That many governmental agencies, restaurant owners, and employers now provide smoke-free environments (see the attached lists) testifies to their experience that separation does not work. It appears that once they were forced to do **something** about second-hand smoke, they eventually chose to go smoke-free.

Public Exhibit 7 (emphasis in original).

e. Mr. Briant raised a concern about warehouses which are one large open building and have no separate lunchrooms or lounges. He interpreted the proposed rules to ban smoking in such a facility if the facility could not meet the ventilation and space requirements. The department stated in its post-hearing comments that it had not considered a one-room building. In response to Mr. Briant's concern, the Department proposed the following modification to part 4620.0975:

> 4620.0975 FACTORIES, WAREHOUSES, OR SIMILAR PLACES OF WORK.
>
> Subp. 2. **Restriction.** If the conditions specified in subpart 1, items A and B, cannot be met, then smoking must be restricted in a factory, warehouse or similar place of work to the following locations:

A. a private enclosed office if the door is kept closed while smoking occurs; ~~or~~

B. the designated smoking-permitted area of an employee lunchroom or lounge as specified in part 4620.0750~~.~~; or

C. in one-room buildings, where separate lunchrooms or lounges do not exist, the employer may designate one smoking-permitted area per 20,000 square feet. One of the separation methods specified in part 4620.0100, Subp. 2. B. must be provided between the nonsmoking and smoking-permitted areas.

This language is consistent with proposed language in part 4620.0400, subpart 1, which was recommended by the rule advisory group. The change is not a substantial one. As modified the proposed rule is consistent with the statute and has been shown to be needed and reasonable. Without the modification, the proposed rule was in conflict with Minn. Stat. § 144.415 as explained in Findings of Fact No. 28 and 29 above.

f. The statute clearly provides authority to the commissioner to restrict or prohibit smoking in warehouses and factories where ventilation is inadequate or workers are too close together. The Legislature must have intended that the Department establish a general standard to judge ventilation and proximity, which is what the Department has proposed. Items A-C set out the restrictions which operate only if the general standards are not met. Although the general prohibition on applying the statute to factories and warehouses might arguably be eaten up by the restrictions contained in the proposed rule, the statute clearly authorizes "rules to restrict or prohibit smoking" and the proposed rule as modified is a reasonable interpretation of a difficult legislative directive.

Proposed Rule 4620.1000 - Restaurants

31. a. The existing rule on restaurants determined if a restaurant was a bar, put some restaurants under the jurisdiction of the Department of Labor and Industry (DOLI), and deemed restaurants in compliance with the rules if 30 percent of the seats in the eating area are designated as smoking-prohibited. Proposed rule 4620.1000 retains the existing language on restaurants, including the 30 percent nonsmoking seating area standard. The DOLI provision is deleted since jurisdiction over such restaurants has been transferred to the Department. The standards for bars are moved to a new rule part.

b. David Siegel, Communications Director of the Minnesota Restaurant, Hotel & Resort Associations supported retention of the existing minimum square footage of the nonsmoking area in restaurants at 30% and pointed out that the average nonsmoking seating is already at 53-56% due to market forces. State Representative Phyllis Kahn suggested that 30% is too small, when the percentage of smokers in the general population is considered. Representative Kahn, who is the chief author of the MCIAA, urged a minimum of 50% to 60%. Carlson agreed.

c. Since the 30 percent standard is not proposed to be changed in this rule proceeding it does not have to be shown to be needed and reasonable. Minn. Rule 1400.0500, subd. 1. The advisory group agreed unanimously that the

30% requirement should not be changed at this time. A modification of the 30% standard in this proceeding would constitute a substantial change since it would make a major substantive change that was not raised by the original notice of hearing in such a way as to invite reaction at the hearing. Minn. Rule 1400.1100, subd. 2. (See Finding of Fact No. 11 c.) Since the Department's statistics indicate that 30 percent of the general population smokes, a larger portion of the seating could perhaps be set aside as smoking-prohibited in a future rule proceeding.

d. Siegel questioned the application of the rule to a facility that has both restaurant seating and a separate bar. The Department suggested additional language that would require the proprietor to calculate the total seating area and allow the proprietor to allocate the nonsmoking area in whatever manner is desired. The only requirement is that the designated nonsmoking areas must amount to 30 percent of the seating in the facility. The Department indicated in its posthearing comment that the separation standards would apply to facilities that were restaurants and bars. The rule, as modified, is needed and reasonable. The modification does not constitute a substantial change.

Proposed Rule 4620.1025 - Bars

32. The standard to be applied to bars for regulating smoking is set by proposed rule 4620.1025. Stated simply, a facility licensed as a restaurant and providing service under that license must meet the restaurant standard. When that food service is not available, the facility can act as a bar. Under the MCIAA, bars may be designated as smoking in their entirety, but restaurants cannot. Minn. Stat. § 144.415. The proposed rule clearly differentiates between the two types of enterprises by the services they offer. While this approach will change some individual facilities back and forth between the categories of restaurant and bar, this approach promotes substance over form. The proposed rule is needed to extend the protections of the MCIAA to the fullest extent intended in public dining places. The rule is reasonable to prevent evasion of the MCIAA standards by identifying a restaurant facility as a "bar." The requirements on any individual facility are not onerous and will protect the public. The rule is needed and reasonable as proposed.

Proposed Rule 4620.1200 - Health Care Facilities

33. The MCIAA expressly prohibits smoking in various types of health care facilities. Minn. Stat. § 144.414, subd. 3(a). Residential health care facilities, such as nursing homes, are not included in this prohibition. Id. Smoking by mental health and chemical dependency patients is expressly allowed in a "separate, well-ventilated area." Minn. Stat. § 144.414, subd. 3(b). In proposed rule 4620.1200, the Department retains the existing rules on health care facilities and adds a subpart on chemical dependency and mental health facilities. The subpart establishes a 60 cfm ventilation standard for such facilities. No one objected to the proposed rule. The rule part is needed and reasonable.

Proposed Rule 4620.1400 - Common Areas

34. This rule is amended to specifically include lobby areas and to clarify that smoking in elevators is prohibited. At the hearing, the Department also proposed to include "common areas of rental apartment buildings" due to a 1994 statutory amendment. A commenter (Ex. 1) asked that public bathrooms also be specifically included. The amendments are needed and reasonable. Although the Department states that public restrooms have not been an enforcement problem, it should consider the suggestion if the proposed rules are intended, as it suggests, to ban smoking in restrooms of office buildings and industrial buildings.

Proposed Rule 4620.1425 - Retail Stores

35. a. The Department would prohibit smoking in all customer areas of retail stores in proposed rule 4620.1425. Designated smoking areas for employees are allowed, if completely separate from customer areas. Restaurants in retail stores must follow the rules for restaurants. In its SONAR, the Department indicated that it has interpreted Minn. Rule 4620.0400, subp. 2 as allowing smoking only if identical good and services are supplied in a nonsmoking area. SONAR, at 24. The Department noted that the proposed prohibition received no adverse comments from trade groups. Id.

b. Al Shofe objected to the proposed rule as preventing customers from sampling tobacco products in a tobacconist's shop. Other commenters, including Mr. Kelm, objected to prohibiting customers from smoking in a smoking permitted area if they wished to do so.

c. The existing rules do not specifically mention retail shops. The existing rule relied upon by the Department as supporting the interpretation presented in the proposed rule states:

> In a public place which contains two or more rooms which are used for the same activity, the responsible person may designate one entire room as smoking permitted as long as at least a portion of one other comparable room has been designated as a no-smoking area.

Minn. Rule 4620.0400, subp. 2.

d. The language of the existing rule is quite different from the proposed rule. The Department cannot base the proposed rule on subpart 2. Proposed rule 4620.1425 conflicts with the MCIAA for the same reasons set out at Finding of Fact No. 29. That is, it flatly bans smoking while the statute permits a smoking area selected by the store management. Although the rule is supported by the evidence and by most retailers, it exceeds the statutory authority granted to the Department. The only way to cure this defect is either to delete the proposed rule or add a provision similar to the suggested modification at 4620.0975, subd. 2.C. Deleting part 4620.1425 would not be a substantial change.

Based upon the foregoing Findings of Fact, the Administrative Law Judge makes the following:

CONCLUSIONS

1. The Minnesota Department of Health (Department) gave proper notice of this rulemaking hearing.

2. The Department has substantially fulfilled the procedural requirements of Minn. Stat. §§ 14.14, subds. 1, 1a and 14.14, subd. 2, and all other procedural requirements of law or rule so as to allow it to adopt the proposed rules.

3. The Department has demonstrated its statutory authority to adopt the proposed rules, and has fulfilled all other substantive requirements of law or rule within the meaning of Minn. Stat. §§ 14.05, subd. 1, 14.15, subd. 3 and 14.50 (i) and (ii), except as noted at Findings 28, 29 and 35.

4. The Department has demonstrated the need for and reasonableness of the proposed rules by an affirmative presentation of facts in the record within the meaning of Minn. Stat. §§ 14.14, subd. 2 and 14.50 (iii).

5. The additions and amendments to the proposed rules which were suggested by the Department after publication of the proposed rules in the State Register do not result in rules which are substantially different from the proposed rules as published in the State Register within the meaning of Minn. Stat. § 14.15, subd. 3, and Minn. Rule 1400.1000, subp. 1 and 1400.1100.

6. The Administrative Law Judge has suggested language to correct the defects cited in Conclusion 3, as noted at Findings 29b and 35d.

7. Due to Conclusions 3 and 6, this Report has been referred to the Chief Administrative Law Judge for his approval pursuant to Minn. Stat. § 14.15, subd. 3.

8. Any Findings which might properly be termed Conclusions and any Conclusions which might properly be termed Findings are hereby adopted as such.

9. A Finding or Conclusion of need and reasonableness in regard to any particular rule subsection does not preclude and should not discourage the Department from further modification of the proposed rules based upon an examination of the public comments, provided that no substantial change is made from the proposed rules as originally published, and provided that the rule finally adopted is based upon facts appearing in this rule hearing record.

Based upon the foregoing Conclusions, the Administrative Law Judge makes the following:

RECOMMENDATION

IT IS HEREBY RECOMMENDED that the proposed rules be adopted except where otherwise noted above.

Dated this 1st day of August, 1994.

GEORGE A. BECK
Administrative Law Judge

Reported: Tape Recorded; No Transcript.