

STATE OF MINNESOTA  
OFFICE OF ADMINISTRATIVE HEARINGS

FOR THE DEPARTMENT OF LABOR AND INDUSTRY

In the Matter of the Proposed Rules of the  
Department of Labor and Industry  
Governing Manufactured Homes  
*Minnesota Rules, Chapter 1350*

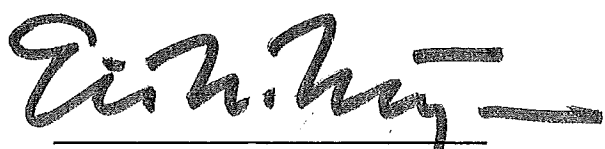
**ORDER ON REVIEW OF  
RULES UNDER MINNESOTA  
STATUTES, SECTION 14.26**

The Minnesota Department of Labor and Industry ("Department") is seeking review and approval of the above-entitled rules, which were adopted by the Department without a hearing. Review and approval is governed by Minn. Stat. § 14.26. On July 23, 2009, the Office of Administrative Hearings received the documents that must be filed by the Department 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 Department 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 following rule parts: Part 1350.6710, subparts 2, 3, and 7. Accordingly, these rule parts are **DISAPPROVED** as not meeting the requirements of Minn. Stat. § 14.06 (a) and Minnesota Rules part 1400.2100, items D and E.
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 6, 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<sup>1</sup> 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<sup>2</sup> 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."

### I. Defect in Part 1350.6710, Subpart 2, Item C

Subpart 2 addresses the approval process for instructors of manufactured home installer continuing education courses. Item C sets forth a list of requirements for instructors. Subitem 1 requires an instructor to:

- (1) adequately address the continuing education technical area or areas to be covered for the assigned classroom hours of continuing education credit, as approved by the commissioner, identified in subpart 1;

As written, this requirement is unclear. The proposed rule does not make clear whether the phrase "as approved by the Commissioner" relates to an earlier action of the Department approving the continuing education course or a future determination of the Department regarding the quality of the instructor's presentation.

Likewise problematic, the proposed language appears to grant the Commissioner discretion to disapprove applications for course credit, if, for whatever reason, the Commissioner concludes the course is "inadequate." Agencies are not permitted to grant upon themselves such standard-less grants of discretion. These actions are in excess of the Department's statutory authority and constitute defects in the proposed rules.<sup>3</sup>

The Administrative Law Judge proposes the following, or substantially similar, change to correct the defect and better express the Department's regulatory intent:

<sup>1</sup> Minn. R. 1400.2100 (2007).

<sup>2</sup> In order to be constitutional, 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).

<sup>3</sup> See, Minn. R. 1400.2100 (D) (2007).

(C) Instructors shall:

(1) thoroughly address the continuing education subjects approved by the Commissioner pursuant to subpart 3, within the credit hours allotted by the Commissioner;

This change, or a substantially similar one, is needed and reasonable and is not a substantial change from the rules as proposed.

## II. Defect in Part 1350.6710, Subpart 3, Item A

Subpart 3 addresses continuing education course approval. Specifically, item A directs:

Courses for manufactured home installer continuing education must be approved in advance by the commissioner, pursuant to this subpart, and will be approved on the basis of the applicant's compliance with this subpart. The commissioner shall provide the final approval regarding the course offering. The Commissioner reserves the right to audit course offerings with or without notice to the instructor. The burden of demonstrating that courses impart appropriate and related knowledge falls on the person seeking the approval or credit. *The commissioner shall deny future course offerings if they are found not to comply with this part.*

The italicized text is ambiguous and unclear. If the Commissioner is claiming the power to disapprove a course because, at some future time, the materials submitted in support of the application for approval are inadequate, the sentence is redundant and unnecessary. The proposed rule makes clear that the "applicant's compliance with this subpart" is the basis upon which course approval determinations are made – now and in the future. If the Commissioner is claiming the power to deny future approval of a course that is now offered, because of an instructor's present noncompliance with the rules of this subpart, the rule should make this possibility plain. A revised rule should likewise set forth the procedural rights and opportunities, if any, that are afforded to an instructor who is the subject of such a noncompliance determination.

Either of these changes is needed and reasonable and would not be a substantial change from the rules as proposed.

## III. Defect in Part 1350.6710, Subpart 7

Subpart 7 addresses withdrawal of course approval and states as follows:

Failure to comply with the requirements of subparts 2 to 6 *may* result in the commissioner's withdrawal of the approval for the continuing education credit and hours for the three-year renewal period, qualifications

as an approved instructor, or approval for a course offering. *Nothing in this part limits the authority of the commissioner from withdrawing an approval pursuant to this part for actions not specifically described in this part.*

The italicized language of subpart 7 grants the Department broad and unfettered discretion as to the bases for withdrawing approval for instructors, continuing education courses and earlier-earned credit hours. As stated above, such standard-less grants of discretion to itself are in excess of the Department's statutory authority and constitute defects in the proposed rules.

The Department has an obligation to provide fair notice to regulated parties and the public as to how its regulatory powers will be exercised.<sup>4</sup> These defects can be cured by changing "may" to "shall," or, in the alternative, adding language to proposed subpart 7 which sets forth the criteria that the Commissioner will apply in determining that withdrawal of an earlier-granted approval is appropriate. In either case, the Department should delete from the last sentence the words "for actions not specifically described in this part."

Such changes would be needed and reasonable and would not be substantial changes from the rules as proposed.

#### **IV. Recommended Technical Corrections**

The Administrative Law Judge recommends several technical corrections to the rules. The technical corrections are not defects in the rules, but are recommendations for corrections to the rules that the agency may adopt if it chooses to do so 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 originally proposed.

##### **1. Part 1350.2900, Table**

Change the language at lines 12.23 and 12.24<sup>5</sup> as follows:

"More than 500 550;"

This corrects a typographical error in the Table.

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<sup>4</sup> See, Minn. Stat. § 14.06 (a) (2008) ("Each agency shall adopt rules, in the form prescribed by the revisor of statutes, setting forth the nature and requirements of all formal and informal procedures related to the administration of official agency duties to the extent that those procedures directly affect the rights of or procedures available to the public").

<sup>5</sup> All references to page and line numbers are to the Revisor's Draft RD 3775 (April 27, 2009).

**2. Part 1350.6400**

The Department wishes to make the following editorial modification to this rule part:

All remittances shall be in the form of checks or money orders payable to ~~“Minnesota Commissioner of Finance”~~ “Minnesota Department of Labor and Industry”; and addressed to: Department of Labor and Industry, 443 Lafayette Road North, Saint Paul, Minnesota 55155.

This change was discussed in the Statement of Need and Reasonableness, but the rule part was inadvertently removed from the last Revisor’s draft of the proposed rules. The Administrative Law Judge finds that this omission does not amount to a defect in the rule because the omission did not deprive regulated parties of an opportunity to participate in the rulemaking proceeding. Furthermore, the proposed change of payee on checks and money orders concerns only the internal management of the Department and does not directly affect the rights or procedures available to the public.

**3. Part 1350.6700**

Change the last sentence of Subpart 1 as follows:

~~Regulations~~ Registrations shall be renewed every three years.

This change corrects (what is assumed to be) a typographical error in the proposed rule.

**4. Part 1350.6705**

Change Subpart 4 as follows:

“Instructor” means a person approved by the commissioner pursuant to part 1350.6710, subpart 2, to act as a trainer, teacher, or presenter of approved manufactured home installer continuing education courses.

This change clarifies that approval of instructors is guided by the standards of part 1350.6710, subpart 2, and not open to the discretion of the Commissioner.

**5. Part 1350.6710**

a. The language of Subpart 2, item A, and the last sentence of Subpart 2, item B, subitem 3, appear to be duplicative. If so, the Department should delete one of the sentences.

b. Subpart 3, item B, subitem 3 of part 1350.6710 states the following:

Following the commissioner's review of the application and course materials, the commissioner shall provide the instructor with a final determination regarding course approval and the number of approved continuing education classroom hours assigned to the course.

The Administrative Law Judge recommends that the Department add language to subitem 3 that specifies a time period within which the Commissioner will render a determination on the request for course approval. In addition, the Administrative Law Judge suggests that the Department add a requirement that the Commissioner's final determination regarding course approval and number of classroom hours be in writing.

**E. L. L.**