

STATE OF MINNESOTA  
OFFICE OF ADMINISTRATIVE HEARINGS  
FOR THE MINNESOTA BOARD OF PSYCHOLOGY

In the Matter of the  
Proposed Adoption of  
Rule Amendments of the  
Minnesota Board of Psychology  
Governing Licensure and  
Professional Conduct.

REPORT OF THE  
ADMINISTRATIVE LAW JUDGE

The above-entitled matter came on for hearing before Administrative Law Judge George A. Beck on Friday, November 4, 1988 at 9:00 A.M. in the Upper Level Banquet Room of the Fred Babcock VFW Post 555, 710 Lakeshore Drive, in the City of Richfield, Minnesota.

This Report is a part of a rule hearing proceeding held pursuant to Minn. Stat. §§ 14.131 through 14.20, to hear public comment; to determine whether the Department has fulfilled all relevant substantive and procedural requirements of law or rule, to determine whether the proposed rules are needed and reasonable, and to determine whether or not the rules, if modified, are substantially different from those originally proposed.

Members of the Agency panel appearing at the hearing included the following members of the Board of Psychology: Robert G. Harlow, Board Chair, Carolyn Noehl, Hommey Canter, Eunice Gelb, Isabel M. Harris, Jean Zilisch, Barbara Seldin, David Baraga, Sherryl Ogren, Pearl Rosenberg, and Nancy Hawkins. Also on the panel were Lois E. Mizuno, Executive Director of the Board; and Penny Troolin, Special Assistant Attorney General, representing the Board of Psychology.

Approximately 40 people attended the hearing and 23 of them signed the hearing register. The hearing continued until all interested persons, groups or associations had an opportunity to be heard concerning the adoption of the proposed rules. Fifty-six timely written comments were submitted by members of the public; the Board submitted 20 written exhibits.

The Minnesota Board of Psychology 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.

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

## FINDINGS OF FACT

### Procedural Requirements.

1. On September 7, 1988, the Board of Psychology filed the following documents with the Chief Administrative Law Judge:

- (a) A copy of the proposed rules certified by the Revisor of Statutes. (Ex. B).
- (b) The Order for Hearing. (Ex. C).
- (c) The Notice of Hearing proposed to be issued. (Ex. E).
- (d) A Statement of the number of persons expected to attend the hearing and estimated length of the Agency's presentation. (Ex. A).
- (e) The Statement of Need and Reasonableness. (Ex. F).
- (f) A Statement of Additional Notice. (Ex. A).

2. On October 3, 1988, a Notice of Hearing and a copy of the proposed rules were published at 13 State Register 876.

3. On September 30, 1988, the Board of Psychology mailed the Notice of Hearing to all persons and associations who had registered their names with the Board for the purpose of receiving such notice.

4. On November 1, 1988, the Board filed the following documents with the Administrative Law Judge:

- (a) The Notice of Hearing as mailed. (Ex. K).
- (b) The Agency's certification that its mailing list was accurate and complete. (Ex. L).
- (c) The Affidavit of Mailing the Notice to all persons on the Agency's list. (Ex. L).
- (d) An Affidavit of Additional Notice. (Ex. M).
- (e) The names of Board 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. (Ex. N).
- (f) A copy of the State Register containing the proposed rules. (Ex. O).

The documents were available for inspection at the Office of Administrative Hearings from the date of filing to the date of the hearing. The documents listed in this Finding were not timely filed pursuant to Minn. Rule 1400.0600. However, since the late filing was inadvertent and since no request was made to view the documents, it appears that no prejudice occurred. Accordingly, this defect is not fatal. City of Mpls. v. Wurtele, 291 N.W.2d 386, 391 (Minn. 1980).

5. The period for submission of written comment and statements remained open through November 23, 1988, the comment period having been extended at the hearing to 19 calendar days following the hearing. The record remained open for an additional 3 working days through November 30, 1988, for responses to comments filed earlier.

## Nature of the Proposed Rule Amendments.

6. The proposed rule amendments make substantive changes in the areas of educational requirements for licensure, license renewal, and in the rules of conduct. Other changes are proposed in an effort to make existing rules easier to understand. The existing rules were adopted in 1982. The Board believes that the changes proposed in this proceeding correct flaws and omissions which have hindered the Board in fully carrying out its mandate to protect the public. (Board Ex. I).

## Small Business Considerations in Rulemaking.

7a. The Board's compliance with Minn. Stat. § 14.115, the small business considerations in rulemaking statute, must be examined. In its Statement of Need and Reasonableness, the Board states that it has determined that this statute does not apply to the proposed rule amendments and therefore, did not address the requirements of the statute. That conclusion cannot be sustained. The statute includes service businesses, such as psychologists, whether practicing in clinics or as sole practitioners. None of the exemptions listed apply to these rules. The proposed amendments do affect small businesses directly. (See exemption § 14.115, subd. 7(b)). For example, the industrial-organizational psychologists have argued that the additional requirements of 7200.5000, subp. 3 are redundant, cumbersome, and expensive. The new client record requirements are another example of a new regulatory requirement on existing practitioners.

7b. An exemption also exists for "service businesses regulated by government bodies for standards and costs such as nursing homes, long-term care facilities, hospitals, providers of medical care, day care centers, group homes, and residential care facilities;" (§ 14.115, subd. 7(c)). Although psychologists are arguably providers of medical care, they are not regulated for costs. The word "costs" must be given effect. Most of the businesses cited are subject to detailed regulation as to allowable costs which they may cite to establish a rate for welfare reimbursement. For example, a nursing home is subject to cost limitations on its managerial salaries. While psychologists are eligible providers in the medical assistance program, the applicable rule regulates the number and length of services rather than the providers costs. (Minn. Rule 9500.1070, subp. 6 (Supp. 1988)). There is nothing in the hearing record which would demonstrate cost regulation of psychologists which would then support an exemption.

7c. It is concluded that if the 7(c) exemption was intended to apply to all of the health-related (or other) licensing boards, the Legislature would have specifically so stated. Rather it appears that the exemption was primarily directed towards a group of businesses which rely heavily upon welfare reimbursement. The Legislature may have concluded that where such extensive regulation is required, less regulation for smaller businesses may not be feasible. The object to be attained by this statute is to encourage agencies to consider less onerous regulation for small businesses. It cannot be assumed that this exemption applies to all businesses regulated for standards from optometrists to real estate brokers to insurance agents without the Legislature specifically so stating. In recent rule proceedings by other

health-related boards, i.e., the Board of Podiatry, the Board of Dentistry, and the Board of Pharmacy, the small business statute was discussed in the Statement of Need and Reasonableness as the statute requires. Unfortunately, the statute does not permit a simple remedy for this problem but states that the "rules shall not be adopted" where an agency fails to comply with the statute. Accordingly, the Board must again initiate a rule hearing proceeding, in which it complies with Minn. Stat. § 14.115, to proceed to adopt the proposed rule amendments.<sup>1</sup>

General Statutory Authority.

8. The Board cites Minn. Stat. §§ 148.90, subd. 2(4), 148.98, and 214.06, subd. 2 as authority for the proposed rule amendments. (Ex. F, p. 2). Minn. Stat. § 148.90, subd. 2, provides that:

Subd. 2. The members of the board shall:

- (1) Be appointed by the governor;
- (2) Be residents of the state;
- (3) Serve for not more than 2 consecutive terms;
- (4) Designate the officers of the board, and pursuant to chapter 14, prescribe rules as may be necessary to enable it to carry into effect the provisions of Laws 1973, chapter 685; and

Minn. Stat. § 148.98 provides in part, that "The board shall adopt a code of ethics to govern appropriate practices or behavior, as referred to in section 148.89. The board shall file such code with the secretary of state at least 30 days prior to the effective date of such code." Minn. Stat. § 214.06, subd. 2 provides, as follows:

Subd. 2. Notwithstanding any law to the contrary, each health related and non-health related licensing board shall promulgate rules providing for the renewal of licenses. The rule shall specify the period of time for which a license is valid, procedures and information required for renewal, and renewal fees to be set pursuant to subdivision 1.

The statutory subdivisions cited provide general authority for the adoption of the rule amendments.

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<sup>1</sup>Prior to the issuance of this Report, the Administrative Law Judge advised the Board of an adverse Finding on this requirement and suggested the possibility of a second hearing prior to issuance of the Report. The Board requested that a full Report be issued before it proceeded further.

## General Support.

9. The proposed rule amendments received general support from the Minnesota Psychological Association which has 750 members including both licensed psychologists (LPs) and licensed consulting psychologists (LCPs). (Ex. 11, 16; Tr. 41). The Minnesota Psychologists in Private Practice (MPPP), whose members are predominantly LCPs, fully support the proposed amendments. (Tr. 33).

## 7200.0100 -- Definitions.

10. 7200.0100, subp. 5a. finds "dual relationship". This definition attracted three comments. One commentor questioned whether the definition would include a court ordered psychological evaluation of a juvenile accused of committing a felony when performed by a forensic psychologist. (Ex. 55). The Board replied however, that it would not consider this to be a dual relationship. (Ex. T, p. 2). Another commentor expressed concern that the prohibition against a relationship that is both professional and "emotional" might include child custody recommendations where intense feelings are common. (Ex. 6). The Board responded that although emotional feelings towards a client are common, the question is whether they result in impaired objectivity. (Ex. T, p. 1). The Board should consider whether further definition of what is meant by an emotional relationship is necessary since a subsequent rule states that objectivity is impaired when a dual relationship exists. In its written reply the Board indicated that it saw "intense feelings" as suggestive of impaired objectivity. This interpretation could be incorporated into the definition. It is, of course, important that licensees understand exactly what it is they are to avoid. Another commentor pointed out that the Board's inclusion of a significant financial involvement as a dual relationship might be interpreted to preclude accepting payment for services rendered to a client. A commentor suggested that significant financial involvement be qualified by adding language such as "other than the legitimate exchange of fees for professional services rendered." (Ex. 10, p. 2). The Board did not object to modifying the definition in this manner. So modified, the proposed definition has been shown to be needed and reasonable.

11. The Board proposes to amend 7200.0100, subp. 10 - "Supervision" by deleting the face-to-face contact requirement. Several commentors spoke to a portion of this subpart which is retained from the current rule, namely that requiring a supervisor to take full professional responsibility for training and performance of a supervisee. The commentors suggested that such a requirement discourages licensees providing supervision because of a potential liability problem. (See, e.g., Ex. 30). The Board pointed out that since no change is proposed to this part of the definition, it is not required to defend it. Minn. Rule 1400.0500, subp. 1. The Board may wish to examine these comments for a future rule proceeding.

## 7200.0600 -- Requirements for Licensure.

12. An addition to this part, 7200.0600 D., requires evidence of having met the supervision requirements. Two commentors suggested that the evidence

should include a rating of the supervisees by the supervisors. (Ex. 30, Ex. 36). The Board may consider this comment within its policymaking discretion. The Board also noted that these requirements apply only to applicants and not to current licensees. (Ex. T, p. 4). The rule is needed and reasonable as proposed.

7200.0400 -- Admission to Examination.

13. Amendments to this rule reference a national standardized test. One commentor felt that this national exam was inadequate to test applicants. (Ex. 4, p. 2). The Board pointed out that Minn. Stat. § 214.03 requires it to use a national standardized test if one exists. The rule is needed and reasonable as proposed.

7200.1300 -- Educational Requirement for Licensure.

14. A modification to 7200.1300, subp. 1 merely restates more clearly the requirement that an LCP must have a doctoral degree with a major in psychology. One commentor urged the Board to consider the merit of each degree presented by an applicant, whether or not there was a major in psychology. (Ex. 50). The Board pointed out that there was no substantive change proposed to this subpart but observed that if a degree met all the other requirements in subparts 3 and 4, an applicant would be considered eligible for licensure regardless of the title affixed to the applicant's major. (Ex. T, p. 6). The subpart is needed and reasonable as amended.

15. 7200.1300, subp. 2 sets out the educational requirement for an LP. One commentor pointed out that no uniform standard exists to interpret what constitutes a "master equivalent". (Ex. 18). The Board pointed out that this is the language from the existing rule which requires the Board to rely on the academic institution's certification that the student has achieved the equivalent of a master's degree on his or her way to the doctorate degree. (Ex. T, p. 7). The subpart is needed and reasonable as proposed. The Board may consider whether further definition is necessary.

16. 7200.1300, subp. 3 sets out the requirements for a major in psychology for degrees earned before July 1, 1990. One commentor pointed out that subpart 3B. omits a reference to clinical psychology. (Ex. 8). The Board replied that paragraphs B and C are intended to alternatives to paragraph A and that majors in clinical psychology are virtually always offered through departments of psychology. (Ex. T, p. 7). Given this interpretation the Board should consider adding the word "or" at the end of Item A. The subpart is need and reasonable as proposed.

17. The majority of the comment in this rule hearing proceeding was directed towards 7200.1300, subp. 4 which sets out new requirements for degrees earned after June 30, 1990. The rule requires specific course work, practicum courses in the applicant's field, and a pre-degree practical field or laboratory experience of 1500 hours for a master's degree or 2000 hours for a doctoral degree. The Board argues in its Statement of Need that these requirements add nothing new, additional or unusual to the curriculum of the typical academic degree program offered by psychology departments. It acknowledges however that the establishment of a minimum standard for students

in those programs who wish to be licensed for independent practice is new. (Ex. I, p. 6).

18. Several individuals expressed support for the proposed educational requirements. The general counsel of American Association of State Psychology Boards supported the requirements and observed that the trend in the states was towards requiring a doctoral degree for licensure. (Ex. 19). A professor at the University of Minnesota Department of Psychology supported upgrading to the American Psychological Association (APA) level of requirements and argued that masters and unaccredited Ph.D. applicants have less formal education and less supervised clinical training and applied experience at present. It was also suggested that master's and doctoral degree applicants should have comparable supervised training experiences. (Ex. 24). State Representative Dee Long also appeared in support of the educational requirements. (Tr. 71).

19. A large number of commentors including students, educators and licensees objected to the Board's proposed date of July 1, 1990 for implementing the proposed education requirements. The educational institutions did not feel they had sufficient time to modify their programs and the students stated it would be impossible to complete their programs of study under the current requirements by that deadline and would therefore be faced with greater expense and more stringent requirements than anticipated. (See, e.g., Ex. 18; Ex. 37; Ex. 40; Ex. 42; Ex. 56). Some commentors sought an extension to June 30, 1992 while others thought that a 1991 deadline would be adequate. In its post-hearing written comments, the Board stated that it would be willing to modify the proposed date to July 1, 1991. (Ex. T, p. 13-15). So modified, the proposed subpart is needed and reasonable with respect to its date of implementation.

20. Subpart 4B.(1) requires four quarter credits of course work in each of the core areas. Two commentors suggested this ought to be 3 quarter credits to correspond with the number of credits granted for graduate level courses at St. Cloud State University. (Ex. 37). The Board noted that four quarter credits are equivalent to 2.67 semester credits which is less than the semester course requirement and asserted that four credits is a minimal and reasonable amount of course work. (Ex. T, p. 16). This particular requirement has been shown to be needed and reasonable as proposed. Another commentor asked that "trimester" hours be recognized. (Ex. 21). The Board does not object to modifying the language to include a reference to "trimester". (Ex. T, p. 16). It may do so in its final rule. Two commentors noted that subpart 4.B.(1) requires "graduate" course work. (Ex. 21; Ex. 37). They suggested that undergraduate courses may offer sufficient training. The Board agrees with this and noted that part 7200.1410 provided a method to use undergraduate courses to satisfy the requirement. (Ex. T, p. 18). The proposed item is needed and reasonable in this respect.

21. Several commentors argued that the core curriculum proposed in subpart 4.B. infringed upon academic freedom. The Board argued that academic institutions need not offer the course work proposed and that students need not take or limit themselves to the prescribed curriculum but that those students who choose to be licensed to practice psychology would have to complete the course work at some academic institution. The Board's argument is, of course, somewhat disingenuous since students are likely to seek out academic programs which conform to the Board's requirements. The Board does assert that it is required by the Legislature to establish standards for

licensure. In its Statement of Need, the Board argues that since licensure in Minnesota is generic, it is necessary that licensees have at least a basic knowledge in the various fields of practice which comprise psychology. It suggests that 45 states have a similar explicit formal statement of course requirements for admission to licensure and that the Board's proposed core areas correspond very closely to that of other states. (Ex. I, p. 8). It is concluded that the Board has demonstrated that inclusion of specific course work requirements is needed and reasonable.

22. Some ten commentators argued that the required course work plus the requirement of a 20-hour per week practicum had the effect of discriminating against various populations including older working students, single parent students, and minority students insofar as a disproportionate number of these students would be excluded from enrolling or remaining in such an intensive program of study. (See, e.g., Ex. 18; Ex. 56; Ex. 41). One commentator suggested that it would double the time for acquiring a master's and that only people who could afford four years of full-time study would be able to qualify. The Board conceded in its post-hearing comments that those who have limited time to devote to the study of psychology may find it difficult or even impossible to meet the proposed requirements. Nonetheless, it does not view the requirements as having a disparate impact on any particular segment of the population. It argues that requirements are designed to raise the minimal baseline of education and training for all psychologists. (Ex. T, p. 11). In legal terms, the question is whether or not the rule violates the equal protection clause of the Fourteenth Amendment to the Federal Constitution. No case law has been cited which would support such a conclusion. The rule applies equally to all applicants. However, there seems to be little doubt that working students face a greater burden under the proposed rule. Since the rule is rationally related to legitimate government objective and does not explicitly discriminate, it is unlikely to be found to be in violation of the Constitution. State, by Spannaus v. Hopf, 323 N.W.2d 746, 753 (Minn. 1982).

23. The discriminatory impact argument is similar to that advanced by other commentators who argued that the more stringent education requirements would restrict entry into the profession. They suggested that this was unreasonable since increased training will not increase competence or effectiveness and would result in the elevation of fees by licensed psychologists. It was argued that there is no evidence of a problem with the current educational requirements or that more education improves effectiveness. (See, e.g., Ex. 17). Although the Board acknowledges that there is no research to support the belief that one particular education and training program produces superior competency, it argues that it still has the obligation to set baseline standards to protect the public. It also asserts that there is no reason to believe that increased education standards will impact reimbursement policies by insurance companies or change the fee structure of psychologists in private practice. (Ex. T, p. 12).

24. The Board is obligated to make an affirmative presentation of facts demonstrating that its proposed rule is needed and reasonable. A rule is reasonable if it is not arbitrary. Hurley v. Chaffee, 341 N.W.2d 281, 284 (Minn. 1950); Application of Hansen, 275 N.W.2d 790 (Minn. 1978). The Board is obligated to explain how its evidence connects rationally with its choice of action. Minnesota Housing Institute v. Pettersen, 347 N.W.2d 238, 246 (Minn. 1984). However, a rule is not unreasonable simply because a more



reasonable alternative exists. Federal Security Administrator v. Quaker Oats Co., 318 U.S. 218, 233 (1943). In short, the Board has considerable policymaking discretion to pick the policy it believes is best. It is only when that policy is shown to be arbitrary that a proposed rule violates Chapter 14. An arbitrary rule is one made without consideration and disregard of the facts and circumstances. Greenhill v. Bailey, 519 F.2d 5, 10 (8th Cir. 1975). It is also necessary to recognize that in a rulemaking proceeding, a presentation in support of a proposed rule need not necessarily be trial-type facts. It may consist of legislative or policy type facts, statutory interpretation, or articulated policy preferences. 1 & 2, Davis, Administrative Law Treatise, (2nd. Ed.) §§ 6:13-14, 12:3. As the court in Manufactured Housing Institute, supra, indicated, it may be necessary for an agency "to make judgments and draw conclusions from 'suspected, but not completely substantiated relationships between facts, from trends among facts, from theoretical projections from imperfect data, from probative preliminary data not yet certifiable as 'fact', and the like'." 347 N.W.2d at 244. The absence of firm data does not preclude an agency from adopting policy in rules.

25. In regard to the proposed subpart, the Board is not precluded from adopting an education and training requirement due to the absence of research showing that it would improve competency or effectiveness. This is a policy judgment which may be made by the Board. See, Manufactured Housing Institute, supra. More difficult requirements are bound to restrict entry into the profession to some degree. It is the Board's obligation to balance this fact against what it believes to be the gain in terms of protection of the public. It must also make a policymaking judgment as to whether its action would result in higher fees charged the public and whether this would be in the public interest. Although the commentors raise serious concerns concerning restricting entry into the profession, the rule has not been shown to be arbitrary in this regard. Rather, the Board must, and should, consider the arguments set out in Findings of Fact No. 21-23 as a matter of policy.

26. A number of commentors argued that the proposed rule appears to be modeled on a program in clinical and counseling psychology and therefore may effectively exclude degrees in other fields such as industrial/organizational (IO) psychology from licensure. It was suggested that current graduate programs in IO do not meet this requirement (Ex. 17) and that therefore the Board rules are at odds with leading educational institutions. (Ex. 13). It was also argued that different psychology departments have different requirements in core areas and that, for example, the University of Minnesota doesn't require biological or physiological bases of behavior for industrial psychologists. (Ex. 10). In its post-hearing comments the Board argued that IO psychologists will not be precluded from licensure. They will, however, be required to take courses in the basic areas of psychology set out. The additional course work required in the rule for the area in which a student will be specializing, may be in industrial/organizational psychology. It also points out that only those individuals seeking a license to practice psychology must meet the Board's requirements. The Board also believes that other states have very similar requirements which have been complied with by IO psychologists.

27. The question, under the case law cited at Finding of Fact No. 24, above, is whether the education requirements are arbitrary insofar as I/O psychologists are concerned. The Board argues that since it issues a generic

license, unrelated to any specialty, which permits the licensee to engage in the independent practice of psychology, it must be sure that each licensee has basic knowledge in important areas. It appears as though an individual can currently obtain a degree in I/O psychology without taking all of these core courses. The proposed requirements cannot be found to be arbitrary, however, since they relate rationally to the Board's goal of protection of the public for those licensed for independent practice. Even though it may be more difficult for an I/O psychologist to become licensed, the Board's determination is a reasonable one. Nonetheless, the Board should consider how the proposal might be modified to lessen the impact upon non-clinical psychologists.

28. A number of commentors also argued that the proposed education requirements effectively eliminate licensure at the master's degree level in that the requirements are based on a model for doctoral degrees and are not consistent with requirements of academic institutions for a master's degree. It was argued that in this respect the education rules exceed the Board's statutory authority. The question is not so much a question of statutory authority, however, as it is a question of whether the proposed rule conflicts with the Minnesota licensing law for psychologists and therefore violates a substantive provision of law. It was suggested that the proposal was essentially the APA's requirement for accreditation of doctoral programs in clinical counselling and school psychology except that there was 500 fewer hours in the practicum for master's level applicants. (Tr. 58; Tr. 81). It was argued that the proposed curriculum is not necessarily a better one, that you essentially have to get a doctoral degree to satisfy the master's requirements and that the requirements circumvent the state law allowing two levels of licensure. (See, e.g., Ex. 17; Ex. 12; Ex. 40).

29. In its post-hearing submission the Board argued that the educational requirements are not exclusive to doctoral programs but are found in existing master's programs. It acknowledged that some graduate schools may not at this time require the core curricula and that some master's degree programs may find it necessary to upgrade their requirements. However, the Board asserts that master's degree students are by no means required to complete a Ph.D., which would require significantly more course work and practical experience. (Ex. T, p. 10).

30. The Legislature has specifically provided in Minn. Stat. § 148.91 for two levels of licensure, namely the licensed consulting psychologist which requires a doctorate degree with a major in psychology and the licensed psychologist which requires only a master's degree from an educational institution meeting the standards prescribed by rule of the Board. Minn. Stat. § 148.91, subd. 5(1). The statute does not define the requirements for a doctorate or a master's degree.

31. An agency must adopt rules "only pursuant to authority delegated by law and in full compliance with its duties and obligations." Minn. Stat. § 14.05, subd. 1. It must fulfill any substantive requirements imposed on it by law. Minn. Stat. §§ 14.14, subd. 2. A rule cannot conflict with the statute. Sellner Manufacturing Co. v. Commissioner of Taxation, 202 N.W.2d 886 (Minn. 1972); Guerro v. Wagner, 246 N.W.2d 838, 841 (Minn. 1976). A rule which is contrary to the language of the statute or to legislative intent is invalid. Can Manufacturers Institute, Inc. v. State, 289 N.W.2d 416 (Minn. 1979); Buhs v. State, 306 N.W.2d 127, 131 (Minn. 1981); J.C. Penney Co., Inc.

v. Commissioner of Economic Security, 353 N.W.2d 243, 246 (Minn.App. 1984). The court in Holland v. State, 115 N.W.2d 161, 163-64 (Iowa 1962) stated the rule this way:

An administrative body may not use the device of promulgating rules to change or add to the law; they are not to be taken as law in themselves, but must be reasonable and used for the purpose of carrying out the legislative enactments. An administrative body may not make law or change the legal meaning of the common law or the statutes.

Neither is it permissible for an agency by rule to narrow the effect of the statute, for example, to narrow a statutory exemption. United Hardware Distributing Co. v. Commissioner of Revenue, 284 N.W.2d 820 (Minn. 1979).

32. If the effect of the proposed rule is to require master's degree candidates to complete the same requirements as those which must be attained by doctoral degree candidates then the Board has plainly attempted to circumvent the statute which authorizes two levels of licensure. The rule would then be contrary to legislative intent. The question of whether proposed 7200.1300, subpart 4, conflicts with the statute can only be decided by comparing the required curricula of existing masters programs with the proposed subpart. It would also be instructive to compare it with the APA requirements and those of the American Association for Counseling and Development (A.A.C.D.) for masters programs. Unfortunately, this rulemaking record does not contain information which would permit such a comparison. The Board asserts that the proposed rule involves little change from current masters program requirements. Opponents allege that the core curricula greatly exceed the normal requirements for a master's degree. (Ex. 40). Another commentor said he had surveyed several masters programs and none met the Board's proposal. (Ex. 17, p. 3). It was also suggested that the AACD standards for a master's program were less extensive. (Ex. 17, p. 3). The question is, however, one of degree. That is, do the requirements greatly exceed a normal master's program and more resemble doctoral requirements? The only specific indication in the record in that regard is that of St. Mary's College which indicated that its master's program met most of the proposed course requirements. The College still objected, however, to having to fit its curriculum into prescribed boxes. (Ex. 56, p. 2). The record also indicates that curriculum requirements in other states for doctoral degrees amount to anywhere from 40 to approximately 72 semester hours of curriculum excluding practicum and thesis. (Ex. 19). The Board's proposed rule requires only 33 semester hours. Based upon this record, it must be concluded that the proposed subpart does not conflict with the statutory directive for two levels of licensure. The evidence does not demonstrate that the core curricula "greatly exceeds" a normal masters program and is in reality a doctoral program, as was asserted by some commentors.

33. Subpart 4.B.(4) requires a minimum of 1500 hours, for the holder of a master's degree, of supervised practical field or laboratory experience in psychology related to the program of the applicant. (4)(c) requires that the experience include formal face-to-face individual supervision averaging at least two hours per week. (4)(d) requires that the experience be completed within 24 months with at least 20 hours per week. A large number of comments from students, potential supervisors, and others argued that this requirement

was onerous, prohibitively expensive and would be difficult for many students to complete in two years. One commentator argued that it would mean a 50% increase in the cost of obtaining a degree and suggested that a practicum in the neighborhood of 400 hours was sufficient. Several commentators argued that group supervision should be permissible instead of individual supervision. It was suggested that the Board had not shown that a 24-month period would be anymore effective than a longer period. (Ex. 3; Ex. 17). Another suggested that the 20-hour per week requirement be lowered to 16 hours per week. (Ex. 21).

34. In its Statement of Need the Board indicates that the purpose of the 1500-hour requirement is the protection of the public since it believes that extensive practical experience under competent guidance is necessary in addition to academic training. It believes that post-degree work experience with an employer cannot be substituted for the supervision and oversight which is gained in an avowedly training experience. (Ex. I, p. 10-11). It points out that the Council for the National Register of Health Service Providers in Psychology specifically mandates a minimum of 1500 hours of pre-degree internship for a psychologist and that the APA has determined that there should be a minimum of 2000 hours of pre-degree internship experience. The Board is not aware of any state which mandates less than 1500 hours of pre-degree supervised experience for the independent practice of psychology. The Board asserts that a survey of the pre-degree experiential requirements of the seven states which also license at the master's level, indicates that Minnesota currently has the lowest experiential requirements. (Ex. I, p. 11). The Board states that the two hours per week of face to face supervisory contact recognizes that supervision in psychology is a highly interpersonal process that requires keen attention to not only what the trainee is doing but also to the way in which he or she is doing it. It amounts to approximately one hour of supervision for approximately ten hours of clinical work. The Board's 24-month and 20-hour-per week requirement is justified as needed to avoid a scattering or diffusion of the training experience and to guarantee sufficient time in a given setting to assure a reasonable continuity of both supervised experience and client contact. The Board believes that the total training must be completed within 24 months to ensure that essential continuity is not lost. (Ex. 11, p. 13). In its post-hearing comment, the Board indicated that having reviewed the public comments it still believes that the standards proposed are necessary to assure that licensees are adequately trained and qualified to engage in independent private practice. (Ex. T, p. 20).

35. The Board has made an adequate demonstration to show that the proposed practicum requirement is not arbitrary. It has explained its choice of action in a rational manner. See, Finding of Fact. No. 24. The Board is still, of course, obligated to review the comments in this record in order to arrive at the best policy choice. It is clear that the adoption of the 1500-hour requirement along with the "20 hours per week within 24 months" requirement as well as the individual supervision requirement, will have a substantial impact on potential applicants. The written comments illustrate the specific effect on individual potential applicants and supervisors. It is recommended that the Board review the comments to ensure that its proposals are the least restrictive necessary to encourage competence for licensees.

7200.2000 -- Professional Employment Requirements.

36. 7200.2000 B. sets out the requirements for a supervisor. Several commentors suggested that the rule ought to require that a supervisor be competent and should define what constitutes competency as a supervisor. The Board acknowledged in its post-hearing comments that the suggestions were well taken and stated that it would consider this issue in the future. (Ex. T, p. 22). The suggestions do not relate to a proposed amendment. The amendments to the Item are needed and reasonable as proposed.

37. 7200.2000 C. increases the amount of supervision during the first two years of employment. The current rule provides for ten separate hours of face-to-face supervision per quarter of a year. The current rule was intended to equal one hour per week with allowances for absences due to illness, vacation and holidays. (Ex. I, p. 17). A number of commentors argued that requiring two hours of supervision per week during the 2-year post-degree supervisory period was onerous and cost-prohibitive and seemed to be designed for clinical psychologists as opposed to for persons practicing in non-clinical areas of psychology. One commentor argued that such supervision would be unobtainable if the licensee is not employed in a mental health agency and suggested that one hour per week is sufficient. (Ex. 26). Another commentor indicated that many would have to pay privately for such supervision and would not be able to get that much time off from an employer. (Ex. 45). Some commentors argued in favor of group supervision.

38. In its post-hearing comments the Board pointed out that group supervision is not precluded by the rule as long as it is face-to-face. The rule permits one hour per week of supervision by a professional other than the supervisor. The Board acknowledged the possibility of an increase in cost for the supervisee but believes this level of supervision is necessary for competence in independent private practice. It also argued that industrial/organizational psychologists impact the lives of individuals as much as clinical psychologists and will benefit from the supervised employment. The Board stated that it did not expect psychologists to complete two hours of supervision when absent from work due to illness or vacation. (Ex. T, p. 23). In the Statement of Need the Board justified this increase in supervision as necessary to ensure that the applicant is adequately prepared to engage in the private practice of psychology. It states that for a normal full-time caseload of 20 to 30 client hours per week, this requirement amounts to only 4 to 6 minutes per case. It argues that a review of applications for licensure submitted during the past five years shows that most applicants' supervision occupies less than one hour per week. (Ex. I, p. 17).

39. Based upon this record it cannot be said that the proposed addition of Item C. is arbitrary. The Board has demonstrated an adequate rationale for the rule in the record. Nonetheless, the Board should carefully consider the comments as to whether or not this level of supervision is available at a reasonable cost to those whose employers cannot or will not provide it. Additionally, the Board should consider incorporating into the proposed additional Item, its announced policy that it does not expect psychologists to complete two hours of supervision when absent from work due to illness or vacation. The present rule apparently recognizes that by a reduced level of supervision. The proposed addition however, does not appear to make a similar accommodation.

7200.3900 -- Collaboration.

40. Language is added to 7200.3900, subp. 1 which makes it clear that a collaborator must practice in the same field of practice as the applicant for licensure. One commentor argued that this was an unreasonable and unnecessary restriction that will eliminate retired practitioners as well as college professors from serving as potential collaborators. (Ex. 17, p. 14). The Board added this language to conform the rule to the statute at Minn. Stat. § 148.93 which imposes this requirement. In its post-hearing comments the Board stated that professors are not excluded from becoming collaborators since the teaching of psychology is included within the private practice of psychology (Minn. Stat. § 148.89, subd. 1) and, provided that they are licensed LCPs, teaching or practicing in the applicant's field. The Board also stated that since retired psychologists are presumed to maintain knowledge of the field in which they practiced, they would be eligible to serve as collaborators. (Ex. T, p. 25). The Board did not oppose language which would clarify that professors and retired practitioners may serve as collaborators but did not see it as necessary. The objector may wish to forward such language to the Board. The proposed amendments to the subpart are needed and reasonable as proposed.

7200.4700 -- Protecting the Privacy of Clients.

41. 7200.4700, subp. 3 sets out a requirement for informing one party of the need to treat information as private in a dual client situation. The proposed changes were meant to clarify rather than change existing meaning. The meaning of this subpart is preserved -- it requires that private information about client number one cannot be disclosed to client number two without the written consent of client number one and vice versa. One commentor argued that dual clients should not include the requestor or payor of services as coequal clients with the true client since this permits adverse parties to obtain client status. (Ex. 7). The Board argued that the rule is not substantively changed by the new language and suggests that the new language emphasizes the psychologist's responsibility to protect confidentiality. (Ex. T, p. 26). The amendment is needed and reasonable as proposed. The language merely clarifies the meaning of the subpart.

7200.4810 -- Impaired Objectivity, Effectiveness.

42. 7200.4810, subp. 2D. prohibits a psychologist from practicing if he or she is dysfunctional as a result of a severe physical or mental health problem including chemical abuse or dependency. One commentor expressed the concern that the rule would automatically characterize physically disabled psychologists as having impaired objectivity. The Board pointed out however, that a licensee must be "dysfunctional" as a result of a "severe" physical problem. The language would not appear to include a psychologist who was physically disabled but able to function. It is needed and reasonable as proposed.

7200.4900 - Client Welfare.

43. 7200.4900, subp. 1a. sets out certain requirements for the contents of a client record. Two commentators argued that the rule was drafted with a view towards the clinical or counselling psychology model and would not appropriately apply to industrial/organizational psychologists, teaching psychologists or forensic psychologists. (Ex. 17, p. 14; Ex. 55). The Board agreed that the language should be modified so that the word "client" in the rule is modified by the phrase "who receives therapy" and that the word "record" in the rule is modified by indicating that it is a "therapeutic" record. One commentator alleged that the rule conflicted with the Minnesota Government Data Practices Act in regard to forensic psychologists. The commentator stated that the Act prohibited disclosure of confidential data on individuals to the subject of that data such as persons charged with or convicted of a crime being evaluated for the court. The Board stated in its post-hearing comments that it did not intend that the rule be in conflict with the Data Practices Act. It stated that it would have no objection to modifying the proposed language to further clarify that individuals evaluated for court purposes do not have access to confidential information. Should the Board add a sentence to subpart 1a. to the effect of "Nothing in this subpart or subpart 2, item H. shall be construed to require a psychologist to disclose confidential data contrary to Minn. Stat. § 13.84." or similar language, and adopt its own proposed modifications described earlier, then the subpart as modified does not violate any substantive provision of law and has been shown to be needed and reasonable.

44. 7200.4900, subp. B expands the subpart on sexual contact with a client to make it clear that a psychologist may not engage in sexual intercourse with a former client for a period of two years following the last professional contact. One commentator stated that the rule seems to have been written with only one kind of psychology practice in mind and questioned how it would be applied to teaching psychologists and industrial/organizational psychologists. The Board replied that it would be entirely appropriate that the rule should apply to industrial/organizational psychologists insofar as they deal with individuals such as prospective employees and that it is also intended to apply to psychology students as indicated in part 7200.5400. The amendment has been shown to be needed and reasonable as proposed. (See, Ex. I, p. 28).

7200.5000 -- Assessments, Tests, Reports.

45. 7200.5000, subp. 3 sets out several new requirements for written or oral reports concerning the psychological state of a client. Several commentators argued that the report requirement should not apply to industrial/organizational psychologists since the requirements would be confusing, expensive, and cumbersome. They argued that the information required by the subpart would be of little value to client organizations who are looking for prompt and brief reports that contain straightforward conclusions on topics such as the evaluation of a job applicant. In its post-hearing submission the Board argued that these requirements were not onerous and were intended to protect the subject of a report including, for example, a prospective job applicant. The Board points out that such reports are used to declare people unsuitable for jobs, to determine if they are

capable of standing trial, or benefiting from certain training, to declare that they are unlikely to be a fit parent or other decisions which affect in profound ways the lives of those who are evaluated. The Board states that requirements, which include a description of how the subject was assessed, a statement of any reservations, a note as to conflicting information, and a disclosure as to whether there was direct contact between the psychologist and the client, should not cause undue time or expense nor require this information to be created anew each time a particular test is used. (Ex. T, p. 31). The Board has sustained its burden of an affirmative presentation of facts demonstrating the need for and reasonableness of this subpart.

7200.5100 -- Public Statements.

46. A new addition to this rule, 7200.5100, subp. 3 places limits on the use or display of a doctorate. One commentor argued that those currently holding nonrecognized Ph.D.s ought to be exempted from compliance with this rule. (Ex. 3). In its Statement of Need the Board indicates that this subpart is based upon complaints submitted to the Board. It sees the display of a Ph.D. from an unaccredited institution or where the doctoral major did not meet the education requirements for licensure as misleading to clients. The rule limits the use of a Ph.D. in a professional psychological setting to those who meet the Board's educational requirements for licensure. (Ex. T, p. 32). The subpart is needed and reasonable as proposed. There can be no valid retroactivity argument in these circumstances since no licensee had a due process right to misrepresenting his or her credentials.

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

CONCLUSIONS

1. That the Board of Psychology gave proper notice of the hearing in this matter.

2. That the Board 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, except as noted at Finding of Fact No. 7.

3. That the Board 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), except as noted at Finding No. 7.

4. That the Board 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).

5. That the amendments and additions to the proposed rules which were suggested by the 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 Nos. 2 and 3 as noted at Finding No. 7.



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

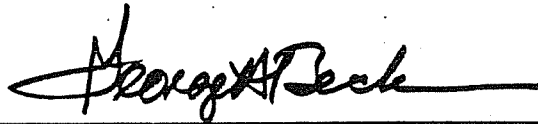
8. That a finding or conclusion of need and reasonableness in regard to any particular rule subsection does not preclude and should not discourage the Board from further modification of the proposed rules based upon an examination of the public comments, provided that no substantial change is made from 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:

ORDER

It is hereby ordered that the proposed rules not be adopted due to a failure to comply with Minn. Stat. § 14.115.

Dated: December 29, 1988.



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GEORGE A. BECK  
Administrative Law Judge

Reported: Taped. Transcript Prepared by  
Mary Ann Hintz