

STATE OF MINNESOTA  
OFFICE OF ADMINISTRATIVE HEARINGS

In the Matter of the Minnesota Board of  
Executives for Long Term Services and  
Supports' Proposed Rules Governing  
Licensure of Assisted Living Directors,  
Minnesota Rules, Chapter 6400

**ORDER ON REVIEW OF  
RESUBMITTED RULES UNDER  
MINN. STAT. § 14.26, SUBD. 2  
AND MINN. R. 1400.2300, SUBP. 8**

This matter came on for review by the Chief Administrative Law Judge pursuant to Minn. Stat. § 14.26, subd. 2 (2020) and Minn. R. 1400.2300, subp. 8 (2019). This rulemaking concerns the proposed rules of the Minnesota Board of Executives for Long Term Services and Supports (Board) governing licensure of assisted living directors under Minnesota Rules, Chapter 6400.

Administrative Law Judge Kimberly Middendorf disapproved portions of the rules in a Report dated February 5, 2021.<sup>1</sup> The Chief Administrative Law Judge concurred with the determinations of the Administrative Law Judge by Order dated February 12, 2021.<sup>2</sup>

On March 9, 2021, the Board requested that the Chief Administrative Law Judge review and approve modifications to the proposed rules pursuant to Minn. R. 1400.2300, subp. 8. The newly submitted rules include modifications incorporating most of Administrative Law Judge Middendorf's recommended changes as well as other stylistic changes made for clarification. The Board also requested the Chief Administrative Law Judge reconsider the disapproval of proposed Minn. R. 6400.7090, subp. 7, related to continuing education requirements for licensees.

The Chief Administrative Law Judge finds that all defects identified in the prior Order have been corrected. In addition, upon reconsideration, the Chief Administrative Law Judge finds that proposed Minn. R. 6400.7090, subp. 7 is not defective as written and should be approved. Finally, the Board's proposed additional modifications do not render the final proposed rules substantially different from those published in the *State Register* on November 30, 2020.<sup>3</sup>

Based upon a review of the modifications made by the Board as presented in its March 9, 2021, submissions, and the rulemaking record,

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<sup>1</sup> Order on Review of Rules Without a Hearing (Feb. 5, 2021).

<sup>2</sup> Order of Chief Administrative Law Judge on Review of Rules (Feb. 12, 2021).

<sup>3</sup> Minn. Stat. § 14.05, subd. 2(b)(2) (2020) ("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.").

**IT IS HEREBY ORDERED THAT:**

The proposed rules, as modified and approved by the Revisor on March 8, 2021, are approved as to legality.

Dated: March 16, 2021



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JENNY STARR  
Chief Administrative Law Judge

**MEMORANDUM**

In her February 5, 2021 Order on Review of Rules, Administrative Law Judge Middendorf recommended several modifications to the proposed rules for clarity. She also disapproved certain provisions as defective. The Board accepted and implemented most of the recommended modifications and corrected most of the identified defects. The Board has now resubmitted the proposed rule and requests reconsideration of the determination that proposed part 6400.7090, subpart 7 is impermissibly vague and defective.

Proposed part 6400.7090 governs continuing education requirements for licensees and lists acceptable and unacceptable content for continuing education programs. Proposed subpart 7 allows the Board to require training in additional specified subjects when advancements in scope of practice or emerging issues arise.

Proposed part 6400.7090, subpart 7, reads as follows:

Subpart 7. **Requirements in specified subjects.** The board shall, when compelled by advancement in scope of practice or emerging long-term services and supports issues, and by public written notice to each licensee on or before September 1, require all licensees to attend continuing education programs in specified subjects.

Judge Middendorf found the proposed rule language allowing the Board to require licensees to attend additional trainings “when compelled by advancement in scope of practice or emerging long-term services and supports issues” to be vague and to grant too much discretion to the Board.

In its resubmission, the Board requests reconsideration of this defect determination. The Board notes that similar language regarding course requirements has been approved for other licensing boards including, most recently, the rules governing

licensure of health services executives.<sup>4</sup> The Board also points out that it and other health licensing boards have broad statutory authority to set continuing education requirements for its licensees under Minn. Stat. §§ 144A.20; 214.12 (2020). Minn. Stat. § 144A.20 requires that assisted living directors receive training on “topics relevant to the operation of an assisted living facility and the needs of its residents.”<sup>5</sup> And Minn. Stat. § 214.12 grants health licensing boards the authority to promulgate rule requirements for renewal of licenses designed to “promote the continuing professional competence of licensees.”<sup>6</sup>

The Board maintains that the proposed rule does not grant it discretion beyond what is necessary to approve continuing education activities that promote the professional competence of assisted living directors. And it contends the proposed provision is needed to better inform and educate licensees on emerging issues and best practices, such as, for example, infection control related to the COVID-19 pandemic. The Board states, however, that should disapproval of the provision be affirmed, it will delete this provision to cure the defect.

Upon reconsideration and review of the Board’s additional submissions and rationale, the Chief Administrative Law Judge is persuaded that Minn. R. 6400.7090, subpart 7 is not impermissibly vague and should be approved as written. The provision is reasonable and will provide the Board the flexibility it needs to address new and potentially unforeseen issues that may arise in long-term services and support settings. Reconsideration of the defect determination is therefore granted and the proposed part 6400.7090, subpart 7 is approved.

The Chief Judge also notes that the Board declined to implement suggested modifications meant to clarify the right of applicants and licensees to request a contested hearing under chapter 14 when notified of a denial or disciplinary action.<sup>7</sup> The Board maintains that the hearing process is sufficiently defined in statute to provide adequate notice to applicants and licensees.<sup>8</sup> Because the suggested modifications were intended as recommendations only and the proposed rule parts were not disapproved, the Board may choose not to make the modifications.

**J. S.**

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<sup>4</sup> See Order on Review of Rules, OAH 5-9028-36680 (Nov. 30, 2020). See *also* Minn. R. 6500.3000, subp. 10 (governing optometrists).

<sup>5</sup> Minn. Stat. § 144A.20, subd. 4(c).

<sup>6</sup> Minn. Stat. § 214.12, subd. 1.

<sup>7</sup> See proposed Minn. R. 6400.7010, subp. 6, .7095, subp. 1.

<sup>8</sup> See Minn. Stat. § 214.103 (2020) (governing health-related licensing board complaints and hearings).