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STATE OF MINNESOTA
OFFICE OF ADMINISTRATIVE HEARINGS

FOR THE BOARD OF CHIROPRACTIC EXAMINERS

In the Matter of the Proposed Rules of the Board of Chiropractic Examiners Governing License Reinstatement; *Minnesota Rules, Chapter 2500*

ORDER ON REVIEW OF RULES UNDER MINNESOTA STATUTES, SECTION 14.26

The Minnesota Board of Chiropractic Examiners ("Board") 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 September 10, 2009, 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,

IT IS HEREBY 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, with two exceptions as set forth in the Memorandum below. Accordingly, the rules are **DISAPPROVED** as not meeting the requirements of Minnesota Rules, part 1400.2100, item A.

3. 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.

4. The Board will develop and submit a new Additional Notice Plan to the Administrative Law Judge for review and approval prior to re-publishing its Request for Comments or its Notice of Intent to Adopt a Rule Without a Public Hearing.

Dated: September 24, 2009

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[1] 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 unconstitutional[2] 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 has found two procedural defects in the rules. Because the procedural defects require the Board to return to the earlier part of the process beginning with either the Request for Comments or the Notice of Intent to Adopt a Rule (With or) Without a Hearing, the Board will have the opportunity to make changes to the rule before publishing it again. Therefore, the Administrative Law Judge has refrained from making formal findings in this report regarding substantive defects in the rule. Instead, the Administrative Law Judge has made several recommendations for revisions of the proposed rules. These recommendations address concerns which might have otherwise been found to be substantive defects in the rule, had the procedural errors not required the Board to begin the rulemaking process again. Lastly, the Administrative Law Judge has included several suggestions to address technical concerns as to the phrasing of certain rules. These technical items are merely recommendations for the Board's consideration. The text of those rules is not legally defective. Each of these matters is addressed in turn below.

Procedural Defects under Minn. R. 1400.2100, Item A

Additional notice

The Administrative Law Judge finds that a procedural error has occurred in this rulemaking process. Minnesota Statutes section 14.22 requires that, in addition to publishing proposed rules and a Notice of Intent to Adopt Rules Without a Public Hearing in the State Register and mailing the proposed rules and Notice to the agency's rulemaking mailing list, the agency must also "make reasonable efforts to notify persons

[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).

or classes of persons who may be significantly affected by the rule by giving notice of its intention in newsletters, newspapers, or other publications, or through other means of communication. Minnesota Statutes section 14.23 requires that the agency describe its "efforts to provide additional notification . . . or . . . explain why these efforts were not made" in its Statement of Need and Reasonableness (SONAR).

In its SONAR, the Board stated that it maintains a rulemaking list and mails notification to everyone on that list. Included on the rulemaking list is the "professional association which represents the interests of the profession at large." In addition, the Board described its additional notice plan, stating that it mails its newsletter to all licensees as well as to others who express interest in getting the newsletter. The newsletter routinely includes "[n]otices regarding rule subject matter and invitations to acquire information on rules being promulgated . . . ." The Board also asserts that it maintains a website which includes "all statutorily required postings."[3]

Other than these efforts, the Board states that "no extraordinary methods were utilized for notification" because the Board maintains no reliable contact information on those persons who do not keep current their license status with the Board.[4]

The Administrative Law Judge finds that the Board's additional notice plan was insufficient to meet the requirements of Minn. Stat. § 14.22. This procedural error is not merely technical in nature. The failure to develop and implement an additional notice plan has deprived interested persons or entities of an opportunity to participate meaningfully in the rulemaking process.[5]

More problematic still, the Board's failure to undertake a wider notification effort is a recurring issue. The same defect was found in the Board's next most recent rulemaking process. *See, In the Matter of the Proposed Rules of the Board of Chiropractic Examiners Governing Records Retention and Access, Minnesota Rules, Chapter 2500,* OAH Docket No. 70-0901-19396-1 (2007).

According to the SONAR, the proposed rule was drafted to establish consistent conditions for reinstating licenses that make the rules easier to apply and enforce.[6] The proposed rules describe the license reinstatement process for individuals whose licenses have been terminated, voluntarily retired, or placed in emeritus status. These proposed rules raise a number of policy issues. The Board may have been well served in this process by the input from the broader affected community.

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[3] SONAR at page 11. The Administrative Law Judge notes that the information regarding rulemaking that appeared in the Board's Spring-Summer 2008 newsletter was general in nature and not specific to this rulemaking effort.

[4] *Id.*

[5] *See* Minn. R. 1400.2100 A. and Minn. Stat. § 14.26, subd. 3 (d).

[6] SONAR at page 2.

The Administrative Law Judge finds that the Board's failure to include groups such as retired or terminated licensees, institutions that offer continuing Chiropractic education, public health associations, health care consumer associations or companies that offer chiropractic malpractice insurance in Minnesota, renders the additional notice plan defective.

The additional notice plan requirement furthers several of the important purposes of the Administrative Procedure Act, including those which are to:

(a) provide oversight of powers and duties delegated to administrative agencies;
(b) increase public accountability of administrative agencies;
(c) increase public access to governmental information; and to
(d) increase public participation in the formulation of administrative rules.[7]

While the Legislature was quick to point out that these purposes do not necessarily result in separate guarantees of substantive rights for regulated parties, it was the lawmakers' collective "expectation that better substantive results will be achieved in the everyday conduct of state government by improving the process by which those results are attained."[8] It is widely acknowledged that direct lines of two-way communication, between government agencies and regulated parties, benefit the agency, the regulated parties and the broader public.[9]

The rules of the Office of Administrative Hearings (OAH) permit an agency to ask OAH for prior approval of the additional notice plan before publishing the request for comments or the notice of proposed rules.[10] Once the additional notice plan is approved, the approval is final and the agency can proceed with the rulemaking knowing that an inadequate notice plan will not require the agency to return to the early rulemaking stages. This optional prior approval procedure is frequently used by agencies and boards – and even by the Board of Chiropractic Examiners in the past.[11]

In this case, however, the Board did not seek prior approval of its additional notice plan. Had it done so, the shortcomings in its notice plan would have been

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[7] *See, Minnesota Statutes* § 14.001 (1), (2), (4) and (5) (2008).

[8] *See, Minnesota Statutes* § 14.001 (2008).

[9] *See, U. S. Dep't of Labor v. Kast Metals Corp.*, 744 F.2d 1145, 1152 n. 11 (5th Cir. 1984) (There is a "widely-shared recognition that administrative agencies need direct lines to the public voice because of their distance from the elective process"); *Jewish Community Action, et al. v. Comm'r of Public Safety*, 657 N.W.2d 604, 610 (Minn. App. 2003) ("an administrative agency needs public input to remain informed"); *accord,* U.S. Senate Report on the federal Administrative Procedure Act of 1946, S.Doc. No. 248, 79th Cong., 2d Sess. 19-20 (1946) ("Public participation . . . in the rulemaking process is essential in order to permit administrative agencies to inform themselves, and to afford safeguards to private interest").

[10] Minn. R. part 1400.2060

[11] *See, In the Matter of the Request for Comments for Proposed Rules of the Minnesota Board of Chiropractic Examiners Relating to Animal Chiropractic,* OAH Docket No. 70-0901-20002-1 (2008).

identified and remedied at an earlier stage of the process. Moreover, had the Board circulated its rulemaking proposals to a wider set of outside stakeholders (like those that are suggested above), their input might have helped the Board to identify and remedy the defects in its proposal before it was submitted to this Office for review.

30-day comment period

In accordance with Minn. Stat. § 14.22, subd. 1 (a), and Minn. R. 1400.2080, subp. 3.B, the Notice of Intent to Adopt Rules must state that the public has at least 30 days to comment upon the proposed rules from the date of publication in the State Register. The Board's Notice was published in the State Register on June 1, 2009, and stated that the comment period ended on June 30, 2009. "To count a time period, the day of . . . publication . . . is not counted and the last day of the time period is counted."[12] Accordingly, the Board's comment period should have ended no sooner than July 1, 2009. A 29-day comment period is a procedural defect.

A procedural defect can be considered a harmless error under Minn. Stat. § 14.26, subd. 3 (d), if: "(1) the failure did not deprive any person or entity of an opportunity to participate meaningfully in the rulemaking process; or (2) the agency has taken corrective action to cure the error or defect so that the failure did not deprive any person or entity of an opportunity to participate meaningfully in the rulemaking process."

While mindful that the tabulation of the comment period most likely followed from an arithmetic error, the defects in the notice plan cloud the determination as to the impact of this error. On this record, it is not clear whether the Board received no comments to its rulemaking proposals because it did not circulate the proposals widely, or because it closed the comment period too soon. Thus, the record does not permit a finding that the error "did not deprive any person or entity of an opportunity to participate meaningfully in the rulemaking process."

Substantive Concerns With the Proposed Rules

Use of "may" and Board discretion

In several parts throughout the text of the proposed rules the Board states that a license "may" be reinstated subject to certain conditions. *See,* Proposed Minn. R. 2500.1900, items A, C, and D, and 2500.2110, items B, D, and E. The Office of Administrative Hearings disfavors the use of the word "may" because it does not inform regulated parties when – if at all – the Board will apply administrative rules.

This same shortcoming also springs from other phrasing used by the Board. In referring to the Special Purpose Examination in Chiropractic, for example, the Board proposes to permit applicants to complete "other examination[s] approved by the

[12] Minn. R. 1400.2030, subp. 1.

board." *See,* Proposed Minn. R. 2500.1900, items D and E, and 2500.2110, items E and F.

The Administrative Law Judge is mindful that in such an instance the Board is carrying forward this phrasing from existing rules; repeating this form in a new context. However, the fact that a format is old does not necessarily make it clear. The Board may wish to consider changing this language prior to re-noticing the proposed rules. For example, changing "may" to "shall," and indicating that the license will be restored at the election of the applicant and fulfillment of the required conditions, would contribute significantly to the interpretation and administration of the rules. The Board may also wish to specify which "other examinations" it will approve.

Other Technical Concerns

The Administrative Law Judge recommends several technical corrections to the rules. The technical corrections are not defects in the rules. The suggested corrections are recommendations that the agency may choose to adopt in order to aid in the administration of the rule. Each of the changes recommended below is needed and reasonable and would not be a substantial change from the rules as proposed.

1. Part 2500.1900

Change Item B as follows:

An applicant whose license has been terminated for a period of greater than five years and who can verify continual practice elsewhere during that time must, in addition to <u>following the procedures in</u> item A, complete the board's jurisprudence examination.

This phrasing clarifies the sentence and makes it parallel to the language at part 2500.2110, item C.

Change the first sentence in the final paragraph of part 2500.1900 as follows:

Any <u>continuing education</u> units acquired in another jurisdiction for the purposes of license renewal may be applied to item A, B, or C.

This phrasing more clearly states the intent of the Board.

2. Part 2500.2110

Change Item F as follows:

> At the election of the applicant, the board shall waive any of the continuing education requirements in items B to ~~E~~ D, upon successful completion of the Special Purposes Examination in Chiropractic . . . within the 12 months preceding the application.

This statement is more accurate because item E does not contain any continuing education requirements. The change also makes the sentence parallel to the meaning of the language at part 2500.1900, item E.

Change the first sentence in the final paragraph of part 2500.2110 as follows:

> Any ~~hours~~ continuing education units acquired in another jurisdiction, for the purposes of license renewal, may be applied to items B, C, and D.

The first change mirrors the recommended change to part 2500.1900 discussed above and more clearly states the intent of the Board. Continuing education is measured in terms of units, not hours.[13] Similarly, the second recommended addition to the rules mirrors the language in the final paragraph of part 2500.1900. This change should avoid confusion in the implementation of the proposed rules.

E. L. L.

[13] Minn. R. 2500.0100, subp. 4a.