STATE OF MINNESOTA
OFFICE OF ADMINISTRATIVE HEARINGS

FOR THE MINNESOTA DEPARTMENT OF PUBLIC SAFETY

In the Matter of the Proposed Rules of the State Department of Public Safety Relating to Fire Protection (Sprinkler) Systems

REPORT OF THE ADMINISTRATIVE LAW JUDGE

The above-entitled matter came on for hearing before Administrative Law Judge Peter C. Erickson at 9:00 a.m. on Tuesday, October 12, 1993 in Room 5 of the State Office Building, St. Paul, Minnesota 55155. This Report is part of a rulemaking proceeding pursuant to Minn. Stat. §§ 14.131 - 14.20 to determine whether the Department of Public Safety has fulfilled all relevant, substantive and procedural requirements of law, to determine whether the proposed rules are needed and reasonable, to determine whether the Department has statutory authority to adopt the proposed rules, and to determine whether or not the proposed rules, if modified, are substantially different from the rules as originally proposed.

Jeffrey S. Bilcik, Assistant Attorney General, 525 Park Street, Suite 55, St. Paul, Minnesota 55103, appeared on behalf of the Minnesota Department of Public Safety (Department or Agency). Appearing and testifying on behalf of the Department in support of the proposed rules were: Dave Orren, Rules Coordinator; Thomas Brace, State Fire Marshal; and Robert James and Jon Nisja, Fire Marshal Division employees. The hearing continued until all interested groups or persons had had an opportunity to testify concerning the proposed rules.

The Department of Public Safety must wait at least five working days before taking any final action on the rules; 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, he must submit the proposed rule to the Legislative Commission to Review Administrative Rules for the Department'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 the Chief Administrative Law Judge, then he shall submit the rule, with the complete 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, he 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 August 13, 1993, the Department of Public Safety 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 Order for Hearing.
(c) The Notice of Hearing proposed to be issued.
(d) A Statement of the number of persons expected to attend the hearing and estimated length of the Agency's presentation.
(e) The Statement of Need and Reasonableness.
(f) A Statement of Additional Notice.

2. On August 30, 1993, a Notice of Hearing and a copy of the proposed rules were published at 18 State Register pp. 654-670.

3. On August 16, 1993, 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.

4. On September 15, 1993, the Department filed the following documents with the Administrative Law Judge:

(a) The Notice of Hearing as mailed.
(b) The Agency's certification that its mailing list was accurate and complete.
(c) The Affidavit of Mailing the Notice to all persons on the Agency's list.
(d) An Affidavit of Additional Notice.
(e) The names of Department personnel who will represent the Agency at the hearing together with the names of any other witnesses solicited by the Agency to appear on its behalf.
(f) A copy of the State Register containing the proposed rules.

(g) All materials received following a Notice of Intent to Solicit Outside Opinion published at 16 State Register pp. 2626-2627 (June 1, 1992) and a copy of the Notice.

The documents were available for inspection at the Office of Administrative Hearings from the date of filing to the date of the hearing.

5. The period for submission of written comment and statements remained open through October 19, 1993. The record closed on October 26, 1993, the fifth business day following the close of the comment period.

6. On October 1, 1993, the Department mailed a notice to the persons who had requested a public hearing on this matter pursuant to the requirements of Minn. Stat. § 14.25.

7. Pursuant to Minn. Stat. § 16A.1285, subd. 4 (1993 Laws, ch. 192, § 56), the Department mailed a Notice of Hearing and a copy of the proposed rules to the Chairs of the Senate Finance Committee and the House Ways and Means Committee on August 13, 1993.

8. On August 13, 1993, a copy of the Statement of Need and Reasonableness was sent to the Legislative Commission to Review Administrative Rules (LCRAR) pursuant to Minn. Stat. §§ 14.131 and 14.23.

9. Pursuant to Minn. Stat. § 16A.128, the Department attached the approval of the Minnesota Department of Finance for the fees imposed by the rule to the Statement of Need and Reasonableness (SONAR). Additionally, attached to the SONAR as Appendix A was a statement setting forth the basis for the fees assessed by the proposed rules. This Statement asserts that the fees collected will approximate the estimated amount of money spent by the Department for salaries, indirect costs, and expenses associated with administering the fire protection industry licensing program. This Statement was provided pursuant to the requirements of Minn. Stat. §§ 16A.128, subd. 1 and 16A.1285, subd. 2.

Statutory Authority

10. Statutory authority to adopt the proposed rules is contained in Minn. Stat. § 299M.04 (1992 Laws, ch. 508, § 4). That statutory provision reads as follows:

> **299M.04 RULES; SETTING FEES.**
>
> The commissioner shall adopt permanent rules for operation of the council; regulation by municipalities; permit, filing, inspection, certificate, and license fees; qualifications; examination, and licensing of fire protection contractors; certification of journeyman sprinkler fitters; registration of apprentices; and the administration and enforcement of this chapter. Fees must be set under section 16A.128. Permit fees must be a percentage of the total cost of the fire protection work.

Small Business Considerations

11. Pursuant to Minn. Stat. § 14.115, the Department considered the effect of the adoption of these proposed rules on small businesses. The Department specifically considered each of the methods for reducing the impact of the rules on small businesses set forth in subdivision 2 of the statutory section. The Department determined that the rules, as proposed, are appropriate and that nothing more can be done to lessen their impact on small businesses.

Nature of the Proposed Rules

12. Minn. Stat. ch. 299M regulates the fire protection industry and was enacted by the Minnesota Legislature during the 1992 Session. See, 1992 Laws, ch. 508. This legislation created a Minnesota Advisory Council on Fire Protection Systems whose responsibility it is to advise the Commissioners of Public Safety and Labor and Industry concerning the appropriate regulation of the fire protection industry. This council, in conjunction with the State Fire Marshal Division, drafted the proposed rules for the purpose of implementing Chapter 299M. Both Chapter 299M and the proposed rules have been drafted in line with a model law that was approved and developed by the National Association of State Fire Marshals. At the present time, many Minnesota jurisdictions have adopted licensing requirements for fire protection system contractors through local ordinances. It is intended that these proposed rules will replace local ordinances and provide consistency to licensure throughout the State. These proposed rules set minimum standards for the licensure of fire protection contractors, and require certification of journeyman sprinkler fitters and registered apprentice sprinkler fitters. Fees are established for licensure and certification-registration.

13. Many of the proposed rule provisions received no negative public comment and were adequately supported by the SONAR. The Judge will not specifically address those provisions in the discussion below and specifically finds that the need for and reasonableness of those proposed rules has been demonstrated.[1] Some concerns raised by the public have been addressed in modifications made by the Department subsequent to the hearing as set forth below. The discussion which follows the modification section will only address substantive issues of need, reasonableness or statutory authority which remain at issue in this proceeding.

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[1]In order for an agency to meet the burden of reasonableness, it must demonstrate by a presentation of facts that the rule is rationally related to the end sought to be achieved. Broen Memorial Home v. Minnesota Department of Human Services, 364 N.W.2d 436, 440 (Minn. App. 1985). Those facts may either be adjudicative facts or legislative facts. Manufactured Housing Institute v. Pettersen, 347 N.W.2d 238, 244 (Minn. 1984). The agency must show that a reasoned determination has been made. Manufactured Housing Institute at 246.

Modifications to the Proposed Rules Made by the Department

14. After hearing the testimony at the hearing and reviewing all of the written submissions, the Department has modified the proposed rules as follows:

7512.0100, Subp. 14 - add the following sentence:

> "State approval agency" also means a state agency in Minnesota or another state if the commissioner determines that the state agency approves training programs and monitors apprentice or trainee progress in a manner comparable to that done by the Department of Labor and Industry or by the United States Department of Labor, Bureau of Apprenticeship and Training.

7512.0300 - the second paragraph is modified to read:

> . . . A person who submits satisfactory proof to the commissioner of actively engaging in full-time fire protection system installation ~~either~~ as a fire protection contractor ~~or journeyman sprinkler fitter~~ for a period of five years before June 1, 1993, and who applies for a license ~~or certificate~~ on or before August 1, 1993, is eligible for licensure ~~or certification~~ without examination until June 1, 1995. A person who submits satisfactory proof to the commissioner of actively engaging in full-time fire protection system installation as a sprinkler fitter for a period of five years before June 1, 1993, and who applies for a certificate on or before August 1, 1993, is eligible for certification without examination until June 1, 1995.[2]

7512.0400, Subp. 2.F. - modified to read:

> F. A person licensed as an alarm and communication contractor under Minnesota Statutes, section 326.2421, or a Minnesota licensed electrical contractor under Minnesota Statutes, section 326.242, does not need a fire protection contractor license to perform activities authorized by the alarm and communication contractor license or electrical contractor license.

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[2]The first sentence of the second paragraph states that the rules are effective June 1, 1993. Minn. Stat. § 14.27 provides that rules are not effective until publication of the notice of adoption in the State Register. The Department stated that the rule will be changed before adoption to reflect the correct effective date and other deadlines will be adjusted. Consequently, the Judge will not address the issue of retroactivity or whether the rule is defective. However, those changes will require resubmission to the Chief Administrative Law Judge pursuant to Minn. Stat. § 14.16.

7512.0500, Subp. 2 - add the following sentence as the first sentence of the paragraph:

> Except as provided in subpart 3, the commissioner shall use the provisions of this subpart to determine whether to issue a fire protection contractor license.

7512.0500 - add a new Subpart 3 to read:

> Subpart 3. **Designer contractor license.** The commissioner shall issue a designer contractor license to an applicant who performs fire protection-related work that is limited to the design of fire protection systems. To obtain a designer contractor license, the applicant shall submit to the commissioner a license application that meets the requirements of subpart 1, except that the bond amount must be $10,000 and the license fee must be $150. The annual license renewal fee is $75. The person designated on the application as managing employee must meet the requirements of a managing employee set out in parts 7512.1300 to 7512.1600, except that to qualify for examination, the person must hold a Level IV certification by the National Institute for Certification in Engineering Technologies, in the field of fire protection, and in the subfield of automatic sprinkler system layout. When performing fire protection-related work, the designer contractor is limited to designing fire protection systems.

The above-modifications were made primarily in response to public comment contained in the record in this matter. Except as may be specifically modified below, the Judge finds that the need for and reasonableness of the above-modifications have been demonstrated and that none constitute a substantial change from the rules as initially proposed.

Discussion of the Proposed Rules

15. The first major issue which arose during the hearing was whether it was appropriate for the Department of Public Safety to designate the Minnesota Department of Labor and Industry as the "state approval agency" for purposes of registering apprentice sprinkler fitters. Minn. Stat. § 299M.01, subd. 2 defines "apprentice sprinkler fitter" as a person who is, in part, "registered with a state or federal approval agency". Proposed Rule 7512.0100, subp. 7 defines "federal approval agency" as the "United States Department of Labor, Bureau of Apprenticeship and Training". Subpart 14 of that rule defines "state approval agency" as the Minnesota Department of Labor and Industry. Proposed Rule 7512.2100, subp. 3C. requires that before the Commissioner of Public Safety may issue an apprentice sprinkler fitter registration and card to an applicant, the applicant must be registered "with a state or federal approval agency". As is set forth above in Finding 14, the Department has modified the definition of "state approval agency" to mean any other state agency in Minnesota or another state:

> . . . if the commissioner determines that the state agency approves training programs and monitors apprentice or

> trainee progress in a manner comparable to that done by the Department of Labor and Industry or by the United States Department of Labor, Bureau of Apprenticeship and Training.

This modified definition opens up the avenues for apprentice registration in other states and, if the commissioner so determines, a state agency in Minnesota other than the Department of Labor and Industry if the commissioner determines that the agency meets the appropriate criteria.

George W. Hawkins, Executive Director of the Minnesota chapter of Associated Builders and Contractors, Inc. (ABC), testified at the hearing that the proposed rules:

> . . . effectively increase the burdens of contractors and apprentices, expand paperwork requirements, increase costs without benefit, restrict entry without merit, and perhaps violate federal law. If these rules become permanent, only in the trade of fire protection will Minnesota crafts people who wish to learn journey person skills be required to deal with the paperwork of two government bodies. Electrical apprentices are required to register with the Board of Electricity, the same agency that licenses journey person electricians. Plumber apprentices must register with the Commissioner of Health, the same department that licenses plumbers. The only agency that registers pressure pipefitter apprentices for purposes of licensing is the Department of Labor and Industry, which is the department responsible for licensing pressure pipefitters. This proposed requirement by the Department of Public Safety is an unnecessary duplication that is not followed for any other craft in Minnesota, and brings with it additional paperwork, resulting in increased operating cost.
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> By rule and statute, the Division of Voluntary Apprenticeship imposes on apprenticeship programs certain wage standards that are based on rates associated with counties, on a county-by-county basis. Frequently these rates are not related to wage structures used by affected contractors. Among others, that is one of the reasons many contractors choose to develop training programs independently. Imposition of these rules will force many contractors to change the terms and conditions of employment they now embrace. And because these predetermined wage structures are so inconsistent from one county to the next, the whole competitive nature of the industry could be thrown into disarray.
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> It is the policy of the Department of Labor and Industry Division of Voluntary Apprenticeship to impose registration ratios that are inconsistent with most current trade practices. The policy states in part that "there will be allowed one apprentice for the first journeyman regularly employed plus one apprentice for each additional three journeymen employed." It adds

that, "Requests for a ratio variance shall be considered by the council on an individual basis."

This arbitrary three to one ratio artificially restricts opportunity. In many cases, if this requirement is imposed on existing contractors and their work forces, some will be required to end the employment of some apprentices.

ABC contends that if registration with the Minnesota Department of Labor and Industry is mandated, a violation of the Federal Employee Retirement Income Security Act of 1974, 29 U.S.C. §§ 101, et seq., ("ERISA"), would result. This follows from the fact that ERISA preempts state laws that "relate to" specified "employee benefit plans". Id., section 1144(a). ABC cites, inter alia, the case of Boise Cascade Corp. v. Peterson, 939 F.2d 632 (8th Cir. 1991), cert. denied, 112 S. Ct. 3014 (1992), to support its position that the proposed rule is preempted by ERISA.[3] ABC contends that both the three-to-one ratio of apprentices to journeymen mandated by the Department of Labor and Industry and the requirement that apprentices be paid a percentage of the state "prevailing wage" are in violation of and would be preempted by ERISA.

16. The Department contends that at the time Chapter 299M was enacted and currently, the Minnesota Department of Labor and Industry is the only "state approval agency" in the State of Minnesota. At the present time, the Department does not want to function as a state approval agency because: (a) it does not want to duplicate services already performed by the Department of Labor and Industry; (b) if the Department were to become a state approval agency, a great deal of planning and preparation would be required to develop the expertise necessary to perform the approval function; and (c) legislation would probably be required to add staff and an appropriation to administer the new function which would require more rulemaking to set the training requirements for apprentices. The Department argues that with the alternatives of the federal agency and approval agencies in other states, the proposed rule is clearly within the legislative directive.

17. The authorizing statute, Minn. Stat. § 299M.01, subp. 2, clearly requires that an apprentice sprinkler fitter be "registered with a state or federal approval agency". At the time that statutory provision was enacted, the 1992 Session, the Legislature was fully aware that the Department of Labor and Industry was the only state approval agency in Minnesota and the Boise Cascade case had been decided approximately nine months prior to enactment. No legislative history has been offered to show that the Legislature even discussed the possibility of the Department of Public Safety becoming a state approval agency for the purposes of Chapter 299M. There is nothing in the record to show how the Department of Labor and Industry changed the pipefitter registration requirements to comply with Boise Cascade or that would suggest a

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[3]Boise Cascade is a Minnesota case which involved a challenge to a rule of the Minnesota Department of Labor and Industry which mandated that the minimum ratio of apprentice pipefitters to licensed pipefitters on a job site shall be one to three. The Eighth Circuit held that the minimum ratio rule was preempted by ERISA.

similar change would not be done for sprinkler fitters. The Judge cannot, at this time, speculate whether the registration of apprentice sprinkler fitters with the Department of Labor and Industry would violate federal law. The Judge must assume that the Department of Labor and Industry will operate its programs in compliance with the law. The Labor and Industry registration requirements are not, however, before the Judge at this time. The proposed rule herein only seeks to implement the legislative directive contained in Minn. Stat. § 299M.01, subd. 2. The Judge finds that the proposed rule, as modified above, has been shown to be both needed and reasonable. The proposed rule does not, on its face, violate the provisions of ERISA. That issue would probably require litigation in federal court after this proposed rule is adopted and a factual basis for the challenge has been established.

18. The next major issue that was raised at the hearing was primarily addressed by the Minnesota Board of Architecture, Engineering, Land Surveying, Landscape Architecture, and Interior Design (hereinafter "Board"). The Board has strenuously argued that the design of fire protection sprinkler systems for buildings falls squarely within the exclusive jurisdiction of a licensed professional engineer. Consequently, the Board contends that the proposed rules should be modified to require that licensed fire protection contractors retain licensed professional engineers to oversee the design of fire protection systems for buildings. Additionally, the Board argues that a provision should be added to the proposed rules which, with certain exceptions, requires that all fire protection systems be installed from plans certified by a licensed professional engineer. The Board asserts that the design of fire protection systems is the practice of professional engineering which is defined as the performance of:

> . . . any technical professional service, such as planning, design, or observation of construction for the purpose of assuring compliance with specification and design, in connection with any public or private structures, buildings, utilities, machines, equipment, processes, works, or projects or in the public welfare or the safeguarding of life, health, or property is concerned or involved, when such a professional service requires the application of the principles of mathematics and the physical and applied engineering sciences, acquired by education or training, and by experience.

Minn. Stat. § 326.02, subd. 3. Because Minn. Stat. § 299M.12 states clearly that Chapter 299M is "not intended to conflict with and does not supersede . . ." any other state laws, the Board argues that the scope of practice of professional engineers cannot be infringed upon by the proposed rules.

19. Minn. Stat. § 299M.03, subd. 1 mandates that an individual "may not sell, <u>design</u>, install, modify, or inspect a fire protection system, . . . unless annually licensed . . . as a fire protection contractor." (Emphasis added.) Licensed professional engineers who perform those functions are specifically exempted from licensure if such engineer "is competent in fire protection system designs". Minn. Stat. § 299M.04 requires the Commissioner of Public Safety to adopt rules concerning the qualifications and licensing of

fire protection contractors. The proposed rules require that a fire protection contractor employ a managing employee who shall be issued a certificate by the Department. That managing employee must meet one of the following qualifications: (a) has 10,000 hours of applicable work experience; (b) holds a Level III or IV certification by the National Institute for Certification in Engineering Technologies (NICET) in the field of fire protection; or (c) the person is a licensed professional engineer and is competent in fire protection system design. The Department contends that Chapter 299M clearly contemplates that someone other than a licensed professional engineer could legally perform the functions of designing, installing, modifying and inspecting fire protection systems pursuant to properly adopted rules. It has been and currently is the practice of the fire sprinkler industry for individuals with NICET Level III or IV certification to perform the system design and application work for sprinkler systems which are installed in buildings. The Department argues that when used by fire protection contractors, the term "design" contemplates the generation of work plans which follow national standards and does not involve the practice of professional engineering.

20. Many sprinkler system contractors testified and submitted written comments in support of the proposed rules which do not require the services of a professional engineer. The contractors argue that it is a long-standing practice that persons other than licensed engineers perform the layout design work for sprinkler systems; that professional engineers have previously not objected to other technically trained individuals performing that function. Douglas Pfaff, a registered professional engineer and district manager for the Grinnell Fire Protection Systems Company, commented as follows:

> The engineering community itself, over the years, has made it clear that the preparation of sprinkler drawings was in fact <u>not</u> professional engineering, in that sprinkler design work is based on the following of, and compliance with standard fire codes, and as such, <u>did not</u> meet the definition of professional engineering. Professional Engineers across the country also made it quite clear that, based on the fact that this was not professional engineering which was going on, sprinkler contractors doing this work could no longer call their design personnel "sprinkler engineers". In agreement with that thinking, the sprinkler industry has since referred to those which prepare our plans as "designers" or "design technicians". (Emphasis in original.)

Kenneth Isman, a professional engineer and Director of Engineering Standards for the National Fire Sprinkler Association, Inc., located in Patterson, New York, commented as follows:

> The basic design of a fire sprinkler system should be done by a professional engineer. This design takes the form of specifications or preliminary plans which include details of the occupancy and construction type, hazard classifications, available water supply, and use of any special equipment, sprinklers, piping or pumps. The engineer responsible for these specifications or preliminary plans is rarely an employee or agent of a fire sprinkler contractor. This person is more

appropriately an agent of the general contracting firm or architectural firm which has been hired by the owner.

The practice of taking the design specifications and generating working plans in accordance with an accepted standard (such as NFPA 13) is NOT engineering. This task is appropriately performed by an engineering technician on the staff of the fire sprinkler contractor.

In 1980, recognizing the need to show competence at this level, the National Fire Sprinkler Association, along with the National Society of Professional Engineers, established the National Institute for Certification in Engineering Technology (NICET) Field of Fire Protection, Subfield of Automatic Sprinkler System Layout and Detail. To date, 24 states either require fire sprinkler contractors to have someone at NICET Level III or above on their staff to maintain a fire sprinkler contractor's license, or they officially recognize NICET at the state level as an acceptable minimum for preparing working drawings.

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In order to achieve a Level III Certification, a person must pass 51 individual exams on 51 different subject categories (called work elements). They must also submit proof of work experience in these subject areas before a certification will be issued. Since NICET will not allow too many work elements to be tested during any single testing period, it would take a minimum of nine months to complete the testing process. Also taking into account the time necessary to perform the experience tasks for each work element, it could take a person a few years to achieve Level III, depending on the diversity of work to which they are exposed. . . .

Brian Galt, President of Allied Fire Protection, Inc., located in Fargo, North Dakota, commented:

> . . . fire sprinkler contractors do not typically perform engineering tasks nor should they. We design and install sprinkler systems based on NFPA standards. These standards are written, and updated by committees which include P.E.s. The committees take into account field experience and fire data as well as current technology and testing data generated by firms such as Factory Mutual Engineering (FM) and Underwriters Laboratories (UL). For the most part, local codes reference these standards. Sprinkler designers take a set of pre-engineered criteria and design the piping system.

Russell Fleming, professional engineer and Vice-President of Engineering for National Fire Sprinkler, Association, Inc., commented:

> Working drawings prepared by technicians in the employ of fire protection contractors incorporate those design decisions in accordance with the provisions of referenced national standards. This "layout and detailing" is not the practice of engineering. It is not design. The relationship between design professionals and the technicians in the employ of fire sprinkler contractors nationwide has been studied extensively. The Society of Fire Protection Engineers, which is the professional association of engineers specializing in fire protection systems, endorses this concept and has published a white paper entitled "Fire Protection Engineers and Fire Protection Engineering Technicians: Relationships and Functions". The positions set forward in this paper have been endorsed by several state Engineering Registration Boards, including those of Texas and Delaware.

In addition, several contractors commented that they had inquired as to the number of licensed professional engineers in the State of Minnesota who were designated as specifically trained in the area of fire protection and discovered that the list contained only two such individuals.

21. The Judge finds that the need for and reasonableness of the proposed rules has been demonstrated without the requirement that professional licensed engineers participate in the "design" of fire protection (sprinkler) systems for buildings. Sufficient evidence from the Board and fire protection contractors has been submitted to show that the design and installation of fire protection systems in buildings has not been viewed by either fire protection contractors or professional engineers as falling within the scope of engineering. This is not to say, however, that the design of fire sprinkler systems could never be "engineering" within the meaning of Minn. Stat. § 326.02, subd. 3. During the 1993 Legislative Session, Chapter 358 was enacted which permits the Board to bring a legal action against any persons who engage in the unauthorized practice of engineering. Thus, a remedy exists if fire protection contractors or design contractors cross over the line and perform engineering work. The Judge finds that the rule, and proposed modification to include a license for design contractors, is supported by the record and does not, on its face, conflict with the statutory definition of professional engineering.

22. ABC argues that there is no statutory authority for the proposed rules which set the criteria for certification of a "managing employee" and create the "managing employee" requirement for a licensed fire protection contractor. However, Minn. Stat. § 299M.04 gives the Commissioner of Public Safety broad authority to promulgate rules regarding the "qualifications" and "licensing of fire protection contractors". The concept of "managing employee" is merely a way to ensure accountability and that a person with appropriate qualifications is responsible for the work performed. The Judge finds that the managing employee rules, 7512.1300-1600, are within the statutory authority of the Department.

23. Although the proposed disciplinary rules clearly set forth the grounds for discipline and even the period of suspension in certain circumstances, the rules do not inform the affected public that a licensee or certificate holder has a right to a contested case hearing before discipline

is imposed. Minn. Stat. § 299M.06 sets forth the right of a license holder or certificate holder to a hearing if disciplinary action is taken. These proposed rules set forth the grounds for disciplinary action and the framework within such action will be taken. The right to a contested case hearing pursuant to Chapter 14 should also be clearly set forth in the rules. The Judge finds that without such a notification of a basic right to a hearing, the proposed disciplinary rules have not been shown to be reasonable. In order to correct this defect, the Department should add the following language to the disciplinary rules:

> Any person against whom the Commissioner takes disciplinary action is entitled to a contested case hearing pursuant to Minn. Stat. Chapter 14 before any such disciplinary action is imposed.

That language should be a new rule entitled "Hearing" at the end of the disciplinary rules. With that addition, the proposed disciplinary rules have been shown to be both needed and reasonable.

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

CONCLUSIONS

1. That the Department of Public Safety gave proper notice of the hearing in this matter.

2. That the Department has 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.

3. That 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)(ii).

4. That the Department has documented the need for and reasonableness of its proposed rules with an affirmative presentation of facts in the record within the meaning of Minn. Stat. §§ 14.14, subd. 2 and 14.50 (iii), except as noted at Finding 23.

5. That the amendments and additions 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. That the Administrative Law Judge has suggested action to correct the defects cited in Conclusion 4 as noted at Finding 23.

7. That due to Conclusion 4, this Report has been submitted to the Chief Administrative Law Judge for his approval pursuant to Minn. Stat. § 14.15, subd. 3.

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

9. That 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 specifically otherwise noted above.

Dated this 3 day of December, 1993.

PETER C. ERICKSON
Administrative Law Judge