5-0903-4592-1

STATE OF MINNESOTA
OFFICE OF ADMINISTRATIVE HEARINGS

FOR THE MINNESOTA BOARD OF MEDICAL EXAMINERS

In the Matter of the Proposed
Adoption of Rules of the Minnesota
Board of Medical Examiners
Relating to Physical Therapy.

REPORT OF THE
ADMINISTRATIVE LAW JUDGE

The above-entitled matter came on for hearing before Howard L. Kaibel, Jr., Administrative Law Judge on May 19, 1990 in St. Paul, Minnesota.

This is a rulemaking proceeding under Minn. Stat. §§ 14.131 - 14.20 held to determine whether the Board of Medical Examiners has fulfilled all relevant, substantive and procedural requirements of law applicable to the adoption of rules, whether the proposed provisions are needed and reasonable, and whether any suggested modifications would constitute impermissible substantial changes.

The Board staff panel consisted of: William R. Marczewski, Medical Regulations Analyst; Patricia Montgomery, Chair, Physical Therapy Advisory Council; and John Breviu, Assistant Attorney General.

The Board 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.

Pursuant to the provisions of Minn. Stat. § 14.15, subd. 3 and 4, this Report has been submitted to the Chief Administrative Law Judge for his approval. If the Chief Administrative Law Judge approves the adverse findings of this Report, he will advise the Board of actions which will correct the defects and the Board may not adopt the rule until the Chief Administrative Law Judge determines that the defects have been corrected. However, in those instances where the Chief Administrative Law Judge identifies defects which relate to the issues of need or reasonableness, the Board may either adopt the Chief Administrative Law Judge's suggested actions to cure the defects or, in the alternative, if the Board does not elect to adopt the suggested actions, it must submit the proposed rule to the Legislative Commission to Review Administrative Rules for the Commission's advice and comment.

If the Board elects to adopt the suggested actions of the Chief Administrative Law Judge and makes no other changes and the Chief Administrative Law Judge determines that the defects have been corrected, then the Board may proceed to adopt the rule and submit it to the Revisor of Statutes for a review of the form. If the Board makes changes in the rule other than those suggested by the Administrative Law Judge and the Chief Administrative Law Judge, then it shall submit the rule, with the complete record, to the Chief Administrative Law Judge for a review of the changes before adopting it and submitting it to the Revisor of Statutes.

When the Board files the rule with the Secretary of State, it shall give notice on the day of filing to all persons who requested that they be informed of the filing.

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

FINDINGS OF FACT

Procedural Requirements.

1. On March 20, 1990, the Board filed the following documents with the Chief Administrative Law Judge:

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

2. On April 9, 1990, a Notice of Hearing and a copy of the proposed rules were published at 14 State Register 2413.

3. On April 13, 1990, the Board 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 April 24, 1990, the Board filed the following documents with the Administrative Law Judge:

(a) The Notice of Hearing as mailed.
(b) The Agency's certification that its mailing list was accurate and complete.
(c) The Affidavit of Mailing the Notice to all persons on the Agency's list.
(d) An Affidavit of Additional Notice.
(e) The names of the Board personnel who would represent the Agency at the hearing together with the names of any other witnesses solicited by the Agency to appear on its behalf.
(f) A copy of the State Register containing the proposed rules.

The documents were available for inspection at the Office of Administrative Hearings from the date of filing to the date of the hearing.

5. The period for submission of written comments and statements remained open through June 8, 1990, twenty calendar days following the close of the hearing. Pursuant to Minn. Stat. § 14.15, subd. 1, an additional three business days were allowed for filing of responsive comments. The record therefore closed on June 13, 1990.

Statutory Authority.

6. Minn. Stat. §§ 148.71, subd. 2; 148.72, subd. 1 and 148.74 authorize the Board to set physical therapy permit and examination fees and promulgate other rules as may be necessary to carry out the purposes of Minn. Stat. §§ 148.65 to 148.78. Statutory authority to adopt the rules has been demonstrated, except as otherwise noted in subsequent findings.

Fiscal Note.

7. The rules will not result in increased costs to local governments exceeding $100,000 in either of the two years immediately following adoption. The Board was consequently not required by Minn. Stat. § 14.131 to prepare a fiscal note on costs to local public bodies.

Small Business Considerations.

8. The Board staff's Statement of Need and Reasonableness (SONAR) considered the effect of the proposed rules on small businesses, concluding that special provisions for such businesses would be inappropriate and/or infeasible. No one disagreed with this conclusion. The Department has fully complied with Minn. Stat. § 14.115.

Nature of the Proposed Rules.

9. Physical therapy (PT) services have been recognized and regulated by the Minnesota Legislature for nearly 40 years, since 1951. Practitioners employ therapeutic exercises and rehabilitative procedures that have recognized value in correcting and alleviating certain disabilities. In the past, most states, including Minnesota, have required consumers to go first to a licensed physician and obtain an order for PT services -- usually after an examination and diagnosis. Recently, many states, including Minnesota, have amended their PT statutes to allow consumers to seek evaluation and treatment directly from therapists without an order from a licensed physician.

In 1985 the Minnesota statutes (148.75h and 148.76, subd. 2a) were amended to allow such direct access to PT services:

> When a previous diagnosis exists indicating an ongoing condition warranting physical therapy treatment, subject to periodic review defined by Board of Medical Examiners rule.

In 1988, the statutes were further amended to allow such direct access to PT treatment without a previous diagnosis for a period of up to 30 days.

The rules proposed herein would implement these legislative revisions, establish continuing education requirements and modify PT registration provisions.

Specific Provisions.

10. There is no need here for a detailed discussion of each subpart of the proposed rules. That has been done in the SONAR which details the need for and reasonableness of each of the provisions. Any provisions not commented on

in this report are specifically found to be needed and reasonable. All of the concerns expressed at the hearing and in written comments have been carefully considered. Except as subsequently noted in this report, Board staff's proposed revisions in response to those concerns are also found to be needed and reasonable, based on the Department's affirmative presentation of facts. None of their proposed revisions are "substantial changes" requiring a new hearing, except as otherwise noted in these Findings.

11. Part .0100, subpart 7, the definition of previously diagnosed conditions, was vigorously opposed in public comments, beginning with the earliest responses to preliminary drafts of the rule. The Board staff has not documented either the need for or the reasonableness of the proposed provisions by an affirmative presentation of facts. The proposal is also beyond the Board's authority in the statute.

The proposed language would limit previously diagnosed conditions to diagnoses that are less than two years old, regardless of whether those diagnoses indicate a need for ongoing physical therapy. The Board staff's June 8 post-hearing comments concede this, corroborating hearing and public written comments, "With chronic conditions, a diagnosis may be life-long (child might be born with cerebral palsy)."

Given the indisputable existence of patients with conditions that are life-long, the proposed two-year limit on all diagnoses is clearly beyond the authority and contrary to the intent of the authorizing legislation. The chief author of the legislation in the Senate, John Brandl, wrote specifically to vigorously object to allowing such time limits to eviscerate the intent of the lawmakers. There is no ambiguity here about the intent of the statutory language. Children with cerebral palsy, paraplegics and others with life-long conditions should not be forced to return to a doctor and have those conditions rediagnosed every time they want to see a physical therapist. Indeed, the proposed rule language could be (undoubtedly erroneously) misinterpreted to require such patients with life-long conditions who are currently being treated under open-ended "evaluate and treat" orders to undergo meaningless biennial 'diagnoses". The staff has simply not documented the statutory authority for adopting a rule requiring new referrals every two years for these life-long conditions. It would be contrary to the plain meaning of the statute. Sellner Manufacturing Co. v. Commissioner of Taxation, 295 Minn. 71, 202 N.W.2d 886 (Minn. 1972).

Even if the proposed limitation were statutorily authorized, it could not be adopted based on the record developed in this hearing because the staff has not documented its need and reasonableness by an affirmative presentation of facts. A factual analysis was specifically sought at the hearing and could be compiled. Physical therapists could be surveyed to assess the impact of alternative approaches on physical therapists, patients and health care costs. Board staff chose not to present any factual data on need or reasonableness. They concede in June 8 comments that the proposal is "not based on specific medical evidence." Their case for reasonableness is based solely on a "consensus between the Board and the Physical Therapy Advisory Council". This does not fulfill the Administrative Procedure Act rulemaking statute which requires objective factual documentation of need and reasonableness, where such information is readily ascertainable. These Minnesota Procedure Act provisions are designed to prevent agencies from simply reaching an internal "consensus" and citing that consensus as the basis for adopting rules which have the full

force and effect of law. Manufactured Housing Institute v. Petterson, 347 N.W.2d 238 (Minn. 1984). In this case, as part of a compromise between the Minnesota Physical Therapist Association, Minnesota Chiropractic Association and the Minnesota Medical Association (to get the legislation heard in the House) language was added to specify that any state board of medical examiner review process would be adopted by "rule". The author of the legislation, other legislators, physical therapists involved in the legislative process and physical therapists generally affected by the impact of the proposed rule on their profession, have a definitive legal right to insist on this affirmative presentation of a factual rationale. Kathy Fleischaker, Director of Rehabilitation Services at Methodist Hospital where they treat 200 to 400 patients per day, was involved in the legislative process when the 1985 and 1988 amendments were adopted. She submitted post-hearing comments contending that the definition is unnecessary. She alleges that the provision is contrary to the legislative intent and that the documentation from the 26 states where direct access has been legalized would support her position.

Physical therapists potentially directly affected by the proposed provision believe it to be unreasonable. Representative of these comments is the post-hearing letter from University of Minnesota Professor Glenn Scutter, the former chairman of the physical therapy council of the state board of medical examiners, who believes the definition would be "arbitrary, costly and would very likely mandate administrative delays in the provision of physical therapy services."

It may be true, as alleged in Board staff June 8 comments (although no data was cited for the proposition) that the majority of physicians believe all citizens should be forced to have annual or at least biennial checkups. If so, data should be marshalled on the cost effectiveness of such a mandate and it should be duly promulgated. The allegation, alone, is not adequate documentation of the need for or reasonableness of requiring superfluous diagnoses biennially of citizens with life-long conditions seeking physical therapy services.

Legally and practically, there is no need for creating the two-year limitation. Physical therapists are required by statute, Minn. Stat. § 148.75(r), to avoid treatments that are "beyond the scope of practice of a physical therapist." If the diagnosing physician has reason to reevaluate whether the patient has a statutory "ongoing condition warranting physical therapy treatment" the physical therapist can be alerted when the diagnosis is verified.

The defect in the proposed rule can be cured in a number of ways. The definition could simply be deleted. The statutory "when a previous diagnosis exists indicating an ongoing condition warranting physical therapy treatment" is unambigous language, which physical therapists can understand and apply without further interpretation.

The defect could also be cured by specifying recognized exceptions such as cerebral palsy and paraplegia, though staff considered this approach and concluded it was impractical. A "catch-all" phrase such as "life-long conditions" would minimize the potential problems of this construct.

The responsibility could also be placed definitively on the diagnosing physician, by specifying that such previous diagnoses are limited to treatments "within the time limits, if any, contained in that diagnosis."

12. The Board staff also did not document the need for or reasonableness of requiring two references from every place of previous employment in applications for registration, as was proposed in subpart .0300(G). Limiting this proposed imposition to the previous five years, as staff suggested in June 8 comments, would not solve the problem. Physical therapists indicated, without contradiction, that in many cases it would simply be impossible to comply with such a requirement. There is no such requirement in license applications for physicians and surgeons (Minn. Rule 5600.0200) or mid-wives (Minn. Rule 5600.2000) or physican assistants (Minn. Rule 5600.2635) or for optometrists. Osteopaths are required to list places of past employment over the last five years (Minn. Rule 5600.1000) (as would be required here of physical therapists in subpart .0300E for their entire post-graduate career) but they are not required to provide references from those places of employment. It is neither necessary nor reasonable to require more of physical therapists than is required of other licensed medical professionals. The defect can be cured by deleting this proposed item and relettering the remainder.

13. Care Providers of Minnesota and others objected vigorously to the proposal in subpart .0300 H. that applications include an accounting of all past disciplinary complaints. This would unreasonably penalize potential physical therapy registrants by forcing them to repeat and perpetuate false and unsubstantiated complaints. There is again, no similar application requirement for any other medical licenses. The defect can be corrected by striking "of any disciplinary complaints" and limiting the required information to disciplinary actions taken on past complaints.

14. Care Providers also objected to the proposal in subpart .0300 I. requiring "an accounting of applicant's use of drugs":

> Minnesota Statutes § 148.75 provides that registration of a physical therapist can be refused or terminated for grounds that include "(a) using drugs or intoxicating liquors to an extent which affects professional competence". It is impossible to see how this can rationally be interpreted to authorize the Board of Medical Examiners to require "an acccounting of the applicant's use of drugs that are subject to abuse . . ." Almost every drug, including caffeine and aspirin are "subject to abuse". To require an accounting of the use of such drugs is certainly not reasonable or rationally related to the state policy. Since this is most likely not the intent, the language requiring the "accounting" should be limited strictly to instances which rise to the level of seriousness stated in the statute. A license application should not be turned into a fishing expedition for the Board of Medical Examiners or a regulatory confessional for the health care provider. (Emphasis original).

Board staff responded in June 8 comments by changing "drugs" to "controlled substances". That revision is a needed and reasonable insubstantial change.

15. Legal counsel for Care Providers and many other commentators objected

to the required divulging in subpart .0300 J. of "any current disabling condition". Board staff has not documented the need for, reasonableness of or legality of requiring applicants to disclose everything that others might perceive to be disabilities in their registration applications.

Minnesota law, Minn. Stat. § 363.03, subd. 1(4)(a) prohibits employers from requiring information about the existence or absence of disabilities. A 1990 amendment also prohibits requests for such information. Minn. Stat. § 363.02, subd. 1(8)(ii) further prohibits obtaining medical data even after hiring. Utilizing such data may be construed as aiding or abetting disability discrimination under Minn. Stat. § 363.03, subd. 6.

Use of the term "disability" places applicants in the "catch 22" position of either filing a false application or listing every conceivable potential disabling condition. "Disabilities" have been construed to include: a colostomy at age 2, Gunnufson v. Onan Corporation, 450 N.W.2d 179 (Minn. Ct. App. 1990); visual impairment, State by Cooper v. Hennepin County, 441 N.W.2d 106 (Minn. 1989); cluster migraine headaches, Kimbro v. Atlantic Richfield Company, 889 F.2d 869 (9th Cir. 1989); poor impulse control, Daley v. Koch, 892 F.2d 212 (2d Cir. 1989); AIDS, Cain v. Hyatt, (1990 U.S. District Court) 3686; obesity, New York State Division of Human Rights v. Xerox Corporation, 1990 U.S. District Court, E.D.Pa.) Lexis 3686; ulcers, Brookshaw v. South St. Paul Feed, Inc., 381 N.W.2d 33 (Minn. Ct. App. 1986); anxiety disorders, Shea v. Tisch, 870 F.2d 786; tuberculosis after 20 years of remission, School Board of Nassau County v. Arline, 480 U.S. 273 (1987); dyslexia, Stutts v. Freeman, 694 F.2d 666 (11th Cir. 1983); emotional instability, paranoia and egocentricity, State by Johnson v. Duluth, 402 N.W.2d 579 (Minn. Ct. App. 1987) and a heart attack five years ago, Washington Administrative Code, § 162-22-040(2). The Minnesota Department of Human Rights has also ruled that "disability" includes smoking.

Requiring self-disclosure of disabilities also places applicants in a legal "catch-22". Failure to list a disability constitutes a legal admission, precluding subsequent pursuit of a disability discrimination complaint, Bauer v. Republic Airlines, 442 N.W.2d 818 (Minn. Ct. App. 1989).

Again, none of the other medical licensing statutes or rules require disclosures of disabilities. It is neither necessary nor reasonable to require more of physical therapists.

The defect can be cured by striking the words "current disabling condition" or by striking item J entirely and relettering.

16. The Board staff has not documented the need for, reasonableness of or statutory authority for the proposed requirement in subpart .0300 K. of "an accounting of any violation of federal, state, or local regulations or statutes by the applicant". Commentators have objected vigorously to this proposed language since its inclusion in the earliest drafts. Representative of the objections is contained in the letter from Care Providers' legal counsel:

> The statute (Minn. Stat. § 148.75) refers to the following:
>
> (b) convicted of a felony;
> (c) conviction for violating any state or federal narcotic law;

> The proposed rule refers to "any violation" and includes every single federal, state, or local regulation or statute. This, by the plain wording of the rule, would include tickets for illegal parking or speeding, building code violations, late filing of taxes, and a host of other city, county, state, and federal regulations or statutes that have absolutely nothing to do with the ability to practice physical therapy. This type of unauthorized regulatory intrusion into what are unrelated and irrelevant details of a person's private life are no more acceptable when they result from unintentional vagueness and overbroadness than when they result from an intentional design of an overzealous agency or individual. The rule must adhere strictly to requesting only the information reasonable and necessary to apply the standards and criteria set forth in the statute.

Board staff agreed in June 8 comments to add the word "convictions" but balks at adding "related to physical therapy". Adding "convictions" would improve the proposed language, but it would still be overly broad.

Again, it is instructive to examine the requirements of other medical professionals. There are no such requirements for physician assistants or mid-wives. Optometrists registering by reciprocity in Minn. Rule 6500.2100 may be denied registration if they have "been convicted of a crime reasonably related to the practice of optometry during the three-year period immediately preceding the application". The statute relating to physicians and osteopaths (Minn. Stat. § 147.091) limits inquiry to conviction of a "felony reasonably related to the practice of medicine or osteopathy" during the previous five years. The chiropractic statute (Minn. Stat. § 148.10) deals only with felonies "reasonably related" to chiropractics during the past five years or to crimes involving moral turpitude. Nurses (Minn. Stat. § 148.261) and practical nurses (Minn. Stat. 148.297) may only be denied registration for convictions of felonies of gross misdemeanors. For embalmers (Minn. Stat. § 149.05) inquiry is limited to crimes involving moral turpitude or relating to the burial or disposal of dead human bodies. Discipline for miscreant dentists (Minn. Stat. § 150A.08) is limited to those who have committed felonies or gross misdemeanors "reasonable related to the practice of dentistry" or those involving moral turpitude. Actionable legal degeneracy for pharmacists (Minn. Stat. § 151.06, subd. 1(6)) is similarly limited to those who have committed felonies or crimes involving moral turpitude or involving drugs. Actionable legal misconduct for podiatrists (Minn. Stat. § 153.19) is limited to felonies committed during the previous five years which are "reasonably related to the practice of podiatric medicine".

It is axiomatic that licensing standards must bear some reasonable relationship to the qualifications of applicants to engage in the regulated activity. Alexander v. St. Paul, 303 Minn. 201, 227 N.W.2d 370 (Minn. 1975). Government has no business inquiring into anything else. All of the above cited requirements are explicitly limited (in all of the cases but one, directly by the Legislature) to convictions for: (1) crimes related to the profession regulated; and/or (2) felonies, gross misdemeanors and those involving moral turpitude. There is no legal or factual basis in this record for disparate treatment of physical therapists.

The defect can accordingly be remedied by limiting the inquiry to convictions for (1) crimes "related to the practice of physical therapy"; and/or (2) felonies, gross misdemeanors and/or those involving moral turpitude.

The contention in staff's June 8 comments that "reasonably related" cannot be ascertained by applicants has been duly noted and discounted. Obviously members of every other medically related profession from optometrists to embalmers are capable of discerning crimes that are "related to" their profession. There is no evidence that physical therapists are particularly lacking in similar perspicacity.

17. Although there was some considerable continuing disagreement throughout the pendancy of this rulemaking effort over the wisdom of the legislative modification, it is quite clear that proposed subpart .1800 A. (establishing a four-month interval between any 30-day initial treatments without previous diagnoses) is needed, reasonable and statutorily authorized.

There is an undeniable need to establish some reasonable interval between the statutory "initial" direct-access-without-referral and a subsequent one, if "initial" is to have any meaning. On the one hand, a one-second interval would make the 30-day limit in the legislation into a joke. On the other hand, at some point, consumers who are successfully treated must be allowed to return again upon recurrence of similar symptoms without referral, to make the direct access reform meaningful.

No one argued with the reasonableness of the four-month interval, suggesting that it should be either shorter or longer. It was enthusiastically advocated by the Minnesota Chapter of the American Physical Therapy Association.

Similarly, there was no significant dispute over whether it was statutorily authorized. Kathy Fleischaker, whose legislative involvement and credentials were discussed earlier, unequivocally concluded that the provision "reflects the intent of the 1988 legislation." No one disagreed.

June 8 staff comments suggest a last-minute "clarification" adding "before referring to a licensed health care provider." At first blush, this could be misinterpreted as creating an affirmative duty of referral of all 30-day patients to a licensed professional. If that were the staff intent, the addition would be a "substantial change" requiring a new hearing. It would also be fundamentally contrary to the intent of the authorizing legislation -- eliminating needless referrals, rather than increasing them. However, the comments make it clear that this was not intended and that many patients will be "done" within the 30 days. This potential confusion or misinterpretation could be avoided by changing the proposed addition to "without referring the patient to a licensed health care provider."

18. The SONAR appeared to say that the four-month limitation on the 30-day initial direct access should apply carte blanche, including new conditions that arise which are totally unrelated to the original reason for admission. In other words, if a consumer consulted a physical therapist directly for low back pain for less than 30 days, s/he could not see a physical therapist later for a sprained ankle without a doctor's order for at least four months. Though such an "interpretation" of the law would produce absurd

results (which is explicitly never the Legislature's intent -- Minn. Stat. § 645.17) it was nonetheless heartily embraced by the Minnesota Chiropractic Association. Staff's June 8 comments clarify the matter by making it clear that the four-month limit is intended to apply to each new unrelated condition. That is manifestly the proper way to implement the statute.

19. The staff has not documented the need for, reasonableness of or statutory authority for proposed subpart .1900 A. - 60-day limit on treatment of previously diagnosed conditions. It was vigorously opposed by therapists generally.

As Professor Scutter and others pointed out, the limitation would be entirely inconsistent with the legislative intent, as previously discussed. As Senator Brandl succinctly puts it:

> It appears that those interests that opposed statutory amendments expanding the practice of physical therapy are now attempting to use the rulemaking process to so restrict it as to reduce the effect and subvert the purpose of the legislative enactments of 1985 and 1988.

Rules cannot be used to narrow statutory exemptions. United Hardware Distrib. Co. v. Commissioner, 284 N.W.2d 820, 822 (Minn. 1979).

Staff June 8 comments essentially concede that the limitation is not reasonable, indicating that 60 days would only be adequate for "many" regimes of treatment in the "majority" of cases. The limitation is obviously not reasonable for the other regimes and a minority of treatment situations which the rule would affect. The directly affected physical therapists objected vigorously to the limit. Ms. Fleischaker observed:

> This would create many problems for my staff working in public schools settings where there are no restrictions on other health care providers.

The requirement of verification of the previous diagnosis will alert the licensed health care provider that the patient is seeking physical therapy for the diagnosed condition. If the diagnosing physician has reason to place time limits on PT treatment, s/he can give appropriate instructions at that time to the therapist, including ordering a review if symptoms are not relieved within an appropriate period of time specific to the patient and the condition involved.

The defect can be cured by striking the words "for up to 60 days".

20. The Minnesota Chapter of the American Physical Therapy Association and others urged deletion of proposed subpart .1900 C. requiring documentation of the previous diagnosis. Many other potentially affected therapists urged only that the verification be made easier, contending that a phone call should suffice. Staff agreed in June 8 comments to allow the documentation to be either "written or oral". With that change, the proposed provision is clearly needed and reasonable. It would read better if the word "documentation" were changed to "verification".

21. There were a number of significant problems with the language related

to continuing education in proposed subparts .2400 through .2600. Staff appears to have done an excellent job of clarifying the language and eliminating the problems in its June 8 comments. The changes are needed, reasonable and insubstantial.

22. The Board should consider adding a simple variance provision to these rules prior to final adoption, as urged by the Minnesota Association of Homes for the Aging. The "authority to grant variance to rule" provision of the Procedures Act specifically encourages adoption of such provisions in Minn. Stat. § 14.05, subd. 4:

> Unless otherwise provided by law, an agency may grant a variance to a rule. Before an agency grants a variance, it shall adopt rules setting forth procedures and standards by which variances shall be granted and denied. An agency receiving a request for a variance shall set forth in writing its reasons for granting or denying the variance. This subdivision shall not constitute authority for an agency to grant variances to statutory standards.

Such variance provisions are common in agency rules. They make rules more reasonable, because they provide a specific means for dealing with hardship situations. Adding such a provision in this proceeding would not appear to be a substantial change as that term is defined in Minn. Rule 1400.1100.

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

CONCLUSIONS

1. That the Board 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.

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 Findings No. 11, 15, 16 and 19.

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), except as noted at Findings No. 11, 12, 13, 15, 16 and 19.

5. That the amendments and additions to the proposed rules which were suggested by the Board 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 Conclusions No. 3 and 4 as noted at Findings No. 11, 12, 13, 15, 16 and 19.

7. That due to Conclusions No. 3 and 4, this Report has been submitted to the Chief Administrative Law Judge for his approval pursuant to Minn. Stat. § 14.15, subd. 3.

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

9. 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:

RECOMMENDATION

It is hereby recommended that the proposed rules be adopted except where specifically otherwise noted above.

Dated this 20TH day of July, 1990.

HOWARD L. KAIBEL, JR.
Administrative Law Judge