

**STATE OF MINNESOTA
OFFICE OF ADMINISTRATIVE HEARINGS
FOR THE BOARD OF CHIROPRACTIC EXAMINERS, THE BOARD OF DENTISTRY,
THE BOARD OF MEDICAL PRACTICE, THE BOARD OF NURSING, AND THE
BOARD OF PODIATRIC MEDICINE**

**In the Matter of the Adoption of
the Health Licensing Boards Proposed
Permanent Rules Relating to Infection
Control by the Board of Chiropractic Examiners,
the Board of Dentistry, the Board of Medical
Practice, the Board of Nursing, and the
Board of Podiatric Medicine, Minn. R.
6950.1000 to 6950.1080.**

**ORDER ON REVIEW OF
RULES UNDER MINN.
STAT. § 14.26**

The health licensing boards, (boards) are seeking review and approval of the above-entitled rules, which were adopted by the boards pursuant to Minn. Stat. § 14.26. On February 3, 1997, the Office of Administrative Hearings (OAH) received documents from the boards required to be filed under Minn. Stat. § 14.26 and Minn. R. 1400.2310. On February 14, 1997, the OAH returned the rule record to the boards. In the letter, the boards were informed that the rule review under Minn. Stat. § 14.26 could not be completed because the procedural review of the record showed that there were 25 or more outstanding requests for a public hearing. On March 6, 1997, the boards submitted a request for reconsideration of the February 14, 1997, letter requesting review again under Minn. R. 1400.2300 and Minn. Stat. § 14.26.

Based upon a review of the written submissions and filings, Minnesota Statutes, Minnesota Rules, and for the reasons set out in the Memorandum which follows,

IT IS HEREBY ORDERED:

The rules were adopted in compliance with the procedural requirements of Minn. Stat., chapter 14 and Minn. R., chapter 1400, with the following exceptions:

- (1) The Notice of Intent to Adopt Rules Without a Public Hearing does not contain a reference to the Office of Administrative Hearings rules for adopting rules as required by Minn. R. 1400.2080, subp. 2, item A.
- (2) The Statement of Need and Reasonableness does not contain a statement describing the probable costs to other agencies of the implementation and

enforcement of the proposed rule and any anticipated effect on state revenues as required by Minn. Stat. § 14.23.

(3) The record indicates that there are 49 outstanding written requests for a public hearing. Pursuant to Minn. Stat. § 14.25, subd. 1, if 25 or more persons submit a written request for a public hearing, the agency must proceed under Minn. Stat. § 14.14 to 14.20. Based on the 49 outstanding hearing requests, the approval of the rules under Minn. Stat. § 14.26 is DISAPPROVED.

The procedural errors in (1) and (2) are found to constitute harmless error under Minn. Stat. § 14.26, subd. 3, clause (d)(1), in that the omissions did not deprive any person or entity of an opportunity to participate meaningfully in the rulemaking process.

Dated this 20th day of March, 1997.



George A. Beck
Administrative Law Judge

MEMORANDUM

Pursuant to Minn. Stat. § 14.25, subd. 1, if, during the 30-day period allowed for comment, 25 or more persons submit to the agency a written request for a public hearing of the proposed rule, the agency shall proceed under the provisions of sections 14.14 to 14.20, rules adopted with a public hearing.

In this case, the boards received 53 written requests for a public hearing during the 30-day comment period, which ended on August 9, 1996. All of the 53 hearing requests objected to Minn. R. part 6950.1090, Unconfined Lesions. On November 13, 1996, after the comment period, Lois Mizuno, Executive Director of the Board of Podiatric Medicine and Chair of the Infection Control Steering Committee, wrote a letter to the persons who had requested a public hearing. The letter provided additional information in support of the rule and asked that the people sign the attached form indicating their withdrawal of their request for a public hearing. In response to the letter, four people withdrew their request for a public hearing, leaving 49 written requests for a public hearing.

With the 49 public hearing requests still outstanding, the boards submitted the rule record to the OAH for review and approval under Minn. Stat. § 14.25, on February 3, 1997. In its Order Adopting rules, the boards indicated that part 6950.1090 had been withdrawn, although at that time, the notice of withdrawal had not been published in the

State Register. In its February 3, 1997, addendum to the Statement of Need and Reasonableness, the board set forth the basis for why they felt the rule should be reviewed under Minn. Stat. § 14.26, and should not proceed to a hearing. However, because the record showed 49 outstanding requests for a public hearing, the administrative law judge determined that the rule could not be reviewed under Minn. Stat. § 14.26. The rule record was returned to the boards on February 14, 1997 with a letter of explanation as to the judges decision as to why the record was being returned.

On March 6, 1997, the boards submitted a letter of reconsideration of the February 14, 1997, decision and resubmitted the rule record for review and approval under Minn. Stat. § 14.26. The rule record is the same as that submitted on February 3, except for letter of March 6, 1997, the copy of the Notice of Withdrawal of Proposed Joint Minnesota Rule 6950.1090, as published in the State Register on March 10, 1997, and the complete rulemaking record of the Board of Optometry. In the request for reconsideration, the boards proposed additional justification as to why they should not have to conduct a public hearing in this matter. Some of the arguments are similar to the ones raised in the February 3, 1997, submission, but will be addressed again here for completeness.

First, the boards point out that all of the 53 persons requesting a public hearing only objected to one rule provision, part 6950.1090, Unconfined Lesions. In addition, the boards state that when the agents of the boards met with representatives of those who had filed requests for a hearing, the representatives stated no objection to or even questioned other rule parts. The boards contend that there is nothing in section 14.25 that would open the door for a person requesting a hearing on a specified proposed rule to revise their hearing request after the close of the 30-day public comment period to include other proposed rules or all the proposed rules.

The administrative law judge finds that Minn. Stat. 14.25, subd. 1, was not intended to limit a persons testimony at a public hearing. A person would not be precluded from testifying about a particular rule if it was not mentioned in the persons request for a hearing. Therefore, the fact that the people in this case only objected to part 6950.1090, would not preclude them from speaking about other rule parts if a hearing were held.

Second, the boards contend that requiring them to conduct a public hearing after withdrawing the only objectionable portion of the rules would make the authority to withdraw rules at any time under Minn. Stat. § 14.05 meaningless. They maintain that if the boards must hold a hearing on a rule that no longer exists, there is no point in withdrawing the rule until after the public hearing.

Minn. Stat. § 14.05, subd. 3, provides that an agency may withdraw a proposed rule any time prior to filing it with the secretary of state. The administrative law judge does not question the boards authority to withdraw proposed rule 6950.1090. However, the administrative law judge finds that chapter 14 does not allow for an agency to

automatically withdraw requests for a public hearing by withdrawing the particular controversial rule provision, as the boards are proposing in this matter. The withdrawal of a rule provision cannot be used to negate the hearing requests that have been filed, regardless of the fact that that was the only rule provision that was objected to.

Furthermore, the legislature has set up a procedure under Minn. Stat. § 14.25, subd. 2, which provides for a process for agencies to use when obtaining the withdrawal of hearing requests and notifying the people who requested a hearing of the withdrawals and inviting people to comment on the withdrawal. In this case, the boards were unable to obtain the necessary withdrawals of hearing requests, so they did not use the provisions established under section 14.25, subd. 2. However, in lieu of those provisions, the boards created their own notice and on February 3, 1997, the same day the rules were submitted to the OAH for review, the boards sent the notice out to the people that requested a hearing, informing them that there will be no hearing and that the rules were being submitted to the OAH for review. The explanation given for the cancellation of the hearing was the withdrawal of rule part 6950.1090.

Therefore, even though the agency has the authority to withdraw a rule provision, it does not automatically have the authority to withdraw the hearing requests. The procedures outlined in Minn. Stat. § 14.25, subd. 2, must be followed so that persons are not deprived of an opportunity to participate meaningfully in the rulemaking process. Minn. Stats. § 14.05, subd. 3, can be used in conjunction with the withdrawal procedure outlined in section 14.25, subd. 2, so that an agency may not have to hold a hearing when a controversial rule provision has been withdrawn from the rule proceeding. However, even if a controversial rule provision has been withdrawn, the public may still want to hold a public hearing, and they have that right under chapter 14.

Third, the boards also contend that after withdrawing the only controversial rule provision, the boards should not be required to conduct a hearing on the remaining rules because, under Minn. Stat. § 14.001, a fair balance must be struck between public participation in the formulation of administrative rules and the simplification of the process of judicial review of agency action. The boards maintain that neither the state's or the public's interest would be served by requiring a public hearing in this matter. In addition, Minn. Stat. § 14.25 must be interpreted consistent with the rules of statutory construction under Minn. Stat. § 645.17, which provides that the legislature does not intend a result that is absurd, impossible of execution, or unreasonable.

The administrative law judge agrees that if the public really does not want a hearing then it should not take place. However, in this case, the record does not demonstrate that the public does not want a hearing in this matter because there are still 49 outstanding requests for a public hearing. Furthermore, the legislature has created a fair balance between the public's right to request a hearing and the agency's right to modify or withdraw a rule and obtain the withdrawal of the hearing requests based on those modifications by providing the withdrawal procedures outlined in Minn. Stat. § 14.25, subd. 2.

Finally, the boards contend that public hearings have not always been held in circumstances where the withdrawn rule is severable and does not make the rules substantially different than the proposed rules. The boards have submitted the rule record from the 1993 Board of Optometry case that was reviewed by the Office of the Attorney General (AG). The boards explain that in that rulemaking, a portion of a rule that was the subject of 25 or more requests for a public hearing was withdrawn, and no public hearing was required to be held by the AG.

The administrative law judge agrees that rule part 6950.1090 can be withdrawn and does not make the rule substantially different than the rule as proposed. In response to the rulemaking record of the Board of Optometry, the administrative law judge notes that the decision was made in 1993. Since 1993, the legislature has added the withdrawal procedures to Minn. Stat. § 14.25, subd. 2, 1995 Laws of Minnesota, Ch. 233, Art. 2, Sec. 23. This amendment to section 14.25, shows that the legislature intended a formal process whereby agencies would obtain the withdrawal of requests for a public hearing and allow the public to be notified of those withdrawals and given an opportunity to provide additional comment. In addition, the AG's office does not cite any specific legal authority for their decision not to require a hearing. Therefore, the administrative law judge has declined to follow the ruling made in the rulemaking case of the Board of Optometry.

Based on the above analysis, the administrative law judge finds that the rules are disapproved because of the 49 outstanding requests for a public hearing. To obtain approval of the rules in this matter, the administrative law judge recommends that the boards send out a letter to those people who requested a hearing, asking them to withdraw their request for a hearing based on the official withdrawal of the objectionable rule provision. A copy of the Notice of Withdrawal, as published in the State Register, should be included with the letter.

This action is recommended because the record indicates that the boards have not tried to obtain the withdrawal of hearing requests based on the fact that the controversial rule part has been withdrawn. On November 13, 1996, the boards sent out a notice asking for people to withdraw their hearing requests. However, that notice provided that rule part 6950.1090 would remain as proposed. The notice only briefly mentioned that, in the alternative, the objectionable rule would be withdrawn. It is important to note that, in this case, the Notice of Withdrawal of rule part 6950.1090, was only recently published in the State Register on March 10, 1997. Therefore, given the fact that the objectionable rule provision has now been officially withdrawn, the boards may be able to obtain the necessary withdrawal of hearing requests.

If the boards are able to reduce the hearing requests below 25, then the procedures in Minn. Stat. § 14.25, subd. 2, can be utilized to inform people of the withdrawal of the hearing requests and cancellation of a public hearing. However, if the agency is unable to obtain the withdrawal of hearing requests, then the public has

determined that they want to hold a public hearing on the rules which is their right under chapter 14.

Pursuant to Minn. R. 1400.2300, subp. 6, this order will be submitted to the chief administrative law judge for review. Under Minn. R. 1400.2300, subp. 8, the boards may resubmit the rule to the chief judge for review after changing it and may request that the chief judge reconsider the disapproval.

G.A.B.