

STATE OF MINNESOTA
OFFICE OF ADMINISTRATIVE HEARINGS
FOR THE DEPARTMENT OF LABOR AND INDUSTRY

In the Matter of the Proposed Rules
Governing Construction Code Inspectors

**REPORT OF THE ADMINISTRATIVE
LAW JUDGE**

Administrative Law Judge Kathleen D. Sheehy conducted a hearing concerning the above rules beginning at 12:30 p.m. on October 26, 2007, at the Minnesota Department of Labor and Industry, 443 Lafayette Road North, Minnesota Room, St. Paul, Minnesota. The hearing continued until all interested persons, groups and associations had an opportunity to be heard concerning the proposed rules.

The hearing and this Report are part of a rulemaking process governed by the Minnesota Administrative Procedure Act.¹ The legislature has designed the rulemaking process to ensure that state agencies have met all of the requirements that Minnesota law specifies for adopting rules. Those requirements include assurances that the proposed rules are necessary and reasonable, that they are within the agency's statutory authority, and that any modifications that the agency may have made after the proposed rules were initially published are not impermissible substantial changes.

The rulemaking process includes a hearing when a sufficient number of persons request that a hearing be held. The hearing is intended to allow the agency and the Administrative Law Judge reviewing the proposed rules to hear public comment regarding the impact of the proposed rules and what changes might be appropriate. The Administrative Law Judge is employed by the Office of Administrative Hearings, an agency independent of the Department of Labor and Industry (Department).

Patricia Munkel-Olson, Esq., 443 Lafayette Road North, St. Paul, Minnesota 55101-2134, appeared at the rule hearing on behalf of the Department of Labor and Industry. The members of the Department's panel were Stephen P. Hernick, Construction Codes and Licensing Division; Donald J. Sivigny, Senior Rules and Code Development Representative; and Barry Grieve, Advisory Committee Chair. Six members of the public signed the hearing register, and four members of the public spoke at the hearing.

Before the hearing, the Department received comments from the Minnesota Mechanical Contractors Association and Minnesota Pipe Trades Association on the proposed rules. After the hearing, the record remained open for 20 calendar days, until November 15, 2007, to allow interested persons and the Department an opportunity to submit written comments. Following the initial comment period, the record remained

¹ Minn. Stat. §§ 14.131 through 14.20 (2006).

open for an additional five days to allow interested persons and the Department the opportunity to file a written response to the comments submitted. The OAH hearing record closed on November 26, 2007. All of the comments received were read and considered.

SUMMARY OF CONCLUSIONS

The Department has established that it has the statutory authority to adopt the proposed rules and that the rules are necessary and reasonable, except for those portions of the rules found to be defective in Finding Nos. 36, 46, 54, 58, and 63.

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

FINDINGS OF FACT

Nature of the Proposed Rules

1. The proposed rules establish competency criteria for individuals serving as construction code inspectors, establish and approve education programs, and require construction code inspectors to comply with continuing education requirements.

2. The Department maintains that the proposed rule is needed to comply with the statutory requirements of Minn. Stat. § 16B.655, which provides:

Subd. 1. **Competency criteria.** The commissioner of labor and industry shall adopt rules establishing required competency criteria for individuals serving as construction code inspectors. For the purpose of this section, "construction code inspectors" means building inspectors, mechanical inspectors, plumbing inspectors, and combination inspectors under the supervision of the building official. Required competency criteria shall be relevant to the building, mechanical, and plumbing codes as adopted in Minnesota.

Subd. 2. **Continuing education.** The commissioner of labor and industry shall adopt rules establishing or approving education programs for construction inspectors related to construction inspection and administration of the State Building Code. Each construction code inspector must satisfactorily complete continuing education requirements as established in rule by the commissioner.

Subd. 3. **Exemption.** A person holding current certification as a building official under section 16B.65 is exempt from this section.

Subd. 4. **Effective date.** Effective January 1, 2008, all construction inspectors hired on or after January 1, 2008, shall, within one year of hire, be in compliance with the competency criteria established according to subdivision 1.

3. In developing the proposed rule the Department sought the recommendations of an advisory committee, which included staff members from the Department's Construction Codes and Licensing Division and representatives from the

Minnesota Association of Plumbing and Mechanical Officials, the South West Minnesota Chapter of Building Officials, the 10,000 Lakes Chapter of Building Officials, the South East Minnesota Code Officials, the Minnesota Association of Plumbing and Heating Cooling Contractors, the North West Chapter of Building Officials, the League of Minnesota Cities, and the Association of Minnesota Building Officials.² The proposed rules are based on the recommendations (either through majority vote or consensus) of the Advisory Committee.³

Procedural Requirements of Chapter 14

4. On August 14, 2006, the Department published a Request for Comments on Possible Rules Governing Construction Code Inspectors, for Inclusion in Minnesota Rules Chapter 1301. The Request indicated that the Department was considering rules that establish competency criteria for individuals serving as construction code inspectors (i.e., building inspectors, mechanical inspectors, plumbing inspectors, and combination inspectors under the supervision of a certified building official); education programs related to construction inspection and administration of the State Building Code; and continuing education requirements for construction code inspectors. The Request for Comments was published at 31 State Register 216. The comment period ran from August 14, 2006, to October 13, 2006.⁴

5. By letter dated August 14, 2007, the Department requested that the Office of Administrative Hearings schedule a rule hearing, assign an Administrative Law Judge, and give prior approval of its Additional Notice Plan. The Department submitted the draft Dual Notice of Hearing; a copy of the proposed rules, with certification of approval as to form by the Revisor of Statutes; and a draft Statement of Need and Reasonableness (SONAR). The proposed Additional Notice Plan was described on page 6 of the SONAR.⁵ The notice plan called for the Department to mail or email the proposed rules and Dual Notice of Intent to Adopt rules to all certified building officials, including all municipal building officials responsible for administration of the State Building Code; and to all persons registered to be on the Department's rulemaking mailing lists related to construction codes, including the American Institute of Architects—Minnesota; consulting and inspection firms; architects and professional engineers; cities, counties, and state agencies; contractors; labor organizations; the Builders Association of Minnesota; the Fire Marshals Association of Minnesota; and the Minnesota Building Trades Council. In addition, the Department stated its intent to publish the proposed rules, the SONAR, and the Dual Notice of Intent to Adopt Rules on its website.⁶

6. In a letter dated August 20, 2007, the Administrative Law Judge approved the Department's Dual Notice and Additional Notice Plan.⁷

² Statement of Need and Reasonableness (SONAR), Attachment A to Ex. D.

³ Ex. D, SONAR at 1.

⁴ Ex. A.

⁵ Draft SONAR at 6, Attachment to letter dated Aug. 14, 2007.

⁶ *Id.*

⁷ Ex. Ki.

7. On September 6, 2007, the Department mailed the Dual Notice of Intent to Adopt Rules to all persons on the Department's rulemaking mailing list and to all parties identified on the Additional Notice Plan.⁸ The Dual Notice stated that a copy of the proposed rules was published in the *State Register* or available upon request from the agency. In addition, the Dual Notice stated the proposed rules were available on the Department's website at www.doli.state.mn.us.⁹ On September 7, 2007, the Department sent the Dual Notice of Intent to Adopt Rules by electronic mail to all persons and associations on the Additional Notice Plan who had provided the Department with an email address.¹⁰

8. On September 6, 2007, the Department mailed a copy of the Dual Notice and SONAR to the legislators specified in Minn. Stat. § 14.116.¹¹

9. On September 6, 2007, the Department mailed a copy of the SONAR to the Legislative Reference Library.¹²

10. On September 10, 2007, the proposed rules and the Dual Notice of Intent to Adopt Rules were published at 32 S.R. 457.¹³

11. On the day of the hearing the following documents were placed in the record:

- Request for Comments as published in the *State Register* (Ex. A);
- A copy of the proposed rule with the Revisor's approval for publication dated July 18, 2007 (Ex. C);
- A copy of the SONAR (Ex. D);
- Certificate of Mailing the SONAR to the Legislative Reference Library on September 6, 2007 (Ex. E);
- Copy of the Dual Notice of Intent to Adopt Rules and the Dual Notice of Intent to Adopt Rules as published in the *State Register* at 32 SR 457 (Ex. F);
- Certificates of Mailing the Dual Notice of Intent to Adopt Rules to the Rulemaking Mailing List on September 6, 2007, and Certificate of Accuracy of the Mailing List (Ex. G);
- Certificate of Mailing the Dual Notice Pursuant to the Additional Notice Plan on September 6, 2007 (Ex. H); and Certificate of E-Mailing the Dual Notice Pursuant to the Additional Notice Plan on September 7, 2007 (Ex. Hii);
- Copies of public comments and requests for hearing on the proposed rules received by the Department before the hearing date (Ex. I);

⁸ Exs. G & H.

⁹ Ex. F.

¹⁰ Ex. Hii.

¹¹ Ex. Kiii.

¹² Ex. E.

¹³ Ex. F.

- Letter from Administrative Law Judge Kathleen D. Sheehy approving Department's Dual Notice dated August 20, 2007 (Ex. Ki);
- Certificate of Posting Dual Notice on the Department's Website on September 11, 2007 (Ex. Kii);
- Certificate of Mailing the Notice and the SONAR to Legislators on September 6, 2007 (Ex. Kiii);
- Letter from the Department to its Executive Budget Officer in the Department of Finance enclosing the proposed rule and draft SONAR, dated July 31, 2007; and the Response from the Executive Budget Officer (Ex. Kiv);
- Certificate of Mailing Notice of Hearing to Those Who Requested a Hearing, dated October 18, 2007 (Ex. Kv);
- Proposed Rule Changes Announced at the Hearing on October 26, 2007 (Ex. L); and
- Written comments of the Minnesota Mechanical Contractors Association and Minnesota Pipe Trades Association received at the hearing (Ex. M).

12. Written comments of the Minnesota Mechanical Contractors Association and Minnesota Pipe Trades Association sent to the Administrative Law Judge after the hearing were marked and placed in the record as Ex. N. The Department's post-hearing responses were marked and placed in the record as Exs. O and P.

Statutory Authorization

13. The Department is required by Minn. Stat. § 16B.655 (effective August 1, 2006) to adopt rules establishing required competency criteria for individuals serving as construction code inspectors and rules establishing or approving education programs for construction inspectors. The Department published its Dual Notice of Intent to Adopt Rules in the *State Register* on September 10, 2007, within the 18-month deadline established by Minn. Stat. § 14.125.

14. The Administrative Law Judge finds that the Department has the statutory authority to adopt the proposed rules.

Regulatory Analysis in the SONAR

15. The Administrative Procedure Act requires an agency adopting rules to consider seven factors in its Statement of Need and Reasonableness.¹⁴ The first factor requires:

¹⁴ Minn. Stat. § 14.131.

(1) A description of the classes of persons who probably will be affected by the proposed rule, including classes that will bear the costs of the proposed rule and classes that will benefit from the proposed rule.

The Department identified the classes of persons who probably will be affected by the proposed rule as individuals who currently act as construction code inspectors, those who desire to become construction code inspectors, and designated building officials and the municipalities that employ construction code inspectors. The persons who probably will bear the costs of the proposed rule include those who desire to become construction code inspectors and the municipalities that employ them. The classes of persons who will benefit from the proposed rule include individuals and persons who reside in or conduct business in a municipality that employs construction code inspectors, those individuals serving as construction code inspectors, designated building officials, and municipalities.¹⁵

(2) The probable costs to the Agency and to any other agency of the implementation and enforcement of the proposed rule and any anticipated effect on state revenues.

The Department stated there are probable costs to the agency in implementing this rule, although the costs are difficult to quantify. The Construction Codes and Licensing Division already conducts courses designed to train inspectors and building officials, and the proposed rule may increase the demand for these training opportunities. The increase in demand, however, will not necessarily translate to an increase in the cost of developing these programs. The Division is likely to incur costs in the form of staff time involved in reviewing and approving educational programs sponsored by other entities. These costs are estimated at between \$600 and several thousand dollars per year, based on the current annual costs of approving residential contractor courses.

Municipalities may incur additional costs in that local building officials will monitor compliance with continuing education requirements contained in the rules. The Division believes these costs will be insignificant as municipalities already typically require building officials to oversee the training of those they supervise. In addition, as the Department's executive budget officer pointed out, municipalities will also incur the costs of paying for these continuing education courses, but these costs are likely "within the normal expectation of inflationary cost pressures."

There may also be a nominal increase in state revenues from fees charged to participants in continuing education programs provided by the Division.¹⁶

¹⁵ Ex. D, SONAR at 3.

¹⁶ *Id.*

(3) The determination of whether there are less costly methods or less intrusive methods for achieving the purpose of the proposed rule.

Because the legislature directed the Department to adopt these rules, the Department determined there is no less costly or less intrusive method of achieving the purpose of the rule. In addition, there are several options for demonstrating compliance with minimum competency criteria—ranging from experience in the industry to a degree in architecture or engineering—and the Division believes the ability to choose among these options will provide individuals the least costly and least intrusive method for achieving the purpose of the proposed rule. Finally, the proposed rule permits individuals to acquire continuing education from any provider offering an approved course. The Division asserts this will permit individuals to self-determine the cost of compliance.¹⁷

(4) A description of any alternative methods for achieving the purpose of the proposed rule that were seriously considered by the agency and the reasons why they were rejected in favor of the proposed rule.

Because the legislature directed the Department to adopt rules concerning competency and continuing education, no alternative methods were considered. In developing the rules, however, the Advisory Committee examined the Minnesota State Building Code; certifications offered by the International Code Council (which grants certifications for Building Inspectors, Building Officials, and others that rely on testing only); regulations concerning construction code inspectors in Rhode Island and Oregon; Center Point Energy certification for HVAC technicians; and the Minnesota Department of Health's certification for sanitarians. The Advisory Committee determined that these programs either (1) do not correlate to the legislative direction regarding construction code inspectors, or (2) are too cumbersome and restrictive.¹⁸

(5) The probable costs of complying with the proposed rules.

There are probable costs of compliance for individuals or municipalities, and there are also probable development costs for entities that choose to offer educational opportunities for the purpose of satisfying continuing education requirements. The Division assumed, however, that the cost of developing a course would be recaptured in the fees paid by attendees. The actual costs are difficult to quantify because of the different options available to comply with the proposed rule. An individual who already meets the competency criteria may incur no additional cost to demonstrate compliance. If not sufficiently experienced, the individual can choose a path to compliance, the cost of which might vary from \$170.00 for a qualifying International Code Council examination to thousands of dollars to acquire a bachelor's degree. The continuing education costs are also difficult to quantify because there are many options; the Division estimates these costs could be as little as the \$35.00 fee for the course

¹⁷ Ex. D, SONAR at 3-4.

¹⁸ *Id.* at 4.

provided by the Division, up to several hundred dollars for courses provided by other entities.¹⁹

(6) The probable costs or consequences of not adopting the proposed rule, including those costs borne by individual categories of affected parties, such as separate classes of governmental units, businesses, or individuals.

The Department asserts that the legislature has already determined that the consequence of not adopting the proposed rules is not acceptable. Because there are no existing minimum competency criteria for construction code inspectors, the probable cost of not adopting the proposed rules would be negligible. A potential cost of not adopting the proposed rule, however, might be that an unsafe building would pass inspection.²⁰

(7) An assessment of any differences between the proposed rules and existing federal regulation and a specific analysis of the need for and reasonableness of each difference.

The Department is not aware of any applicable federal regulation that requires competency criteria or continuing education requirements for construction code inspectors.²¹

16. The Administrative Law Judge finds that the Department has adequately considered the seven factors in the regulatory analysis required by Minn. Stat. § 14.131.

Performance Based Rules

16. The Administrative Procedure Act²² also requires an agency to describe how it has considered and implemented the legislative policy supporting performance based regulatory systems. A performance based rule is one that emphasizes superior achievement in meeting the agency's regulatory objectives and maximum flexibility for the regulated party and the agency in meeting those goals.²³

17. The Department stated that the proposed rule was carefully considered and includes a variety of mechanisms to accomplish the goal of having construction code inspectors meet a minimum level of competency before engaging in the work of inspecting, and to maintain and grow that minimum level of competency through continuing education.²⁴

18. The Administrative Law Judge finds that the Department has met the requirements set forth in Minn. Stat. § 14.002 for assessing the impact of the proposed rules, including consideration and implementation of the legislative policy supporting performance-based regulatory systems.

¹⁹ Ex. D, SONAR at 5.

²⁰ *Id.*

²¹ *Id.* at 6.

²² Minn. Stat. § 14.131.

²³ Minn. Stat. § 14.002.

²⁴ Ex. D, SONAR at 6.

Consultation with the Commissioner of Finance

19. Under Minn. Stat. § 14.131, the Agency is also required to "consult with the commissioner of finance to help evaluate the fiscal impact and fiscal benefits of the proposed rule on units of local government."

20. The Department consulted with its Department of Finance representative, Executive Budget Officer Keith Bogut, and in a memorandum dated August 8, 2007, Mr. Bogut concluded that the proposed rule will require local units of government to incur additional costs, primarily for continuing education requirements, in the form of fees for existing courses and more frequent or expanded training requirements. While an increase in costs is probable, Mr. Bogut concluded the magnitude of the costs would likely be minimal and well within the normal expectation of inflationary cost pressures.²⁵

21. The Administrative Law Judge finds that the Department has met the requirements set forth in Minn. Stat. § 14.131.

Analysis Under Minn. Stat. § 14.127

22. Effective July 1, 2005, under Minn. Stat. § 14.127, the Department must "determine if the cost of complying with a proposed rule in the first year after the rule takes effect will exceed \$25,000 for: (1) any one business that has less than 50 full-time employees; or (2) any one statutory or home rule charter city that has less than ten full-time employees."²⁶ The Department must make this determination before the close of the hearing record, and the Administrative Law Judge must review the determination and approve or disapprove it.²⁷

23. The Department has determined that the cost of complying with the proposed rule in the first year after it takes effect will not exceed \$25,000 for any one small business or small city. The Department believes the costs associated with the proposed rule will be insignificant for businesses and municipalities.²⁸

24. The Administrative Law Judge finds that the agency has made the determination required by Minn. Stat. § 14.127 and approves that determination.

Rulemaking Legal Standards

25. Under Minn. Stat. § 14.14, subd. 2, and Minn. Rule 1400.2100, a determination must be made in a rulemaking proceeding as to whether the agency has established the need for and reasonableness of the proposed rule by an affirmative presentation of facts. In support of a rule, an agency may rely on legislative facts, namely general facts concerning questions of law, policy and discretion, or it may simply rely on interpretation of a statute, or stated policy preferences.²⁹ The Department prepared a SONAR in support of the proposed rules. At the hearing, the Department

²⁵ Ex. Kiv.

²⁶ Minn. Stat. § 14.127, subd. 1.

²⁷ Minn. Stat. § 14.127, subd. 2.

²⁸ Ex. D, SONAR at 7.

²⁹ *Mammenga v. Department of Human Services*, 442 N.W.2d 786 (Minn. 1989); *Manufactured Housing Institute v. Pettersen*, 347 N.W.2d 238, 244 (Minn. 1984).

primarily relied upon the SONAR as its affirmative presentation of need and reasonableness for the proposed rule. The SONAR was supplemented by comments made by Department representatives at the public hearing and in written post-hearing submissions.

26. The question of whether a rule has been shown to be reasonable focuses on whether it has been shown to have a rational basis, or whether it is arbitrary, based upon the rulemaking record. Minnesota case law has equated an unreasonable rule with an arbitrary rule.³⁰ Arbitrary or unreasonable agency action is action without consideration and in disregard of the facts and circumstances of the case.³¹ A rule is generally found to be reasonable if it is rationally related to the end sought to be achieved by the governing statute.³²

27. The Minnesota Supreme Court has further defined an agency's burden in adopting rules by requiring it to "explain on what evidence it is relying and how the evidence connects rationally with the agency's choice of action to be taken."³³ An agency is entitled to make choices between possible approaches as long as the choice made is rational. Generally, it is not the proper role of the Administrative Law Judge to determine which policy alternative presents the "best" approach since this would invade the policy-making discretion of the agency. The question is rather whether the choice made by the agency is one that a rational person could have made.³⁴

28. In addition to need and reasonableness, the Administrative Law Judge must also assess whether the rule adoption procedure was complied with, whether the rule grants undue discretion, whether the Department has statutory authority to adopt the rule, whether the rule is unconstitutional or illegal, whether the rule constitutes an undue delegation of authority to another entity, or whether the proposed language is not a rule.³⁵

Analysis of the Proposed Rules

General

29. Currently, there are no statutes or rules requiring licensing, minimum competencies, or continuing education requirements of building inspectors, mechanical inspectors, or plumbing inspectors who work under the supervision of the designated building official of a municipality. The proposed rule establishes competency criteria for building inspectors, mechanical inspectors, plumbing inspectors, and "combination inspectors," who, under the supervision of a designated building official, inspect building construction, mechanical systems, plumbing systems, or two or more of the three disciplines; establishes and approves education programs; and establishes continuing education requirements for construction code inspectors. Neither the rule nor the

³⁰ *In re Hanson*, 275 N.W.2d 790 (Minn. 1978); *Hurley v. Chaffee*, 231 Minn. 362, 367, 43 N.W.2d 281, 284 (1950).

³¹ *Greenhill v. Bailey*, 519 F.2d 5, 19 (8th Cir. 1975).

³² *Mammenga*, 442 N.W.2d at 789-90; *Broen Memorial Home v. Department of Human Services*, 364 N.W.2d 436, 444 (Minn. Ct. App. 1985).

³³ *Manufactured Housing Institute*, 347 N.W.2d at 244.

³⁴ *Federal Security Administrator v. Quaker Oats Co.*, 318 U.S. 218, 233 (1943).

³⁵ Minn. R. 1400.2100.

statute on which it is based requires licensing of inspectors. The rule provides only that Parts 1301.1300 to 1301.1600 "shall be administered by the supervising designated building official." Individuals holding a current certification as a building official under Minn. Stat. § 16B.65 are exempt from meeting competency and continuing education requirements. The rules apply to all construction code inspectors hired on or after January 1, 2008, by requiring compliance with competency criteria within one year of hire.

Discussion of Proposed Rule

30. The Minnesota Mechanical Contractors Association (MMCA) is a group consisting of approximately 200 mechanical contractors, most of which are headquartered and work in Minnesota. The Minnesota Pipe Trades Association (MPTA) has more than 9,000 members, who mostly live and work in Minnesota. Both the MMCA and the MPTA originally opposed the proposed rule in its entirety.³⁶ After reviewing certain changes the Department proposed at the hearing, the MMCA and MPTA limited their opposition to parts 1301.1300 to 1301.1600.³⁷ Specifically, the MMCA and MPTA oppose the competency criteria for mechanical and plumbing inspectors (Part 1301.1400, subps. 3 & 4); the minimum competency criteria for "combination inspectors" (Part 1301.1400, subp. 5); and portions of the continuing education requirements. The MMCA and MPTA contend the competency criteria for mechanical and plumbing inspectors are unreasonable because they are insufficiently rigorous; the criteria for "combination inspectors" are unreasonable and contrary to the statute because the proposed criteria would permit inspectors who have no competency in one of the three disciplines to conduct inspections in all three disciplines; and the continuing education requirements are unreasonably vague. Each argument is addressed more specifically in the discussion of the rules below.

31. One commenter proposed expanding the scope of the competency rules to cover all of the inspection trades and all persons, not just those who are supervised by municipal building officials.³⁸ The statute, however, authorizes the adoption of rules only to establish competency criteria for individuals serving as construction code inspectors who are under the supervision of the building official. The expansion of the rule advocated by this commenter would be inconsistent with Minn. Stat. § 16B.655.

32. Craig Hoium is the Austin Building Official. He is also president of the Association of Minnesota Building Officials and president of the Southeast Code Officials Chapter. He is a member of the advisory committee that developed the proposed rule language. He commented at the hearing that the difficulty faced by the advisory committee was in developing standards that would be appropriate in both large and small communities throughout the state. If the standards were too stringent, it would be difficult for small municipalities to recruit and pay qualified inspectors. He indicated that the advisory committee received many comments from code officials and building inspectors that the proposed rules were both (1) too rigorous, and (2) less rigorous than the municipal standards currently in place. He contended the proposed

³⁶ Ex. I.

³⁷ Ex. N.

³⁸ Ex. I.

rules were a reasonable approach acceptable to the Association of Minnesota Building Officials and should be adopted as proposed by the Department.³⁹

Part by Part Analysis

33. This report is limited to discussion of the portions of the proposed rules that received significant comment or otherwise need to be examined. When rules are adequately supported by the SONAR or the Department's oral or written comments, a detailed discussion of the proposed rules is unnecessary. The agency has demonstrated the need for and reasonableness of all rule provisions not specifically discussed in this report by an affirmative presentation of facts. All provisions not specifically discussed are authorized by statute, and there are no other problems that would prevent adoption of the rules.

34. **1301.1310, subpart 3.** The Department initially proposed defining a "building inspection technology course or BIT course" as a "building inspection technology course from an accredited college or university that is recognized by the Department of Labor and Industry." The MMCA objected to this definition as being too vague, contending it should include a minimum number of hours.⁴⁰ At the hearing, the Department proposed to change this definition as follows:

Building inspection technology course or BIT course means a building inspection technology course offered for college or university credit from an accredited college or university that is recognized by the Department of Labor and Industry.⁴¹

35. This additional language is acceptable to the MMCA and MPTA. The proposed change does not make the rule substantially different than as published.⁴²

36. There is a different issue not addressed by the MMCA and MPTA, however, in that the proposed rule gives the Department the discretion to determine which courses (offered for college or university credit, from an accredited college or university) will be recognized by the Department. It does not say how the Department will determine which of these courses or colleges it will recognize, or how local building officials will be able to tell which courses or colleges the Department will recognize. A proposed rule is impermissible if it delegates unbridled discretion to administrative officers. As the Minnesota Supreme Court has held, a law must furnish:

A reasonably clear policy or standard of action which controls and guides the administrative officers in ascertaining the operative facts to which the law applies, so that the law takes effect upon these facts by virtue of its

³⁹ Hearing Transcript at 38-41.

⁴⁰ Ex. I (MMCA letter of Oct. 10, 2007).

⁴¹ Ex. L.

⁴² Minn. Stat. § 14.05, subd. 2 (a modification does not make a proposed rule substantially different if "the differences are within the scope of the matter announced ... in the notice of hearing and are in character with the issues raised in that notice," the differences "are a logical outgrowth of the contents of the ... notice of hearing and the comments submitted in response to the notice," and the notice of hearing "provided fair warning that the outcome of that rulemaking proceeding could be the rule in question.")

own terms, and not according to the whim or caprice of the administrative officers.⁴³

As written, the proposed rule is too vague and grants unfettered discretion to the Department to "recognize," or not, a particular college program. This discretion is a defect in the proposed rule.

37. In contrast to the proposed rule, the comparable rule for certification of building officials provides that "BIT refers to building inspection technology programs offered in the community college system."⁴⁴ It allows specific points toward certification for a BIT AAS degree, BIT certificate, and BIT code-related courses.⁴⁵ The rule concerning continuing education for building officials similarly references specific programs and meetings, as well as "college building inspection technology and other related college courses."⁴⁶ It further provides that other continuing education offerings "must be approved on the basis of comparison with the [specifically listed] items in subpart 1."⁴⁷ These rules do not grant unfettered discretion to the Department.

38. The defect found above in Finding 36 could be corrected in several different ways. The easiest fix would be to eliminate the words "that is recognized by the Department of Labor and Industry," which would mean all BIT college-level courses would fit the definition. Or the Department could use the definition applicable to building officials, as noted above, which would reference BIT courses offered in the community college system. If the Department wishes to retain the ability to review other types of course offerings for approval, it should say what criteria will be used in determining whether to recognize a particular BIT course, as it did for the rule concerning building officials.

39. **1301.1310, subparts 8 and 11.** The Department originally proposed defining the term "mechanical inspector" as "an individual who, under the supervision of a designated building official, inspects mechanical systems." Similarly, it proposed defining "plumbing inspector" as "an individual who, under the supervision of a designated building official, inspects plumbing systems."

40. At the hearing, the Department proposed to change this language to reference the applicable competency requirements in part 1301.1400. Thus, a mechanical inspector would be defined as "an individual who, under the supervision of a designated building official, inspects mechanical systems and meets the requirements of 1301.1400, subpart 3." A plumbing inspector would be defined as "an individual who, under the supervision of a designated building official, inspects plumbing systems and meets the requirements of 1301.1400, subpart 4." For purposes of consistency, the Department also proposed the same modification of the definition of building inspector in part 1301.1310, subpart 4, which would read "an individual who, under the supervision of a designated building official, inspects building construction and meets the requirements of 1301.1400, subpart 2." The MMCA and MPTA do not object to

⁴³ *Lee v. Delmont*, 228 Minn. 101, 113, 36 N.W.2d 530, 538 (1949).

⁴⁴ Minn. R. 1301.0300 A.

⁴⁵ *Id.* 1301.0300 A (1)-(3).

⁴⁶ Minn. R. 1301.1000, subp. 1 I.

⁴⁷ *Id.*, subp. 2.

these changes. The Department has proposed no similar change, however, in the definition of a combination inspector. The language of that subpart defines a combination inspector as an individual who, "under the supervision of a designated building official, inspects buildings and structures in two or more of the following disciplines: A. building construction; B. plumbing systems; and C. mechanical systems."⁴⁸ Thus, the Department has chosen to define building, plumbing, and mechanical systems inspectors as persons who meet the competency criteria in those disciplines, but it has not defined a combination inspector as a person who meets any competency criteria. This is an obvious inconsistency that appears to undermine the Department's efforts in other subparts to link the definitions of building, plumbing, and mechanical systems inspectors to the meeting of competency criteria. If the Department takes action to cure to defect noted in Finding 63 (competency criteria for combination inspectors), it may be necessary to change this definition as well.

41. The Administrative Law Judge finds that the proposed language of 1301.1310, subparts 4, 8, and 11 to be needed and reasonable. These changes do not render the proposed rules substantially different from the rule as published. If the Department chooses to make a similar change to the definition of a combination inspector, such a change would not make the proposed rule substantially different than the rule as published.

42. **1301.1310, subpart 7.** The Department originally defined a "designated building official" as "an individual who, as a certified building official, has been designated by a municipality pursuant to Minnesota Statutes, section 16B.65, subdivision 1." At the hearing, the Department proposed changing the definition to read "an individual who, as a certified building official or building official limited, has been designated by a municipality pursuant to Minnesota Statutes, section 16B.65, subdivision 1."

43. This change is intended to recognize the different categories of certification for building officials, which are authorized by Minn. Stat. § 16B.65, subd. 3 (2006), and Minn. R. 1301.0200, subp. 5 (2005). No person objected to this change. The Administrative Law Judge finds the proposed definition to be needed and reasonable, and the change does not make the rule language substantially different from the rule as published.

44. **1301.1400, subpart 2.** At the hearing, the Department proposed making the following change in the competency criteria for a building inspector:

To conduct the activities of a building inspector, an individual must meet at least one of the following minimum competency criteria:

- A. three years' verifiable experience in construction with specific skilled participation in the construction of foundations and superstructures;
- B. five years' experience in the complete design of buildings;

⁴⁸ See Minn. R. 1301.1300, subp. 5.

- C. successful completion of two or more BIT courses in building construction;
- D. vocational or trade school diploma or equivalent education related to building construction;
- E. bachelor's degree or more in architecture, engineering, or construction management;
- F. national certification as a building inspector; or
- G. two years' experience conducting building construction inspections while under the supervision of a Minnesota designated building official.⁴⁹

45. No person objected to this rule language or to the proposed change. The Department added the word "verifiable" in response to criticisms that the rule was not sufficiently rigorous. The Department stated that although it "assumes that any of the minimum competency criteria [must] be verifiable, the addition of the word is not harmful to the intent of the rule and does not change the meaning of the proposed rule."⁵⁰ The addition of this word may not change the meaning of 1301.1400, subpart 2 A, but it does arguably create ambiguity regarding other subparts, such as the experience requirements referenced in 1301.1400, subparts 2 B and 2 G. The Administrative Law Judge recommends either deleting "verifiable" from subpart 2 A or adding the word "verifiable" to subparts 2 B and 2 G.⁵¹ This suggestion is made to avoid ambiguity, and it is not a defect in the rule. Changes made to avoid this ambiguity would not make the rule substantially different than the rule as published. If the Department elects to make no further changes, the rule as proposed would be needed and reasonable, and the change made does not make the rule substantially different.

46. In its post-hearing response, the Department proposed adding the word "current" to subpart 2 F, so that it would read "current national certification as a building inspector." The Administrative Law Judge concludes the addition of the word "current" is needed and reasonable, and does not make the rule substantially different than as originally proposed. For the reasons explained in Finding No. 58, however, the Administrative Law Judge believes the Department should be required to modify subpart 2 F to specify which current national certifications are acceptable, or to specify at minimum that "current certification by a national model building code group" is required.

47. **Part 1301.1400, subparts 3 and 4.** At the hearing, the Department proposed the following changes to the competency criteria for mechanical inspectors and plumbing inspectors:

⁴⁹ Ex. L.

⁵⁰ Ex. O at 5.

⁵¹ The rule regarding the experience needed for certification of building officials does not use the term "verifiable." It refers to "municipal building code inspection or plan review experience" and "experience in the design of buildings or in the construction of buildings." See Minn. R. 1301.0300 C.

Subp. 3. Mechanical inspector. To conduct the activities of a mechanical inspector, an individual must meet at least one of the following minimum competency criteria:

- A. three years' verifiable experience in the installation or design of mechanical systems;
- B. successful completion of two or more BIT courses, with at least one course specifically related to mechanical systems;
- C. vocational or trade school diploma or equivalent education related to the construction of mechanical systems;
- D. bachelor's degree or more in architecture or engineering; or
- E. national certification in mechanical system inspections; or
- F. ~~two years' experience conducting mechanical inspections while under the supervision of a Minnesota designated building official.~~

Subp. 4. Plumbing inspector. To conduct the activities of a plumbing inspector, an individual must meet at least one of the following minimum competency criteria:

- A. three years' verifiable experience in the installation or design of plumbing systems;
- B. successful completion of two or more BIT courses, with at least one course specifically related to plumbing systems;
- C. vocational or trade school diploma or equivalent education related to the construction of plumbing systems;
- D. bachelor's degree or greater in architecture or engineering; or
- E. national certification in plumbing system inspection; or
- F. ~~two years' experience conducting plumbing inspections while under the supervision of a Minnesota designated building official.~~

48. The Department added the word "verifiable" to subparts 3 A and 4 A for the same reasons stated with regard to 1301.1400, subpart 2 A, above. The addition of the word in these subparts does not create the ambiguity noted in subpart 2 A because there are no other references in these subparts to demonstrating competence through experience. Nonetheless, the Administrative Law Judge recommends that the Department be consistent in either adding this word or deleting it from all three subparts.

49. The Department proposed deleting subparts 3 F and 4 F in response to concerns that the qualifications more specific to mechanical systems or plumbing systems would more accurately target the scope of knowledge the competency criteria were intended to address.⁵² No person objected to the deletion of subparts 3 F and 4 F.

⁵² Tr. 15.

50. The MMCA and the MPTA object generally to the competency criteria in these subparts, contending first that the competency criteria should be targeted to the complexity of the work being inspected. For example, a mechanical or plumbing inspector may typically do inspections of single family dwellings in a small jurisdiction and have no experience or qualifications to inspect more complex systems; this same person, however, would be deemed competent under these criteria to inspect work on a 12-story hotel with indoor and outdoor pools, or on a low-pressure steam boiler system in an industrial property. This distinction in complexity is recognized by the building code and the plumbing code.⁵³ They argue that the end sought to be achieved by the statute is competency criteria relevant to all parts of the building, mechanical, and plumbing codes, not just the less complex portions of those codes. For this reason, they argue that subparts 3 and 4 are not reasonable since they are not rationally related to the end sought in Minn. Stat. § 16B.655 (2006).⁵⁴

51. An agency is entitled to make choices between possible approaches as long as the choice made is rational. It is not the role of the Administrative Law Judge to determine which policy alternative presents the "best" approach, since doing so would invade the agency's policy-making discretion. The question for the Administrative Law Judge is rather whether the choice made by the agency is one that a rational person could have made. Under the current system, there are no competency criteria for construction codes inspectors. The statute does not require that all construction code inspectors be required to meet the criteria, only those hired after January 1, 2008; and these new hires will have one year from the date of hire to meet the criteria. The proposed rules reflect "minimum" competency criteria, but do not prohibit a municipality from setting criteria that exceed the competency criteria established by the rules, if building projects in the municipality require a higher level of knowledge. The decision to set "minimum" competency criteria, as opposed to developing criteria targeted to projects with varying degrees of complexity, has a reasonable basis in the statute and does not make the rule irrational or unreasonable.

52. Specifically with regard to subpart 4 A, the MMCA and MPTA argue that the only experience that should be counted toward meeting this competency criterion is experience as a licensed plumber. Similarly, they argue that both of the BIT courses referenced in subparts 3 B and 4 B should specifically relate to mechanical and plumbing systems, respectively. The MMCA and MPTA also contend that the "vocational or trade school diploma" referenced in subparts 3 C and 4 C is not sufficiently defined and question whether a certificate in appliance repair, or a combination of courses in building codes and plumbing codes, would qualify. These organizations did not, however, propose any alternative language for these subparts. Furthermore, the MMCA and MPTA argue that subparts 3 E and 4 E are insufficiently specific because they do not specify how many hours would be needed for "national certification."⁵⁵

53. With regard to subpart 4 A, the Department agrees that the experience that should be counted toward meeting this criterion is "plumbing-related experience

⁵³ Ex. I.

⁵⁴ Ex. M; Ex. N.

⁵⁵ Ex. I.

that is obtained without violating the plumbing licensure laws." It does not, however, believe that it is necessary to change the language of the proposed rule to address this issue.⁵⁶ If the Department construes the rule in this manner, it is hard to see why the Department would not expressly say so in the rule itself. Under the statute, application of the rules is left to local building officials throughout the state, and it would be difficult for them to know what the Department's intent is, if it is not expressed in the rule.

54. Despite the Department's presumption that the experience necessary to meet this criterion is obtained without violating the plumbing licensure laws, the language contained in subpart 4 A as proposed would allow a local building official to conclude that unlicensed work, as long as it is verifiable, would count toward this competency criterion. The Department has offered no reason why it should be necessary or reasonable to permit this result. Accordingly, the Administrative Law Judge finds that the Department has not demonstrated the need for and reasonableness of the proposed rule in the rulemaking record. This constitutes a defect in the proposed rule. To cure this defect and to render the language of the rule consistent with the rulemaking record, the rule should be modified by adding the caveat that "qualifying experience is that obtained in compliance with plumbing licensure laws" or words to that effect. This change would not render the rule substantially different than the rule as published.

55. With regard to subparts 3 B and 4 B, the Department is opposed to changing the rule to require the successful completion of two or more BIT courses specifically related to the mechanical or plumbing inspection categories. The Administrative Law Judge concludes that the decision to require only one BIT course specifically related to mechanical or plumbing inspection is a policy choice that is legitimately within the Department's discretion.

56. With regard to subparts 3 C and 4 C, the Department proposed revising the rule to read "vocational or trade school diploma or equivalent education related to the construction of mechanical or plumbing systems. It is unclear whether this change satisfies the objections raised by the MMCA and the MPTA. The Department has shown that these subparts are needed and reasonable, and the change does not render the rule substantially different from the rule as published.

57. With regard to subparts 3 E and 4 E, the Department contends the "national certification" criterion is sufficiently clear and that it is intended to reference the certifications offered by national model code groups.⁵⁷ In its post-hearing comments, the Department proposed adding the word "current" to both subparts, so that they would read "current national certification in mechanical system inspection" and "current national certification in plumbing system inspection."⁵⁸ The Department is unwilling to make any further changes in this subpart. In contrast to the proposed rule, the rule applicable to certification of building officials specifically references certifications by the Council of American Building Officials and the International Conference of Building

⁵⁶ Ex. O at 7.

⁵⁷ Ex. O at 8.

⁵⁸ *Id.* at 11-12.

Officials.⁵⁹ It is not clear why the Department is unwilling to be similarly specific in this rule.

58. Again, despite the Department's representation that it intended to reference certification by model code groups, the language contained in subparts 3 E and 4 E as proposed would allow a local building official to conclude that certification by groups other than national model code groups would count toward this competency criterion. The Department has offered no reason why it should be necessary or reasonable to permit this result. Accordingly, the Administrative Law Judge finds that the Department has not demonstrated the need for and reasonableness of the proposed rule in the rulemaking record. This constitutes a defect in the proposed rule. To cure this defect and to render the language of the rule consistent with the rulemaking record, the language of these subparts should be modified to make reference to the specific model code groups that offer acceptable certifications, or if these groups cannot be identified with any certainty, to refer at minimum to certification by "a national model code group." Changes of this nature would not make the rule substantially different than the rule as published.

59. **Minn. R. 1301.1400, subpart 5.** This subpart provides as follows:

Subp. 5. Combination inspector. To conduct the activities of a combination inspector, an individual must meet the minimum competency criteria for at least two of the following disciplines:

- A. building inspector;
- B. mechanical inspector; or
- C. plumbing inspector.

60. The MMCA and MPTA object to this subpart on the basis that it exceeds the statutory authority to adopt rules. The statute grants the Commissioner authority to adopt competency criteria for "combination inspectors," and it requires that competency criteria "shall be relevant to the building, mechanical, and plumbing codes adopted in Minnesota."⁶⁰ They contend that the requirement that competency for a combination inspector be demonstrated in only two of the three disciplines amounts to a "no-competency" requirement in the third discipline and that the Commissioner thereby fails to satisfy the statutory requirement for relevant competency in all three disciplines.

61. The MMCA and MPTA also argue that the proposed rule conflicts with the public health and safety requirements contained in Minn. Stat. § 16B.59, which separately requires the Department to administer and amend the State Code of Building Construction for the purpose of providing basic and uniform performance standards and establishing reasonable safeguards for the health, safety, welfare, comfort and security of the residents of Minnesota. They assert that lack of knowledge and competency in one of these areas jeopardizes public health and safety, and a rule allowing a combination inspector to lack knowledge in one discipline conflicts with the Department's obligation to safeguard public health and safety. Finally, they argue that

⁵⁹ Minn. R. 1301.0300 B (1), (2).

⁶⁰ Minn. Stat. § 16B.655, subd. 1.

the competency criteria for combination inspectors is not reasonable because requiring competency in only two of the three disciplines is not rationally related to the requirement that competency criteria be relevant to the building, mechanical and plumbing codes in Minnesota.⁶¹

62. The Department argues in response that the advisory committee carefully considered these issues and recommended that satisfaction of the minimum competencies in two of the inspection categories is sufficient to permit inspection in all three categories. The Department has interpreted the authorizing legislation to include a combination inspector in its literal sense—someone who inspects in two or more of the inspection categories specified in the statute. The Department contends that although the statute does not provide a definition of “combination inspector,” the legislature would not have had to refer to such a category at all if it intended that competency in all three disciplines should be required.⁶² In addition, the Department proposed a change to the continuing education requirements for combination inspectors that would require 20 hours of continuing education each year, of which six must be in each discipline. This change is intended to ensure that combination inspectors will not only maintain their competence in the two disciplines for which they meet criteria, but will over time become competent in the third discipline through the continuing education requirement.⁶³

63. The Administrative Law Judge agrees with the Department that the legislature intended to make incremental change by making competency requirements applicable to future hires and by providing a one-year window in which new hires may meet these requirements. But the statute expressly requires the Department to adopt competency criteria for all types of inspectors that “shall be relevant to” the building, mechanical, and plumbing codes in Minnesota. In proposing a rule that permits a combination inspector to conduct inspections in all three disciplines, when the inspector meets the competency criteria for only two of them, the Department has disregarded the statutory mandate. The Department certainly has the discretion to interpret the term “combination inspector” in its literal sense as an inspector who inspects in two or more of the inspection categories specified in the statute; it does not follow, however, that the legislature intended a “combination inspector” who meets competency criteria in two areas to be exempt from meeting competency criteria in the third. The legislature took care to specify the exemptions for currently certified building officials and persons hired prior to January 1, 2008. If the legislature had intended to exempt a “combination inspector” from meeting competency criteria in any category, the Administrative Law Judge concludes it would have said so specifically. Contrary to the Department’s argument, there are well-grounded reasons to include the category of “combination inspector” in the statute, other than to create an unspoken exception to the competency criteria, such as recognizing that inspectors who are qualified in multiple areas might have different continuing education requirements than those who are not. The rule as proposed is inconsistent with the statutory requirement to adopt competency criteria relevant to the building, mechanical, and plumbing codes. This defect could be cured

⁶¹ Ex. M.

⁶² Ex. O at 9.

⁶³ Ex. L.

by developing competency criteria for combination inspectors that link knowledge of the building, mechanical, and plumbing codes to the ability to conduct inspections in those same areas. Because the Administrative Law Judge has found the proposed rule to be inconsistent with the statute, it is not necessary to address the other objections articulated by the MMCA and the MPTA.

64. **Minn. R. 1301.1600.** This proposed rule provides as follows:

Subpart 1. Mandatory continuing education. Each construction code inspector must annually meet the requirements for continuing education in subparts 2 and 3, and provide evidence of completed continuing education credits to the designated building official. The designated building official must retain evidence of compliance for three years.

Subp. 2. Building, mechanical, and plumbing inspectors. Each building inspector, mechanical inspector, or plumbing inspector must complete 15 hours of continuing education annually, of which six hours must be in the discipline in which the individual meets the competency criteria.

Subp. 3. Combination inspectors. Each combination inspector must complete 20 hours of continuing education annually, of which six hours must be in each discipline in which the individual meets the competency criteria..

65. The MMCA and MPTA objected to the number of hours of continuing education required each year (15 for building, mechanical, and plumbing inspectors; 20 for combination inspectors), arguing those requirements were excessive compared to what is required for attorneys (45 hours over three years) and electricians (16 hours over two years). The Department's decision to require 15 or 20 hours of continuing education, as opposed to some other number, is legitimately within its policy-making discretion. The Administrative Law Judge cannot say that the proposed rule is defective because too many hours of continuing education are required. The proposed rule is appropriate given the public safety interests at stake, and the hours required are not so burdensome as to restrict the ability to engage in the occupation.

66. The MMCA and MPTA also objected to the rule on the basis that it is unclear who would monitor compliance for inspectors who go through periods of unemployment or are employed by or contract with more than one municipality.⁶⁴ They argue that the rule is vague, incomplete, and therefore unreasonable because it contains no provision for enforcement, reporting, or consequences for failure to comply.⁶⁵

67. The Department's response to these criticisms is that, under the statute, municipalities will continue to self-determine their own hiring criteria for inspectors based on the needs of the municipality. Inspectors must meet the applicable minimum competency within the first year of hire, then they must annually meet the continuing education requirements in each subsequent 12-month period in which they are performing inspections for the municipality. The designated building official is required

⁶⁴ Ex. I.

⁶⁵ Ex. N.

to retain evidence of compliance for three years. The Department has the authority under Minn. R. 1301.1500 to review and evaluate code-related education programs to determine whether credit should be given and if so, how much, for any particular offering. The Department does retain enforcement authority over certified building officials, and it has the authority to deny, suspend, limit, place conditions on, or revoke a certificate if the person holding it "violates a provision of sections 16B.59 to 16B.75 or a rule adopted under those sections."⁶⁶ The Department also has oversight authority over municipalities that administer and enforce the State Building Code.⁶⁷ In addition, municipalities may have their own enforcement standards. The Administrative Law Judge concludes the proposed rule is not vague, incomplete or unreasonable because it lacks provision for enforcement, reporting, or consequences for failure to comply.

68. At the hearing, the Department proposed the following change to the subpart concerning combination inspectors:

Subp. 3. Combination inspectors. Each combination inspector must complete 20 hours of continuing education annually, of which six hours must be in each discipline ~~in which the individual meets the competency criteria~~.⁶⁸

69. This change (referenced in Finding No. 62 above) was intended to respond to the criticisms that competency criteria for combination inspectors are unreasonably lax, and no party objected to this change. The Department has shown that the rule, as proposed, is needed and reasonable, and the change does not make the rule substantially different from that proposed. Depending on how the Department chooses to define combination inspectors and to develop competency criteria for combination inspectors in response to the defect noted in Finding No. 63, however, it may wish to revise the continuing education requirement for combination inspectors. It would certainly be rational to adopt different continuing education requirements for inspectors who meet the competency criteria in more than one inspection area (either by requiring continuing education in the areas in which the competency criteria are met, or by requiring fewer total hours of annual continuing education to maintain competency in each area). This type of change would not make the rule substantially different from that as published.

70. In its post-hearing response, the Department also proposed changing subpart 1 to read as follows:

Subpart 1. Mandatory continuing education. Each construction code inspector must annually meet the requirements for continuing education in subparts 2 and or 3, and provide verifiable evidence of completed continuing education credits to the designated building official. The designated building official must retain evidence of compliance for three years.⁶⁹

⁶⁶ Minn. Stat. § 16B.65, subd. 5b.

⁶⁷ *Id.* § 16B.62, subd. 2.

⁶⁸ Ex. L.

⁶⁹ Ex. O at 15.

71. These changes are intended to clarify that subpart 3 applies only to combination inspectors and to clarify that evidence of completion must be verifiable. These changes do not make the rule substantially different than as originally published. The Department has shown that the modified language is needed and reasonable.

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

CONCLUSIONS

1. The Department of Labor and Industry gave proper notice of the hearing in this matter.

2. The Department has fulfilled the procedural requirements of Minn. Stat. § 14.14 and all other procedural requirements of law or rule.

3. The Department has demonstrated its statutory authority to adopt the proposed rule 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).

4. The Department has documented the need for and reasonableness of its proposed rule 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 in Finding Nos. 36, 46, 54, 58, and 63.

5. The modifications to the proposed rules that were offered by the Department after publication in the State Register do not make the rules substantially different from the proposed rule within the meaning of Minn. Stat. §§ 14.05, subd. 2, and 14.15, subd. 3.

6. The Administrative Law Judge has suggested action to correct the defects cited in Conclusion 4, as noted in Finding Nos. 38, 46, 54, 58, and 63.

7. Due to Conclusion 4, 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 that might properly be termed Conclusions and any Conclusions that might properly be termed Findings are hereby adopted as such.

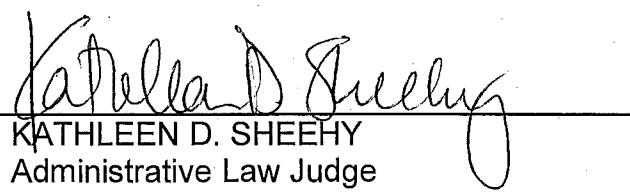
9. A finding or conclusion of need and reasonableness in regard to any particular rule subsection does not preclude and should not discourage the Board from further modification of the proposed rules based upon an examination of the public comments, provided that the rule finally adopted is based upon 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 rule be adopted except as otherwise noted above.

Dated: December 28, 2007.



KATHLEEN D. SHEEHY
Administrative Law Judge

NOTICE

The Department must make this Report available for review by anyone who wishes to review it for at least five working days before the Department takes any further action to adopt final rules or to modify or withdraw the proposed rules. If the Department makes changes in the rules other than those recommended in this report, it must submit the rules, along with the complete hearing record, to the Chief Administrative Law Judge for a review of those changes before it may adopt the rules in final form.

Because the Administrative Law Judge has determined that the proposed rules are defective in certain respects, state law requires that this Report be submitted to the Chief Administrative Law Judge for his approval. If the Chief Administrative Law Judge approves the adverse findings contained in this Report, he will advise the Department of actions that will correct the defects, and the Department may not adopt the rules until the Chief Administrative Law Judge determines that the defects have been corrected. However, if the Chief Administrative Law Judge identifies defects that relate to the issues of need or reasonableness, the Department may either adopt the actions suggested by the Chief Administrative Law Judge to cure the defects or, in the alternative, submit the proposed rules to the Legislative Coordinating Commission for the Commission's advice and comment. The Department may not adopt the rules until it has received and considered the advice of the Commission. However, the Department is not required to wait for the Commission's advice for more than 60 days after the Commission has received the Department's submission.

If the Department elects to adopt the actions suggested by the Chief Administrative Law Judge and make no other changes and the Chief Administrative Law Judge determines that the defects have been corrected, it may proceed to adopt the rules. If the Department makes changes in the rules other than those suggested by the Administrative Law Judge and the Chief Administrative Law Judge, it must submit copies of the rules showing its changes, the rules as initially proposed, and the

proposed order adopting the rules to the Chief Administrative Law Judge for a review of those changes before it may adopt the rules in final form.

After adopting the final version of the rules, the Department must submit them to the Revisor of Statutes for a review of their form. If the Revisor of Statutes approves the form of the rules, the Revisor will submit certified copies to the Administrative Law Judge, who will then review them and file them with the Secretary of State. When they are filed with the Secretary of State, the Administrative Law Judge will notify the Department, and the Department will notify those persons who requested to be informed of their filing.