

STATE OF MINNESOTA
OFFICE OF ADMINISTRATIVE HEARINGS
FOR THE MINNESOTA DEPARTMENT OF HEALTH

In the Matter of the Proposed Rules of
the Minnesota Department of Health
Relating to the Minnesota Asbestos
Abatement Rules, *Minnesota Rules*
parts 4620.3100 through 4620.3415
and 4620.3580.

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

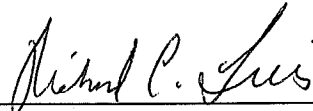
The Minnesota Department of Health ("Department") is seeking review and approval of the above-entitled rules, which were adopted by the agency without a hearing. Review and approval is governed by Minn. Stat. § 14.26. On June 23, 2008, the Office of Administrative Hearings received the documents that must be filed by the agency under Minn. Stat. § 14.26 and Minn. R. 1400.2310. The Department supplemented the record on July 14, 2008. Based upon a review of the written submissions and filings, and for the reasons set out in the Memorandum which follows,

IT IS ORDERED:

1. The agency has the statutory authority to adopt the rules.
2. The rules were adopted in compliance with all procedural requirements of Minnesota Statutes, chapter 14, and Minnesota Rules, chapter 1400.
3. The rules are needed and reasonable, with the exception of the failure of the rules to define the term "verifiable evidence" as it is used in the rules. Accordingly, the rules are **DISAPPROVED** as not meeting the requirements of Minnesota Rules, part 1400.2100, item D.

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: July 15, 2008



RICHARD C. LUIS
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 Hearings¹ identify several types of circumstances under which a rule must be disapproved by the Administrative Law Judge or the Chief Administrative Law Judge. These circumstances include situations in which 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; 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; the rule is substantially different than the rule as originally proposed and the agency did not comply with required procedures; the rule grants undue discretion to the agency; the rule is unconstitutional² or illegal; the rule improperly delegates the agency's powers to another entity; or the proposal does not fall within the statutory definition of a "rule."

In the present rulemaking process, the Administrative Law Judge finds that the proposed rule language requiring "verifiable evidence" of education and training grants the agency discretion beyond what is allowed by law, in violation of Minn. Rules part 1400.2100.D. The statutory authority for the Commissioner of Health to adopt these rules is found at Minnesota Statutes, section 326.78, subdivision 1.

In this rulemaking proceeding, the Department is substituting the former requirement that applications for certification or renewal of certification for asbestos worker, supervisor, management planner or project designer be accompanied by a copy of certain course diplomas with a new requirement that such applications be accompanied by "verifiable evidence" of the relevant course diplomas.³ The phrase "verifiable evidence" is not defined. Without definition,

¹ Minnesota Rules part 1400.2100.

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

³ See proposed Minn. Rules 4620.3300, subpts. 4.C. and 5.B.; 4620.3310, subpts. 5.C. and 6.B.; 4620.3330, subpts. 5.C. and 6.B.; 4620.3340, subpts. 5.C. and 6.B.; and 4620.3350, subpts. 5.C. and 6.B.

“verifiable evidence” is subject to interpretation so broad that it could lead to widely differing interpretations by the Department over time. Nor does the phrase, undefined, provide guidance to an applicant as to what sort of documentation might be required. The “copy of” requirement in the old rule no longer exists, suggesting that something else, or something less, might be required. On the other hand, it appears that more evidence than simply the applicant’s statement is required, because the application specifically calls for “evidence of your . . . course certificate(s).”⁴ This failure to define what is meant by “verifiable evidence” constitutes a defect in the proposed rule.

The Department can cure the defect by adding a new subpart to Minnesota Rules part 4620.3100, the Definitions section of chapter 4620. This subpart would define the term “verifiable evidence.” The Administrative Law Judge recommends the following definition. However, while some definition of the term “verifiable evidence” is required to cure the defect discussed in this order, the Administrative Law Judge is not requiring the Department to adopt this exact language if the Department determines that other, similar language would more accurately describe what it intends to permit as “verifiable evidence.”

Verifiable evidence. “Verifiable evidence” means a signed statement verifying that the applicant has completed a training course or a refresher course. The statement may be provided in hard copy or electronic form or may be other electronic evidence such as an excerpt from a database. The statement or electronic evidence must be submitted by the provider of a training course, or by a government agency in another state charged with certifying or licensing asbestos workers if the course was taken in another state.

This addition to the proposed rule would be needed and reasonable and is not a substantial change from the rule as proposed.

R.C.L.

⁴ Asbestos Certification Application, Exhibit B attached to Statement of Need and Reasonableness.