

STATE OF MINNESOTA
OFFICE OF ADMINISTRATIVE HEARINGS
FOR THE MINNESOTA DEPARTMENT OF COMMERCE

In the Matter of the Proposed
Rule Relating to the Liquor
Liability Assigned Risk Plan

REPORT OF THE
ADMINISTRATIVE LAW JUDGE

The above-entitled matter came on for hearing before Administrative Law Judge Howard L. Kaibel, Jr. on April 27, 1993, at 9:00 a.m. in 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, determine whether the Minnesota Department of Commerce ("the Department") has fulfilled all relevant substantive and procedural requirements of law or rule applicable to the adoption of the rules, determine whether the proposed rules are needed and reasonable, and determine whether or not modifications to the rules proposed by the Department after initial publication are substantially different from those originally proposed.

The Department's hearing panel consisted of Special Assistant Attorney General Carolyn Ham; Staff Attorney Donna Watz; Program Administrator Beth Eulberg; and Alan Hapke, an actuarial consultant. Twenty persons attended the hearing. Nine persons signed the hearing register. Procedural exhibits from the Department and public exhibits were received as evidence during the hearing. The hearing continued until all interested persons, groups or associations had an opportunity to be heard.

The record remained open for the submission of written comments until May 4, 1993, five working days following the date of the hearing. Pursuant to Minn. Stat. § 14.15, subd. 1, another five working days were allowed for the filing of responsive comments. At the close of business on May 11, 1993, the rulemaking record closed for all purposes. A number of post-hearing written comments were received from interested persons. The Department representatives submitted written comments responding to matters discussed at the hearing.

This Report must be available for review to all affected individuals upon request for at least five working days before the agency takes any further action on the rule(s). The agency may then adopt a final rule or modify or withdraw its proposed rule. If the Commissioner makes changes in the rule other than those recommended in this report, he must submit the rule with the complete hearing record to the Chief Administrative Law Judge for a review of the changes prior to final adoption. Upon adoption of a final rule, the agency must submit it to the Revisor of Statutes for a review of the form of the rule. The agency must also give notice to all persons who requested to be informed when the rule is adopted and filed with the Secretary of State.

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

FINDINGS OF FACT

Procedural Requirements

1. On February 4, 1993, the Department filed the following documents with the Chief Administrative Law Judge:

- (a) a copy of the proposed rules as certified by the Revisor of Statutes;
- (b) the Order for Hearing;
- (c) the Notice of Hearing;
- (d) the Statement of Need and Reasonableness (SONAR); and
- (e) an estimate of the number of persons who were expected to attend the hearing and an estimate of the length of the Department's presentation.

2. On February 19, 1993, the Department mailed the Notice of Intent to Adopt a Rule With a Public Hearing to all persons and associations who had registered their names with the Department for the purpose of receiving such notice.

3. On February 19, 1993, the Department also mailed the Notice of Hearing to all persons and associations who had submitted a written request for a public hearing and to more than 800 other potentially interested parties.

4. On September 21, 1992, a Notice of Intent to Solicit Outside Opinion was published in 17 State Register 638. X

5. On February 22, 1993, the Notice of Hearing and a copy of the proposed rules were published in 17 State Register 2037.

6. On April 7, 1993, the Department filed the following documents with the Administrative Law Judge:

- (a) the Notice of Hearing as mailed;
- (b) a copy of the State Register pages containing the Notice of Hearing and referencing the location of the proposed rules in the State Register;
- (c) an affidavit stating that the Notice of Hearing was mailed on February 19, 1993, to all persons who submitted a written request for a public hearing in response to the Department's Notice of Intent to Adopt a Rule Without a Public Hearing;

(d) a copy of the Notice of Solicitation of Outside Information or Opinions published in 17 State Register 638, on September 21, 1992, together with the materials received by the Department in response to the solicitations; and

(e) the names of agency personnel who would represent the Department at the hearing.

7. All documents were available for inspection and copying at the Office of Administrative Hearings from the date of filing to May 11, 1993, the date the rulemaking record closed. Minn. Rule 1400.0600 requires that the documents listed in the foregoing Finding be filed with the Administrative Law Judge at least 25 days before the hearing. The documents were filed twenty days before the hearing. No participants expressed an interest in the documents prior to the hearing. The documents only reflect actions taken by the Department. Failing to file them in a timely fashion has not impaired anyone's ability to participate in this rulemaking. Under Minn. Stat. 14.15, subdivision 5, the untimely filing constitutes a harmless error and not a defect in this rulemaking.

Nature of the Proposed Rules

8. In 1985, Minnesota Statutes, Chapter 340A was enacted. Section 409 subdivision 3, outlines the establishment of an assigned risk plan for liquor liability, designed to provide coverage to those who cannot purchase the required coverage from the standard insurance market. In 1986, Minnesota Rules Chapter 2783 were enacted pursuant to Minnesota Statutes 340A.409. These rules governed the operation of the liquor liability assigned risk plan and established the rates for coverage.

Minnesota Statutes, Chapter 340A.409, subdivision 3(g), states that the assigned risk premiums must be on an actuarially sound basis. In 1992, the Commissioner of Commerce requested an independent actuary to review the rates for the liquor liability assigned risk plan and to make comments regarding the soundness of the rates and the reserving procedures used by the assigned risk plan. The results of that actuarial audit were that the rates were inadequate and the request to the board of directors that the rates be increased to levels recommended by the actuary. These rules reflect those rate levels.

Statutory Authority

9. In its Notice of Hearing the Department cites Minn. Stat. § 340A.409, subd. 2(h), as statutory authority for issuance of the proposed rules. Minn. Stat. § 340A.409, subd. 3(h) provides such authority. The Department has adequately documented statutory authority to promulgate these rules.

Small Business Considerations in Rulemaking

10. Minn. Stat. § 14.115, subd. 2, requires that state agencies proposing rules which may affect small businesses must consider methods for reducing adverse impact on those businesses. In its Notice of Hearing and

SONAR, the Department indicated that the impact of the proposed rules on small businesses had been considered. It would indeed have required transcendental blinders to look at these rules without considering adverse impacts on small businesses and their amelioration.

This Report does not concur with the statement of Department Staff in their final written comments that "Minn. Stat. § 14.115 does not address the financial impact of rules on small businesses." The legislature clearly did intend rulemaking scrutiny of financial impacts in enacting that mandate. While there may be other potential adverse impacts of governmental rules on small businesses such as psychological or sociological effects, it is financial impact on small businesses which the statute primarily addresses.

On the other hand, considering financial impacts, this Report does concur with the Department Staff's conclusion that the adverse effects have been duly addressed. The amount of increased premium that the staff is proposing to impose on small businesses is the lowest that is actuarially sound, based on the expert testimony. No one has suggested a fairer structure for passing that increase on to the small businesses, which all of these policy holders are. The Department has met the requirements of Minn. Stat. § 14.115, subd. 2.

Fiscal Note

11. Minn. Stat. § 14.11, subd. 1, requires agencies proposing rules that will require the expenditure of public funds in excess of \$100,000 per year by local public bodies to publish an estimate of the total cost to local public bodies for the two years immediately following adoption of the rule. In its Notice of Hearing, the Department stated that the proposed rules would not require any expenditure of public money by local units of government. The Department is not required to prepare a fiscal note.

Impact on Agricultural Land

12. Minn. Stat. § 14.11, subd. 2, requires that agencies proposing rules that have a "direct and substantial adverse impact on agricultural land in the state" comply with the requirements set forth in Minn. Stat. §§ 17.80 to 17.84. Under those statutory provisions, adverse impact is deemed to include acquisition of farmland for a nonagricultural purpose, granting a permit for the nonagricultural use of farmland, the lease of state-owned land for nonagricultural purposes, or granting or loaning state funds for uses incompatible with agriculture. Minn. Stat. § 17.81, subd. 2 (1990). Because the proposed rules will not have a direct and substantial adverse impact on agricultural land, Minn. Stat. § 14.11, subd. 2, does not apply.

Substantive Provisions

13. The Department must establish the need for and reasonableness of the proposed rules by an affirmative presentation of facts. The Department prepared a Statement of Need and Reasonableness (SONAR) in support of the adoption of the proposed rules and supplemented its SONAR at the hearing.

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).

This Report is generally limited to discussion of the portions of the proposed rules that received significant critical comment. Because most sections of the proposed rules were not opposed and were adequately supported by the SONAR, a detailed discussion of each section of the proposed rules is unnecessary. The need for and reasonableness of the provisions that are not discussed in this Report have been demonstrated by an affirmative presentation of facts, and such provisions are specifically authorized by statute.

14. Nearly all of the testimony in this proceeding related in one way or another to the single predominate issue --whether premiums for the assigned risk plan ("the plan") should be increased and if so, by what amount. Plan members and potential members doubted the need for any increase at all, fearing that the Department staff's proposed substantial hikes would force some small businesses to close. On the other hand, commercial insurers who provide competitive coverage in the so-called "voluntary market" to the least risky businesses wanted a much higher increase in plan rates, fearing that future claims in excess of plan premiums might force the Commissioner to assess them to cover the shortfall.

The law requires that plan premiums must be "actuarially sound" -- that is sufficient to cover statistically calculated risks. It is however, abundantly evident on this record that there is more than one acceptable way for reasonable minds to calculate risks with statistics. Even experienced reputable actuaries speak in terms of "ranges" of reasonableness and differ as to the parameters of those ranges.

If there are professional actuaries who believe that the plan's current rates are statistically adequate to cover calculable risks, they did not participate in this proceeding. All of the reliable actuarial evidence in this proceeding indicates that some increase is required to insure that the plan will remain financially sound, the only question is how much of an increase is needed.

The staff candidly proposes to promulgate rates based on the most "optimistic" actuarial projections available. They would hold the increase to the lowest possible amount that would be consistent with independent outside professional assessments.

The chosen rates are rationally related to the Department's obligations to assure that the plan is actuarially sound and to minimize unnecessary adverse impacts of government on small business. Considering all of the evidence in this record, they have adequately documented the need for and reasonableness of their proposal with an affirmative presentation facts.

A major consideration in approving the staff's proposal is the ease with which it can be revised, based on new or different evidence. Minn. Stat. § 340A.409, subd. 3(h) specifically provides that the rates can be amended by a mandatory expedited 55-day amendment process initiated by a written petition filed by "any person". This entire question is thus subject to mandatory review 180 days after the Commissioner's decision. If any of the effected businesses or their association has or obtains convincing evidence (actuarial or otherwise) that the rates are excessive, this review can be reconvened for expedited relief forthwith. Conversely, if commercial insurers are ever actually imminently threatened with assessments to cover some plan shortfall, pursuant to Minn. Stat. § 340A.409, subd. 3(d), due to some unanticipated combination of increased losses and diminished premiums --they could also utilize these procedures for expedited relief. No one has suggested that any such deficit will occur in the next 180 days.

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

CONCLUSIONS

1. The Minnesota Department of Commerce gave proper notice of this rulemaking hearing.

2. The Department has fulfilled the procedural requirements of Minn. Stat. § 14.14, subds. 1, 1a, and 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).

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

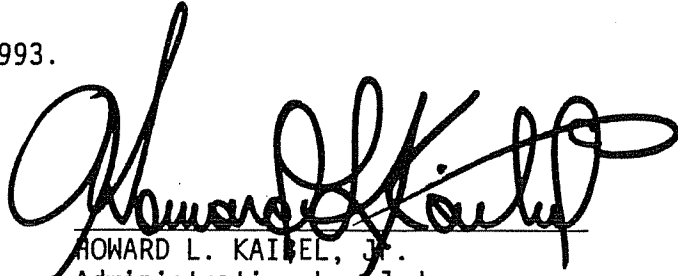
6. A Finding or Conclusion of need and reasonableness in regard to any particular rule subsection does not preclude and should not discourage the Department from further modification of the proposed rules based upon an examination of the public comments, provided that no substantial change is made from 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 consistent with the findings and conclusions made above.

Dated this 21st day of June, 1993.


HOWARD L. KAIEL, J.
Administrative Law Judge

Reported: Tape Recorded, No Transcript.