

STATE OF MINNESOTA
OFFICE OF ADMINISTRATIVE HEARINGS

In the Matter of the the Proposed
Rule Amendments Governing
Minnesota Veterans Homes,
Minnesota Rules, Chapter 9050

**REPORT OF THE
ADMINISTRATIVE LAW JUDGE**

This matter came before Administrative Law Judge Jessica A. Palmer-Denig for rulemaking hearing on January 31, 2022. The public hearing was held remotely through an interactive video conference on the Microsoft Teams platform.

As explained below, the Minnesota Department of Veterans Affairs (Department or MDVA) proposes to amend the administrative rules governing its operation of the Minnesota Veterans Homes. The proposed rule amendments concern policies and procedures related to admissions, discharges, and billing practices that affect residents. The public hearing and this Report are part of a larger rulemaking process under the Minnesota Administrative Procedure Act (APA).¹ The Minnesota Legislature designed this process to ensure that state agencies meet all the requirements of law and rule in adopting and amending rules.

The public hearing was conducted to permit Department representatives and the Administrative Law Judge to hear public comments regarding the impact of the proposed rules and any changes that might be appropriate. Further, the hearing process provides the public an opportunity to review, discuss, and critique the proposed rules, and to ensure a fully developed rulemaking record. In addition to the comments received at the public hearings, the public was permitted to submit written comments into the record.

As described more extensively below, the agency must establish that the proposed rules are needed and reasonable; the rules are within the agency's statutory authority; the agency has fulfilled all procedural requirements; and that any modifications to the rule made after the proposed rules were initially published in the *State Register* are within the scope of the matter that was originally announced.

SUMMARY OF CONCLUSIONS

The Department established it has the statutory authority to adopt the proposed rules. The Department did not establish that it complied with all procedural requirements of law and rule, or that the proposed rules are needed and reasonable. The Department failed to adequately address all of the regulatory factors required for consideration in the Statement of Need and Reasonableness (SONAR) under Minn. Stat. § 14.131. This is a

¹ See Minn. Stat. §§ 14.05-.20 (2020). See also, Minn. R. 1400.2000-.2310 (2021).

prejudicial defect and not a harmless error.² Further, the Department has not sufficiently supported the proposed rules through an affirmative presentation of facts, resulting in prejudicial procedural and substantive defects. Therefore, the Administrative Law Judge **DISAPPROVES** the proposed rules. For the reasons explained herein, the Administrative Law Judge also **RESCINDS** her approval of the MDVA's additional notice plan.

Based upon all the record, including the Department's exhibits, and the oral and written comments received, the Administrative Law Judge makes the following:

FINDINGS OF FACT

I. Background Regarding the Proposed Rules

1. In 1988, the Minnesota Legislature separated the Veterans Homes from the Department and established a Veterans Homes Board of Directors (Board).³ The Board was tasked with managing and overseeing the operations of the five Veterans Homes in Minnesota.⁴ The Board consisted of nine members appointed by the Governor.⁵ The Board was directed to restructure the Veterans Homes along the lines of the medical model of operations to turn them into high quality health care facilities, while also taking into consideration the special needs of the veteran population.⁶ To accomplish this dual focus, the Board's membership included representatives from the health care field and veterans' organizations.⁷ The Board was responsible for ensuring that the Veterans Homes were operated according to stated goals and standardized practices, policies, and procedures, that residents' rights were respected, and that veterans residing at the Veterans Homes maintained a high quality of life.⁸

2. The Board was managed by an Executive Director.⁹ The Executive Director was responsible for ensuring that the Board's vision, mission, and goals were properly carried out. Each Veterans Home was managed by an administrator, who at the time reported directly to the Executive Director.¹⁰ All the facilities had medical directors, directors of nursing, social services, financial and other staff appropriate to the needs and levels of care of their veteran residents.¹¹

3. In 1989, the Board developed and adopted Minnesota Rules, chapter 9050 governing Veterans Homes. The chapter was amended several times early in its history.¹²

4. In 2007, the Board was abolished, and duties and responsibilities related to

² See *Builders Ass'n of Twin Cities v. Minn. Dept. of Labor and Industry*, 872 N.W.2d 263, 274 (Minn. 2015).

³ Exhibit (Ex.) D at 6; See 1988 Minn. Laws ch. 699.

⁴ Ex. D at 6.

⁵ *Id.*, See 1988 Minn. Laws ch. 699.

⁶ Ex. D at 6.

⁷ *Id.*; See 1988 Minn. Laws ch. 699.

⁸ Ex. D at 6.

⁹ *Id.*

¹⁰ *Id.*

¹¹ *Id.*

¹² *Id.* at 5-6. See MDVA Response to Public Comments (Feb. 22, 2022), Attachments 1-4 (SONARs for amendments to chapter 9050 proposed in 1989, 1991, 1993 and 1995).

the management of the five Veterans Homes were transferred back to the Department.¹³

5. According to the Department, the overall function of Minnesota Rules, chapter 9050 has not changed over the years. The purpose of chapter 9050 is to determine an individual's eligibility and suitability for admission to the Minnesota Veterans Homes facilities; to identify and define grounds on which a resident of a Minnesota Veterans Homes facility shall be discharged and the methods by which such discharge is effected; to clarify the method used to calculate the cost of providing care; to establish an objective and equitable method to determine the amount paid by a resident for services provided by the facility; to provide notice of admission requirements, eligibility standards, financial obligations, service obligations, and information which must be disclosed to or by the Minnesota Veterans Homes facilities, and the requirements of disclosure.¹⁴

6. The Department now seeks to amend its rules governing Minnesota Veterans Homes. The proposed amendments relate to admissions, discharges, and billing procedures. The Department maintains that the amendments also clarify repayment options, update bed hold requirements, add an immediate discharge process, clarify the cost of care calculation, update income and property allowances for board and care residents, update Health Insurance Portability and Accountability Act (HIPAA) requirements, and add new rules regarding the adult day health care program and pharmaceutical services.¹⁵

7. The Department states that the proposed amendments reflect practices that will best serve Minnesota Veterans Homes staff, residents, and their families.¹⁶ According to the Department, the proposed rule amendments establish clear, standardized procedures that ensure its operations and healthcare administration are consistent and transparent, and that decisions are made based on reasonable and objective criteria.¹⁷

II. Rulemaking Authority

8. Under Minn. Stat. § 196.04 (2020), the Commissioner of the Department (Commissioner) has authority to adopt "reasonable and proper rules to govern the procedure of the divisions of the department and to regulate and provide for the nature and extent of the proofs and evidence and the method of taking and furnishing the same, in order to establish the right to benefits provided by the law."

9. In addition, Minn. Stat. § 198.003 (2020) provides as follows:

The commissioner shall determine policy and, subject to chapter 14, adopt, amend, and repeal rules for the governance of the homes. With respect to residents' administrative appeal time periods that are not established by statute, the commissioner may create by rule reasonable time periods within which a resident must appeal an administrative determination to the next

¹³ Ex. D at 6; See Executive Order 07-21 (Nov. 21, 2007); Reorganization Order No. 194 (Nov. 19, 2007).

¹⁴ Ex. D at 6.

¹⁵ *Id.* at 5.

¹⁶ *Id.*

¹⁷ *Id.* at 9.

administrative level. If the determination is not appealed within the time set by rule, the determination becomes final.

The commissioner shall take other action as provided by law.

10. The MDVA has the statutory authority to adopt the proposed rules under Minn. Stat. §§ 196.04, 198.003.

III. Procedural Requirements of Minn. Stat. Ch. 14 and Minn. R. Ch. 1400

A. Request for Comments

11. Minn. Stat. § 14.101 requires that an agency solicit comments from the public on the subject matter of a proposed rulemaking at least 60 days prior to the publication of a notice of intent to adopt rules or a notice of hearing. Such notice must be published in the *State Register*.¹⁸

12. On January 4, 2016, the MDVA published in the *State Register* a Request for Comments seeking comments on possible amendments to its rules governing the Minnesota Veterans Homes.¹⁹ The MDVA explained that the rulemaking was intended to add new or modify existing definitions; comply with statutory changes; and make technical changes.²⁰ The MDVA stated that it was considering clarifying repayment options; updating bed hold requirements; updating discharge processes, including implementing a new immediate discharge process; clarifying cost of care calculations; updating income and property allowances for board and care residents; and updating HIPPA requirements.²¹

13. The Request for Comments was published at least 60 days prior to the publication of the Notice of Intent to Adopt Rules, as discussed below.

14. The Department complied with the requirements established by Minn. Stat. § 14.101.

B. Publication of Notice of Intent to Adopt Rules

15. Minn. Stat. § 14.14, subd. 1a(a) and Minn. R. 1400.2080, subp. 6, require that an agency publish in the *State Register* a notice of intent to adopt rules at least 30 days prior to the date of hearing and at least 30 days prior to the end of the comment period.

16. The Department originally requested approval of its Additional Notice Plan and Notice of Intent to Adopt Rules without a Public Hearing unless 25 or more Requests

¹⁸ Minn. Stat. § 14.101.

¹⁹ Ex. A (Request for Comments).

²⁰ *Id.*

²¹ *Id.*

for Hearing are Received (Dual Notice) on September 23, 2021.²² The Administrative Law Judge approved both by Order dated September 29, 2021.²³

17. The Department published the Dual Notice in the *State Register* on October 18, 2021.²⁴ The Dual Notice provided that if the Department received 25 or more requests for a hearing, the hearing on the proposed rules would take place on December 7, 2021.²⁵

18. On November 23, 2021, the Department filed a request to reschedule the hearing to January 31, 2022.²⁶ The Department also requested review and approval of its Notice of Rescheduled Hearing.²⁷

19. By Order dated November 24, 2021, the Administrative Law Judge granted the Department's request to continue and reschedule the hearing from December 7, 2021, to January 31, 2022.²⁸

20. The MDVA published the Notice of Rescheduled Hearing in the *State Register* on December 6, 2021.²⁹ The Department also provided the Notice of Rescheduled Hearing to all interested persons pursuant to its approved Additional Notice Plan.³⁰ The Notice of Rescheduled Hearing advised that the hearing would take place by video conference on January 31, 2022, and it provided information on how persons could join the hearing via the internet or telephone.³¹

21. The Dual Notice and Notice of Rescheduled Hearing contain all the information required under Minn. R. 1400.2080 and were published more than 30 days before the hearing dates and the close of the comment period.

C. Notice Requirements

1. Notice to Official Rulemaking List

22. Minn. Stat. § 14.14, subd. 1a, requires that each agency maintain a list of all persons who have registered with the agency for the purpose of receiving notice of rule proceedings.

²² The Department filed its initial submission on September 21, 2021, and thereafter supplemented its filing on September 23, 2021.

²³ See Order on Request for Review and Approval of Additional Notice Plan and Notice of Intent to Adopt Rules Without a Hearing (Sept. 29, 2021).

²⁴ Ex. F1.

²⁵ *Id.*

²⁶ See Letter from MDVA Deputy General Counsel, Dale Klitzke to Administrative Law Judge Jessica Palmer-Denig (Nov. 23, 2021) (on file with the Minn. Office Admin. Hearings).

²⁷ *Id.*

²⁸ See Order on Request for Review and Approval of Notice of Rescheduled Hearing (Nov. 24, 2021).

²⁹ Ex. F2.

³⁰ See Order on Request for Review and Approval of Notice of Rescheduled Hearing (Nov. 24, 2021).

³¹ Ex. F2.

23. On October 18, 2021, the Department mailed a copy of the Dual Notice to all persons and entities on its official rulemaking list.³² The official rulemaking list was comprised of all persons and entities who requested to be placed on the Department's mailing list for the purpose of receiving such notice.³³

24. The Dual Notice advised that if the Department received 25 or more requests for a hearing, the hearing would take place on December 7, 2021.³⁴

25. On December 1, 2021, the Department mailed a copy of the Notice of Rescheduled Hearing to all persons and entities on its official rulemaking list.³⁵

26. Minn. Stat. § 14.14, subd. 1a, requires that an agency give notice of its intent to adopt rules by U.S. mail or electronic mail to all persons on its official rulemaking list at least 30 days before the date of the hearing.

27. Minn. R. 1400.2080, subp. 6, provides that a notice of hearing or notice of intent to adopt rules must be mailed at least 33 days before the end of the comment period or the date of the hearing.

28. The Department fulfilled the notice requirements established in Minn. Stat. § 14.14 and Minn. R. 1400.2080, subp. 6.

2. Additional Notice

29. Minn. Stat. § 14.14, subd. 1a(a), requires that an agency make reasonable efforts to notify persons or classes of persons who may be significantly affected by the rule being proposed by giving notice of its intent to adopt rules. Such notice may be made in newsletters, newspapers, or other publications, or through other means of communication.³⁶ This notice is referred to as "additional notice" and is detailed by an agency in its additional notice plan.

30. Minn. Stat. § 14.131 requires that an agency include in its SONAR a description of its efforts to provide additional notice. Alternatively, the agency must detail why additional notification efforts were not made.³⁷

³² Ex. G1 (Certificate of Mailing Dual Notice; Certificate of Accuracy of Mailing List); Ex. H1 (Certificate of Giving Additional Notice Under the Additional Notice Plan). Exhibit G1 is labeled as a certificate of mailing, but certifies only that the rulemaking list is accurate and complete. Exhibit H1 contains the certification that the Dual Notice was mailed to all persons and entities on the Department's official rulemaking list. See Ex. H1 at 16.

³³ Exs. G1, H1 at 1-7.

³⁴ Ex. F1.

³⁵ Exs. G2, H2. In a similar fashion to the mailing of the Dual Notice, Exhibit G2 is labeled as a certificate of mailing, but attests only that the rulemaking list is accurate and complete. Exhibit H2 contains the agency's certification that the Notice of Rescheduled Hearing was sent to all persons on the list. See Ex. H2 at 1.

³⁶ Minn. Stat. § 14.14, subd. 1a(a).

³⁷ Minn. Stat. § 14.131.

31. An agency may request approval of its additional notice plan by an administrative law judge prior to service.³⁸

32. The Department requested and was granted approval of its Additional Notice Plan on September 29, 2021.³⁹

33. On October 18, 2021, the Department provided notice under its Additional Notice Plan, as follows:⁴⁰

- (a) Published the Dual Notice on the MDVA's Public Notice webpage at <https://mn.gov/mdva/about/reports/jsp>;
- (b) Provided specific notice to agencies and organizations that advocate for or provide services to veterans via email with a hyperlink to an electronic copy of the Dual Notice.⁴¹ These groups include the Minnesota Association of County Veterans Service Officers, including Tribal Veteran Service Officers; the Minnesota Assistance Council for Veterans; the American Legion Department of Minnesota; Department of Minnesota AMVETS; Vietnam Veterans of America Minnesota State Council; Disabled American Veterans Department of Minnesota; Jewish War Veterans; Minnesota Paralyzed Veterans of America; and the Department of Minnesota Veterans of Foreign Wars; and
- (c) Provided notice to the specific groups that requested copies of the proposed rules during the Request for Comment period. These groups include the Minnesota Elder Bar, the Minnesota Veterans Home Family Council, and the Minnesota Department of Human Services' Office of Ombudsman for Long-Term Care.

34. According to its approved Additional Notice Plan, the Department was to provide, via email or U.S. Mail, a copy of the Dual Notice, SONAR, and proposed rules to the identified specific groups and organizations.⁴² In its Certification of Giving Additional Notice, the Department certifies only that it provided notice by sending an email with a hyperlink to the Dual Notice.⁴³ The Department did not attach a copy of the transmittal

³⁸ Minn. R. 1400.2060.

³⁹ Order on Request for Review and Approval of Additional Notice Plan and Notice of Intent to Adopt Rules Without a Hearing (Sept. 29, 2021).

⁴⁰ Ex. H1 at 1-7, 16-20.

⁴¹ Ex. H1 at 1.

⁴² See Order on Request for Review and Approval of Additional Notice Plan and Notice of Intent to Adopt Rules without a Hearing (Sept. 29, 2021).

⁴³ See Ex. H1 at 1.

email; it only attached a list of the email addresses for the specific groups.⁴⁴ The Department did not establish it complied with its approved Additional Notice Plan.

35. At the time the Department submitted its request for approval of its Additional Notice Plan on September 21, 2021, it included a copy of the SONAR outlining its plan.⁴⁵ The SONAR also contained a statement by the agency describing the outreach efforts in which it had already engaged in the development of the proposed rules.⁴⁶ The MDVA represented that it had conducted these outreach activities to comply with Minnesota rulemaking standards and to solicit input from stakeholders on the development of the rules.⁴⁷ The MDVA further represented that, in addition to publishing its Request for Comments, it had “communicated with specific groups about amending the rules,” and it named the “Minnesota Elder Bar of Minnesota, the Minnesota Veterans Home Family Council-Minneapolis, and the Minnesota Department of Human Services, The Office of Ombudsman for Long-Term Care.”⁴⁸ The SONAR also stated it would provide a draft of the rules to these groups when one was available.⁴⁹

36. There is no avenue for public participation in the consideration of an additional notice plan. Nor does an administrative law judge conduct an independent investigation of an agency’s statements about its engagement with the public up to that point. In approving the Additional Notice Plan, the Administrative Law Judge relied on the MDVA’s representations that it had already communicated with specific groups with an interest in the proposed rules and that it would provide a draft of the rules to these groups when one was available.

37. During the public comment and hearing process, however, numerous commenters challenged the MDVA’s representations regarding its outreach, including members of the specific organizations named in the SONAR.⁵⁰ As explained in further detail below, the Administrative Law Judge has determined that the MDVA misrepresented its engagement with the public in the development of the proposed rules. The Administrative Law Judge would not have approved the MDVA’s Additional Notice Plan as proposed had she known that the SONAR’s description of the level of prior stakeholder involvement was not true.⁵¹

38. In rulemaking proceedings under Minn. Stat. §§ 14.131-.20, Minn. R. 1400.2200-.2240 apply. Under Minn. R. 1400.2210, subp. 8, in connection with a

⁴⁴ Ex. H1 at 7.

⁴⁵ Letter from Dale Klitzke to the Administrative Law Judge (Sept. 21, 2021).

⁴⁶ *Id.* (See attached SONAR at 7).

⁴⁷ *Id.*

⁴⁸ *Id.*

⁴⁹ *Id.*

⁵⁰ See, e.g., Comment of Cheryl Hennen (Attachment to eComment of Maisie Blaine) (Nov. 20, 2021); Comment of Amber Hildebrandt and Suzanne Scheller (Nov. 19, 2021); Public Hearing Transcript (Tr.) (Jan. 31, 2020) at 67 (M. Blaine).

⁵¹ Ordinarily, approval of an additional notice plan serves as the final determination as to the adequacy of the agency’s notice of rulemaking, so long as the agency implements the additional notice plan. Minn. R. 1400.2060, subp. 4. Underlying that rule, however, is a presumption that statements made by the agency in soliciting approval of the additional notice plan are true. Further, as noted above, the MDVA did not demonstrate that it complied with all terms of its additional notice plan.

rulemaking hearing, the Administrative Law Judge “is authorized to do all things necessary and proper to conduct the hearing and to promote justice, fairness, and economy.” The Administrative Law Judge determines that, in light of the developments in the record during the public comment process and the rulemaking hearing, approval of the MDVA’s Additional Notice Plan must be rescinded.

39. As a result, the Administrative Law Judge concludes that the MDVA has not complied with the additional notice requirements of Minn. Stat. §§ 14.131, .14, subd. 1a(a). As described further below, the Administrative Law Judge determines that this deficiency is not harmless error.⁵²

3. Notice to Legislators

40. Under Minn. Stat. § 14.116, an agency is required to send a copy of the Dual Notice and the SONAR to certain legislators at the time it mails its Dual Notice to persons on its rulemaking list and pursuant to its additional notice plan.

41. On October 18, 2021, the Department mailed or emailed a copy of the Dual Notice, SONAR, and proposed rules to the chairs and ranking minority party members of the legislative policy and budget committees with jurisdiction over the proposed rules, and to the Legislative Coordinating Commission.⁵³

42. The MDVA fulfilled its notification responsibilities under Minn. Stat. § 14.116.

4. Notice to the Legislative Reference Library

43. Minn. Stat. § 14.131 and Minn. R. 1400.2070, subp. 3, require the agency to send a copy of the SONAR to the Legislative Reference Library when the Notice of Intent to Adopt is mailed.

44. On October 18, 2021, the MDVA mailed a copy of the SONAR to the Legislative Reference Library.⁵⁴

45. The MDVA complied with Minn. Stat. § 14.131 and Minn. R. 1400.2070, subp. 3.

5. Notice to Commissioner of Agriculture

46. Minn. Stat. § 14.111 imposes additional notice requirements when the proposed rules affect farming operations. The statute requires that an agency provide a copy of any such changes to the Commissioner of Agriculture at least 30 days prior to publishing the proposed rules in the *State Register*.⁵⁵

⁵² Minn. Stat. § 14.15, subd. 5.

⁵³ Ex. H1 at 12-15.

⁵⁴ Exs. E, H1 at 8-11.

⁵⁵ Minn. Stat. § 14.111.

47. The Department's proposed rules do not impose restrictions or have an impact on farming operations. As a result, the MDVA was not required to notify the Commissioner of Agriculture.⁵⁶

D. Rule Hearing and Submission of Written Comments

48. The Administrative Law Judge conducted a public rulemaking hearing on January 31, 2022. The MDVA's panel at the hearing included: Dale Klitzke, MDVA Deputy General Counsel; Simone Hogan, MDVA Healthcare Services Director; and Nancy Curtis, MDVA Healthcare Business Analyst.⁵⁷

49. In support of its request for approval to adopt the proposed rules, the Department offered the following documents into the record as exhibits, as required by Minn. Stat. § 14.14, subd. 2a and Minn. R. 1400.2220:

Ex. A: MDVA's Request for Comments as published in the *State Register* on January 4, 2016;

Ex. C: Proposed rules dated April 26, 2021, including the Revisor's approval;

Ex. D: MDVA's SONAR, dated June 8, 2021;⁵⁸

Ex. E: Certificate of mailing the SONAR to the Legislative Reference Library on October 18, 2021;

Ex. F1: Dual Notice as published in *State Register* on October 18, 2021;

Ex. F2: Notice of Rescheduled Hearing as published in the *State Register* on December 6, 2021;

Ex. G1: Certificate of Accuracy and Completeness of Department's rulemaking mailing list on October 18, 2021;

Ex. G2: Certificate of Accuracy and Completeness of Department's rulemaking list as of December 1, 2021, for purposes of sending Notice of Rescheduled Hearing;

Ex. H1: Certificate of Giving Additional Notice Under the Additional Notice Plan on October 18, 2021, including notice to those registered on the Department's rulemaking mailing list; Certificate of sending a copy of the SONAR to the Legislative Reference Library; Certificate of Sending the Dual Notice, SONAR and proposed rules to

⁵⁶ See Ex. D at 68.

⁵⁷ Tr. at 17-20.

⁵⁸ The SONAR is signed and dated June 8, 2021. However, the cover or title page of the SONAR is dated April 2021.

Legislators and Legislative Coordinating Commission (LCC) on October 18, 2021;

Ex. H2: Certificate of Providing Notice of Rescheduled Hearing on December 1, 2021;

Ex. I1: Written eComments on the proposed rules received during the comment period that followed publication of the Dual Notice;⁵⁹

Ex. I2: Written comments on the proposed rules received by U.S. Mail or facsimile transmission during the comment period following publication of the Dual Notice;⁶⁰

Ex. K1: Certificate of Consulting with Minnesota Management and Budget (MMB) with attached letter dated June 14, 2021; Memorandum from MMB to MDVA regarding fiscal impact of proposed rules dated June 28, 2021;

Ex. K2: Letter to Administrative Law Judge Jessica Palmer-Denig from MDVA requesting review and approval of its Dual Notice and Additional Notice Plan dated September 21, 2021;

Ex. K3: Order on Request for Review and Approval of Additional Notice Plan and Dual Notice dated September 29, 2021;

Ex. K4: MDVA letter requesting to reschedule rulemaking hearing dated November 17, 2021;

Ex. K5: Order on Request for Review and Approval of Notice of Rescheduled Hearing dated November 24, 2021;

Ex. L1: Copy of slides from MDVA's presentation at rulemaking hearing on January 31, 2021;

Ex. L2: MDVA's proposed modifications to its proposed rule amendments.

Ex. L3: List of attendees at January 31, 2022, rulemaking hearing;

Ex. L4: Transcript of January 31, 2022, rulemaking hearing;

⁵⁹ The Department received 47 comments submitted via the OAH eComment website during the comment period following publication of the Dual Notice.

⁶⁰ The Department received seven comments by U.S. Mail or Facsimile during the comment period following publication of the Dual Notice.

50. Mr. Klitzke offered the MDVA's exhibits and addressed the procedural requirements for rulemaking.⁶¹ He also presented the MDVA's positions as to the need for and reasonableness of the rule.⁶²

51. Approximately 36 people attended the hearing on January 31, 2022.⁶³ The hearing continued until all interested persons, groups, or associations had an opportunity to be heard concerning the proposed rules. Seven members of the public commented on the proposed rules during the hearing.⁶⁴

52. After the hearing, the Administrative Law Judge extended the initial time period for submission of public comments to 20 calendar days – until February 22, 2022 – to permit interested persons and the Department additional time to submit written comments.⁶⁵ During the initial post-hearing public comment period, members of the public submitted four written comments. The MDVA also submitted initial responsive comments.⁶⁶

53. Following the initial comment period, the hearing record remained open for an additional five business days to permit interested persons and the Department to reply to the earlier-submitted comments. No additional public comments were filed during the rebuttal comment period, but the MDVA submitted a comment in rebuttal.⁶⁷ The rebuttal comment period closed on March 1, 2022, and the hearing record closed on that date.

54. By Order dated March 3, 2022, the Chief Administrative Law Judge extended the deadline for completion of the Administrative Law Judge's report to April 15, 2022.⁶⁸

IV. Statutory Requirements

A. Regulatory Factors

55. Under the Administrative Procedure Act, an agency adopting or amending its rules must address eight factors in its SONAR, to the extent the agency, through reasonable effort, can ascertain the information.⁶⁹ Those factors are:

- (1) a description of the classes of persons who probably will be affected by the proposed rule, including classes that will bear the costs of the proposed rule and classes that will benefit from the proposed rule;

⁶¹ Tr. at 18-19 (The MDVA offered Exs. A-L2 at the commencement of the rulemaking hearing on January 31, 2022. The MDVA submitted Exs. L3-L4 after the hearing.).

⁶² *Id.* at 19-35.

⁶³ Ex. L-3 (list of hearing attendees).

⁶⁴ See Tr. at 37-89.

⁶⁵ See Minn. Stat. § 14.15, subd. 1.

⁶⁶ See MDVA's Response to Public Comments (Feb. 22, 2022).

⁶⁷ See MDVA's Post-Hearing Rebuttal Response to Public Comments (Mar. 1, 2022).

⁶⁸ Order Extending Deadline for Rule Report (Mar. 3, 2022); see Minn. Stat. § 14.15, subd. 2.

⁶⁹ Minn. Stat. § 14.131.

- (2) the probable costs to the agency and to any other agency of the implementation and enforcement of the proposed rule and any anticipated effect on state revenues;
- (3) a determination of whether there are less costly methods or less intrusive methods for achieving the purpose of the proposed rule;
- (4) a description of any alternative methods for achieving the purpose of the proposed rule that were seriously considered by the agency and the reasons why they were rejected in favor of the proposed rule;
- (5) the probable costs of complying with the proposed rule, including the portion of the total costs that will be borne by identifiable categories of affected parties, such as separate classes of governmental units, businesses, or individuals;
- (6) the probable costs or consequences of not adopting the proposed rule, including those costs or consequences borne by identifiable categories of affected parties, such as separate classes of government units, businesses, or individuals;
- (7) an assessment of any differences between the proposed rule and existing federal regulations and a specific analysis of the need for and reasonableness of each difference; and
- (8) an assessment of the cumulative effect of the rule with other federal and state regulations related to the specific purpose of the rule and reasonableness of each difference.⁷⁰

1. Classes of Persons Affected, Benefitted, or Bearing Costs of the Proposed Rule

56. The MDVA states that the proposed rules will affect residents and prospective residents of the Minnesota Veterans Homes, as well as residents' spouses, dependent children, other family members, veteran service organizations, and individuals and groups that advise veterans and their families regarding veterans' benefits.⁷¹

57. The MDVA states that the "primary bearer of the cost of the proposed rules" are the MDVA and the veterans served by the Minnesota Veterans Homes.⁷² According to the MDVA, veterans' family members, veteran service organizations, and other government entities and agencies that assist individuals with accessing veteran benefits

⁷⁰ *Id.*

⁷¹ Ex. D at 61.

⁷² *Id.* at 62.

and that oversee the operation of the Minnesota Veterans Homes will also be affected by the proposed rules to a lesser degree.⁷³

58. The MDVA states that it, and current and potential residents of the Minnesota Veterans Homes, will benefit from the proposed rules.⁷⁴ According to MDVA, veterans' family members, veteran service organizations, and other government entities and agencies that assist individuals with accessing veteran benefits and that oversee the operation of the Minnesota Veterans Homes will also be affected by the proposed rules to a lesser degree.⁷⁵

2. Probable Costs to the Agency and Other Agencies for Implementation and Enforcement and Effect on State Revenues

59. The MDVA provides only one sentence to address its costs and one sentence explaining costs to other agencies. It asserts that the "costs to MDVA are nominal and will have no impact on the current operational budget."⁷⁶ The MDVA contends that the "costs to other agencies are nominal and should have no impact."⁷⁷

60. With respect to the proposed rules' effect on State revenues, MDVA states: The breadth of change regarding State revenue is unknown; however, the MDVA anticipates the effect on State revenue to be minimal based on the proposed rule changes in part 9050.0560 regarding the maintenance charge determination.⁷⁸

61. The MDVA has not adequately addressed this factor in the SONAR. Under Minn. Stat. § 14.131(2), the MDVA must identify probable costs for itself and other agencies in connection with the implementation and enforcement of the proposed rules. The MDVA does not state that there are no costs; rather its analysis recognizes that some costs will exist. The MDVA's assertion that the costs are nominal is not supported by the record because it does not provide any information about what those costs are.

3. Less Costly or Less Intrusive Methods for Achieving the Purpose of the Proposed Rule

62. The MDVA states that it is required to follow various federal and state regulations relating to licensure for health care facility operations. The MDVA notes that chapter 9050 has not been amended since 1995. According to the MDVA, revising the rules to align with current health care industry standards and federal and state regulations is necessary and reflects the least intrusive option.⁷⁹

⁷³ *Id.*

⁷⁴ *Id.*

⁷⁵ *Id.*

⁷⁶ *Id.*

⁷⁷ *Id.*

⁷⁸ *Id.*

⁷⁹ *Id.*

63. Moreover, the MDVA points out that Minn. Stat. § 196.04, subd. 1, requires the Commissioner to adopt reasonable rules to govern the operations of the Department. The MDVA maintains that, while it does not believe there are less costly or less intrusive methods for achieving the proposed rules' purposes, whether there are other such methods is "an irrelevant point" given this rulemaking requirement.⁸⁰

64. The MDVA also states that if the intent of this regulatory factor is to determine whether there are less costly and less intrusive eligibility or evidentiary requirements to establish an individual's right to benefits, "it is the opinion of MDVA that the proposed rule is appropriate on all fronts."⁸¹

65. Likewise, with respect to less costly or less intrusive procedures for managing the Minnesota Veterans Home, the MDVA maintains that its proposed rules reflect best practices and align with state and federal regulations for operating skilled nursing facilities and Boarding Care homes.⁸² The MDVA contends that there are no alternatives to adopting the proposed rules to achieve the objectives of updating the processes for determining benefit eligibility and for operating the homes in alignment with current federal and state requirements.⁸³

66. The MDVA states that the proposed rules are needed to ensure that only those who are eligible receive benefits allowed by law and to achieve consistency in the operation of the state Veterans Homes so that care is provided in the most efficient, effective, and high-quality manner possible.⁸⁴

67. The requirement that an agency address less costly or intrusive methods for achieving the purpose of a proposed rule in the SONAR is not an irrelevant requirement. "By discussing the agency's thought process in the SONAR, the agency will inform the public why an agency chose the particular method it did."⁸⁵ Simply stating an opinion that a proposed rule is "appropriate on all fronts," does not meet that standard. Even so, based on the entirety of the MDVA's analysis, the Administrative Law Judge determines the MDVA discussed its reasons for proceeding as it did.

4. Description of Alternative Methods for Achieving the Purpose of the Proposed Rule Considered by the Agency and Why Alternatives Were Rejected

68. The MDVA believes that there are no alternatives for achieving the purpose of the proposed rules other than undergoing rulemaking as required by Minn. Stat. § 196.04. The MDVA asserts that it conducted a thorough analysis of federal and state regulations governing operations of the state Veterans Homes. It maintains that the proposed rule amendments are needed to align chapter 9050 with existing state and

⁸⁰ *Id.* at 63.

⁸¹ *Id.*

⁸² *Id.*

⁸³ *Id.*

⁸⁴ *Id.*

⁸⁵ See Minnesota Administrative Procedure § 17.2.2(3) (George A. Beck and Mehmet Konar-Steenberg, eds. 3d ed. 2014).

federal regulations, as well as current health care industry best practices related to long term care facilities and other congregant care residential programs.⁸⁶

5. Probable Costs of Complying with Proposed Rules, Including the Portion of the Total Costs Borne by Identifiable Categories of Affected Parties

69. The MDVA's analysis of this factor reads as follows:

For the MDVA, other government and nongovernmental entities, the costs of complying with the proposed rules are synonymous with the costs of implementing and enforcing the proposed rules. The costs of complying with the proposed rules are not more than the programmatic costs associated with meeting the rule requirements. The costs of complying with the proposed rules will be no more than the costs of meeting the requirements of the existing rule.⁸⁷

67. The MDVA has not provided information regarding the probable costs of ongoing compliance. The MDVA refers to Section 9 of the SONAR, but that section does not reveal any additional information regarding costs. This is not sufficient to meet the requirement to address the costs of compliance with the proposed rule under Minn. Stat. § 14.131(5).

6. Probable Costs or Consequences of not Adopting the Proposed Rules, Including Costs Borne by Individual Categories of Affected Parties

68. The MDVA states that a significant consequence of not adopting the proposed rules would be that the existing rules would remain out of date and not accurately reflect current federal and state requirements governing the operation of the Minnesota Veterans Homes.⁸⁸ For example, the proposed rules align definitions and terminology with the federal Center for Medicare and Medicaid Services (CMS) certification rules. By not adopting the proposed rule amendments, the existing rules will remain out of alignment with certain federal requirements.⁸⁹

7. Assessment of Differences Between Proposed Rules and Existing Federal Regulations

69. This factor requires the MDVA to provide "an assessment of any differences between the proposed rule and existing federal regulations and a specific analysis of the need for and reasonableness of each difference."⁹⁰

⁸⁶ Ex. D at 64.

⁸⁷ *Id.*

⁸⁸ *Id.*

⁸⁹ *Id.*

⁹⁰ Minn. Stat. § 14.131(7).

70. The MDVA's discussion of this factor reads as follows:

There are no federal regulations that govern rulemaking procedures for Minnesota state agencies that are adopting, amending, or repealing its rules through Minn. Stat. ch. 14. The purpose of this rulemaking is to update and clarify the existing Minnesota Veterans Homes rules.

The MDVA believes that the proposed rule amendments do not differ greatly from federal and state rules that govern the operation of the state Veterans Homes due to licensure and certification. Many of the rule revisions are to align state rule with federal rules and requirements.⁹¹

71. The MDVA recognizes that there are differences between its rules and federal standards. However, its SONAR does not identify or analyze these differences, notwithstanding the statutory directive. This is a critical inquiry because a rule must be disapproved if it conflicts with other applicable law or is unconstitutional.⁹² As discussed in more detail below, the rules proposed by the MDVA vary from or conflict with certain provisions of federal law. As such, the MDVA has not adequately analyzed this factor.

8. Cumulative Effect of the Rule with Other Federal and State Regulations

72. Minn. Stat. § 14.131 defines "cumulative effect" as "the impact that results from incremental impact of the proposed rule in addition to the other rules, regardless of what state or federal agency has adopted the other rules."

73. The MDVA states that the proposed rules will not add another level of regulation. Instead, the proposed rules will clarify procedures and remove outdated language and discrepancies that exist in the current rule. According to the MDVA, these revisions will increase the efficiency and effectiveness of its regulations.⁹³

B. Performance-Based Regulation

74. An agency is required to describe in its SONAR the manner in which the agency has considered and implemented the legislative policy supporting performance-based regulatory systems.⁹⁴ A performance-based rule is one that emphasizes superior achievement in meeting the agency's regulatory objectives and maximum flexibility for the regulated party and the agency in meeting those goals.⁹⁵

75. The MDVA notes that it is required to participate in quality improvement assessment and planning on a frequent and regular basis. It does this by closely

⁹¹ Ex. D at 64-65.

⁹² Minn. R. 1400.2100(D)-(E). Under the Supremacy Clause of the U.S. Constitution in the event of a conflict between state and federal law, the contrary state rules are preempted. See U.S. Const., art. VI, cl. 2.

⁹³ Ex. D at 65.

⁹⁴ Minn. Stat. §§ 14.002; 131 (2020)

⁹⁵ Minn. Stat. § 14.002.

reviewing all adverse and sentinel events through a “root cause analysis process.”⁹⁶ It also facilitates a Quality Assurance and Performance Improvement program and engages in high quality delivery of care to all residents of the Minnesota Veterans Homes.⁹⁷

76. The MDVA also states that the proposed rules clarify processes and provide sufficient detail to ensure that veterans and persons applying for or receiving healthcare understand how decisions are made, including cost and benefit determinations related to healthcare.⁹⁸ In addition, the MDVA maintains that the proposed rule amendments provide the Department with sufficient flexibility to meet the changing needs of veterans and their families.⁹⁹

77. The MDVA has described how it considered the legislative policy related to performance-based regulatory systems under Minn. Stat. § 14.131.¹⁰⁰

C. Consultation with the Commissioner of Minnesota Management and Budget

78. Minn. Stat. § 14.131 requires that agencies consult with the Commissioner of Minnesota Management and Budget (MMB) to help evaluate the fiscal impact and fiscal benefits of the proposed rule on local units of government.

79. On June 14, 2021, the MDVA sent a letter to MMB’s Commissioner, along with the proposed rules and SONAR, seeking the required consultation.¹⁰¹

80. On June 28, 2021, MMB issued a memorandum analyzing the fiscal impacts and benefits on local units of government.¹⁰² MMB concluded that the proposed rule amendments do not have any fiscal impact on local units of government.¹⁰³

D. Summary of Compliance with Minn. Stat. § 14.131

81. The Administrative Law Judge finds that the MDVA has not addressed the statutory factors required under Minn. Stat. § 14.131(2), (5) and (7). The impact of these deficiencies in the SONAR are addressed in greater detail below.

E. Cost to Small Businesses and Cities under Minn. Stat. § 14.127

82. Minn. Stat. § 14.127, requires an agency to “determine if the cost of complying with a proposed rule in the first year after the rule takes effect will exceed \$25,000 for: (1) any one business that has less than 50 full-time employees; or (2) any one statutory or home rule charter city that has less than ten full-time employees.” The

⁹⁶ Ex. D at 65.

⁹⁷ *Id.*

⁹⁸ *Id.* at 9.

⁹⁹ *Id.*

¹⁰⁰ Minn. Stat. § 14.131.

¹⁰¹ Ex. K1 at 1-2 (Certificate of consulting with MMB and transmittal letter to MMB).

¹⁰² Ex. K1 at 4 (Memorandum from MMB Executive Budget Officer to Dale Klitzke).

¹⁰³ *Id.*

Agency must make this determination before the close of the hearing record, and the Administrative Law Judge must review the determination and approve or disapprove it.¹⁰⁴

83. The proposed rule amendments are related to the management of the Veterans Homes operated by the MDVA. The MDVA states that there is no circumstance where a small business or city would be involved in the operation of a Minnesota Veterans Home. Therefore, the MDVA asserts that compliance with the rules will not cause any small business or city to incur an expense of more than \$25,000 in the first year after the amendments take effect.¹⁰⁵

84. The Administrative Law Judge finds that the MDVA has made the determinations required by Minn. Stat. § 14.127 and approves those determinations.

F. Adoption or Amendment of Local Ordinances

85. Under Minn. Stat. § 14.128, the agency must determine if a local government will be required to adopt or amend an ordinance or other regulation to comply with a proposed agency rule. The agency must make this determination before the close of the hearing record, and the Administrative Law Judge must review the determination and approve or disapprove it.¹⁰⁶

86. The MDVA concluded that, because there is no relationship between the operation of the Minnesota Veterans Homes and local units of government, no local government will be required to adopt or amend an ordinance or other regulation to comply with the proposed rules.¹⁰⁷

87. The Administrative Law Judge finds that the MDVA has made the determination required by Minn. Stat. § 14.128 and approves that determination.

V. Rulemaking Legal Standards

88. Once an agency has made a choice to pursue rulemaking, the Administrative Law Judge's role is to ensure the agency acts lawfully.

89. Under Minn. Stat. § 14.14, subd. 2, and Minn. R. 1400.2100, the agency must establish the need for, and reasonableness of, a proposed rule through an affirmative presentation of facts. In support of a rule, the agency may rely upon materials developed for the hearing record,¹⁰⁸ "legislative facts" (namely, general and well-established principles that are not related to the specifics of a particular case, but

¹⁰⁴ Minn. Stat. § 14.127, subds. 1, 2.

¹⁰⁵ Ex. D at 66.

¹⁰⁶ Minn. Stat. § 14.128, subd. 1.

¹⁰⁷ Ex. D at 67.

¹⁰⁸ See *Manufactured Hous. Inst. v. Petterson*, 347 N.W.2d 238, 240 (Minn. 1984); *Minn. Chamber of Commerce v. Minn. Pollution Control Agency*, 469 N.W.2d 100, 103 (Minn. Ct. App. 1991).

which guide the development of law and policy),¹⁰⁹ and the agency's interpretation of related statutes.¹¹⁰

90. A proposed rule is reasonable if the agency can "explain on what evidence it is relying and how the evidence connects rationally with the agency's choice of action to be taken."¹¹¹

91. By contrast, a proposed rule will be deemed arbitrary and capricious where the agency's choice is based upon whim or devoid of articulated reasons, or if it "represents its will and not its judgment."¹¹²

92. Additionally, under Minn. R. 1400.2100, a rule must be disapproved if it:

- A. was not adopted in compliance with procedural requirements of this chapter, Minnesota Statutes, chapter 14, or other law or rule, unless the judge decides that the error must be disregarded under Minnesota Statutes, section 14.15, subdivision 5, or 14.26, subdivision 3, paragraph (d);
- B. is not rationally related to the agency's objective or the record does not demonstrate the need for or reasonableness of the rule;
- C. is substantially different than the proposed rule, and the agency did not follow the procedures of part 1400.2110;
- D. exceeds, conflicts with, does not comply with, or grants the agency discretion beyond what is allowed by, its enabling statute or other applicable law;
- E. is unconstitutional or illegal;
- F. improperly delegates the agency's powers to another agency, person, or group;
- G. is not a "rule" as defined in Minnesota Statutes, section 14.02, subdivision 4, or by its own terms cannot have the force and effect of law; or
- H. is subject to Minnesota Statutes, section 14.25, subdivision 2, and the notice that hearing requests have been withdrawn and written responses to it show that the withdrawal is not consistent with Minnesota Statutes, section 14.001, clauses (2), (4), and (5).

93. When proposing rules, an agency is entitled to make choices between different possible regulatory approaches, so long as the alternative selected by the agency is a rational one. While reasonable minds might differ as to whether one or

¹⁰⁹ Compare generally *United States v. Gould*, 536 F.2d 216, 220 (8th Cir. 1976).

¹¹⁰ See *Mammenga v. State Dep't of Human Servs.*, 442 N.W.2d 786, 789-92 (Minn. 1989); *Manufactured Hous. Inst.*, 347 N.W.2d at 244.

¹¹¹ *Manufactured Hous. Inst.*, 347 N.W.2d at 244.

¹¹² See *Mammenga*, 442 N.W.2d at 789; *St. Paul Area Chamber of Commerce v. Minn. Pub. Serv. Comm'n*, 251 N.W.2d 350, 357-58 (Minn. 1977).

another particular approach represents “the best alternative,” the agency’s selection will be approved if it is one that a rational person could have made.¹¹³

94. The delegation of rulemaking authority is drawn from the Minnesota Legislature and is conferred upon the agency. A judge does not fashion requirements that the judge regards as best suited for the regulatory purpose. The legal review under the APA begins with this important premise.¹¹⁴

VII. The Proposed Rules Must be Disapproved

95. After a thorough review of the record, the Administrative Law Judge determines that the MDVA’s proposed rules must be disapproved as a whole. The Administrative Law Judge recognizes the gravity of this determination and does not take this step lightly. However, the Administrative Law Judge concludes that deficiencies in the MDVA’s SONAR, and the impact of those deficiencies on the legality review required by law, do not permit approval of the proposed rules. These deficiencies include the MDVA’s failure to provide the analysis required by Minn. Stat. § 14.131, as well as the MDVA’s misrepresentation of its efforts to obtain public participation in the development of the rules.

A. Failure to Address Minn. Stat. § 14.131(2), (5) and (7)

96. Minn. R. 1400.2070, subp. 1, requires an agency promulgating rules to prepare a SONAR. That rule also establishes certain parameters for the contents of the SONAR, stating:

The statement of need and reasonableness must summarize the evidence and argument that the agency is relying on to justify both the need for and the reasonableness of the proposed rules, and must state how the evidence rationally relates to the choice of action taken. The statement must explain the circumstances that created the need for the rulemaking and why the proposed rulemaking is a reasonable solution for meeting the need. The statement must be sufficiently specific so that interested persons will be able to fully prepare any testimony or evidence in favor of or in opposition to the proposed rules. A general description of the statute being implemented or restating the proposed rule is not sufficient.¹¹⁵

¹¹³ *Minn. Chamber of Commerce*, 469 N.W.2d at 103; *Peterson v. Minn. Dep’t of Labor and Indus.*, 591 N.W.2d 76, 79-80 (Minn. Ct. App. 1999).

¹¹⁴ *See Manufactured Hous. Inst.*, *supra*, 347 N.W.2d at 244 (instructing that the state courts are to restrict the review of agency rulemaking to a “narrow area of responsibility, lest [the court] substitute its judgment for that of the agency”); *see also, In the Matter of the Proposed Rules of the Minnesota Pollution Control Agency Governing Permits for Greenhouse Gas Emissions*, Minnesota Rules Chapters 7005, 7007 and 7011, OAH No. 8-2200-22910-1 at 20, REPORT OF THE ADMINISTRATIVE LAW JUDGE (Minn. Office Admin. Hearings Nov. 9, 2012).

¹¹⁵ Minn. R. 1400.2070, subp. 1.

97. The agency must also address the statutory factors identified in Minn. Stat. § 14.131.¹¹⁶ An agency's discussion of these factors in the SONAR may be imperfect, but can be sufficient so that it can still be said that the agency addressed a particular factor.¹¹⁷ It is also possible for an agency to supplement information presented in the SONAR during the later stages of rulemaking, such that the record as a whole supports finding that an issue has been addressed.¹¹⁸

98. Additionally, an agency must make an affirmative presentation of facts to establish the need for and reasonableness of its proposed rules.¹¹⁹ In doing so, the agency has some leeway. The Minnesota Supreme Court has recognized that an agency may be required to "make judgments and draw conclusions from 'suspected, but not completely substantiated, relationships between facts, from trends among facts, from theoretical projections from imperfect data, from probable preliminary data not yet certifiable as 'fact,' and the like.'"¹²⁰ The content of the rulemaking record may vary depending on the nature of the rule; in some cases a substantial evidentiary record is required, while in other cases "common knowledge" or "common sense" will be sufficient.¹²¹

99. In this case, the MDVA did not address the probable costs for itself, other governmental agencies, and regulated parties as required by Minn. Stat. § 14.131(2) and (5). The SONAR acknowledges that some costs will exist in connection with implementation and enforcement of the rules, but the SONAR states only that the costs are "nominal" and "have no impact."¹²² The MDVA's analysis regarding the costs of compliance also does not provide sufficient information. It states:

For the MDVA, other government and nongovernmental entities, the costs of complying with the proposed rules are synonymous with the costs of implementing and enforcing the proposed rules. The costs of complying with the proposed rules are not more than the programmatic costs associated with meeting the rule requirements. The costs of complying with the proposed rules will be no more than the costs of meeting the requirements of the existing rule.¹²³

100. Under Minn. R. 1400.2100(A), a rule must be disapproved if it was not adopted in compliance with the procedural requirements of Minn. Stat. ch. 14, Minn. R. ch. 1400, or other law or rule, unless the error must be disregarded as harmless error.

¹¹⁶ *Id.*, subp. 2(A).

¹¹⁷ See, e.g., *Water in Motion, Inc. v. Minn. Dep't of Labor and Industry*, No. A16-0335, 2016 WL 7041978 at *7-*8 (Minn. Ct. App. 2016) (stating that the agency's analysis of costs "lacks the level of detail we might prefer," but that its articulation of potential higher and lower costs associated with different portions of the rule was sufficient).

¹¹⁸ *Builders Ass'n*, 965 N.W.2d at 359 (stating that the "public hearing is the agency's opportunity to expound upon the information in the SONAR.").

¹¹⁹ Minn. Stat. § 14.14, subd. 2.

¹²⁰ *Manufactured Hous. Inst.*, 347 N.W.2d at 244.

¹²¹ *Mammenga*, 442 N.W.2d at 791.

¹²² Ex. D at 62.

¹²³ *Id.* at 64.

Under the harmless error standard in Minn. Stat. § 14.15, subd. 5, an administrative law judge must disregard a defect in the proceeding due to an agency's failure to satisfy a procedural requirement if the administrative law judge finds that: (1) the defect did not deprive a person or entity of an opportunity to meaningfully participate in the proceeding; or (2) the agency took corrective action to cure the defect so that no person or entity was deprived of such an opportunity.

101. When an agency's failure to address a procedural requirement causes actual prejudice to the rulemaking process, however, the rule must be invalidated.¹²⁴ A deficient SONAR causes prejudice "when it does not adequately preview the agency's intentions, evidence, and rationale so as to afford parties the opportunity to meaningfully participate in the rulemaking process."¹²⁵

102. An agency can satisfy its obligation to discuss the probable costs that a proposed rule may impose without providing extensive details.¹²⁶ In *Builders Ass'n*, the Board of Electricity sufficiently discussed costs of compliance by identifying five rule changes and indicating that the costs would not exceed \$600 per project.¹²⁷ Similarly, in *Water in Motion*, the agency adequately identified probable costs when it discussed certain rule provisions that could increase costs and others that could result in lower costs; the Board also noted that costs were difficult to quantify, but in its judgment the rules were cost "neutral."¹²⁸

103. The requirement that an agency identify the probable costs of a proposed rule is not onerous. The agency must simply summarize information identifying what the costs are. Here, because the MDVA did not provide any information about the probable costs of the rule, there is no way for the public or this tribunal to review, understand, or comment on the basis for the MDVA's assessments that the costs are "nominal" and "have no impact."

104. Some provisions of the proposed rules suggest that there will be increased costs for the MDVA, other agencies, and regulated parties, and that these may not be nominal or have no impact. For example, the MDVA proposes to revise the procedures related to reconsideration of the decision to involuntarily discharge a resident from a Veterans Home. Under the current rule, a resident or a resident's legal representative may request reconsideration of the notice of involuntary discharge, or may waive the reconsideration hearing and proceed directly to an appeal before the Office of Administrative Hearings.¹²⁹

¹²⁴ See *Minn. League of Credit Unions v. Minn. Dep't of Commerce*, 486 N.W.2d 399, 405-06 (Minn. 1992); *Builders Ass'n of the Twin Cities v. Bd. of Elec.*, 965 N.W.2d 350, 360-61 (Minn. Ct. App. 2021).

¹²⁵ *Builders Ass'n*, 965 N.W.2d at 361.

¹²⁶ For examples of discussions of costs, see *In the Matter of the Proposed Rules of the Minnesota Dep't of Health Governing Assisted Living Facilities*, OAH No. 65-9000-37175, REPORT OF THE ADMINISTRATIVE LAW JUDGE at 15-25 (Mar. 29, 2021); *In the Matter of the Proposed Rules of the Dep't of Agriculture Governing Groundwater Protection*, OAH No. 71-9024-35205, REPORT OF THE ADMINISTRATIVE LAW JUDGE at 11-16 (Sept. 21, 2018).

¹²⁷ *Builders Ass'n*, 965 N.W.2d at 359.

¹²⁸ 2016 WL 7041978 at *7-*8.

¹²⁹ Minn. R. 9050.0220, subps. 3, 6 (2021).

105. The MDVA intends to amend this rule to require a reconsideration hearing related to every involuntary discharge notice, rather than providing the reconsideration hearing only upon request.¹³⁰ The MDVA's proposed rule deletes the current language allowing the veteran or the veteran's legal representative to waive the reconsideration process and proceed directly to an appeal.¹³¹ As a result, the MDVA would undertake an internal reconsideration hearing involving witness testimony and the presentation of evidence every single time the MDVA determines it will involuntarily discharge a resident.¹³²

106. The MDVA has not provided any information regarding whether it will have any increased costs associated with conducting these additional hearings. The Office of Ombudsman for Long Term Care (OOLTC) is authorized to represent veterans in reconsideration hearings,¹³³ and will continue to do so under the MDVA's proposed rule.¹³⁴ Comments from the State Ombudsman and several Regional Ombudspersons establish that the OOLTC is actively involved in matters related to discharges from the Veterans Homes.¹³⁵ The MDVA provides no information about whether the OOLTC will bear increased costs if it must represent veterans in additional involuntary discharge hearings. The MDVA also has not assessed whether requiring a veteran to proceed with a reconsideration hearing, some portions of which are duplicative of an ultimate administrative appeal, will result in increased costs for the veterans themselves.¹³⁶

107. At the public hearing, a commenter raised concerns about the adequacy of the SONAR because the MDVA had not addressed the probable cost impacts of the proposed rule.¹³⁷ The MDVA could have responded with additional information, consistent with Minn. Stat. § 14.15, subd. 5(2), in order to cure the defect. It did not do so. Instead, in response to this comment, the MDVA simply stated: "MDVA has complied with the required contents of the SONAR as required within Minn. Stat. Ch. 14 and Minn. R. ch. 1400."¹³⁸

¹³⁰ Ex. C at 34.

¹³¹ *Id.*

¹³² *Id.* at 34, 37.

¹³³ Minn. R. 9050.0220, subp. 4(A) (2021).

¹³⁴ Ex. C at 36.

¹³⁵ Comment of Cheryl Hennen at 1-2 (Nov. 19, 2021); Comment of Kristen Rice (Nov. 22, 2021); Comment of Lori Goetz (Nov. 23, 2021); Comment of Christopher Bonander (Nov. 23, 2021); Tr. at 64 (Maisie Blaine) ([D]ischarge complaints are consistently the most frequent complaint handled by the [OOLTC] year after year in Minnesota.)

¹³⁶ It should also be noted that the MDVA has not explained why it has chosen to eliminate the veteran's right to forego a reconsideration hearing and proceed directly to an appeal. The rule-by-rule analysis in the SONAR does not address this change specifically, but states that the agency will automatically provide a reconsideration hearing in every case and that this is intended to protect residents' due process rights. Ex. D. at 33. In response to concerns from commenters that this requirement will add additional time and costs before the resident can appeal, the MDVA essentially restates the positions expressed in the SONAR. MDVA's Response to Public Comments at 23-24 (Feb. 22, 2022). The MDVA has not explained why this revision is necessary, or why a resident's due process rights are not sufficiently protected by the ability to have an appeal heard by this tribunal.

¹³⁷ Tr. at 41 (Suzanne Scheller).

¹³⁸ MDVA Response to Public Comments at 44-45 (Feb. 22, 2022).

108. The foregoing is just one example of probable costs associated with the proposed rules. Because the MDVA did not provide information as to what any costs might be, there is no way to assess whether other parts of the rule could carry implementation or compliance costs.

109. The MDVA's SONAR also did not address conflicts with federal regulations. As noted above, under Minn. R. 14.131(7), the MDVA is required to identify any differences between its proposed rule and existing federal regulations and to provide specific analysis of the need for and reasonableness of each difference.¹³⁹ The MDVA stated only that it believed its proposed rules did not "differ greatly" from federal regulations and that the rule changes it proposes are intended to align with federal law.¹⁴⁰

110. Commenters raised concerns that the rules have extensive differences with federal law, however.¹⁴¹ For example, commenters noted that the MDVA's proposed rule regarding the grounds for an involuntary discharge conflicts with federal regulations governing transfer and discharge of residents in skilled nursing facilities under 42 C.F.R. § 483.15 (2021), and domiciliary care settings under 38 C.F.R. § 51.300 (2021).¹⁴² Those rules establish specific grounds that may be used to discharge residents.¹⁴³

111. The MDVA proposes to repeal Minn. R. 9050.0200, subp. 3 (2021), which currently contains the bases for involuntary discharge from the Veterans Homes and amend subpart 2(B) to state these grounds.¹⁴⁴ In connection with these changes, the MDVA adds new language that would allow it to discharge a resident involuntarily when "the resident's behavior exhibits willful or deliberate disregard for the veterans home facility's regulatory requirements or policies."¹⁴⁵ This is not one of the grounds federal law identifies as a basis for discharge.¹⁴⁶

112. In the SONAR, the MDVA states that the grounds for discharge in its proposed rule part 9050.0200, subpart 2(B) "align with" the existing reasons for discharge

¹³⁹ Minn. Stat. § 14.131(7).

¹⁴⁰ Ex. D. at 65.

¹⁴¹ The SONAR need not contain evidence or argument in rebuttal of evidence and argument presented by the public. Minn. R. 1400.2070, subp. 1. At the same time, there is a presumption underlying that rule that the agency will have engaged in some analysis that meets the requirements of Minn. Stat. § 14.131, Minn. R. 1400.2070, subp. 1. If an agency simply performs no analysis as to matters that it can reasonably ascertain and should discuss, it shifts the burden to the public and this tribunal, and doing so is not in compliance with rulemaking standards.

¹⁴² See e.g., Comment of Cheryl Hennen at 20 (Nov. 19, 2021); Comment of Amber Hildebrandt and Suzanne Scheller (Nov. 19, 2021); Comment of Jill Sauber at 5-6 (Nov. 22, 2021). It should be noted that commenters identified other instances in which they believe the proposed rules conflict with federal regulations, such as the right to choose a physician or to refuse medical care. See Comment of Cheryl Hennen at 7, 10-11 (Nov. 19, 2021); Comment of Jill Sauber at 3 (Nov. 22, 2021). The Administrative Law Judge has not addressed every conflict with federal regulations in this order, but instead selected a representative example to illustrate the problem created by the lack of analysis in the SONAR.

¹⁴³ See 38 C.F.R. § 51.300(d)(2); 42 C.F.R. § 483.15(c).

¹⁴⁴ Ex. C at 30.

¹⁴⁵ *Id.*

¹⁴⁶ See 38 C.F.R. § 51.300(d)(2); 42 C.F.R. § 483.15(c).

under Minn. R. 9050.0200, subp. 3, and contends that it is reasonable to identify the circumstances under which the MDVA may involuntarily discharge a resident.¹⁴⁷ The SONAR's rule-by-rule analysis does not acknowledge that the MDVA is adding a new basis for discharge or analyze how the addition of this provision differs from the federal regulations.¹⁴⁸ Responding to comments objecting to this proposed rule, the MDVA states:

The proposed amendments to item B are needed to more clearly and concisely identify all the circumstances for which the MDVA may initiate involuntary discharge proceedings against a resident of one of its facilities. It is reasonable to provide the circumstances under which involuntary discharge procedures start in order to ensure that the facility and resident are informed that specific circumstances will lead to an involuntary discharge.

The proposed amendments to parts 9050.0200 and 9050.0220 provide additional protection to the resident by creating another level of internal review, which in turn will ensure proper adherence to both federal and state law as it pertains to the discharge process and resident's rights.¹⁴⁹

113. The MDVA does not claim that it is not subject to federal regulations governing the discharge of residents from skilled nursing or domiciliary care facilities, and it contends that its discharge processes are designed to ensure compliance with federal law. Yet it proposes to adopt a ground for discharge that does not comport with the language of existing federal regulations, and it has failed to address the difference, as required by Minn. Stat. § 14.131(7).

114. The MDVA also proposes to change the eligibility standards for admission to the Veterans Homes under Minn. R. 9050.0050 (2021). Under Minn. R. 9050.0050, subp. 3a, a person is considered to be a resident of Minnesota if the person "currently resides in Minnesota and intends to reside in the state permanently," and "does not own or maintain a home in another state."

115. The MDVA's proposed rules provide that a veteran seeking admission to a Veterans Home "must be a permanent resident of the state of Minnesota as defined in subpart 3a."¹⁵⁰ The MDVA proposes to amend subpart 3a to provide:

¹⁴⁷ Ex. D at 30.

¹⁴⁸ It also should be noted that the MDVA has never explained why it proposes to add this ground for discharge to the rule or why this change is reasonable. Here, and in other parts of the SONAR, the MDVA recites the proposed rule language and then offers conclusory statements indicating that the rule change is reasonable, without offering information about why the rule change is needed or why it selected that particular solution to address an identified problem. This does not meet the MDVA's burden to establish the need for and reasonableness of proposed rules.

¹⁴⁹ MDVA's Response to Public Comments at 23-24 (Feb. 22, 2022).

¹⁵⁰ Ex. C at 13.

Subp. 3a. **Residency.** For purposes of determining residency ~~under Minnesota Statutes, section 198.022, paragraphs (2) and (3)~~, a person is a permanent resident of Minnesota if:

A. the person ~~currently~~ physically resides in Minnesota ~~and intends to reside in the state permanently~~ for at least 90 days prior to application to a veterans home operated by the commissioner; and

B. the person does not rent, own, or maintain, or occupy a home in another state.¹⁵¹

116. In response, commenters contend that the 90-day durational residency requirement is similar to durational residency requirements that have been held to be unconstitutional.¹⁵²

115. In the SONAR, the MDVA's rule-by-rule analysis states that the proposed amendments are:

needed to clarify what it means to be considered a resident in order to meet the eligibility requirements for admission to a Minnesota Veterans Homes facility. In seeking to define residency, the constitutional limitations on residency requirements, as determined by state and federal law, were taken into consideration.¹⁵³ This rule is reasonable because it reflects these limitations yet assures that the Veterans Homes facility will be available to those eligible applicants who are residents of the state of Minnesota.¹⁵⁴

117. In response to comments expressing constitutional concerns, the MDVA reiterated that it took into consideration the constitutional limitations on residency requirements.¹⁵⁵ The MDVA further stated that the durational residency requirement is necessary to ensure that a veteran or veteran's spouse intends to make Minnesota their permanent residence, and "mitigates the risk of migration to Minnesota for the sole purpose of admission to a Minnesota Veterans Home," placing a financial burden on Minnesota taxpayers.¹⁵⁶ The MDVA also states that other Minnesota state statutes contain residency requirements for eligibility for taxpayer funded benefits.¹⁵⁷

¹⁵¹ Ex. C at 14; MDVA's Response to Public Comments at 8 (Feb. 22, 2022). The Department originally proposed to require that the person rent, own, maintain, or occupy a residence in Minnesota suitable for year-round use for least 90 days prior to applying for admission. Ex. C at 14. In response to public comments contending that this provision would disqualify homeless veterans from eligibility for admission, the Department altered its proposed rule to reflect the language noted here. Tr. at 34.

¹⁵² Comment of Amber Hildebrandt and Suzanne Scheller (Nov. 19, 2021); Comment of Jill Sauber at 2-3 (Nov. 22, 2021); Tr. at 75 (Mary Frances Price).

¹⁵³ The MDVA's language regarding its consideration of constitutional concerns is similar to statements it made in support of the 1995 amendments adopting the current rule, but that rule provided for benefits to current residents, and so did not trigger the same concerns. MDVA's Response to Public Comments at Attachment 4 at 7 (Feb. 22, 2022).

¹⁵⁴ Ex. D at 22.

¹⁵⁵ MDVA's Response to Public Comments at 7 (Feb. 22, 2022).

¹⁵⁶ *Id.*

¹⁵⁷ *Id.* at 7-8.

118. It could be argued that the reference in Minn. Stat. § 14.131(7) requires an agency to address “existing federal regulations” that differ from proposed rule language, and that this does not expressly indicate that an agency must address constitutional law limitations. At the same time, a rule must be rejected if it is unconstitutional, and an agency that has considered a potential constitutional conflict should address such issues as its proposed actions may be “regulated” by terms of the Constitution. The MDVA’s SONAR and response, however, do not provide any analysis of the constitutional considerations related to imposition of the 90-day durational residency requirement.¹⁵⁸

119. In 1993, the Minnesota Supreme Court struck down a state statute imposing a six-month durational residency requirement for receipt of full general assistance-work readiness benefits.¹⁵⁹ The Court held that the statute’s differentiation in the amount of benefits violated the U.S. Constitution by indirectly burdening the right to travel.¹⁶⁰ The Court noted that the right to travel is a fundamental right, and that it is implicated when a statute uses any classification that penalizes the exercise of the right,¹⁶¹ including when a state law classifies “residents according to the time they established residence, result[ing] in the unequal distribution of rights and benefits among otherwise qualified bona fide residents.”¹⁶² The Court further stated that the conservation of limited state funds was not a justification for the durational requirement, noting that “[t]he conservation of the taxpayers’ purse is simply not a sufficient state interest to sustain a durational residence requirement which, in effect, severely penalizes exercise of the right to freely migrate and settle in another State.”¹⁶³

120. The United States Supreme Court subsequently decided *Saenz v. Roe*, in which it concluded that California’s one-year durational residency requirement for full benefits under the Temporary Aid to Needy Families program violated the constitutional right to travel.¹⁶⁴ The Court stated that the right to travel provides that those who elect to become permanent residents of a state have a right to be treated like other citizens of a state.¹⁶⁵ The Court noted that the Fourteenth Amendment proves an additional source of protection for this facet of the right to travel, in stating that “[a]ll persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States.”¹⁶⁶ It also held

¹⁵⁸ See *Minn. Env’tl Science and Econ. Review Bd. v. Minn. Pollution Control Agency*, 870 N.W.2d 97, 101 (Minn. Ct. App. 2015) (adopting standards for an agency’s response to comments and holding that an agency “must respond in a manner that states the main reasons for its decision and explains why the agency reached the decision it did.”). At a minimum, the MDVA was required to respond substantively to identified constitutional concerns.

¹⁵⁹ *Mitchell v. Steffen*, 504 N.W.2d 198 (Minn. 1993).

¹⁶⁰ *Id.* at 200.

¹⁶¹ *Id.* at 201-202.

¹⁶² *Id.* (quoting *Attorney Gen. of N.Y. v. Soto-Lopez*, 476 U.S. 898, 903, 106 S.Ct. 2317, 2321 (1996)).

¹⁶³ *Id.* at 203 (internal quotation omitted) (quoting *Mem’l Hosp. v. Maricopa Cty.*, 415 U.S. 250, 263, 94 S.Ct. 1076, 1085 (1974)).

¹⁶⁴ 526 U.S. 489, 119 S.Ct. 1518 (1999).

¹⁶⁵ *Id.* at 500, 119 S.Ct. at 1525.

¹⁶⁶ *Id.* at 503, 119 S.Ct. 1526; U.S. Const., Amdt. 14, § 1.

that California’s legitimate interest in saving money under the rule “provides no justification for its decision to discriminate among equally eligible citizens.”¹⁶⁷

121. At the public hearing, a commenter challenged the adequacy of the SONAR’s analysis of the differences between the proposed rules and federal law and asserted that the SONAR was procedurally defective.¹⁶⁸ The MDVA did not provide a substantive response, stating only that: “MDVA has complied with the required contents of the SONAR as required within Minn. Stat. Ch. 14 and Minn. R. ch. 1400.”¹⁶⁹

122. In light of the differences between its proposed rules and the identified constitutional concerns, the Administrative Law Judge determines that the MDVA failed to provide the analysis required by Minn. Stat. § 14.131(7) in the SONAR. The MDVA could have cured this defect by submitting additional information, or by responding substantively to public comments on this issue,¹⁷⁰ but instead did not correct this defect.

123. The defects in these areas of the SONAR are so complete that they cannot be considered harmless error and overlooked because the SONAR does not “adequately preview the agency’s intentions, evidence, and rationale so as to afford parties the opportunity to meaningfully participate in the rulemaking process.”¹⁷¹ The Administrative Law Judge concludes that the MDVA’s failure to address costs in connection with its proposed rules, and failure to provide analysis of conflicts between the proposed rules and federal law are prejudicial deficiencies.¹⁷² These deficiencies prevented meaningful participation of the public in the rulemaking process. Even if this were not so, however, there is an additional basis requiring disapproval of the rules.

B. Failure to Engage Stakeholders and Increase Public Participation and Misrepresentations Related to its Outreach Efforts

124. The rulemaking process is intended to fulfill one of the purposes of the APA, as identified by the legislature in Minn. Stat. § 14.001 (2020), which is to increase public participation in the formulation of administrative rules.¹⁷³ A rulemaking proceeding that includes a public hearing, in addition to a period for submission of written comments, offers an opportunity for members of the public to participate. To obtain meaningful public participation in the rulemaking process, agencies are required to provide additional notice beyond the minimum notice required by making reasonable efforts “to notify persons or classes of persons who may be significantly affected by the rule being proposed by giving notice of its intention in newsletters, newspapers, or other publications, or through other

¹⁶⁷ *Id.* at 507, 119 S.Ct. at 1528.

¹⁶⁸ Tr. at 41 (S. Scheller).

¹⁶⁹ MDVA Response to Public Comments at 44-45 (Feb. 22, 2022).

¹⁷⁰ *Minn. Env’t Science and Econ. Review Bd.*, 870 N.W.2d at 101.

¹⁷¹ *Builders Ass’n*, 965 N.W.2d at 361.

¹⁷² It is true that some commenters identified the differences between federal law and the proposed rules, and participated in the rulemaking as to those issues. But because the MDVA failed to articulate and analyze the differences as required, commenters did so in a vacuum without any knowledge of the basis for the MDVA’s proposals. This is not meaningful participation.

¹⁷³ Minn. Stat. § 14.001(5).

means of communication.”¹⁷⁴ An agency must detail these efforts in the SONAR, or explain why it did not engage in such outreach.¹⁷⁵

125. In its SONAR, the Department represented that it conducted “outreach activities while developing these rule amendments.”¹⁷⁶ The Department stated that it did so “in part to comply with the requirements of Minnesota’s rulemaking process,” and also to “notify, engage, and inform potentially interested parties about this rulemaking and solicit their input on the MDVA’s proposal to amend the rules.”¹⁷⁷ In describing its efforts to “develop and solicit input on the rule amendments,” the Department stated that, in addition to posting documents related to this rulemaking on its website and publishing the Request for Comments in the *State Register*, it “communicated with specific groups about amending the rules.”¹⁷⁸ According to the Department, these groups included: “the Minnesota Elder Bar of Minnesota, the Minnesota Veterans Home Family Council-Minneapolis, and the Minnesota Department of Human Services, The Office of Ombudsman for Long-Term Care.”¹⁷⁹ The Department also stated that it would “ensure that these groups receive the draft rules when they become available.”¹⁸⁰

126. During the pre-hearing public comment period, however, numerous commenters, including those associated with the groups named by the MDVA, asserted that the MDVA’s SONAR misrepresented the agency’s outreach during the development of the rules.

127. The OOLTC’s State Ombudsman submitted a comment noting that, though it was identified as an organization the MDVA made contact with during the development of the rules, it was not given any opportunity to review or provide input on the proposed rules prior to the public comment period.¹⁸¹ The OOLTC also averred that it was not notified in 2016 when the MDVA published its Request for Comments, and so submitted no comments at that time.¹⁸²

128. Amber Hildebrandt, Chair of the Elder Law Section of the Minnesota State Bar Association (MSBA), and Suzanne Scheller, the Elder Law Section’s Legislative Chair, submitted a letter in which they highlighted the MDVA’s assertion that it had directly engaged with the Elder Law bar and stated:

MDVA did not communicate with the Elder Law Section of the MSBA regarding amending the rules nor did MDVA ensure that the Elder Law Section received a draft of the rules. Neither past nor present Chairs of the Elder Law Section or the Legislative Committee of the Elder Law Section received communication from MDVA regarding the proposed rules and no

¹⁷⁴ Minn. Stat. § 14.14, subd. 1a(a).

¹⁷⁵ Minn. Stat. § 14.131.

¹⁷⁶ Ex. D at 7.

¹⁷⁷ *Id.*

¹⁷⁸ *Id.*

¹⁷⁹ *Id.*

¹⁸⁰ *Id.*

¹⁸¹ Comment of Cheryl Hennen at 55 (Nov. 19, 2021).

¹⁸² *Id.*

substantive process was utilized to engage Elder Law Section feedback. Therefore, the Elder Law Section objects to the misleading statement made by the MDVA and any implications that such proposed changes to the rules reflect input from and/or notification to the Elder Law Section.¹⁸³

129. Lauren L. Fink, an elder law attorney, stated that the MDVA's assertion that it was in contact with the Elder Law Section and OOLTC was "plainly false."¹⁸⁴ She noted that she is on the board and serves as the Secretary of the Minnesota Chapter of the National Academy of Elder Law Attorneys, and she attested that this group was not contacted. She also noted her lengthy service with the Elder Law Governing Council of the MSBA, and certified that this group also was not contacted. Finally, she attested that she had communicated with the OOLTC and could share "that this group was not provided the rules until their issuance on October 18, despite attempts to request this information and collaborate with the MDVA dating back to 2016."¹⁸⁵ She expressed concern that the MDVA's "incorrect" statement would result in the promulgation of rules without feedback from important stakeholders.¹⁸⁶

130. Jill Sauber, also an elder law attorney, similarly noted that many of her colleagues practicing in the elder law area had themselves reached out to the MDVA to inquire about when the proposed changes would be presented in an attempt to collaborate with the agency.¹⁸⁷ She described the MDVA's lack of response as "radio-silence," and stated that she was alarmed that the rules could be adopted without sufficient public participation.¹⁸⁸

131. Cathryn Reher is an elder law attorney who has practiced law for 30 years, including representing veterans and their spouses who receive care through the Minnesota Veterans Homes.¹⁸⁹ She is involved with the Elder Law Section of the MSBA, and echoed concerns that the SONAR inaccurately represented that the MDVA communicated with the section.¹⁹⁰ She stated: "Misleading veterans and the public is a serious matter. The MDVA should be held accountable for the quality and extent of input received from stakeholders listed in the SONAR in the drafting of the proposed rules."¹⁹¹

132. Representatives of organizations that serve aging Minnesotans around the entire state maintained that the MDVA failed to engage stakeholders in the development of the rules. These comments came from the Central Minnesota Council on Aging, which is the designated area agency on aging for 14 counties in Central Minnesota;¹⁹² Dancing Sky Area Agency on Aging, which serves 21 counties in Northwest and West Central

¹⁸³ Comment of Amber Hildebrandt and Susanne Scheller (Nov. 19, 2021).

¹⁸⁴ Comment of Lauren Fink (Nov. 19, 2021).

¹⁸⁵ *Id.* at 1.

¹⁸⁶ *Id.*

¹⁸⁷ Comment of Jill Sauber at 1-2 (Nov. 22, 2021).

¹⁸⁸ *Id.* at 2.

¹⁸⁹ Comment of Cathryn D. Reher (Nov. 19, 2021).

¹⁹⁰ *Id.*

¹⁹¹ *Id.*

¹⁹² eComment of Lori Vrolson (Nov. 22, 2021).

Minnesota;¹⁹³ Trellis, the area agency on aging for the metro area;¹⁹⁴ the Arrowhead Area Agency on Aging, which covers the seven county Arrowhead region of Minnesota;¹⁹⁵ and the Southeastern Minnesota Area Agency on Aging, which serves the 11-county area of Southeastern Minnesota.¹⁹⁶

133. The Minnesota Elder Justice Center (MEJC) is a statewide nonprofit organization that works to prevent and alleviate abuse, neglect, and financial exploitation of older and vulnerable adults.¹⁹⁷ The MEJC expressed concerns about the lack of stakeholder engagement in the formulation of the proposed rules and contended that the MDVA violated Minn. Stat. § 14.14, by failing to meet its notice obligations.

134. At the public hearing, commenters raised additional challenges to the veracity of the MDVA's representations regarding its outreach efforts.

135. Maisie Blaine commented on behalf of the OOLTC. She stated that,

we were listed as an involved stakeholder in the SONAR but were not involved in the drafting of these . . . rules, nor invited, to our knowledge, to give any input. In fact, despite our regional representatives repeatedly asking about the proposed rules and what was contained in them beyond the little bit that's found in the public register, we were not made aware of any of the proposed changes until the posting of the rules.¹⁹⁸

136. Ms. Blaine further contended that "there was little transparency about notifying anyone about these rules through any of the means that the MDVA has at their disposal," and she asserted that the MDVA had failed to comply with Minn. Stat. § 14.14's requirement to engage in outreach to stakeholders.¹⁹⁹

137. In addition to submitting a written comment, Ms. Reher spoke at the hearing to express her disappointment and concern over the MDVA's lack of outreach to advocacy groups in the rule development process.²⁰⁰ Ms. Reher stated that she and other Elder Law Section members never heard from Mr. Klitzke about the proposed rules until approximately one month before the proposed rules were published in the *State Register* with the Dual Notice in October 2021.²⁰¹ Ms. Reher states that she was surprised when she read the MDVA's statements in the SONAR indicating that it had conducted outreach activities with advocacy groups in developing the rules and that it would ensure that these groups received a draft of the proposed rules when it became available.²⁰² Ms. Reher notes that the first draft of the proposed rules is dated April 2021, as is the first page of

¹⁹³ eComment of Darla Waldner (Nov. 22, 2021).

¹⁹⁴ eComment of Dawn Simonson (Nov. 22, 2021).

¹⁹⁵ eComment of Kristi Kane (Nov. 23, 2021); eComment of Brenda Shafer-Pellinen (Nov. 23, 2021).

¹⁹⁶ eComment of Laurie Bownell (Nov. 23, 2021).

¹⁹⁷ Comment of Sean Burke (Nov. 23, 2021).

¹⁹⁸ Tr. at 67 (M. Blaine).

¹⁹⁹ *Id.* at 67-68.

²⁰⁰ Tr. at 50-51 (C. Reher).

²⁰¹ *Id.*

²⁰² *Id.*

the Department's SONAR, but that the rules were not made available until they were published.²⁰³

138. Ms. Reher also commented that, based on the lack of stakeholder involvement, she has serious concerns about the integrity of the entire rulemaking process.²⁰⁴ Ms. Reher maintains that the Department should have afforded advocacy groups and stakeholders opportunities to comment and provide input on the proposed rules well in advance of the final draft published in the *State Register*.²⁰⁵ Ms. Reher believes the reasonableness of the proposed rules is called into question by the Department's failure to solicit input from stakeholders.²⁰⁶

139. During the post-hearing public comment period, Ms. Hildebrandt submitted a sworn affidavit, in which she stated:

I have reviewed the [SONAR] and proposed amendments drafted by the [MDVA], as well as attended the hearing on January 31, 2022. There have been statements made by the MDVA in the documents and at the hearing that interested parties and stakeholders were consulted during the amendment process. I believe this is a material misrepresentation.²⁰⁷

140. Ms. Hildebrandt's affidavit explained that the Governing Council of the Elder Law Section held a regular meeting on February 18, 2022. During the meeting:

The MDVA proposed amendments and January 31st hearing were discussed. Of the 21 council members in attendance, including the prior 2 chairs, it was confirmed that no representatives for the Section received communications about or drafts of the proposed amendments in advance of publication on October 18, 2021.²⁰⁸

141. Ms. Hildebrandt further states:

On behalf of the Elder Law Governing Council, I request that the MDVA withdraw the proposed amendments and begin the process anew so that stakeholders and interested parties may have input regarding the rules governing veterans in Minnesota. It is patently unfair to allow the MDVA to proceed as it did regarding the proposed amendments.²⁰⁹

142. The Elder Law Section was not alone in its request that the rules be withdrawn and that the MDVA be directed to engage in outreach. Numerous elder law practitioners, and the Minnesota Chapter of the National Academy of Elder Law Attorneys, requested that the rules be rescinded and then re-proposed after stakeholder

²⁰³ *Id.* (See Exs. C, D).

²⁰⁴ *Id.* at 53.

²⁰⁵ *Id.*

²⁰⁶ *Id.*

²⁰⁷ Affidavit (Aff.) of Amber Hildebrandt (Hildebrandt Aff.) at 1 (Feb. 22, 2022).

²⁰⁸ *Id.*

²⁰⁹ *Id.* at 1-2.

engagement occurred.²¹⁰

143. In its response to public comments, the MDVA stated that it provided all notifications to the public and affected stakeholders required by the APA and Minnesota Rules, chapter 1400.²¹¹ The MDVA also noted that it created a webpage dedicated to this rulemaking and posted the required notices and supporting rulemaking documents there.²¹² In its rebuttal comments responding to Ms. Hildebrandt's sworn affidavit, it contended her concerns were a reiteration of other comments, and it repeated the same response.²¹³

144. The MDVA has not acknowledged that certain comments alleged that it made specific misrepresentations in its SONAR about its contacts with advocacy groups and another governmental entity. It did not deny these allegations, explain the basis for its representations, or offer any support for the veracity of its prior statements.²¹⁴ Given the content of the comments from the public and staff of another agency challenging the MDVA's representations, and the MDVA's lack of any substantive response supporting its statements, the Administrative Law Judge must conclude that the MDVA did not engage with these groups and, therefore, that the SONAR misrepresented the MDVA's efforts to obtain stakeholder input in the development of these rules.²¹⁵

145. It is common for rulemaking matters to include conflicts over the wording of a proposed rule, or about whether the agency is making a reasonable regulatory choice. A conflict over whether an agency has been truthful in its representations in support of a rulemaking proposal is, as far as the Administrative Law Judge can tell, unprecedented.

146. On this record, the Administrative Law Judge concludes that the MDVA's presentation in support of the rules is substantively and procedurally defective.

147. As to the deficiency on procedural grounds, the MDVA was required to engage in efforts to provide additional notice and to detail those efforts in its SONAR, or explain why it did not engage in such efforts.²¹⁶ The MDVA's representations about the stakeholder involvement in which it had already engaged formed the foundation for the

²¹⁰ See, e.g., Comment of Lauren Fink; Comment of Allison Frasier (Nov. 19, 2021); Comment of Sarah Sicheneder (Nov. 22, 2021); Comment of Brenna Galvin (Nov. 23, 2021); Comment of Cathryn D. Reher (Nov. 19, 2021); Comment of Amber Hildebrandt and Suzanne Scheller (Nov. 19, 2021) Comment of Jill Sauber (Nov. 18, 2021).

²¹¹ Department's Response to Public Comments at 4-5 (Feb. 22, 2022).

²¹² *Id.* at 5.

²¹³ Department's Post-Hearing Rebuttal Response at 2-3 (Mar. 1, 2022).

²¹⁴ See Department's Response to Public Comments (Feb. 22, 2022); Department's Post-Hearing Rebuttal Response (Mar. 1, 2022). It appears that the MDVA is no longer claiming to have engaged in the outreach efforts described in the SONAR, which it previously represented were "in addition to" publication of the Request for Comments and posting materials on its website.

²¹⁵ This is particularly concerning because the MDVA received no responses from the public to its Request for Comments in 2016 (see Tr. at 33), so the outreach efforts and interactions with advocacy groups it described would have been the only external input available during the developmental stages of the proposed rules. In light of this record, it appears that, in fact, there was no public engagement or input from impacted persons in the development of the rules.

²¹⁶ Minn. Stat. §§ 14.14, subd. 1a; .131.

adequacy of its subsequent additional notice. The MDVA was not required to undertake any particular form of outreach to comply with these requirements, but to the extent it made statements regarding its efforts to engage stakeholders, those representations needed to be true.

148. Further, an agency must make an affirmative presentation of facts in support of a proposed rule. Administrative law judges rely on the agency's presentation of facts in determining whether the agency has complied with all requirements, and whether the rules are needed and reasonable. An agency's engagement with the public in the development of rules can add credibility to the agency's determination of the possible regulatory choices available, and provide part of the basis for the agency to explain why it made the policy choices it did. This presentation of facts, particularly about interactions with the public, goes to the heart of several of the APA's express purposes: to increase public accountability of public agencies; to increase public access to governmental information; and to increase public participation in the formulation of administrative rules.²¹⁷ It should go without saying that this presentation of facts, including facts about the agency's efforts to engage with the public, must be truthful.

149. The MDVA's description of its solicitation of stakeholder input during the development of the rules is part of its affirmative presentation of facts in support of the need for and reasonableness of the proposed rules. In light of the content of the record, including statements and sworn evidence from members of the public and another entity within state government, and in the absence of any response from the MDVA explaining its representations in the SONAR, the Administrative Law Judge must conclude that this portion of the MDVA's affirmative presentation of facts is not true.

150. The Administrative Law Judge determines that this procedural and substantive defect is critical, undermines the rulemaking process, and was prejudicial to this rulemaking proceeding. Therefore, the Administrative Law Judge determines that the rules must be disapproved as a whole. She also determines that the prejudice resulting from these defects cannot be corrected in this proceeding. The MDVA should engage in the outreach efforts described in the SONAR, consider the input received, and re-propose rules at a later date.

151. The Administrative Law Judge reiterates that she understands the severity of this determination. It is clear that the MDVA engaged in a substantial amount of internal work over the five-year span between its Request for Comments and its initiation of this proceeding, and that work is not erased by the holding here.

152. At the same time, this outcome is the direct result of the MDVA's choices. The MDVA drafted the SONAR and is responsible for its contents. During the rulemaking, the MDVA was alerted that a problem existed related to its statements; it had an opportunity to respond to those concerns, but did not do so. Further, many commenters requested that the MDVA step back and reevaluate the rulemaking process due to the concerns raised. The MDVA chose to proceed, resulting in the issuance of this order.

²¹⁷ Minn. Stat. § 14.001(2), (4)-(5).

VIII. Additional Comments

153. Due to the determination that these rules must be disapproved, the Administrative Law Judge does not perform a detailed rule-by-rule analysis of the language of the proposed rules, or the need for and reasonableness of any particular rules.

154. In the foregoing analysis, the Administrative Law Judge pointed out some provisions that were not supported by reasoning explaining the need for and reasonableness of the proposed rules. However, because the MDVA may later propose rules that differ from those in their current proposal, the Administrative Law Judge is hesitant to comment extensively on the proposed rules as currently written. Such comments would be advisory and not binding on an administrative law judge assigned to conduct a later review.

155. Yet, in an effort to assist the MDVA when it seeks a review of rules in the future, the Administrative Law Judge offers a suggestion for its consideration. The MDVA should review the SONAR to ensure that it adequately explains the regulatory choices that the MDVA is making. The need for and reasonableness of each new rule and rule change should be explained, as an “agency must explain on what evidence it is relying and how that evidence connects rationally with the agency’s choice of action to be taken.”²¹⁸ That explanation cannot simply include a restatement of the language of the rule and an assertion that the rule is reasonable.²¹⁹ Rather the MDVA must provide its reasoning as to why there is a need to change or add a rule, and then articulate how the particular solution it chose will address that issue. Reviewing this SONAR with these standards in mind may provide a smoother path for a re-proposal of the rules.

Based upon the Findings of Fact and the contents of the rulemaking record, the Administrative Law Judge makes the following:

CONCLUSIONS

1. The Administrative Law Judge has authority and jurisdiction to review these rules under Minn. Stat. §§ 14.14, .15, .50 (2020), and Minn. R. 1400.2100.
2. The MDVA published a Dual Notice and Notice of Rescheduled Hearing, affording the public notice of the hearing, but did not fulfill its additional notice requirements under Minn. Stat. § 14.14.
3. The MDVA demonstrated it has statutory authority to adopt the proposed rules.
4. The MDVA did not establish that it fulfilled all other requirements of law or rule within the meaning of Minn. Stat. §§ 14.05, subd. 1, 14.50(i), (ii).

²¹⁸ *Manufactured Hous. Inst.*, 347 N.W.2d at 244.

²¹⁹ Minn. R. 1400.2070, subp. 1.

5. The MDVA failed to demonstrate that its SONAR complied with Minn. Stat. § 14.131, Minn. R. 1400.2070.

6. The MDVA's failure to adequately address in its SONAR all of the regulatory factors required to be considered under Minn. Stat. § 14.131, is a substantive defect and not a harmless error.²²⁰ The defects in the SONAR are prejudicial.

7. The MDVA's misstatements regarding its outreach to the public in the formulation of the rules result in procedural and substantive defects in the rules. The defects are not harmless error and are prejudicial.

8. Approval of the MDVA's Additional Notice Plan is **RESCINDED**.


9. The proposed rules are **DISAPPROVED**.

Based upon the foregoing Conclusions, the Administrative Law Judge makes the following:

RECOMMENDATION

It is recommended that the Department's proposed rules be **DISAPPROVED**.

Dated: April 15, 2022


JESSICA A. PALMER-DENIG
Administrative Law Judge

NOTICE

The Department must make this Report available for review by anyone who wishes to review it for at least five working days before it may take any further action to adopt final rules or to modify or withdraw the proposed rules. If the Department makes changes in the rules, it must submit the rules, along with the complete hearing record, to the Chief Administrative Law Judge for a review of those changes before it may adopt the rules in final form.

Because the Administrative Law Judge has determined that the proposed rules are defective in certain respects, state law requires that this Report be submitted to the Chief Administrative Law Judge for her approval. If the Chief Administrative Law Judge approves the adverse findings contained in this Report, she will advise the Department

²²⁰ See Minn. R. 1400.2100, subp. A (A rule must be disapproved by a judge if the rule was not adopted in compliance with procedural requirements of Minn. Stat. ch. 14, or other law or rule unless the error was "harmless" within the meaning of Minn. Stat. § 14.15, subd. 5); see also, *Builders Ass'n*, 872 N.W.2d at 272-74.

of actions that will correct the defects, and the Department may not adopt the rules until the Chief Administrative Law Judge determines that the defects have been corrected.

However, if the Chief Administrative Law Judge identifies defects that relate to the issues of need or reasonableness, the Department may either adopt the actions suggested by the Chief Administrative Law Judge to cure the defects or, in the alternative, submit the proposed rules to the Legislative Coordinating Commission for the Commission's advice and comment. If the Department makes a submission to the Commission, it may not adopt the rules until it has received and considered the advice of the Commission. However, the Department is not required to wait for the Commission's advice for more than 60 days after the Commission has received the Department's submission.

If the Department elects to adopt the actions suggested by the Chief Administrative Law Judge and make no other changes and the Chief Administrative Law Judge determines that the defects have been corrected, it may proceed to adopt the rules. If the Department makes changes in the rules other than those suggested by the Administrative Law Judge and the Chief Administrative Law Judge, it must submit copies of the rules showing its changes, the rules as initially proposed, and the proposed order adopting the rules to the Chief Administrative Law Judge for a review of those changes before it may adopt the rules in final form.

After adopting the final version of the rules, the Department must submit them to the Revisor of Statutes for a review of their form. If the Revisor of Statutes approves the form of the rules, the Revisor will submit certified copies to the Administrative Law Judge, who will then review them and file them with the Secretary of State. When they are filed with the Secretary of State, the Administrative Law Judge will notify the Department, and the Department will notify those persons who requested to be informed of their filing.