OAH 12-2500-20479-1
Governor's Tracking No. AR 370

STATE OF MINNESOTA
OFFICE OF ADMINISTRATIVE HEARINGS

FOR THE PUBLIC UTILITIES COMMISSION

In the Matter of the Proposed Rules of the Public Utilities Commission Governing Ex Parte Communications; Minnesota Rules, Chapter 7845

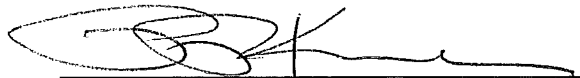
ORDER OF THE CHIEF ADMINISTRATIVE LAW JUDGE ON REVIEW OF RULES UNDER MINNESOTA STATUTES, SECTION 14.26, SUBD. 3(b)

The Minnesota Public Utilities Commission ("Commission") has adopted the above-entitled rules without a hearing pursuant to Minnesota Statutes, section 14.26. On September 23, 2009, the Office of Administrative Hearings received the documents that must be filed by the Commission under Minnesota Statutes § 14.26 and Minn. R. 1400.2310. On October 7, 2009, the Administrative Law Judge issued the Order on Review of Rules under Minnesota Statutes, Section 14.26. As set forth in the October 7, 2009 Order, portions of the rules were disapproved on substantive grounds.

Based upon a review of the written submissions and filings, Minnesota Statutes, Minnesota Rules, and the October 7, 2009 Order,

IT IS HEREBY ORDERED: that the findings of the Administrative Law Judge in the October 7, 2009 Order on Review of Rules under Minnesota Statutes, Section 14.26, regarding the disapproval of the rules are **APPROVED** as to the procedural defect as harmless error and Minn. R. 7845.7900, subpart 2; and **DISAPPROVED** as to Minn. R. 7845.7900, subparts 1 and 3.

Dated this 14th day of October, 2009.



RAYMOND R. KRAUSE
Chief Administrative Law Judge

MEMORANDUM

This matter comes to the Chief Administrative Law Judge (ALJ) pursuant to Minn. Stat. § 14.26, subd. 3 (b) and Minn. R. 1400.2300, subp. 6, on review of an Administrative Law Judge's findings that portions of a proposed agency rule should not be approved. Those provisions require the Chief Administrative Law Judge to then review and "approve or disapprove the judge's determination within five working days and . . . state the reasons in writing and . . . advise the agency what changes are required for approval."

The Administrative Law Judge approved the proposed rules with the exception of part 7845.7900, subparts 1, 2, and 3. As a result, the Chief ALJ review is limited to those items disapproved by the ALJ and the reasons set forth for their disapproval.

After review of the rule-making record and the ALJ Order dated October 7, 2009, the Chief ALJ agrees with the ALJ's findings regarding part 7845.7900, subpart 2. The ALJ's findings that this portion of the rule is defective are approved. The ALJ's Order advises the Commission what changes are required for approval and the Chief ALJ incorporates those findings into this Order.

The Chief ALJ does, however, respectfully disagree with the ALJ regarding the findings as to part 7845.7900, subparts 1 and 3, and concludes that the Commission has established both the legality and the reasonableness of and need for those proposed subparts. Findings made by the ALJ that these portions of the rule are defective are not approved.

Part 7845.7900, subpart 1

Subpart 1 states:

> After receiving the administrative law judge's report, the commission shall provide notice of the report to all persons on the commission's official service list for the affected proceeding.

The Chief ALJ respectfully disagrees with the ALJ's analysis of this portion of the proposed rule. A rule is generally found to be reasonable if it is rationally related to the end sought to be achieved by the governing statute.[1] 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."[2] 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 because this would invade the policy-making discretion of the agency. The

[1] *Mammenga v. Department of Human Services*, 442 N.W.2d 786, 789-90 (Minn. 1989); *Broen Memorial Home v. Department of Human Services*, 364 N.W.2d 436, 444 (Minn. Ct. App. 1985).
[2] *Manufactured Housing Institute v. Pettersen*, 347 N.W.2d 238, 244 (Minn. 1984).

question is rather whether the choice made by the agency is one that a rational person could have made.[3]

The Chief ALJ concludes that the Commission has shown this proposed rule language to be necessary and reasonable. The failure of the Commission to insert a deadline to provide notice of the ALJ's report to affected parties does not rise to the level of a defect. The Commission has made a policy decision that it is entitled to make by providing for notice of the ALJ's report to affected parties. The language of subpart 1 is rationally related to the objective of the agency and the Legislature to put into place a thorough and efficient process to resolve complaints regarding alleged ex parte communications.

The Chief ALJ does, however, agree that inserting a deadline or time period into the proposed subpart would be useful to the Commission and to affected parties. Such a change would be needed and reasonable and would not make the rules substantially different. The Commission may wish to consider this recommended technical correction as it proceeds with this rulemaking, but the addition of such language is not required for approval of the proposed rule.

Part 7845.7900, subpart 3

Subpart 3 states:

> Following the comment period, and with notice, the commission shall hold a hearing and render its decision regarding the imposition of sanctions. Notice of the hearing must be sent to those on the commission's official service list for the affected proceeding.

Here, again, the ALJ found that the Commission's failure to insert a deadline by which to hold a hearing rendered this subpart defective. For the same reasons as stated above, the Chief ALJ respectfully disagrees. The Chief ALJ finds that the imposition of a specific deadline goes beyond the authority of the ALJ. However, the Chief ALJ also finds that should the Commission decide to insert a deadline or time parameters by which it must hold the hearing, such a change would be needed and reasonable and would not make the rules substantially different.

R. R. K.

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