

2252

8-2802-8219-1

STATE OF MINNESOTA
OFFICE OF ADMINISTRATIVE HEARINGS

FOR THE MINNESOTA STATE BOARD OF TECHNICAL COLLEGES

In the Matter of Proposed Adoption
of the Rules of the State of Minnesota,
State Board of Technical Colleges,
General Studies and General Education,
Minn. Rules Part 3700.1200 to
3700.1280.

REPORT OF THE
ADMINISTRATIVE LAW JUDGE

The above-entitled matter came on for hearing before Administrative Law Judge Jon L. Lunde on November 30, 1993, at 9:00 a.m. in the Fifth Floor Conference Room, Veterans Services Building, 20 West Twelfth Street, St. Paul, Minnesota.

This Report is part of a rulemaking proceeding held pursuant to Minn. Stat. §§ 14.131 to 14.20 (1990) to hear public comment, determine whether the Minnesota State Board of Technical Colleges ("the Board") has fulfilled all relevant substantive and procedural requirements of law applicable to the adoption of the rules, evaluate whether the proposed rules are needed and reasonable, and determine if any modifications to the rules proposed by the Board after initial publication are substantially different from those originally proposed.

Charles Mottl, Assistant Attorney General, Suite 1200, NCL Tower, 445 Minnesota Street, St. Paul, Minnesota 55101-2130, appeared on behalf of the Board. The Board's hearing panel consisted of Gloria Pomroy, License Specialist, and Helen Henrie, Deputy Chancellor. Twelve persons attended the hearing. Eleven persons signed the hearing register. The Administrative Law Judge received twenty-seven agency exhibits and one public exhibit as evidence during the hearing. The hearing continued until all interested persons, groups, and associations had an opportunity to be heard concerning the adoption of the rules.

The record remained open for the submission of written comments until December 7, 1993, five working days following the date of the hearing. Pursuant to Minn. Stat. § 14.15, subd. 1 (1992), five additional working days were allowed for filing responsive comments. On December 14, 1993, the rulemaking record closed for all purposes. The Administrative Law Judge received one written comment from interested persons during the comment period and one written comment during the reply period. The Board also submitted post-hearing comments responding to matters discussed at the hearing. The Board did not propose any further amendments to the rules.

This Report must be available for review by all affected individuals upon request for at least five working days before the Board takes any further

action on the rules. The Board may then adopt final rules or modify or withdraw its proposed rules. If the Board makes changes in the rules other than those recommended in this Report, it must submit the rules with the complete hearing record to the Chief Administrative Law Judge for a review of the changes prior to final adoption. Upon adoption of final rules, the Board must submit the rules to the Revisor of Statutes for a review of the form of the rules. The agency must also give notice to all persons who requested to be informed when the rules are adopted and filed with the Secretary of State.

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

FINDINGS OF FACT

Procedural Requirements

1. On August 27, 1993, 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) a copy of the Board's Order for Hearing and an Authorizing Resolution;
- (c) a copy of the proposed Notice of Hearing;
- (d) a Statement of Need and Reasonableness (SONAR) with supplements;
- (e) an estimate of the number of persons expected to attend the hearing and the expected length of the Board's presentation at the hearing; and
- (f) a statement indicating that the Board would provide additional, discretionary notice of the hearing to Technical College officers, curriculum staff, and some members of the Board.

2. On June 1, 1993, a copy of the proposed rules on general studies were published at 17 State Register 2966. On June 7, 1993, a copy of the proposed rules on general education were published at 17 State Register 3045. On October 11, 1993, a Notice of Hearing was published at 18 State Register 1058. The Notice of Hearing cited the June 1, 1993 publication for the text of the proposed rule on general studies and the June 7, 1993 publication for the text of the proposed rule on general education. An amendment to the proposed rule relating to general studies license conversions is included in the October 11, 1993 publication.

3. On October 5, 1993, 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 notice of the proposed adoption of rules by the Board. This mailing included those persons to whom discretionary notice was given.

4. On November 2, 1993, the Board filed the following documents with the Administrative Law Judge:

- (a) the Notice of Hearing as mailed;
- (b) a copy of the State Register pages containing the Notice of Hearing and the proposed rules;
- (c) an affidavit stating that the Notice of Hearing was mailed on October 5, 1993, to all persons on the Board's mailing list;
- (d) an affidavit certifying that the Board's mailing list was accurate and complete as of September 27, 1993;
- (e) a copy of the Notices of Intent to Solicit Outside Information published in 17 State Register 1764 (January 11, 1993) and 17 State Register 2521 (April 19, 1993); and
- (f) a list of persons on the Board's hearing panel.

Small Business Considerations

5. Minn. Stat. § 14.115, subd. 2 (1990), requires state agencies proposing rules which may affect small businesses to consider methods for reducing adverse impact on those businesses. In its Notice of Hearing, the Board asserted that the small business statute is inapplicable to this rulemaking proceeding.

Minn. Stat. § 14.115, subd. 2 (1990), requires that methods for reducing the impact on small businesses be taken into account when agencies propose rules "which may affect small businesses." "Small business" is defined in § 14.115, subd. 1, as "a business entity . . . that (a) is independently owned and operated; (b) is not dominant in its field; and (c) employs fewer than 50 full-time employees or has gross annual sales of less than \$4,000,000." The rules relate only to technical colleges. They are not small businesses within the meaning of Minn. Stat. § 14.115, subd. 1 (1990). Therefore, the Board need not consider the statutory factors for reducing the impact of its rules on small businesses.

Fiscal Notice

6. Minn. Stat. § 14.11, subd. 1 (1990), requires agencies proposing rules which will require the expenditure of public funds in excess of \$100,000 per year by local public bodies to publish an estimate of the total cost to local public bodies for the two-year period immediately following adoption of the rules. The proposed rules do not affect "local public bodies." Therefore, the preparation of a fiscal notice is not required for these rules.

Impact on Agricultural Land

7. Minn. Stat. § 14.11, subd. 2 (1990), requires that agencies proposing rules that have a "direct and substantial adverse impact on agricultural land in the state" comply with the requirements set forth in Minn. Stat. §§ 17.80 to 17.84 (1990). Under those statutory provisions, adverse impact is deemed to include acquisition of farmland for a nonagricultural purpose, granting a permit for the nonagricultural use of farmland, the lease of state-owned land for nonagricultural purposes, or granting or loaning state funds for uses incompatible with agriculture. Minn.

Stat. § 17.81, subd. 2 (1990). Because the proposed rules will not have a direct and substantial adverse impact on agricultural land within the meaning of Minn. Stat. § 14.11, subd. 2 (1990), these statutory provisions do not apply.

Outside Information Solicited

8. In formulating the proposed rules, the Board published two Notices of Intent to Solicit Outside Information: in January, 1993 and April, 1993. See 17 State Register 1764 (January 11, 1993) and 17 State Register 2521 (April 19, 1993). The Board subsequently published its initial versions of the rules in the State Register on June 1 and 7, 1993. At that time, the Board believed that it would be able to adopt the proposed rules without a public hearing. However, hundreds of comments were received by the Board in response to those notices. The large number of comments and hearing requests received by the Board in response to the June publications required a hearing. In response to the comments received following the June notices, the Board made modifications before publishing the final version of the rules. By the time the Board published its final version of the rules, nearly all concerns previously expressed had been resolved. The few remaining concerns are addressed in this Report.

Objection to Reply Comment

9. On December 14, 1993, Roger A. Peterson, of Peterson, Engberg & Peterson, Attorneys at Law, submitted a comment on behalf of the Minnesota Federation of Teachers (MFT). That comment included a memorandum dated December 29, 1992, from Dayton Perry, Director of Evaluation for the Board. The memorandum included the results of a survey to determine which occupational programs offered in Minnesota technical colleges are accredited or certified or require licensure, certification or registration of graduates. The Board objected to the inclusion of this survey in the record. Under Minn. Stat. § 14.15, subd. 2, additional evidence may not be submitted during the second, five-day comment period. The survey is "additional evidence" within the meaning of the statute. Hence, it cannot be considered.

Error in Mailing List Certification

10. The Board staff certified the Board's mailing list as accurate and complete on September 27, 1993. The Board's mailing to that list occurred on October 5, 1993. The purpose of certifying the list is to ensure that all persons whose names are on the list on the day of mailing receive notice. Although the Board's certification of the accuracy and completeness of the mailing list is technically defective, the defect is wholly a matter of form. When advised of the problem, the Board responded with a letter asserting that no changes occurred to the mailing list between September 27, 1993, and October 5, 1993, and the mailing list was accurate and complete on the date of mailing.

In 1992, the Administrative Procedure Act was amended by adding a provision excusing harmless errors. Minn. Stat. § 14.15, subd. 5. Under the statute, in determining if noncompliance is harmless, the Administrative Law Judge must decide if any person was deprived of an opportunity to participate and whether the agency took any corrective action. There is no indication that any person or association who asked to be on the list failed

to receive notice of the hearing. Because no person was deprived of an opportunity to participate, the technical defect in the Board's initial certification of the mailing list constitutes a harmless error under Minn. Stat. § 14.15, subd. 5(1) and must be disregarded. See also City of Minneapolis v. Wurtele, 291 N.W.2d 386, 391 (Minn. 1980); Handle with Care v. Department of Human Services, 406 N.W.2d 518 (Minn. 1987).

Need for and Reasonableness of the Proposed Rules in General

11. Among other things, the Administrative Law Judge must determine if the Board established the need for and reasonableness of the proposed rules by an affirmative presentation of fact. The Board prepared a Statement of Need and Reasonableness ("SONAR") to support adoption of the proposed rules. At the hearing, the Board primarily relied upon the SONAR as its affirmative presentation of need and reasonableness. The SONAR was augmented by a "supplemental" SONAR, comments made by the Board at the hearing, and its written, post-hearing comments.

To be reasonable a rule must have a rational basis. Thus Minnesota Court of Appeals has held a rule to be reasonable if it is rationally related to the end sought to be achieved by the statute. Broen Memorial Home v. Minnesota Department of Human Services, 364 N.W.2d 436, 440 (Minn.App. 1985); Blocker Outdoor Advertising Company v. Minnesota Department of Transportation, 347 N.W.2d 88, 91 (Minn.App. 1984). To establish reasonableness, the Supreme Court of Minnesota has held that an agency must "explain on what evidence it is relying and how the evidence connects rationally with the agency's choice of action to be taken." Manufactured Housing Institute v. Pettersen, 347 N.W.2d 238, 244 (Minn. 1984).

This Report is generally limited to a discussion of the rules that received significant critical comment or otherwise need discussion. Due to the large number of students and other interested individuals who submitted comments and the substantive uniformity of the comments, only a limited number of the individuals who filed comments will be individually identified. Persons or groups who do not find their particular comments summarized in this Report should know that the Administrative Law Judge has read and considered each suggestion. Because nearly all sections of the proposed rules were unopposed and were adequately supported by the SONAR, a detailed discussion of each section of the proposed rules is unnecessary. The Administrative Law Judge specifically finds that the need for and reasonableness of the any provisions not discussed in this Report have been demonstrated by an affirmative presentation of facts, and that such provisions are specifically authorized by statute.

Statutory Authority

12. In its Notice of Hearing, the Board asserted that Minn. Stat. § 136C.04, subd. 9, provides authority for the promulgation of the proposed rules. Minn. Stat. § 136C.04, subd. 9, reads in pertinent part:

the state board [of technical colleges] may adopt rules under chapter 14 for licensure of teaching, support, and supervisory personnel in post-secondary and adult vocational education.

The Administrative Law Judge concludes that the Board has authority under Minn. Stat. §§ 136C.04, subd. 9 to adopt these rules.

Background

13. Prior to 1983, the State Board of Education established the teacher licensure requirements for secondary (high school), post-secondary and adult vocational technical education. Minn. Stat. §§ 121.11, subd. 1 and 125.184, subd. 4 (1982). In 1983, the State Board of Vocational Technical Education (now the Board of Technical Colleges) was established, and it was given general supervisory authority over post-secondary and adult vocational education. The new State Board of Vocational Technical Education was also given statutory authority to license post-secondary and adult vocational teachers. See Minn. Laws 1983, c. 258, § 61, subd. 9, codified as Minn. Stat. § 136C.04, subd. 9. Existing rules of the State Board of Education (see, 5 MCAR § 1.0780-1.0798, later recodified as Minn. Rules, Ch. 3515.) relating to post-secondary and adult vocational education were, by statute, transferred to the new State Board of Vocational Technical Education. See, Minn. Stat. § 15.039, subd. 3 (1982).¹ Furthermore, Minn. Laws 1983, c. 258, § 63, subd. 1 stated that the "functions of the state board for vocational education relating to post-secondary and adult vocational education are transferred to the state board of vocational technical education." It also specifically stated that the rules of the State Board for Vocational Education governing post-secondary and adult vocational education licensure were transferred to the Board of Vocational Technical Education. The State Board for Vocational Education referred to in the 1983 Act was, in fact, the State Board of Education. Under Minn. Stat. § 121.11, subd. 1 (1982) the State Board of Education served as the State Board for Vocational Education.

14. The proposed rules set standards for licensing persons seeking to teach general studies and general education in technical colleges. Advisory committees were established to add input in the development of license requirements in both areas. General studies includes applied math, applied communications, applied physics, applied chemistry, applied anatomy/physiology, first aid instructor, cardio-pulmonary resuscitation (CPR), developmental math, developmental reading, and occupational English as a second language (ESL). The rules also indicate how existing general studies licenses will be converted to new licensing categories. Existing licenses are allowed to transfer to the new categories in the corresponding subject area. For example, a "related math" license will be replaced with an "applied math" license. Licensure standards are also proposed for general education. A general education teacher can teach a variety of courses for which the teacher is licensed. Licensed fields include biology, chemistry, English, ecology/environmental science, economics, geography, geology, history, journalism, math, music, communications, philosophy, physics, political science, psychology, sociology, and visual arts. Among other things, an applicant must

1. Minn. Stat. § 15.039, subd. 3 relates to the transfer of powers among state agencies. In subdivision 3, it requires that rules adopted pursuant to responsibilities which are transferred to a new or different agency remain effective and must be enforced until amended or repealed by the agency to which the powers and responsibilities are transferred.

meet the occupational and educational requirements for general studies license. However, a provisional license provision is proposed for those who cannot meet other, new license requirements.

General Studies

15. For over ten years, the Board has issued general studies licenses. In the past, the licenses have been issued under Minn. Rules, Ch. 3515 (1991) to individuals holding the appropriate degree and having the necessary occupational experience. Chapter 3515 was originally promulgated by the Board of Education acting as the State Board of Vocational Education. After the Board succeeded to the powers of the Board of Education, it became responsible for the licensure of post-secondary vocational technical education teachers and "inherited" the Board of Education's responsibilities and powers under chapter 3515. Since that time, the Board has begun to develop new rules in chapter 3700 to supplant those in chapter 3515.

16. The requirements for applicants seeking licensure in general studies are set out in proposed rule 3700.1200. Each subpart of the proposed rules is discussed below.

Subpart 1.

17. Subpart 1 of proposed rule 3700.1200 contains the qualifications an applicant for a general studies license must have. Among other things, an applicant must meet the standards in part 3700.0100 (general requirements for post-secondary vocational teachers) and the particular standards for the specific license sought. Part 3700.0100 requires, among other things, that an applicant for licensure comply with parts 3515.0100 to 3515.4400 and 3515.5000. The Board established that the licensing requirements in subpart 1 are needed and reasonable as proposed. However, the title of the subpart ("Listed here") has no meaning. Since the title is not part of the rule itself this is not a defect. However, the Board should change the title to "License Requirements" or something similar.

Subpart 2. Do not apply

18. Subpart 2 identifies eight rule parts (or portions thereof) that do not apply to general studies license applicants. The specific requirements excluded relate to committee review, occupational experience, demonstration of knowledge, reexamination, appeals, instructors in related post-secondary subjects, and licensure charts. The wording of subpart 2 is particularly terse. The rule states "Parts 3515.0100, subpart 25; 3515.4100; *** "do not apply." The rule would be clearer if it stated, "The requirements in parts 3515.0100, subpart 25; *** do not apply to applicants for licensure in general studies." The change would improve the clarity of the rule and would not constitute a substantial change. Also, the title should be clarified by changing the heading from "Do not apply" to "Rules not applicable" or "Inapplicable rules."

19. Under subpart 1, the new general studies requirements are in addition to the requirements in part 3700.0100. Part 3700.0100 states that applicants must comply with parts 3515.0100 to 3515.4400 and 3515.5000. In subpart 2, some parts of chapter 3515 are excluded. They include 3515.0100, subp. 25; 3515.4100; 3515.4200; 3515.4300; 3515.4400; 3515.6005, subpart 1;

3515.9920; and 3515.9941. Read together, these subparts are confusing. For example, subpart 2 states that part 3515.0100, subp. 25 does not apply to the licensure of general studies teachers. Subpart 25, however, is merely a definition. Because the new general studies rule contains occupational experience requirements, the Board apparently does not intend to apply any of the occupational experience requirements in parts 3515.1200 and 3515.1300 to general studies teachers. Apparently, it is the Board's intention to only require persons applying for a general studies license to comply with part 3515.2100 and the teaching education sequence in 3515.1400. If that is so, the rule should be clarified by including parts 3515.1200 and 3515.1300 in the exclusionary language of subpart 2. Alternatively, and preferably, the Board should consider eliminating subpart 2 and changing subpart 1 to include a specific reference to the additional rules that apply to applicants for a general studies license. For example, subpart 1 could state "An applicant for a license in general studies must only meet the requirements in this part and the requirements in parts"

20. The Minnesota Federation of Teachers (MFT) opposed exclusion of the committee review process in Part 3515.4100 from the general studies licensure requirements. The committee review process allows an applicant who fails to meet the vocational licensure requirements in Chapter 3515 to petition the Commissioner of Education for a qualification reevaluation. That reevaluation is performed by a committee of at least three people with specific qualifications in the relevant educational and vocational areas. If the applicant's qualifications are found to be equivalent to licensure standards the license is granted. MFT maintains that the Board has not demonstrated the need or reasonableness of excluding general studies from committee review .

21. The committee review procedure, which was initially adopted by the Department of Education acting as the Board for Vocational Education, authorizes the issuance of a license if the review committee finds that an individual's qualifications are equivalent to the licensure standards in Chapter 3515. The rule states that an individual who disputes an adverse committee review recommendation may appeal the recommendation pursuant to appeal procedures of the Board of Teaching in part 8700.2500. Because the Board now has exclusive authority to license post-secondary and adult vocational technical teachers, it is questionable whether the Commissioner of Education has any authority to make determinations of equivalency under the rule. It seems unlikely that any reference to a decision by an individual, officer or board other than the Technical College Board has any effect. However, that issue need not be considered. The only issues raised by MFT's objections are whether applicants for general studies licensure should have the committee review process available to them.

22. In its first public SONAR,² which was issued when the Board attempted to adopt the rules without a public hearing, the Board stated:

Since the technical colleges do not have the authority to grant degrees or degree equivalencies it is reasonable and necessary not to allow the technical colleges to grant degree equivalencies through the process of committee review. Therefore committee review for this credential is no longer an option.

SONAR for General Studies, at 3.

23. The Board received a large number of comments on general studies after publication of its notice proposing to adopt rules without a hearing. Therefore, it prepared a supplemental SONAR to address issues raised in those comments. In its supplemental SONAR, the Board discussed the need for committee review stating:

Committee review is a provision whereby a committee of specified individuals evaluates the qualifications of an applicant, [sic] who has been denied a license because the evidence of qualifications presented by the candidate for licensure did not meet the qualifications identified in the rule.

The option of committee review is not provided for in the general studies rule in order to eliminate duplication of effort, reduce costs and provide a reevaluation process.

A process for the reevaluation [sic] of evidence of courses and majors exists in the form of a degree equivalency option under Minnesota Rules, part 3515.0100, subp. 17. This option is implemented in the following manner. If a candidate believes that the education (degrees and/or courses) which they are presenting may not clearly demonstrate that they have met the requirements established in the rule they may seek a determination of equivalent preparation from any post-secondary institution authorized to grant the corresponding degree or major. Under this process the candidate is free to select the institution and department and work directly with representatives of the institution and department. The only restriction placed upon the choice of institution and department is that the institution is authorized to grant the degree/major required in the licensure field. This process may be conducted before or during the original application process, thus increasing the efficiency of the process and reducing costs for the applicant. When the institution/department has completed the review and granted the equivalency, documentation of that decision is provided by the candidate to the State Board Licensure Unit. The statement of equivalency is accepted by the State Board as evidence that the candidate does meet the educational requirement stated in the rule and the license would be granted.

-
2. MFT asserted that the language supporting this rule was different in a prior SONAR. The Board speculated that the MFT may have seen a draft copy of the first SONAR. There is no reason to consider agency drafts in determining the need and reasonableness of a rule. The agency is entitled to formally determine what theory it will pursue and what facts it will present to support its proposed rules. Therefore, drafts will not be considered.

Providing for committee review in this rule when the processes for degree/major equivalency already exists is an unnecessary duplication of effort. Duplication of effort is particularly evident because faculty from degree/major granting institutions would be asked to serve on the committee review.

The cost associated with the reevaluation through the degree/major equivalency option are [sic] less than those which occur when a committee review is conducted by the Board Office. In addition to the \$50.00 application fee, a fee of \$100.00 is charged for committee review in those licenses where it is used as an option for reevaluation.

Supplemental SONAR for General Studies, at 2-3.

24. MFT asserts that the equivalency reevaluation is not a substitute for committee review because the instructor who seeks committee review typically does not hold a degree in the field for which equivalency would be sought. MFT acknowledges that the existing rules require instructors to hold such a degree to be eligible to teach such courses. According to the MFT, the lack of such a degree should not be a bar to teaching such courses, because the credits for general studies courses do not transfer to other institutions but are taken only to support vocational studies at the technical college. MFT also stated that the Board has allowed persons not holding the appropriate degree to teach general studies courses in the past. Those objections have no merit.

25. General studies credits are not transferable to state colleges or community colleges. Therefore, the qualifications of persons teaching those courses in technical colleges arguably need not be as stringent as the qualifications of persons teaching courses whose credits do transfer. However, this fact does not mean that the Board must abandon all standards for instructors of general studies courses or that it cannot require the same standards of them as are required of community college instructors. Whether such courses are taken to support vocational education or for independent reasons, the instructors must be held to a standard of educational ability and credentialing necessary to appropriately train students taking technical college courses. Because the proposed rules for general studies licensure contain the same academic requirements which were established over ten years ago, the need and reasonableness of those educational requirements need not be established in this proceeding. Under Minn. Rules, pt. 1400.0500, subp. 1C. (1991) an agency proposing amendments to existing rules need not demonstrate the need for and reasonableness of previously adopted rules which are not affected by newly proposed amendments.

26. Under the committee review process in part 3515.4100, a license applicant may follow the committee review process in order to establish that the applicant's education or experience are equivalent to license standards under that rule. There is no evidence that anyone has been granted a license who does not have the appropriate degree under that rule. Assuming that in a particular case a person's education could be found equivalent to degree requirements not strictly met, the Administrative Law Judge is still persuaded that elimination of the committee review process is necessary and reasonable. Applicants who do not have the necessary degree, but who have equivalent educational experience, may obtain verification of that experience from any institution accredited to grant a degree or major in the area required for

licensure. Consequently, having a second, duplicative process, is unnecessary. The Board's decision to eliminate the committee review process for general studies licenses is necessary and reasonable because it eliminates the unnecessary duplication of procedures. Furthermore, to the extent that the committee review process would authorize the licensure of persons not having the necessary baccalaureate degree, or its equivalent, elimination of that process simply guarantees that persons teaching in general studies have the appropriate educational background. It has always been the Board's position that general studies teachers must have an appropriate baccalaureate degree. Preserving that policy is necessary and reasonable. The fact that courses taught by properly educated general studies teachers in technical colleges are not transferable does not mean that the qualifications of general studies teachers in technical colleges should be relaxed.

27. The existing requirements for general studies teachers apparently have not been met by some current instructors. MFT asserts that the Board has been aware of this situation and is, therefore, estopped from enforcing those requirements. No case law or treatise has been cited to support the claim of estoppel. To establish a claim of estoppel, MFT must show that the Board made representations which were reasonably relied upon and will cause harm if the estoppel is not granted. Brown v. Minnesota Department of Public Welfare, 368 N.W.2d 906, 910 (Minn. 1985)(citing Northern Petrochemical Co. v. United States Fire Insurance Co., 277 N.W.2d 408, 410 (Minn. 1979)). When estoppel is sought against the government, the harm to the party asserting it must be balanced against the harm to the public interest if the estoppel is granted.

28. At the hearing, the Board indicated that it has not pursued enforcement actions absent complaints about the credentials of an instructor hired to fill a technical college position. MFT asserts that unlicensed instructors have obtained positions based on the perceived nonenforcement of the existing rule. The passivity of the Board, if any, in ignoring the use of improperly credentialed instructors is not a representation on which an unqualified person could reasonably rely. No evidence in the record shows that the Board affirmatively advised unqualified instructors that they need not comply with the existing licensure rules. The instructors cited by MFT as "at risk" under the proposed rules must have reasonably relied upon a representation to establish estoppel. If the Board's failure to act constitutes a representation, the instructors' failure to obtain the credentials expressly required by rule remains unreasonable. Reliance upon nonenforcement of the Board's rule simply is not reasonable in light of the lack of any Board statements and the express language of the rule.

29. Even if all three elements of estoppel existed in this case, wrongful conduct by the Board must be shown before any balancing between private and public harm is undertaken. In the Matter of Westling Manufacturing, Inc., 422 N.W.2d 328, 332-33 (Minn. Ct. App. 1989). There is no evidence of wrongful conduct by the Board. For some years, the Board has treated its rules on licensure as enforceable only after a complaint. This approach is a legitimate exercise of discretion, given the Board's perception of the problems posed by instructors with improper credentials and the extent of the Board's resources. Although reasonable persons could disagree regarding the efficacy of the Board's conduct, its conduct was not wrongful.

30. Assuming that the elements of estoppel and wrongful conduct by the Board had been shown, a balancing test must be conducted weighing the harm to

the party and the harm to the public if estoppel is granted or denied. In this case the harm to the instructors is that they will be excluded from teaching some general studies courses in technical colleges. The harm to the public takes three forms. Students are denied courses taught by properly credentialed instructors. Technical colleges are harmed by lowering the standards of the credentialing process for their faculty. Properly credentialed instructors are denied the benefit of positions which are held by instructors without those credentials. The harm to the improperly credentialed instructors, occurs merely through the application of existing standards. The proposed rule does not change the existing standard, it merely applies that standard. The harm to the public outweighs the private harm and thus estoppel is inappropriate.

31. MFT argued that since the improperly credentialed instructors have been teaching general studies courses "successfully" for a number of years, it is unreasonable to require these instructors to meet the minimum standards in the proposed rules. The reasonableness of the rule, however, is not measured by whether individuals may or may not qualify under a rule. Rather, the rule must be measured objectively. In Mammenga v. Dept. of Human Services, 442 N.W.2d 786, 789-90 (Minn. 1989), the Minnesota Supreme Court stated:

The rule itself is unreasonable (and therefore invalid) when it fails to comport with substantive due process because it is not rationally related to the objective sought to be achieved.

* * *

The mere fact, however, that the application of a rule may yield a harsh or undesirable result in a particular case does not make the rule invalid. [citations omitted]. To say a rule is "invalid as applied" means that the rule is invalid if, as employed, it is unreasonable in a due process sense, i.e., that the rule is not rationally related to the legislative ends sought to be achieved. . . [citations omitted].

MFT's arguments that elimination of committee review is inappropriate due to the fact that some general studies teachers currently employed at technical colleges do not have the appropriate baccalaureate degree or its equivalent must be rejected. The argument confuses the issues properly considered in a contested case proceeding and in a rulemaking proceeding. The rule is clearly appropriate in its future application to persons who have not been teaching general studies courses at technical colleges without the appropriate educational experience. As to all persons seeking licensure who do not currently hold a teaching position at a technical college the rule is clearly necessary and reasonable. It should be approved on that ground even if the Board were estopped from applying it in a particular case on the grounds of estoppel. In this proceeding, individual claims of estoppel cannot be adjudicated. Therefore, it is appropriate to approve the rule. If application of the rule to a particular individual is subsequently challenged on the grounds of estoppel, the challenging applicants entitlement to licensure and the applicant's claims of estoppel can be adjudicated. If the Board is estopped from applying licensure requirements in a particular case, the rule is still valid in all other cases.

The legislative end sought to be achieved by the general studies rule is the maintenance of appropriate standards for teaching general studies courses in technical colleges. Requiring a degree or significant number of credits in the field is rationally related to establishing standards for instructors. Eliminating a method by which persons without such qualifications obtain approval to teach those courses is also rationally related to maintaining standards.

Subpart 3. Occupational Experience

32. The existing general studies license requirements ensure that persons with direct, "hands-on" experience in particular areas of expertise are on the faculty of the State Technical College system. The Board has concluded, however, that qualified persons were being excluded from teaching by overly restrictive occupational experience requirements. General Studies SONAR, at 3. Therefore, the Board has proposed five different ways for meeting the occupational experience requirement. The first is completion of a three credit course in applied occupational concepts; second is 500 hours of occupational experience in the program area; third is current licensure as an instructor in an occupational program area; fourth is completion of an approved internship sponsored by the Board. The fifth and final (Subpart 3(C)) alternative is:

40 clock hours verified by an authorized administrator in a combination of all the following:

- (1) ex officio occupational advisory committees;
- (2) business/industrial site visits; and
- (3) occupational program classroom/laboratory observation.

The five alternative ways of meeting the occupational experience requirements necessary for licensure in general studies were shown to be reasonable and needed. However, the alternative found in Subpart 3C of the rule should be clarified. It is not clear, for example, who an authorized administrator is. If it is a technical college administrator, the rules should say that. Also, the rule should state whether the 40 clock hours can be earned in any combination of the three subitems. If it can, the words "any combination" rather than "a combination" should be used. In order to clarify the rule, the Administrative Law Judge suggests that it be rewritten to read as follows:

40 clock hours of participation, verified by an authorized technical college administrator, in any combination of the following:

- (1) ex officio occupational advisory committees;
- (2) business/industrial site visits; or

- (3) occupational program classroom/laboratory observation.

While participation is a broad term, it does indicate some formal connection with the three listed options. Whatever language is selected for item C, the language used must inform the regulated public what experience meets the occupational experience requirement.

Proposed Rule 3700.1210 - General Studies, Applied Math, Etc.

33. Proposed rule 3700.1210 sets the specific standard for instructors who teach in the general studies area of applied math. No commentator objected to any of the specific standards in this rule. However, the title of subpart 1 ("May teach") is awkward. While the title cannot constitute a defect in the proposed rule, the Judge suggests that the Board replace it with "Eligible teacher." This comment applies to all the rule parts for a specific field. Proposed rule 3700.1210 is needed and reasonable.

Proposed Rule on Application

34. Commentators responding after the first publication of the proposed rules questioned how existing licenses were to be treated. The Board added additional language before the second rule publication to meet these concerns. At the end of proposed rule 3700.1280, entitled "General Studies, Occupational English as a Second Language," the Board has placed rule language entitled "Application." A further title states "Conversion of Existing Instructors Licenses." The first paragraph of the body of the rule relates to bilingual, bicultural reading and math licenses and how those licenses may be retained or converted to the general studies equivalents of those licenses. The second paragraph contains a table indicating existing license titles and the new titles for those licenses. The Board has shown this rule to be needed and reasonable. The rule would be clearer if it was set out as a separate rule part with each paragraph designated as a subpart.

Repealer

35. In response to the first publication of the proposed rules, some commentators questioned the repeal of Minn. Rule 3515.9942, a licensure chart. The Board indicated that three of the licenses, Supplemental Support/Technical Tutor, Interpreter for the Deaf, and Occupational English as a Second Language, were either repealed, removed, or are in the proposed rule. However, to meet the commentators concerns, the Board altered the language in the repealer to state that rule 3515.9942 "no longer applies to part 3700.1280." The repealer, as amended, is necessary and reasonable, but it would be preferable to include the quoted language in Subpart 2.

GENERAL EDUCATION

Proposed Rule 3700.1205 - General Education License

36. General education credits are earned by students seeking an Associate of Applied Science Degree. The existing practice for general

education credits has been to have the course taught under a cooperative arrangement with community colleges or the State University system. Under such arrangements a licensed instructor from the community college or state university teach general education courses. Until recently, no technical college has been eligible to provide general education courses by its own instructors for students to earn those credits.

37. Under Minn. Stat. § 136C.042, subd. 1, the Board may "approve, disapprove, or modify a plan for awarding associate degrees at a technical college." An agreement has authorized Alexandria Technical College and Hutchinson Technical College to offer courses in general education for which degree credits may be earned. Supplemental SONAR on General Education, at 1. The Board has indicated that the authorization is for up to 32 general education credits. Id. These credits are eligible for transfer to Minnesota community colleges or the State University system. Id.

38. Up to the present, technical colleges have not had instructors licensed in general education. Since Alexandria Technical College and Hutchinson Technical College are now providing general education courses for which licensed instructors are typically required, the Board has proposed that licensure be required for instructors in general education courses in technical colleges. Proposed rule 3700.1205 establishes the standards of this licensure.

Subpart 1 - May teach

39. The disciplines for which licensed general education instructors are able to teach courses are set out in subpart 1 of proposed rule 3700.1205. Eighteen fields are listed which are in the science, social science, and humanities areas. No one objected to subpart 1. As discussed above, the Board may choose to change the title to "Eligible teacher." Subpart 1 is needed and reasonable.

Subpart 2 - Other Requirements

40. Two other rules are cited in subpart 2 as requirements for technical college instructors seeking licensure to teach general education courses. These requirements are parts 3700.0100 (general requirements for post-secondary vocational teachers) and 3700.1200, subp. 3 (occupational experience). The Board characterizes these rules as "generic to all general studies general education staff." SONAR on General Education, at 2. Part 3700.0100 is presently a promulgated rule. The Board has shown that the requirements are needed and reasonable to establish appropriate standards for general education instructors.

Subpart 3 - Educational Experience Requirement

41. Persons seeking licensure as general education instructors are required by subpart 3 to have minimal educational experience in a particular field. As proposed, the minimum educational experience is a master's degree with either a major in the assigned field or 23 graduate credits in the assigned field. The Board arrived at these standards after consultation with staff at the community colleges, technical colleges, and the State University system. SONAR on General Education, at 3.

42. Larry Anderson, Ann Craigmile, and Gary Albrecht objected to the requirements of subpart 3 as applied to instructors who have taught courses at the technical colleges for years. Some of these instructors will have few opportunities to obtain 23 graduate credits in their field. Other instructors with the opportunity to obtain those credits may choose not to do so just for the opportunity to teach a few general education courses. Anderson stated that he was not interested in taking additional courses, since he is only two years away from retirement. Craigmile and Albrecht asserted that the rule will have the effect of depriving some instructors of their livelihood. Anderson, Albrecht, and Craigmile urged the Board to exempt existing teachers from the educational requirement for general education.

43. The Board responded that some instructors teaching general education courses in the Alexandria and Hutchinson Technical Colleges are now doing so without licenses. The credits obtained by students in courses taught by unlicensed instructors are not transferable. This situation has caused an undue hardship for students, who are forced to retake identical courses taught by licensed instructors to obtain the credits necessary for meeting degree requirements. To ensure that instructors without master's degrees or the appropriate graduate credits have some alternative, the Board has proposed a provisional status for existing instructors. See, Finding 45, below.

44. Where technical colleges have altered their educational mission by offering general education classes taught by their own instructors, it is needed and reasonable to impose the same licensure standards as the standards met by general education instructors in community colleges or the State University system. Without adequate minimum standards, transferring students will be harmed by having to retake coursework already completed, but taught by an unlicensed instructor. Subpart 3 is needed and reasonable, as proposed.

Subpart 4 - Provisional Status

45. For instructors who do not meet the licensure standards set in subpart 3, the Board offers provisional licensure. The standards for provisional licensure are established in subpart 4. These standards are:

- A. a minimum of 15 quarter credits taught in the field within the past five years;
- B. a bachelor's degree (or some higher degree);
- C. an individual education plan approved by the college administration;
- D. application for provisional licensure is made within one year of the rule taking effect.

Instructors who meet these standards may receive a provisional, three-year license. Subpart 4 is needed and reasonable. However, item C is unclear. If there is some rule that governs individual education plans, it should be cited. If there is no such rule, the rules should state what the individual education plan must do. For example, if it is a plan by which an individual will obtain necessary educational experience to be licensed as a general education instructor, it must say so.

Dick Wagenknecht, Math Director for St. Paul Technical College, objected to the 15 credit minimum to teach remedial math. Wagenknecht also opposed the removal of work experience from the licensure provision. The Board pointed out that provisional licensure is new and is intended only for existing instructors. The minimum qualification of 15 quarter credits within the past five years is intended to provide assurance that only qualified instructors will obtain provisional licensure. Recognition of applications for a provisional license to one year after the rules take effect ensures that only current instructors are eligible for provisional licensure. Since the work experience requirement already exists for current instructors, that requirement is not being "dropped" for provisional licensure. The Board has shown that the provisional licensure provision of subpart 4 and the renewal provision in subpart 5 are needed and reasonable.

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

CONCLUSIONS

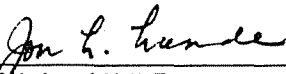
1. The Minnesota State Board of Technical Colleges ("the Board") gave proper notice of this rulemaking hearing.
2. The Board has substantially fulfilled the procedural requirements of Minn. Stat. §§ 14.14, subds. 1, 1a and 2 (1990), and all other procedural requirements of law or rule so as to allow it to adopt the proposed rules.
3. 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) and (ii) (1990).
4. The Board has demonstrated the need for and reasonableness of the proposed rules by an affirmative presentation of facts in the record within the meaning of Minn. Stat. §§ 14.14, subd. 2 and 14.50 (iii) (1990).
5. No additions or amendments to the proposed rules were suggested by the Board after publication of the proposed rules in the State Register and thus the rules are not substantially different from the proposed rules as published in the State Register within the meaning of Minn. Stat. § 14.15, subd. 3 (1990), and Minn. Rules pts. 1400.1000, subp. 1, and 1400.1100 (1991).
6. Any Findings which might properly be termed Conclusions and any Conclusions which might properly be termed Findings are hereby adopted as such.
7. 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 consistent with the Findings and Conclusions made above.

Dated this 12th day of January, 1994.



JON L. LUNDE
Administrative Law Judge

Reported: Tape Recorded (No Transcript Made)