

July 6, 2023

VIA EMAIL ONLY

Gina Fast, Executive Director
Jenna Bohl, Rule Requestor
Tami Thein, Rule Requestor
Minnesota Board of Cosmetologist Examiners
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Re: *In the Matter of the Proposed Rules of the Board of Cosmetologist Examiners Relating to Education, Licensing, and Practice of Cosmetology, Minnesota Rules Chapter 2110*
OAH 65-9013-36457; Revisor R-4456

Dear Ms. Fast, Ms. Bohl, and Ms. Thein:

Enclosed please find the Chief Administrative Law Judge's **ORDER ON REVIEW OF RESUBMITTED RULES UNDER MINN. STAT. § 14.16, SUBDS. 1, 2 AND MINN. R. 1400.2240, SUBPS. 4, 5** in the above-entitled matter. The Minnesota Board of Cosmetologist Examiners may resubmit the rule to the Chief Administrative Law Judge for review after correcting the defects or may request that the Chief Administrative Law Judge reconsider the disapproval. If the Board does not wish to follow the suggested actions of the Chief Administrative Law Judge to correct the defects found, the Board may follow the process outlined in Minn. Stat. § 14.15, subd. 4.

If the Board chooses to resubmit the rule to the Chief Administrative Law Judge for review after changing it, or request reconsideration, the Board must file the documents required by Minn. R. 1400.2240, subps. 4 and 5.

If you have any questions, please contact William Moore at (651) 361-7893, at william.t.moore@state.mn.us or via fax at (651) 539-0310.

Sincerely,


MICHELLE SEVERSON
Legal Assistant

Enclosures

cc: Office of the Revisor of Statutes
Legislative Coordinating Commission

STATE OF MINNESOTA
OFFICE OF ADMINISTRATIVE HEARINGS

In the Matter of the Proposed Rules of
the Board of Cosmetologist Examiners
Relating to Education, Licensing, and
Practice of Cosmetology, Minnesota
Rules Chapter 2110

**ORDER ON REVIEW OF
RESUBMITTED RULES UNDER
MINN. STAT. § 14.16, SUBDS. 1, 2
AND MINN. R. 1400.2240, SUBPS. 4, 5**

This matter came on for review by Chief Administrative Law Judge Jenny Starr pursuant to Minn. Stat. § 14.16, subds. 1, 2 (2022) and Minn. R. 1400.2240, subps. 4, 5 (2021). The proposed rules concern the Board of Cosmetologist Examiners' (Board) rules relating to education, licensing, and practice of cosmetologists and other licensed professionals in the beauty industry.

Following a public hearing, Administrative Law Judge Ann C. O'Reilly disapproved portions of the proposed rules in a Report dated January 30, 2023.¹ By Order dated February 9, 2023, the Chief Administrative Law Judge concurred with most of the determinations made by Judge O'Reilly but disagreed with a few approvals and disapprovals.²

On June 13, 2023, the Board notified the Chief Judge that, in response to her Order, it was withdrawing most of the proposed rule parts and modifications developed during the rulemaking process.³ The Board further indicated that it would publish the Notice of Withdrawn Rules in the *State Register*,⁴ as required by Minn. Stat. § 14.05, subd. 3 (2022).⁵ The Board published its Notice of Withdrawn Rules in the *State Register* on June 20, 2023.⁶

On June 28, 2023, the Board resubmitted the proposed modified rules for approval pursuant to Minn. R. 1400.2240, subp. 5.⁷ As part of its resubmission, the Board withdrew its proposed changes to Minn. R. 2110.0010, subps., 17f, 18d, 18e, 18f, and 19a; .0125; .0190; .0310; .0320; .0330; .0390, subps. 3, 3a, 3b, 5; .0395; .0410; .0500; .0510; .0520;

¹ Report of Administrative Law Judge (Jan. 30, 2023).

² Order of the Chief Administrative Law Judge on Review of Rules (Feb. 9, 2023).

³ Letter from Gina Fast, Board Executive Director, to Chief Administrative Law Judge Jenny Star (June 13, 2023).

⁴ *Id.*

⁵ *Id.*

⁶ Board's Resubmission of Proposed Rules (June 28, 2023); Exhibit (Ex.) K4 (Notice of Withdrawn Rules).

⁷ Board's Resubmission of Proposed Rules.

.0525; .0530; .0545; .0590; .0625; .0640; .0650; .0660; .0670; .0671; .0680; .0690; .0705; .0730; .0740.⁸

The Board submitted only the following proposed rules for approval: Rules 2110.0010, subp. 12a; .0390, subps. 1A, B, D; .0400; .0505A; .0550; .0580; .0630.⁹

The Board also withdrew the repeal of Rules 2110.0010, subps. 14, 15; .0100; .0320, subps. 9, 11, 12; .0330, subps. 3, 4, 5; .0390, subp. 3a; and .0410, subps. 2, 5.¹⁰ The Board submitted only Rule 2110.0710 for repeal.¹¹

The Chief Administrative Law Judge finds that, with one exception, the Board's modifications, including the withdrawal of proposed rule parts and amendments, do not render the final proposed rules substantially different from those published in the *State Register* on September 26, 2022, and presented at the public hearing.¹²

The Chief Judge finds, however, that given the Board's withdrawal of most of its proposed rules, the definition of "course completion certificate" in proposed Rule 2110.0010, subp. 12a is ambiguous and in conflict with current provisions of the rules. Accordingly, this rule part is defective and cannot be approved for the reasons set forth in the Memorandum below.

Based upon a review of the modifications made by the Board as presented in its submission of June 28, 2023, and the rulemaking record, and for the reasons set forth in the Memorandum attached hereto,

IT IS HEREBY ORDERED THAT:

(1) The following proposed rules, as modified by Board and reflected in the Revisor draft dated June 21, 2023, are **APPROVED** as to legality:

Rule 2110.0390, subps. 1A, B, D;
Rule 2110.0400;
Rule 2110.0505A;
Rule 2110.0550;
Rule 2110.0580; and
Rule 2110.0630.

(2) The repeal of Rule 2110.0710 is **APPROVED**.

⁸ *Id.*

⁹ *Id.*

¹⁰ *Id.*

¹¹ *Id.*

¹² Minn. Stat. § 14.05, subd. 2(b)(2) (2022) ("A modification does not make a proposed rule substantially different if . . . the differences are a logical outgrowth of the contents of the notice of intent to adopt or notice of hearing and the comments submitted in response to the notice."); Minn. Stat. § 14.05, subd. 3 (authority to withdraw proposed rule); Minn. R. 1400.2240, subp. 8 (2021) ("Withdrawing a rule is appropriate unless the withdrawal of the rule or a portion of the rule makes the remaining rule substantially different.").

(3) Proposed Rule 2110.0010, subp. 12a is **DISAPPROVED** as it is now ambiguous and conflicts with existing provisions in Rule 2110.0520 (Esthetician Training); Rule 2110.0525 (Advanced Esthetician Training); Rule 2110.0530 (Nail Technician Training); and modified proposed Rule 2110.0580 (Eyelash Technician Training).

Dated: July 6, 2023



JENNY STARR
Chief Administrative Law Judge

MEMORANDUM

Following a public hearing in this matter, presiding Administrative Law Judge Ann O'Reilly issued a Report disapproving several of the Board's proposed rule amendments.¹³ Judge O'Reilly found that the Board failed to properly articulate the requirements for licensure and failed to support the need and reasonableness of several provisions. Judge O'Reilly also found some proposed rules unduly vague, in conflict with other regulations, or otherwise defective.¹⁴ The Chief Judge issued an Order concurring with most of Judge O'Reilly's detailed determinations and recommendations to cure the defects.¹⁵

On June 13, 2023, the Board notified the Chief Judge that it was withdrawing most of its proposed rule parts and amendments, but proceeding forward with certain of the proposed rules that were approved by the Chief Judge upon original submission.¹⁶ On June 20, 2023, the Board published a Notice of Withdrawn Rules in the *State Register*.¹⁷ The Notice stated that the Board was withdrawing the amendments it originally proposed to the following rule parts:

- 2110.0010, subparts 17F, 18d, 18e, 18f, 19a;
- 2110.0125;
- 2110.0190;
- 2110.0310;
- 2110.0320;
- 2110.0330;
- 2110.0390, subparts 3, 3a, 3b, 5;
- 2110.0395;
- 2110.0410;

¹³ Report of Administrative Law Judge.

¹⁴ *Id.*

¹⁵ Order of Chief Administrative Law Judge on Review of Rules.

¹⁶ Letter from Gina Fast, Board Executive Director, to Chief Administrative Law Judge Jenny Star (June 13, 2023).

¹⁷ Board's Resubmission of Proposed Rules (June 28, 2023), Ex. K4.

- 2110.0500;
- 2110.0510;
- 2110.0520;
- 2110.0525;
- 2110.0530;
- 2110.0545;
- 2110.0590;
- 2110.0625;
- 2110.0640;
- 2110.0650;
- 2110.0660;
- 2110.0670;
- 2110.0671;
- 2110.0680;
- 2110.0690;
- 2110.0705;
- 2110.0730; and
- 2110.0740.¹⁸

The Board is also withdrawing its repeal of the following rule parts:

- 2110.0010, subparts 14, 15;
- 2110.0100;
- 2110.0320, subparts 9, 11, 12;
- 2110.0330, subparts 3, 4, 5;
- 2110.0390, subpart 3a; and
- 2110.0410, subparts 2, 5.¹⁹

The Board submitted only the following proposed rules for approval: Rules 2110.0010, subp. 12a; .0390, subps. 1A, B, D; .0400; .0505A; .0550; .0580; and .0630.²⁰ In addition, it is only proceeding with the repeal of one rule part: Rule 2110.0710.²¹

The law provides that an agency may withdraw a proposed rule or a portion of a proposed rule at any time prior to filing it with the Secretary of State unless the remaining rule is rendered substantially different from the rule as originally published.²² A modification, including withdrawal of a provision, does not make a rule substantially

¹⁸ *Id.*

¹⁹ *Id.*

²⁰ *Id.*

²¹ *Id.*

²² Minn. Stat. § 14.05, subd. 3; Minn. R. 1400.2240, subp. 8.

different unless the change extends beyond the scope of the notice given to the public or raises a subject or has a different effect that could not be contemplated.²³

In this instance, the Board is withdrawing most of its proposed rule amendments. The withdrawal of the proposed rule amendments could be anticipated as a logical outgrowth of the rulemaking process where the Administrative Law Judge disapproved several proposed parts as defective. No new subject matter was introduced by virtue of the withdrawal of the proposed rule parts, nor was a new class of persons affected.

The Chief Judge further finds that withdrawing the proposed rule amendments has no significant or unanticipated effect on the remainder of the proposed rule amendments and does not render the remaining rule substantially different from the rule as originally proposed, with one exception. Proposed Rule 2110.0010, subp. 12a, defining “course completion certificate” is now defective given the Board’s withdrawal of its other proposed rule parts and amendments.

Proposed Rule 2100.0010, subp. 12a was part of the Board’s overall scheme to clarify the existing rules by introducing defined terms, using those defined terms in a consistent manner within the rules, and addressing stakeholder concerns regarding ambiguities in the requirements of licensure for each of the practice areas currently regulated by the Board: cosmetology, esthesiology, advanced practice esthesiology, nail technology, and eye lash technology.²⁴

As proposed, Rule 2100.0010, subp. 12a defines “course completion certificate,” a requirement for licensure under Minn. R. 2105.0145 (2021). The definition, as modified by the Board during the rulemaking process, reads as follows:

“Course completion certificate” means a notarized form provided by the board that a student must use to obtain a license in Minnesota. A course completion certificate must include a student’s program completion information, including the number of clinical service exercises required by the board that the student has completed and the results of the practical skills test.²⁵

In withdrawing proposed amendments to Rules 2110.0510, .0520, .0525, .0530, and .0580, Item E, the Board is leaving in place the current licensing requirements for each of the five practice areas. The current rules do not all clearly prescribe “clinical service exercise” requirements. Moreover, the term “clinical service exercises” is nowhere defined in the rules. Current Rule 2110.0510 (cosmetology training) articulates licensing

²³ See Minn. Stat. § 14.05, subd. 2; see also, *Chamber of Commerce v. Pollution Control Agency*, 469 N.W.2d 100, 105-106 (Minn. Ct. App. 1991) *rev. denied* (July 24, 1991) (interpreting former Minn. R. 1400.1100, subp. 2 (1989)).

²⁴ In the 2023 session, the Minnesota Legislature created a sixth license: hair technician, which requires 900 hours of training and education. See 2023 Minn. Laws ch. 62, art. 2, §§ 98, 99, 102, 103. This new practice area is not included in the existing or proposed rules.

²⁵ See Board’s Resubmission of Proposed Rule at Ex. C3 (Revisor draft dated June 21, 2023).

requirements in practice hours and “service exercises” for various skills. These are referred to as “quotas.”²⁶

The other rules are not as specific in terms of “exercises” and none of them refer to “clinical service exercises.” For example, Rule 2110.0520 (esthetician training) requires 200 hours of “clinical instruction and experience” and then requires “at least” 60 facials, 40 makeup applications, 20 face waxes, and 20 body waxes. Yet it does refer to the required facials, makeup applications, or waxes as “clinical service exercises.”²⁷

Similarly, Rule 2110.0530 (nail technician training) requires 150 hours of “clinical instruction and experience” in “applied sciences and skills” and then requires 50 manicures, 10 applications of artificial nails, and three sculptured nail applications. Yet it does not refer to the manicures, artificial nail applications, or sculpturing as “clinical services exercises.”²⁸

Rule 2110.0525 (advanced practice esthetician training) and Rule 2110.0580 (eyelash technician training), as modified, have no clinical service exercise requirements at all. These rules only require a certain number of hours of “clinical instruction.”²⁹

As Administrative Law Judge O’Reilly explained in her Report, the proposed definition of “course completion certificate” in Rule 2110.0010, subp. 12a, was approved contingent upon the number of hours of clinical service exercises being added to licensing rules for each practice area.³⁰ The reason for the Judge’s disapproval of the Board’s proposed new licensing rules (amended Rules 2110.0510, .0520, .0525, .0530, and .0580) was because the Board was not clear or specific on its requirements for licensure.³¹ The Board noted in its Statement of Need and Reasonableness (SONAR) that it intended to devise those requirements after the rulemaking process³² – a plan that improperly evades the rulemaking process.³³

By deciding to not include specific clinical service exercise requirements in Rules 2110.0510, .0520, .0525, .0530, and .0580, and electing, instead, to use the existing licensing provisions, the definition of “course completion certificate” become defective. It is defective because it imposes a requirement of “clinical service exercises” (a term not used in the current rules) and injects confusion into the licensing requirements. For these

²⁶ See Minn. R. 2010.0510 E (2021).

²⁷ Minn. R. 2110.0520 (2021).

²⁸ Minn. R. 2110.0530 (2021).

²⁹ Minn. R. 2110.0525, .0580 (2021).

³⁰ Report of the Administrative Law Judge at 25.

³¹ *Id.* at 35-49.

³² SONAR at 23.

³³ The Board’s enabling statute, Minn. Stat. § 155A.27, subd. 2 (2022) requires that the Board determine qualifications for licensing and establish *by rule* “the educational and experiential prerequisites” for licensure. Therefore, the Board cannot avoid this duty by establishing such requirements outside of rulemaking.

reasons, the Board's proposed Rule 2110.0010, subp. 12a, defining "course completion certificate" must be disapproved.³⁴

In addition, the reference to "practical skills test" in the definition introduces an additional layer of confusion in the rules. The Board has withdrawn proposed Rule 2110.0590, which was intended to impose a new licensing requirement of a hands-on "practical skills test," different from the "written practical test" required for licensure under Rule 2105.0145 (not a subject of this rulemaking proceeding). Yet the Board's proposed definition of "course completion certificate" continues to reference a "practical skills test." The current rules require "skills tests,"³⁵ but the rules do not mention "a practical skills test."³⁶ The reference to a "practical skills test" in proposed Rule 2110.0010, subp. 12a, therefore creates more confusion and ambiguity, rendering the definition more defective.

Finally, the Chief Judge recommends that references to "practical skills test" in proposed Rule 2110.0505, Item A(7) and proposed Rule 2110.0550, Item C, be modified by deleting the word "practical" so that these proposed rules reference only "skill tests" consistent with the current rule provisions.

In sum, by withdrawing most of its proposed rule changes, the Board has elected not to use this rulemaking to clarify the licensing requirements for the five existing practice areas. While the Board is authorized to withdraw its originally-proposed rule amendments, it must still ensure that the few new amendments it is adopting will work with the existing rules that the Board has decided to keep in place.

J. S.

³⁴ The Board is also advised that the licensing requirements of Minn. R. 2105.0145 may cause more confusion for license applicants and schools because it only references a "written practical test" (different than a skills test) and 38 hours of required training for an eye lash technician license.

³⁵ See Minn. R. 2110.0545, Item C (2021).

³⁶ There is also a reference to practical skills test in Minn. R. 2105.0183 (2021), governing applicants licensed in other states.