

STATE OF MINNESOTA  
OFFICE OF ADMINISTRATIVE HEARINGS

FOR THE DEPARTMENT OF HEALTH  
Division of Environmental Health

In the Matter of the Proposed Rules  
Governing Ionizing Radiation;  
*Minnesota Rules*, Chapter 4732 (repeal of  
*Minnesota Rules*, Chapter 4730)


**ORDER ON REVIEW OF  
RULES UNDER MINNESOTA  
STATUTES, SECTION 14.26**

The Minnesota Department of Health's Environmental Health Division ("Department" or "Agency") is seeking review and approval of the above-entitled rules, which were adopted by the agency without a hearing. Review and approval is governed by Minn. Stat. § 14.26. On August 16, 2007, the Office of Administrative Hearings received the documents that must be filed by the agency under Minn. Stat. § 14.26 and Minn. R. 1400.2310. Based upon a review of the written submissions and filings, and for the reasons set out in the Memorandum below,

**IT IS HEREBY ORDERED:**

1. The agency has the statutory authority to adopt the rules.
2. The complete text of the proposed rules is approved.
3. The rules were adopted in compliance with all procedural requirements of Minnesota Statutes, chapter 14, and Minnesota Rules, chapter 1400, with one exception, as set forth in the Memorandum below. Accordingly, the rules are **DISAPPROVED** as not meeting the procedural requirements of Minnesota Rules, part 1400.2100, item A.
4. Pursuant to Minnesota Statutes, section 14.26, subdivision 3(b), and Minnesota Rules, part 1400.2300, subpart 6, the rules will be submitted to the Chief Administrative Law Judge for review.

Dated: August 30, 2007

  
ERIC L. LIPMAN  
Administrative Law Judge

## MEMORANDUM

Pursuant to Minnesota Statutes, section 14.26, the agency has submitted these rules to the Administrative Law Judge for a review as to legality. The rules adopted by the Office of Administrative Hearings<sup>1</sup> identify several types of circumstances under which a rule that is newly proposed by an agency must be disapproved by the Administrative Law Judge or the Chief Administrative Law Judge. These circumstances include situations in which: (1) a rule was not adopted in compliance with procedural requirements, unless the judge finds that the error was harmless in nature and should be disregarded; (2) the rule is not rationally related to the agency's objectives or the agency has not demonstrated the need for and reasonableness of the rule; (3) the rule is substantially different than the rule as originally proposed and the agency did not comply with required procedures; (4) the rule grants undue discretion to the agency; (5) the rule is unconstitutional<sup>2</sup> or illegal; (6) the rule improperly delegates the agency's powers to another entity; or (7) the proposal does not fall within the statutory definition of a "rule."

The Administrative Law Judge has found one procedural error in the rulemaking process. All other rule parts are approved.

### **Procedural Defect Under Minn. R. 1400.2100, Item A**

Minn. Stat. § 14.25, subd. 1 requires an agency to proceed to a public hearing if, during the 30-day period allowed for comment, 25 or more persons submit to the agency a written request for a public hearing on the proposed rules.

In this rulemaking proceeding, the Department received 53 requests for a public hearing. Of those 53 requests, 49 were from the dental community regarding concerns about utilization logs (proposed Minn. R. 4732.0545) and the retake-reject analysis (proposed Minn. R. 4732.0535).

Based upon these requests, the Department amended the proposed rules to exclude the dental community from these requirements. The Department sent a letter reflecting its intent to amend the rules in this way to each of the dentists who had requested a hearing. In the letter, the agency inquired as to whether the rule amendments addressed the earlier-expressed concerns and whether the responding dentists would be willing to withdraw their requests for a hearing. Ultimately, 38 of the 53 hearing requests were withdrawn.

Because, following the withdrawals, there were fewer than 25 requests for hearing remaining, the Department cancelled the public hearing scheduled for July 10, 2007. The agency cancelled the public hearing by way of a "Notice of Cancellation of Hearing to Persons Who Requested a Hearing" dated July 2, 2007. This Notice was

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<sup>1</sup> See, Minn. R. 1400.2100 (2005).

<sup>2</sup> In order to meet constitutional standards, a rule must be sufficiently specific to provide fair warning of the type of conduct to which the rule applies. See, *Cullen v. Kentucky*, 407 U.S. 104, 110 (1972); *Thompson v. City of Minneapolis*, 300 N. W.2d 763, 768 (Minn. 1980).

sent to all 53 persons who had requested a hearing. The Notice stated that the hearing was canceled because there were fewer than 25 outstanding hearing requests.<sup>3</sup> It further stated that “[t]he Department will proceed to adopt the rules without a hearing and then submit the rules and other required documents to the Chief Administrative Law Judge for review by the Office of Administrative Hearings. The Department will consider all written comments when it adopts the rules.” The Notice concluded by directing “questions or comments concerning the cancellation of the hearing or about the rule adoption process” to the agency contact person.

An agency is required, under Minn. Stat. § 14.25, subd. 2, to take the following action regarding withdrawal of hearing requests:

If a request for a public hearing has been withdrawn so as to reduce the number of requests below 25, the agency must give written notice of that fact to all persons who have requested the public hearing. . . . The notice must explain why the request is being withdrawn, and must include a description of any action the agency has taken or will take that affected or may have affected the decision to withdraw the requests. The notice must also invite persons to submit written comments within five working days to the agency relating to the withdrawal. The notice and any written comments received by the agency is part of the rulemaking record submitted to the administrative law judge under section 14.14 or 14.26. The administrative law judge shall review the notice and any comments received and determine whether the withdrawal is consistent with section 14.001, clauses (2), (4), and (5).

This subdivision applies only to a withdrawal of a hearing request that affects whether a public hearing must be held and only if the agency has taken any action to obtain the withdrawal of the hearing request.

The July 2, 2007 Notice of Cancellation does not comply with the requirements of Minn. Stat. § 14.25, subd. 2. The Notice does not include a description of the action taken by the agency that affected, or may have affected, the withdrawal of the requests. Likewise important, the Notice does not invite persons to submit written comments regarding the cancellation of the hearing, within five working days. Without these required elements of the record, it is not possible to adequately “determine whether the withdrawal is consistent with section 14.001, clauses (2), (4), and (5).”

In order to correct the defect, the Administrative Law Judge recommends that the agency develop a subsequent Notice that complies with Minn. Stat. § 14.25, subd. 2,<sup>4</sup> and mail this revised Notice to each of the persons who requested a public hearing. Once the agency has completed this mailing, and received any comments regarding the withdrawal of the public hearing within the five-business-day comment period, the

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<sup>3</sup> The Notice of Cancellation of Hearing and the Order Adopting Rules differ as to the number of hearing requests (52 or 53) and the number of requests withdrawn (35 or 38), however, these inconsistencies do not affect the substantive outcome as to whether a hearing must be held.

<sup>4</sup> Compare, Minnesota Rulemaking Manual, A Reference Book for the Practitioner (2006) (Notice of Withdrawal of Hearing Requests) (<http://www.health.state.mn.us/rules/manual/chapters.html>).

agency shall resubmit the rule record to the Chief Administrative Law Judge for review. The resubmitted record shall include the revised Notice and any comments received in response to this Notice so that a comparison with Minn. Stat. § 14.001, clauses (2), (4), and (5) may occur.

**E.L.L.**