OAH Docket No. 70-0901-20002-1
Governor's Tracking No. AR 445

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 Animal Chiropractic; *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 January 22, 2010, 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 found to be harmless error as set forth in the Memorandum below.

3. The rules are needed and reasonable, with the exception of the following rule parts: 2500.7010, items B (3) and C (4); 2500.7050, item A; 2500.7060; 2500.7070; and 2500.7080. Accordingly, these rule parts are **DISAPPROVED** as not meeting the requirements of Minnesota Statutes, section 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: February 5, 2010

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 seven defects in the rules, two of which are harmless procedural errors. The Administrative Law Judge has also recommended three technical corrections, as discussed below. The technical corrections do not reflect defects in the rules, but are merely recommendations for clarification to the rules that the Board may adopt if it chooses to do so. All other rule parts are approved.

Procedural Defects under Minn. R. 1400.2100, Item A

Request for Comments

The first procedural defect relates to the publication of the Request for Comments under Minn. Stat. § 14.101. An agency must publish the Request for Comments "within 60 days of the effective date of any new or amendatory law requiring rules to be adopted, amended, or repealed." Effective May 13, 2008, the Legislature gave the Board specific authority to adopt rules regarding the scope of practice of animal chiropractic.[3] Accordingly, as required by Minn. Stat. § 14.101, the Board should have published its Request for Comments on or before July 14, 2008.[4] The Board did not publish the Request for Comments until December 22, 2008.

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[1] Minn. R. 1400.2100 (2007).

[2] 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).

[3] *See*, 2008 Laws of Minnesota, Chapter 297, Article 1. This law was effective the day following final enactment.

[4] The sixtieth day following the effective date was Saturday, July 12, 2008. The next business day was Monday, July 14, 2008.

The question is whether this failure 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."

Because the Legislature did not specify a penalty for failure to comply with the 60-day publishing requirement under section 14.101, this Office has held that the requirement of that section is directory in nature.[5]

Importantly, this result differs from the consequences that follow from a failure to publish the Notice of Intent to Adopt Rules within 18 months "of the effective date of the law authorizing or requiring rules," as required by Minn. Stat. § 14.125. Section 14.125 explicitly provides that an agency's authority to promulgate rules expires if it fails to comply with the provisions of that statute.[6]

Thus, while the nature and effect of the publishing deadlines in sections 14.101 and 14.125 are different, their purposes are complimentary. The purpose of the requirement that an agency publish a Request for Comments within 60 days of the effective date of its authorizing legislation is to ensure that an agency begins the process of public notification early, so that it is in a position to avoid a later expiration of its rulemaking authority under section 14.125.

In this instance, while the Board missed its deadline to publish the Request for Comments by five months, it did meet the later deadline set by Minn. Stat. § 14.125. Accordingly, because the language of § 14.101 is directory and not mandatory, and this procedural error did not deprive anyone of the opportunity to meaningfully participate in the rulemaking process, the Administrative Law Judge finds this procedural defect harmless.

Notice of Intent to Adopt Rules

Prior to adopting rules, an agency must publish in the *State Register* one of three types of notices of its intent to adopt rules.

Minnesota Rule 1400.2080, subpart 2 lists the information that must be included in these notices, including "a citation to the specific statutory authority for the rule."

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[5] *See,* Letter on Procedural Findings, *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 at 3-4 (April 11, 2008).

[6] *Compare,* Minn. Stat. § 14.125 (2008) ("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").

On October 5, 2009, the Board timely published a Notice of Intent to Adopt Rules. In the Notice, the Board referenced its general statutory authority to adopt rules, found at Minn. Stat. § 148.08. However, the Board neglected to cite to the specific delegation for these rule, found in the 2008 Laws of Minnesota, Chapter 297, Article 1.

The Board did not meet the requirements of Minnesota Rule 1400.2080, subpart 2 in this instance. As noted above, the question is whether this defect 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 Administrative Law Judge notes that the Request for Comments did contain the citation to the Board's specific statutory authority and this document was widely disseminated – including individuals on the Board's rulemaking mailing list and its additional notice plan. Likewise, the Board's Statement of Need and Reasonableness (SONAR) included a discussion of the 2008 delegation of rulemaking authority.

In this circumstance, interested persons would have understood the Board's claim of rulemaking authority, such that the citation error in the Notice of Intent to Adopt Rules did not deprive anyone of the opportunity to meaningfully participate in the rulemaking process. This defect is a harmless error.

Substantive Defects under Minn. R. 1400.2100, Items D and E

Part 2500.7010, items B and C

This proposed rule part set forth the criteria for the initial registration of licensed chiropractors to provide animal chiropractic services and for the renewal of those registrations. In both instances, the Board proposes language that requires registrants to pay "a fee set by the legislature."

In its SONAR, the Board acknowledges that the Legislature has not yet set a fee for either of these actions. The Board states that it expects the Legislature to set such a fee and hopes to have the accompanying regulation in place when this fee is later established.

In this context, it is significant to note that the Legislature directed the Board to establish a complete set of "criteria for registration to engage in the practice of animal chiropractic diagnosis and treatment ...."[7] In the view of the Administrative Law Judge, to the extent that the proposed regulatory program hinges upon the happening of future events, and would be confusing to regulated parties until these contingencies occur, the proposed rules are defective under Minn. R. 1400.2100, items D and E.

[7] *See*, 2008 Laws of Minnesota, Chapter 297, Article 1 (codified at Minn. Stat. §§ 148.01, subds. 1, 1a, 1b, 1c, 1d; 148.032; 148.033; and 148.035).

This defect can be cured in one of two ways.

The Board could delete the fee language in items B and C and engage in new rulemaking after the hoped-for legislative action is complete. In fact, if the follow-on rulemaking is limited to the addition of the fees, the Board may wish to use the abbreviated rulemaking process under Minn. Stat. § 14.388. This abbreviated process is available when the agency is proposing to "incorporate specific changes set forth in applicable statutes when no interpretation of law is required."[8]

Another alternative would be for the Board to set the fee amounts for the initial registration of licensed chiropractors to provide animal chiropractic services and for the renewal of those registrations at the fee amounts now set for initial licensure and renewal in Minnesota Rules 2500.1000 and 2500.1100. In this context it is important to note that the Minnesota Legislature has signaled its approval of these fee categories and amounts; and codified this view in Minn. Stat. § 148.108.[9] In the view of the Administrative Law Judge, it would be a permissible exercise of the Board's authority to link the "criteria for registration to engage in the practice of animal chiropractic diagnosis and treatment," with the fee categories and amounts that have been earlier-approved by the Legislature.

Amending the proposed rules in either of these two ways is needed and reasonable and would not result in rules that are substantially different from those originally published in the *State Register*.

Part 2500.7050, item A

Item A permits the Board and the Minnesota Board of Veterinary Medicine (MBVM) to work together to create disciplinary procedures for complaint resolution, and states as follows:

> The board and the MBVM may work out any reasonable procedures to establish a cooperative relationship for the purposes of facilitating complaint resolution against animal chiropractors. The procedures shall be in writing, and shall be provided to the recipient of a complaint upon initial notification of the existence of the complaint.

As written, Item A gives the Board authority to establish, implement and revise disciplinary procedures outside of the rulemaking process. Because it exceeds both the specific and general rulemaking authority granted to the Board, this rule is defective.

In this context, two points deserve special emphasis. First, the 2008 legislation does not provide for a wholesale exemption of the disciplinary process from rulemaking – indeed, the statutory requirement that criteria for this program be established in rules

[8] *See,* Minn. Stat. § 14.388 (3) (2008).

[9] *See,* Minn. Stat. § 148.108 (1) (2008) ("In addition to the fees established in Minnesota Rules, chapter 2500, the board is authorized to charge the fees in this section").

leads to the contrary conclusion. Furthermore, the Board's general rulemaking authority in Minn. Stat. § 148.08, subd. 3, directs the Board to promulgate rules necessary to administer sections 148.01 to 148.105 for the health, safety, and welfare of the public. The Board's disciplinary powers are encompassed within these statutory sections and directly relate to the public protection role envisaged by the Legislature. Accordingly, any procedures established by the Board for disciplining providers of animal chiropractic services are subject to rulemaking.

To correct this defect, the Board must delete the language of Item A from the proposed rules. This action is needed and reasonable and would not render the proposed rules substantially different.

Part 2500.7060

This Part addresses inactive animal chiropractic registration.

> A Minnesota licensed chiropractor who has converted a Minnesota license to inactive status may apply to the board for an inactive animal chiropractic registration. An inactive animal chiropractic registration is intended for those chiropractors who will be in active chiropractic practice elsewhere. Upon approval of an application, the board will modify the annual animal chiropractic registration certificate to indicate inactive registration.

As written, this rule part is vague and potentially misleading. According to the 2008 legislation, an active chiropractic license is required before a provider may engage in the practice of animal chiropractic.[10] Notwithstanding this requirement, however, the proposed rule language implies that a chiropractor with an inactive license could still maintain an active animal chiropractic registration. To correct this defect, the Board should delete the proposed language in its entirety and reword Part 2500.7060 in the following, or a substantially similar, manner:

> Upon board approval of an application by a Minnesota licensed chiropractor to convert a Minnesota license to inactive status, the board shall modify the annual animal chiropractic registration certificate to indicate inactive registration.

This modification is needed and reasonable and would not render the proposed rules substantially different.

Part 2500.7070

This Part relates to the annual renewal of an inactive animal chiropractic registration. It requires the registrant to complete an annual application and "submit the

[10] *See,* 2008 Laws of Minnesota, Chapter 297, Article 1, Sections 25, 26, 28 and 30.

annual renewal fee for an inactive animal chiropractic registration as authorized under Minnesota Statutes, section 148.108." As addressed in the discussion of Part 2500.7010 above, the legislature has not yet set fees for animal chiropractic registration. Therefore, to refer regulated individuals to Minn. Stat. § 148.108, which does not now refer to any selection by the Legislature for this fee, is misleading and renders the rule language defective.

As discussed above, the Board can correct this defect in one of two ways. The Board could delete the reference to a fee in the proposed rules and make a later addition to this subpart through a follow-on rulemaking proceeding, once the Legislature has set fees for this purpose. Alternatively, the Board could revise the proposed rule to refer to the practice of annual renewal of inactive licenses under Minn. R. 2500.2030. Either of these modifications is needed and reasonable and would not render the proposed rules substantially different.

Part 2500.7080

This part allows the Board to reinstate an inactive animal chiropractic registration.

An inactive animal chiropractic registration *may* be reinstated to an active animal chiropractic registration according to items A to C:

A. completion of a board-approved application of reinstatement;

B. *payment of a reinstatement fee as authorized under Minnesota Statutes, section 148.108*, and

C. submission of a notarized statement from the doctor stating that the registrant has completed six hours of continuing education credits in animal chiropractic-related subjects as approved by the board for each year the registration was inactive. (Emphasis added).

The Administrative Law Judge concludes that there are two defects in Part 2500.7080. First, use of the phrase "may be reinstated" grants the Board undue discretion as to the reinstatement of inactive animal chiropractic registrations. As written, registrants cannot be certain that the Board will reinstate a chiropractic registration even if the registrant has fulfilled all three of the listed requirements. This defect can be corrected by changing "may" to "shall." The modification is needed and reasonable and would not render the proposed rules substantially different.

Second, in Item B, the Board references a fee that the Legislature has not yet established. The Board has, however, assigned a fee for reinstatement of inactive chiropractic licenses in Minn. R. 2500.2040. Accordingly, to correct this defect, the Board must either delete Item B or refer to the practice of reinstatement of inactive chiropractic licenses under Minn. R. 2500.2040. Either of these modifications is needed and reasonable and would not render the proposed rules substantially different.

Other Technical Concerns

The Administrative Law Judge recommends three 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 proposed.

1. Part 2500.7000, subpart 3

Change Subpart 3 as follows:

"Animal rehabilitative therapy" means any therapy applied for the purposes of preparing for or complementing the chiropractic adjustment to animals. These therapies ~~may~~ include mobilization, light therapy, therapeutic ultrasound . . . ."

In this context, the word "may" adds nothing to the meaning of the subpart and could introduce some ambiguity into the meaning of animal rehabilitative therapy. The Administrative Law Judge recommends that the word be deleted so as to avoid confusion among regulated parties.

2. Part 2500.7030, subpart 1

Change Subpart 1 as follows:

All records, including radiographic reports, that are created subject to parts 2500.7000 to 2500.7090, must be maintained for a minimum of three years following the last clinical encounter.

Adding a comma after the word "reports" will clarify that the Board requires all records created subject to parts 2500.7000 to 2500.7090, and not just radiographic reports, to be maintained for at least three years. This change should avoid confusion in the implementation of the proposed rules.

3. Part 2500.7050

Change the opening paragraph of Part 2500.7050 as follows:

~~The board may, in its sole discretion, utilize any representative from the Minnesota Board of Veterinary Medicine (MBVM) to assist the board in complaint resolution. The representative may include, but not be limited to, the MBVM's executive director, staff, board members, or a consultant.~~ The board is authorized to utilize the executive director, staff, board members, or a consultant of the Minnesota Board of Veterinary Medicine (MBVM) to assist the board in complaint resolution.

Rewording this paragraph clarifies the Board's meaning and eliminates phrases that are generally disfavored in rulemaking (such as "may, in its sole discretion" and "may include, but not be limited to") as granting an agency undue discretion. Typically, an Administrative Law Judge will find this type of language defective. In this situation, however, the language is not defective because the authorization to add additional professionals to the complaint resolution process will benefit, not harm, regulated parties.

E. L. L.