

STATE OF MINNESOTA
OFFICE OF ADMINISTRATIVE HEARINGS
FOR THE DEPARTMENT OF HUMAN SERVICES

In the Matter of the Proposed Rules of the
Minnesota Department of Human Services
Governing Community Action Agencies
and Community Action Programs;
Minnesota Rules, Chapter 3350
(renumbered Chapter 9571)

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

The Minnesota Department of Human Services ("Department") sought 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 September 25, 2008, 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 which follows below,

IT IS HEREBY ORDERED:

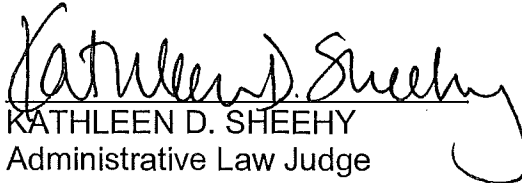
1. The agency has the statutory authority to adopt the proposed rules.
2. The rules are needed and reasonable.
3. The rules were adopted in compliance with the procedural requirements of Minnesota Statutes, Chapter 14, and Minnesota Rules, Chapter 1400, with the exception that is set forth in the Memorandum below. Accordingly, the rules are **DISAPPROVED** as not meeting the requirements of Minnesota Rules, part 1400.2100, item A.
4. The agency shall correct the defect by:
 - (a) Re-sending (by either first-class or electronic mail) a copy of the Notice of Intent to Adopt a Rule, the proposed rules, and the Statement of Need and Reasonableness (SONAR) to the legislators described in Minn. Stat. § 14.116, so that the materials are received no later than **November 6, 2008**; and
 - (b) Re-submitting the proposed rules to this Office with:
 - i. documentary evidence that the Department has complied with step (a), above;

- ii. copies of any comments received during the comment period, including comments from any interested parties; and,
- iii. copies of any responses made by the agency to commentators.

These materials shall be submitted to the Administrative Law Judge for approval following the close of a **second 30-day comment period**.

5. Pursuant to Minn. Stat. § 14.26 (3)(b), and Minn. R. 1400.2300 (6), the rules will be submitted to the Chief Administrative Law Judge for review.

Dated: October 9, 2008


KATHLEEN D. SHEEHY
Administrative Law Judge

MEMORANDUM

Pursuant to Minnesota Statutes, section 14.26, the agency has submitted these rules to the Office of Administrative Hearings for a legal review.

According to state law, there are several circumstances under which a rule must be disapproved by the Administrative Law Judge or the Chief Administrative Law Judge. A proposed rule is defective when it:

- (a) is not adopted in compliance with the procedural requirements of state law, unless the judge finds that the error was harmless in nature and should be disregarded;
- (b) is not rationally related to the agency's objectives or the agency has not demonstrated the need for and reasonableness of the rule;
- (c) is substantially different than the rule as originally proposed and the agency did not comply with required procedures;
- (d) grants undue discretion to the agency, is unconstitutional¹ or illegal;²
- (e) improperly delegates the agency's powers to another entity; or
- (f) falls outside of the statutory definition of a "rule."³

¹ In order to meet constitutional requirements, a rule must be sufficiently specific to provide fair warning of the type of conduct to which the rule applies. See, e.g., *Cullen v. Kentucky*, 407 U.S. 104, 110 (1972); *Thompson v. City of Minneapolis*, 300 N. W.2d 763, 768 (Minn. 1980)

² See, Minn. Stat. §§ 14.05, 14.51 (2006); Minn. R. 1400.2100 (2007).

³ See, Minn. Stat. § 14.02 (2006); Minn. R. 1400.2100 (2007).

Defect in the Proposed Rules

In this matter, the Administrative Law Judge has found one procedural defect in the proposed rules. The defect follows from a failure to provide the Notice of Intent to Adopt a Rule to certain legislators in a timely manner as required by Minn. Stat. § 14.116. While the identified error might seem technical in nature, it involves a violation of an important minimum statutory requirement.

Notice to Legislators

Minn. Stat. § 14.116 requires that, “[w]hen an agency mails notice of intent to adopt rules . . . , the agency must send a copy of the same notice and a copy of the statement of need and reasonableness to the chairs and ranking minority party members of the legislative policy and budget committees with jurisdiction over the subject matter of the proposed rules.” Minn. R. 1400.2080, subp. 6, requires an agency to mail its Dual Notice at least 33 days before the end of the comment period. So, an agency must provide notice to legislators pursuant to Minn. Stat. § 14.116, at least 33 days before the end of the comment period.

In this instance, the Department hand delivered its Dual Notice and the supporting materials to the chairs and ranking minority party members of the legislative policy and budget committees with jurisdiction over the subject matter of the proposed rules on August 26, 2008, one day before the end of the comment period. This is a procedural defect in that it essentially precluded the legislators from commenting on this rulemaking proceeding.

Compliance with the special notice requirements ensures that certain policy leaders are apprised of related rulemaking proceedings, can easily review the language of the proposed rules and have a genuine opportunity to submit timely comments to the agency. The Department’s failure to provide timely notice to the legislators designated by Minn. Stat. § 14.116, constitutes a defect in the proposed rules that is more than a harmless error.⁴ Accordingly, this defect will not be disregarded.

The Department can cure this defect by resubmitting the Dual Notice, the proposed rules, and the SONAR to the appropriate legislators by November 6, 2008, and re-opening a 30-day comment period. The Department is not required to republish its Dual Notice in the *State Register* or re-mail the materials to its rulemaking mailing list or its additional notice mailing list. However, the Department must accept comments and requests for hearing from the legislators as well as any other interested member of the public during this period. If the second 30-day comment period produces 25 or more requests for a hearing, then the Department will be required to proceed to hearing.

⁴ See, Minn. Stat. § 14.15 (5) (2006).

Recommended Technical Corrections

The Administrative Law Judge recommends the following technical corrections to the rules. The recommendations are not defects in the rules, but are merely recommendations for correction to the rules that the agency may adopt if it chooses to do so. These changes would not make the rules substantially different from those published in the State Register on July 28, 2008.

Minn. R. 3350.0040, subpart 3, item C

The Administrative Law Judge recommends that the Department amend item C, as follows: "list of board of directors which, including their addresses and telephone numbers, that indicates officers and committee memberships, ~~tenure on the board, and the sector each director represents as required by the act.~~"

This amendment would make the proposed rules consistent with the amendment made at rule part 3350.0040, subpart 1, item C, and would eliminate confusion among community action agencies as to the recognition records that must be retained and the level of detail required in those records. The recommended change does not make subpart 3, item C substantially different than originally published in the State Register.

Minn. R. 3350.0100, subpart 3

The Administrative Law Judge recommends that the Department correct a typographical error in the last sentence of subpart 3. The sentence should read as follows: "The department will also send the grantee a notice of termination and comply with the other procedural requirements of parts 3350.0060, subpart 3 or ~~4~~ 4a."

Subpart 4 of rule part 3350.0060 is proposed for repeal and proposed subpart 4a will take its place. The proposed rule should be amended at subpart 3 to reflect that change. The recommended change does not make subpart 3 substantially different than originally published in the State Register.

Minn. R. 3350.0100, subpart 4

The Administrative Law Judge recommends that the Department correct a typographical error in the last sentence of subpart 4. The reference to part 3350.0160, subpart 6, item D, should instead be a reference to part 3350.0170, subpart 6, item D.

This change is consistent with the current rule language of part 3350.0100, subpart 2, as well as the intent of the Department to merely reorganize the language of part 3350.0100, subpart 2 into subparts 3 and 4 for ease of understanding. The

recommended change does not make subpart 4 substantially different than originally published in the State Register.

Minn. R. 3350.0170, subpart 5

The Administrative Law Judge recommends the following changes, or substantially similar changes, to subpart 5:

A previously funded grantee must submit an application within 45 calendar days of the application deadline or the waiver deadline established by the department, or the department will deny the application under subpart 6. If a submitted application remains incomplete or noncomplying for 30 calendar days after the department's request for a revision of the application, supplementary information, or other required documents or 45 calendar days from ~~an applicable~~ the application deadline or waiver deadline, whichever period is greater, the department will deny the application under subpart 6.

This change will improve the readability of subpart 5 and clarify the intent of the Department. The recommended change does not make subpart 5 substantially different than originally published in the State Register.

Minn. R. 3350.0170, subpart 6, item D

The Administrative Law Judge recommends the following change to subpart 6, item D: "The department's denial of an application based on items A, B, and C is cause for termination of available funds for two years under part 3350.0060, subpart 1, item F E."

The proposed rules amend part 3350.0060, subpart 1 so that item F no longer exists. This change reflects a proposed change made to the last sentence of subpart 6, item D, in which this same correction was made. The recommended change does not make subpart 6, item D substantially different than originally published in the State Register.

K. D. S.