

**4659.0080 VARIANCE.**

Subpart 1. **Request for variance.** A license applicant or licensee may request at any time that the commissioner grant a variance from the provisions of this chapter. The request must be made in writing to the commissioner and must specify the following:

- A. the name and address of the license applicant or licensee requesting the variance;
- B. the rule requirement from which the variance is requested;
- C. the variance requested and the time period for which the variance is requested;
- D. the specific alternative actions, if any, that the license applicant or licensee proposes to follow;
- E. the reasons for the request, including why the license applicant or licensee cannot comply with a requirement in this chapter;
- F. justification that the variance will not impair the services provided, and will not adversely affect the health, safety, or welfare of residents or the residents' rights under Minnesota Statutes, chapter 144G, including the assisted living bill of rights;
- G. a signed statement attesting to the accuracy of the facts asserted in the variance request; and
- H. the name, address, and contact information of any person or entity the license applicant or licensee knows would be adversely affected by granting the variance, including prospective residents, residents, and their representatives.

The commissioner may require additional information from the license applicant or licensee before acting on the request.

Subp. 1a. **Notice.** The commissioner shall make reasonable efforts to ensure that persons or entities who may be affected by the variance have timely notice of the variance request, including affected prospective residents, residents, and their representatives. In addition, the agency shall notify the ombudsman of all variance requests. The commissioner may require the license applicant or licensee requesting the variance to serve notice on the persons or entities entitled to notice under this subpart.

Subp. 2. **Criteria for evaluation.** The decision to grant or deny a variance or variance renewal request must be based on the department's evaluation of the following criteria:

- A. whether the alternative measures, if any, comply with the intent of this chapter and are equivalent to or superior to those prescribed in this chapter;
- B. whether compliance with this chapter poses an undue burden on the license applicant or licensee; and

C. whether the variance adversely affects the health, safety, or welfare of the residents or any of the residents' rights under Minnesota Statutes, chapter 144G, including the assisted living bill of rights.

Subp. 3. **Duration and conditions.** The commissioner may limit the duration of any variance. The commissioner may impose conditions on granting a variance that the commissioner considers necessary to protect public health, safety, or the environment. A variance has prospective effect only. The commissioner may not grant a variance from a statute or court order. Conditions attached to the variance are an enforceable part of the rule to which the variance applies.

Subp. 4. **Decision and timing.** (a) The commissioner must notify the license applicant or licensee and all persons or entities entitled to notice under subpart 1a, in writing, of the commissioner's decision to grant or deny a variance request or variance renewal request, or to revoke a variance. If the variance request or variance renewal request is granted, the notification must specify the period of time for which the variance is effective and the alternative measures or conditions, if any, to be met by the license applicant or licensee. If the commissioner denies, revokes, or refuses to renew a variance, the commissioner must notify the license applicant or licensee, in writing, of the reasons for the decision and the right to appeal the decision under subpart 8.

(b) The commissioner shall grant or deny a variance request or variance renewal request as soon as practicable, and within 60 days of receipt of the completed variance application, unless the license applicant or licensee agrees to a later date. Failure of an agency to act on a request for a variance or variance renewal within 60 days constitutes approval of the variance or variance renewal.

Subp. 5. **Renewal.** A licensee seeking to renew a variance must submit the request required under subpart 1 at least 45 days before the expiration date of the variance.

Subp. 6. **Violation of variances.** A failure of the licensee to comply with the terms of the granted variance is a violation of this chapter.

Subp. 7. **Denial, revocation, or refusal to renew.** The commissioner shall deny, revoke, or refuse to renew a variance if:

A. the variance adversely impacts the health, safety, or welfare of residents or the residents' rights under Minnesota Statutes, chapter 144G, and the assisted living bill of rights;

B. the license applicant or licensee has otherwise failed to demonstrate that a variance should be granted under the criteria in subpart 2;

C. the license applicant or licensee has failed to comply with the terms of the variance under subparts 3 and 4;

D. the license applicant or licensee notifies the commissioner in writing that it wishes to relinquish the variance; or

E. the revocation, denial, or refusal to renew a variance is required by a change in law.

Subp. 8. **Appeal procedure.** A license applicant or licensee may appeal the denial, revocation, or refusal to renew a variance by requesting a hearing from the commissioner. The request must

be made in writing to the commissioner and delivered personally or by mail within ten calendar days after the license applicant or licensee receives the notice. If mailed, the request must be postmarked within ten calendar days after the license applicant or licensee receives the notice. The request for hearing must set forth in detail the reasons why the license applicant or licensee contends the decision of the commissioner should be reversed or modified. At the hearing, the applicant or licensee has the burden of proving by a preponderance of the evidence that the variance should be granted or renewed, except in a proceeding challenging the revocation of a variance, where the department has the burden of proving by a preponderance of the evidence that a revocation is appropriate. Hearings under this subpart must be conducted under the Administrative Procedure Act in Minnesota Statutes, chapter 14, and the rules of the Office of Administrative Hearings related to contested case proceedings in parts 1400.5010 to 1400.8400.

Subp. 9. **Fees and costs.** When requesting a variance under this part, the license applicant or licensee shall pay a fee as provided under Minnesota Statutes, section 14.056, subdivision 2.

**Statutory Authority:** *MS s 144G.09*

**History:** *46 SR 33*

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