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OAH Docket No. 78-2200-15556-1

STATE OF MINNESOTA
OFFICE OF ADMINISTRATIVE HEARINGS
FOR THE POLLUTION CONTROL AGENCY

In the Matter of the Adoption of Permanent Rules of the Pollution Control Agency Relating to Procedural Rules, Minnesota Rules, Chapter 7000.	**ORDER ON REVIEW OF RULES UNDER MINNESOTA STATUTES, SECTION 14.26**

The Minnesota Pollution Control Agency ("Agency" or "MPCA") is seeking review and approval of the above-entitled rules, which were adopted by the agency pursuant to Minn. Stat. § 14.26. On September 16, 2003, the Office of Administrative Hearings received the documents that must be filed by the agency under Minn. Stat. § 14.26 and Minn. R. 1400.2310. Based upon a review of the written submissions and filings, Minnesota Statutes, Minnesota Rules, and for the reasons set out in the Memorandum which follows,

IT IS HEREBY ORDERED:

1. The agency has the statutory authority to adopt the rules.

2. The rules were adopted in compliance with the procedural requirements of Minnesota Statutes, chapter 14, and Minnesota Rules, chapter 1400.

3. The record for the adopted rules demonstrates a rational basis for the need and reasonableness of the proposed rules.

4. The following provisions of the adopted rules are **DISAPPROVED** as not meeting the requirements of Minnesota Rules, Part 1400.2100, item D: 7000.0100, subpart 2 and 7000.1300, subpart 7. (See Memorandum). All other rule parts are approved.

Dated this 30th day of September, 2003.

GEORGE A. BECK
Administrative Law Judge

MEMORANDUM

Pursuant to Minnesota Statutes, Section 14.26, the agency has submitted these rules to the Administrative Law Judge ("ALJ") for a review of their legality. Proposed Minnesota Rules, Parts 7000.0100, subpart 2 and 7000.1300, subpart 7 are disapproved as not meeting the legal standard of Minnesota Rules, Part 1400.2100, item D, as discussed below. All other rule parts are approved. The ALJ suggests one technical correction that the agency may adopt if it chooses to do so.

Proposed rule part 7000.0100, subpart 2.

Minnesota Statutes section 116.02, subdivision 1 defines the Pollution Control Agency as consisting of "the commissioner and eight members appointed by the governor . . ." The MPCA correctly states that this definition of agency varies from the customary usage of the word which tends to be used to refer collectively to the board, the commissioner and MPCA staff.

Because the purpose of these rule amendments is to better delineate the responsibilities of the commissioner and the board, the MPCA felt it was important to refer specifically to the board or the commissioner in the appropriate places, and only use the word agency when referring to the agency as a whole. Therefore, MPCA has proposed to redefine agency in the rules as "the Minnesota Pollution Control Agency in general."

The proposed definition of agency is in conflict with the statutory definition and results in a different meaning of the word agency than that stated by the legislature. This rule part exceeds statutory authority by conflicting with a specific legislative definition and constitutes a defect in the rules under Minnesota Rules, Part 1400, item D.

In the SONAR, the MPCA states it is "proposing to amend the definition of 'agency' for purposes of this rule chapter only."[1] This defect can be cured by addition of language stating MPCA's intent that the rule's definition of agency is "for the purpose of these rules only." With this change, the rules would read: "Subp. 2. **Agency or agency members.** For the purposes of this chapter only, 'agency' or 'agency members' means the . . ." Adoption of the language suggested, or language having a similar effect, would cure the above-noted defect. It would not constitute a substantial change, and the resulting subpart is needed and reasonable.

Proposed rule part 7000.1300, subpart 7.

The subpart as proposed provides that "[a]ny evidence containing information classified as not public offered by the commissioner, agency, or a

[1] *See* SONAR at 5, ¶ 3.

party to the contested case hearing shall be made a part of the hearing record of the case . . ." This language could be interpreted to provide for the automatic admission of all evidence containing not public information. In contrast, the Office of Administrative Hearings' (OAH) Contested Case Hearings Rules provide authority to the ALJ to decide whether evidence is admissible. Minnesota Rules Part 1400.7300, subpart 1 states that "[t]he judge may admit all evidence which possesses probative value, including hearsay, if it is the type of evidence on which reasonable, prudent persons are accustomed to rely in the conduct of their serious affairs. . . . Evidence which is incompetent, irrelevant, immaterial, or unduly repetitious shall be excluded." OAH rules clearly give the authority to make decisions on admissibility to the ALJ.

There is a conflict between the Office of Administrative Hearings' procedural rules for contested case hearings and the agency's proposed rules. Minnesota Statutes section 14.51 (1) provides the authority for the chief administrative law judge to adopt rules governing the procedural conduct of all hearings, including contested case hearings. It specifies that these "procedural rules shall be binding upon all agencies and shall supersede any other agency procedural rules with which they may be in conflict."

The proposed standard for admissibility of evidence containing not public information is in conflict with the OAH procedural rules for contested case hearings and constitutes a defect in the rules under Minnesota Rules, Part 1400, item D. This defect can be cured by adding the word "admissible" to the subpart, preserving the authority of the ALJ to make decisions about the admissibility of evidence. The subpart would therefore read: "[a]ny admissible evidence containing information classified as not public offered by the commissioner, agency, or a party to the contested case hearing shall be made a part of the hearing record of the case . . ."

Adoption of the language suggested, or language having a similar effect, would cure the above-noted defect. It would not constitute a substantial change, and the resulting subpart is needed and reasonable.

In addition to the aforementioned defects in the rules, there is a portion of the proposed rule that could be clarified. The clarification is not a defect, but rather a technical change that the Agency may adopt if it chooses to do so.

Proposed rule part 7000.1750, subpart 4.

This subpart defines the term "party" for the purposes of this part of the rule. In the first sentence of the subpart, it states that a person who has been "granted permission to intervene" is a party. In the next to last sentence of the subpart, it states that a person who "is properly intervened . . . under part

1400.6200," is a party. There is no reason to include an intervener in the definition of a party twice.

The Administrative Law Judge recommends that subpart 4 be amended to remove one of the two references to interveners as parties. This amendment, or an amendment with similar effect, is needed and reasonable and does not make the rule substantially different than originally proposed.

G.A.B.