

MINNESOTA OFFICE OF ADMINISTRATIVE HEARINGS

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April 11, 2008

Patricia Munkel-Olson
Construction Codes and Licensing Attorney
Department of Labor and Industry
443 Lafayette Road North
St. Paul, MN 55155

RE: In the Matter of the Proposed Rules of the State Boxing
Commission Relating to Boxing; Minnesota Rules, Chapter
2201.
OAH Docket No. 70-1008-19587-1;
Governor's Tracking No. AR 379.

Dear Ms. Munkel-Olson:

After reviewing the above-referenced rules, as modified by the agency on March 7, 2008, the Administrative Law Judge (ALJ) has made three negative procedural findings, all determined to be harmless errors under Minn. Stat. § 14.26, subd. 3(d)(1). Accordingly, the rules are approved as to legality. The rules as modified are not substantially different than the rules as published in the State Register on December 31, 2007. The Administrative Law Judge, however, recommends several corrections to the rules. In discussions with OAH Staff Attorney Maria Lindstrom, the Commission has indicated that it is amenable to making the changes described below, or changes substantially similar to those described below. OAH approval of the rules is contingent upon the Commission making those amendments to the proposed rules.

Procedural Defects – Harmless Errors

A. Cost Analysis Under Minn. Stat. § 14.127

At the time the Commission submitted the rule record to OAH for review, it had not made a determination about whether the cost of complying with the proposed rule in the first year after it takes effect will exceed \$25,000 for any one small business with less than 50 full-time employees or any one city with less

- (a) The Commission may adopt rules that include standards for the physical examination and condition of boxers and referees.
- (b) The Commission may adopt other rules necessary to carry out the purposes of this chapter, including, but not limited to, the conduct of boxing exhibitions, bouts, and fights, and their manner, supervision, time, and place.²

The Commission adopted the rules of the Association of Boxing Commissions (ABC) at a duly-called Commission meeting. At that time, the Commission believed that it had satisfied the rulemaking requirements of Minn. Stat. § 341.25 (a) and (b). Subsequently, the Commission became aware that it must follow the rulemaking procedures of the Administrative Procedure Act (APA) in order to adopt rules that have the full force and effect of law.³ At a meeting held on December 6, 2007, the Commission took action to engage in rulemaking activities to adopt rules pursuant to the procedural requirements of the APA, and resolved to authorize the Executive Director of the Commission to act on its behalf.

As noted above, the Commission's statutory authority for the proposed rules became effective on July 1, 2006. Accordingly, the Commission should have published its Request for Comments on or before September 1, 2006, as required by Minn. Stat. § 14.101. The Commission did not publish the Request for Comments until December 17, 2007, when it made a good faith effort to comply with Minn. Stat. § 14.101. The Request for Comments included the draft rule language.

The question is whether this defect regarding publication of the Request for Comments is a harmless error. 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."

The language of § 14.101 is directory in nature and not mandatory. There is no specified penalty under 14.101 for failure to comply. This differs from § 14.125, which explicitly states that an agency's authority will expire if it fails to comply with the statute.⁴ Presumably, the purpose of the requirement that an

² See Minn. Stat. § 341.25 (a) and (b). A year later, the Commission received additional statutory authority to adopt rules, but that authority is not relevant to these proposed rules. See 2007 *Minn. Laws*, Chapter 135, Article 3, Sections 30-37.

³ The Governor directed the Department of Labor and Industry to assist the Commission with adopting these rules under the APA.

⁴ "An agency shall publish a notice of intent to adopt rules or a notice of hearing within 18 months of the effective date of the law authorizing or requiring rules to be adopted, amended, or repealed. If the notice is not published within the time limit imposed by this section, the authority for the rules expires."

indicate that the Legislature did not support the idea of disapproving a rule based solely on problems with the Request for Comments.

Under all of these circumstances, the ALJ finds that the agency's procedural error did not deprive any person or entity of an opportunity to participate meaningfully in the rulemaking process.

Amendments to Proposed Rules to Obtain ALJ Approval

The Commission has agreed to make the following language changes to the proposed rules to obtain the approval of the Administrative Law Judge. These changes reflect the intent of the Commission, are consistent with Minnesota Statutes, Chapter 341, and do not make the rules substantially different from those published in the State Register on December 31, 2007.

Minn. R. 2201.0020, subpart 3

The Administrative Law Judge recommends the following correction to the rules to clarify and enhance the definition at subpart 3: " 'Association of Boxing Commissions' or 'ABC' means the Association of Boxing Commissions of which the Minnesota Boxing Commission is a member."

Such a clarification is needed and reasonable because of an error in the statute referencing the "American Boxing Commission."⁵ The change does not make subpart 3 substantially different than originally published in the State Register.

Minn. R. 2201.0020, subparts 4 and 14

The Administrative Law Judge recommends the following changes to the definitions of boxer at subpart 4 and tough person at subpart 14:

"Boxer" means an individual that practices the act of attack and defense with the fists, using padded gloves. ~~Where applicable, boxer includes an individual who engages in the practice of boxing by using hands, feet, or both in any manner.~~

"Tough person," "tough man," or "tough woman" means ~~an individual~~ a boxer who engages in the practice of boxing by using hands, feet, or both in any manner."

The ALJ finds the use of the phrase "where applicable" in the definition of boxer to be confusing, even though it does mirror the language of the statute. By making the changes noted above, the ALJ finds that the rule more clearly

⁵ The Commission indicated that it has proposed legislation to correct this error in the current legislative session.

Minn. R. 2201.0300, subpart 2

Item A

Subpart 2 describes what the Commission requires of a boxer or tough person when applying for a license. To make the connection between the statutory licensing requirements and the rule clearer, the ALJ recommends the following change to item A: "In addition to the results of a current medical examination as required by Minn. Stat. § 341.30, subd. 4 (c), each applicant for a boxer license must submit to the Commission evidence of testing and results for the following conditions"

This change is consistent with the intent of the Commission and the language of the statute, is needed and reasonable, and does not make subpart 2, item A substantially different than originally proposed.

Item B

Item B specifically addresses applicants for a license who have received a knockout judgment in an immediately preceding contest, and requires those individuals to submit to the Commission the results of an MRI, MRA, or EEG. The ALJ recommends that the Commission modify the language of item B (1) at lines 4.1 and 4.2 in the following, or substantially similar, manner: "The MRI test and the results must be dated between the date of the knockout judgment and the date of the application, but may be up to five calendar years old."

Furthermore, to reflect the intent of the Commission, a modification to the language at lines 4.6 and 4.7 is also necessary in the following, or substantially similar, manner: "The test and the result of the MRA or the EEG must be dated between the date of the knockout judgment and the date of the application, but must be dated within the previous calendar year from the date of application."

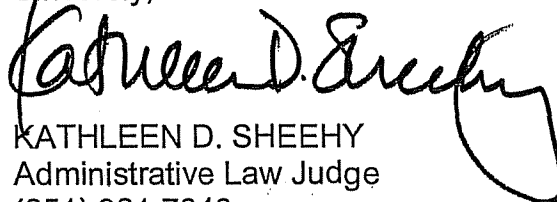
These changes are consistent with the intent of the Commission, are needed and reasonable, and do not make subpart 2, item B substantially different than originally proposed.

Item C

Item C describes what is required of applicants who are 35 years of age or older, in addition to the requirements of item A. The Commission has indicated that the language at lines 4.15 and 4.16 is incorrect and wishes to substitute the language at 3.17 and 3.18, which provides, "Each test and the results must be dated within the previous calendar year from the date of the application." In addition to this change, the ALJ also recommends a minor modification at item C (1), which could read more accurately if changed to "physical examination."

With the contingent approval of these rules, our office is sending this letter to the agency for its implementation of the suggested corrections. The agency rule record is enclosed. Please contact Maria Lindstrom at (651) 361-7841 with any questions and to inform OAH when the Commission has made the required changes discussed above.

Sincerely,

A handwritten signature in black ink, appearing to read "Kathleen D. Sheehy". The signature is fluid and cursive, with a large loop at the end of the last name.

KATHLEEN D. SHEEHY
Administrative Law Judge
(651) 361-7848

cc: Office of the Governor
Office of the Attorney General
Legislative Coordinating Commission
Revisor of Statutes