

OAH Docket No. 7-1006-20130-1
Governor's Tracking No. AR 402

STATE OF MINNESOTA
OFFICE OF ADMINISTRATIVE HEARINGS

FOR THE BOARD OF ARCHITECTURE,
ENGINEERING, LAND SURVEYING,
LANDSCAPE ARCHITECTURE, GEOSCIENCE
AND INTERIOR DESIGN

In the Matter of the Proposed Rules of
the Board of Architecture, Engineering,
Land Surveying, Landscape
Architecture, Geoscience and Interior
Design

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

The Board of Architecture, Engineering, Land Surveying, Landscape Architecture, Geoscience and Interior Design ("Board") is seeking review and approval of the above-entitled rules, which were adopted by the Board without a hearing. Review and approval is governed by Minnesota Statutes § 14.26. On April 9, 2009, the Office of Administrative Hearings received the documents that must be filed by the Board under Minnesota Statute § 14.26 and Minn. R. 1400.2310. The Board supplemented the record on April 20, 2009 with attachments to Enclosures G and P which were inadvertently omitted with the initial filing of documents for review. Based upon a review of the written submissions and filings, and for the reasons set out in the Memorandum which follows,

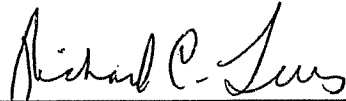
IT IS ORDERED:

1. The Board 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 the exception of a single harmless error as described in the Memorandum, below.

3. The rules are needed and reasonable, with the exception of the failure of the rules to designate the Board as the authority which fixes the standards for registration of Architects in Minn. R. 1800.1200. Accordingly, that rule part is **DISAPPROVED** as not meeting the requirements of Minn. R. 1400.2100, items D and F.

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: April 21, 2009



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."

Defect in Rule 1800.1200

The Administrative Law Judge finds that language in this proposed rule stating that "[t]he applicant shall attain the uniform passing grade established through a psychometrically acceptable standard-setting procedure" constitutes a defect because it does not comply with applicable law, in violation of Minn. R. 1400.2100.D and may improperly delegate the Board's power or authority to

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).

another person or group, in violation of Minn. R. 1400.2100.F. The third paragraph of part 1800.1200, subpart 1 includes the following new language:

An applicant is required to pass all sections of the examination in order to qualify for licensure. The board or examination administrator shall report to the applicant the results of each examination section. The applicant shall attain the uniform passing grade established through a psychometrically acceptable standard-setting procedure.

The Board's rulemaking authority is set forth in Minn. Stat. § 326.06, which provides "[t]he board shall make all rules, not inconsistent with law, needed in performing its duties; and shall fix standards for determining the qualifications of applicants . . ." This authority clearly requires that the Board itself, not a vendor, or administrator, establish the passing grade for any qualifying examination it requires. The language of the proposed rule is unclear about who will establish the uniform passing grade. To the extent that there is ambiguity in this language, and someone other than the Board, such as a contracted vendor, could determine the passing grade, the proposed language grants undue discretion to the Board by permitting it to improperly delegate its own responsibility and powers to another entity.³ The Administrative Law Judge recommends that the Board adopt the following language:

An applicant is required to pass all sections of the examination in order to qualify for licensure. The board or examination administrator shall report to the applicant the results of each examination section. The applicant shall attain the uniform passing grade established by the Board through a psychometrically acceptable standard-setting procedure.

The addition of this language will cure the defect by clarifying that the Board will make the determination of what is a passing grade. This change is found to be needed and reasonable and is a not substantial change from the rule as proposed.

Harmless Procedural Error

The Board filed, as part of its Exhibit P in this proceeding, a certificate stating "on February 3, 2009, upon discovery that the Notice to Adopt Rules . . . was sent to the wrong House finance committee, I sent a copy of the Notice and the Statement of Need and Reasonableness to the . . . correct House finance committee." The Notice should have been sent on January 26, 2009, when it was sent to all of the other appropriate legislative committees. The comment period in this proceeding ended on March 4, 2009, which means that the

³ Minn. R. 1400.2100.D. and F.

legislators who received the late notice had as few as 26 days instead of the required 30 days to comment on the proposed rule.

The Administrative Law Judge finds that this later notice to the House Higher Education and Workforce Development Finance and Policy Division is harmless error pursuant to Minn. Stat. § 14.26, subd. 3 (d)(2). Upon discovering the notice was sent to the wrong committee, the Board took corrective action to cure the error so that it did not deprive any person or entity of an opportunity to participate meaningfully in the rulemaking process. No comments were received by the Board from any legislators or other persons regarding this rulemaking. Furthermore, on or about January 22, 2009, all legislators, including those on the affected committee, were mailed the Board's newsletter which included the entire Notice of Intent to Adopt a Rule.

Recommended Technical Corrections

Consistent Use of Phrase "Examination Vendor"

In part 1800.1200 of the proposed rules, the Board adds several references to the "examination delivery vendor," explaining, in the Statement of Need and Reasonableness, that "[t]he examination for architect registration has not been administered by the Board for many years, but rather has been administered by a vendor."⁴ The Board is consistent with its use of the phrase "examination delivery vendor" except in part 1800.1200, subp. 1, in the third paragraph where the proposed rule states:

The board or examination administrator shall report to the applicant the results of each examination section.

To insure clarity and consistency, the Administrative Law Judge recommends that the Board amend this language as follows:

The board or examination delivery vendor ~~administrator~~ shall report to the applicant the results of each examination section.

This change is needed and reasonable and is a not substantial change from the rule as proposed.

Use of Approved Equipment During Examination

Subpart 5 of part 1800.1200 addresses equipment permitted during the examination. The proposed language reads:

⁴ Board's Exhibit D., page 11.

Applicants shall only use the equipment approved by the examination delivery vendor during the Architect Registration Examination.

To assure grammatical and logical clarity, the Administrative Law Judge recommends that the proposed language be changed to read:

For the Architect Registration Examination, Applicants applicants shall only use the equipment approved by the examination delivery vendor during the Architect Registration Examination.

This change eliminates the ambiguity in the original proposed language which seemed to authorize the examination delivery vendor to approve equipment during the actual examination. This change is needed and reasonable and is a not substantial change from the rule as proposed.

R.C.L.