

July 23, 2024

**VIA EFILING ONLY**

Alicia Popowski  
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Minnesota Board of Peace Officer  
Standards and Training  
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Saint Paul, MN 55104  
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**Re: *In the Matter of the Proposed Rules of the Board of Peace Officer Standards and Training Governing Peace Officer Standards of Conduct; Minnesota Rules, part 6700.1600***  
**OAH 24-9007-39670; Revisor R- 4850**

Dear Ms. Popowski:

Enclosed herewith and served upon you is the **REPORT OF THE ADMINISTRATIVE LAW JUDGE** in the above-entitled matter. The Administrative Law Judge has determined there are no negative findings in these rules.

The Office of Administrative Hearings has closed this file and is returning the rule record so that the Minnesota Board of Peace Officer Standards and Training can maintain the official rulemaking record in this matter as required by Minn. Stat. § 14.365. Please ensure that the agency's signed order adopting the rules is filed with our office. The Office of Administrative Hearings will request copies of the finalized rules from the Revisor's office following receipt of that order. Our office will then file the adopted rules with the Secretary of State, who will forward one copy to the Revisor of Statutes, one copy to the Governor, and one to the agency for its rulemaking record. The Board will then receive from the Revisor's office three copies of the Notice of Adoption of the rules.

The Board's next step is to arrange for publication of the Notice of Adoption in the State Register. Two copies of the Notice of Adoption provided by the Revisor's office should be submitted to the State Register for publication. A permanent rule does not become effective until five working days after a Notice of Adoption is published in the State Register in accordance with Minn. Stat. § 14.18.

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If you have any questions regarding this matter, please contact William Moore at (651) 361-7893, [william.t.moore@state.mn.us](mailto:william.t.moore@state.mn.us) or via facsimile at (651) 539-0310.

Sincerely,

A handwritten signature in black ink that reads "Nichole Sletten". The script is cursive and fluid, with the first name "Nichole" and last name "Sletten" clearly distinguishable.

NICHOLE SLETTEN  
Legal Assistant

Enclosure

cc: David Cullen  
Legislative Coordinating Commission  
Revisor of Statutes

STATE OF MINNESOTA  
OFFICE OF ADMINISTRATIVE HEARINGS

In the Matter of the Proposed Rules  
of the Board of Peace Officer Standards  
and Training Governing Peace Officer  
Standards of Conduct; Minnesota Rules,  
part 6700.1600

**REPORT OF THE  
ADMINISTRATIVE LAW JUDGE**

This matter came on before Assistant Chief Administrative Law Judge Kristien R. E. Butler for a public rulemaking hearing on May 22, 2024. The public hearing was held virtually by way of the WebEx videoconferencing platform.

**IT IS HEREBY DETERMINED:**

1. Board has the statutory authority to adopt the rule.
2. Except as noted in Findings of Fact 9, 13, 14, 15, and 16 below, Board has fulfilled all procedural requirements of Minn. Stat. § 14.14 (2022) and all other procedural requirements of law and rule.
3. The rulemaking record demonstrates the rule is needed and reasonable.

Based upon all the testimony, exhibits, and submitted comments, and for the reasons explained in the accompanying Memorandum, the Judge now hereby issues the following:

**ORDER**

1. The proposed rule part is **APPROVED**.

The Board of Peace Officer Standards and Training (Board) proposes to amend its rules relating to the standard of conduct of Minnesota peace officers. Specifically, Board seeks to reimplement the rule requiring peace officers to comply with any Order of Board.<sup>1</sup> This rule, previously known as Minnesota Rule 6700.1600, item H, had been in effect in Minnesota since at least 1997.<sup>2</sup> In 2020, Board carried out a comprehensive review of its governing rules under Minnesota Rules, chapter 6700.<sup>3</sup> This review related to peace officer background investigations, psychological screenings, minimum selection

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<sup>1</sup> Exhibit (Ex.) F.

<sup>2</sup> *Id.*; Ex. D at 5.

<sup>3</sup> Ex. D at 5.

standards, and standards of conduct.<sup>4</sup> When this comprehensive rules review was finalized in 2023, Board discovered it had inadvertently omitted Minnesota Rule 6700.1600, item H.<sup>5</sup> Without this rule in place, Board currently lacks the legal authority to effectively enforce its Orders.<sup>6</sup>

The hearing and this Report are part of a larger rulemaking process under the Minnesota Administrative Procedure Act.<sup>7</sup> The Minnesota Legislature has designated this process to ensure all State agencies meet all of the legal requirements specified for adopting rules.

The hearing was conducted to permit Board representatives and the Judge to hear public comment regarding the reimplementation of the mistakenly omitted rule, along with any changes to it that might be appropriate. Furthermore, the hearing process provides the general public with the opportunity to review, discuss, and critique proposed agency rules.

Board must establish that the proposed rule is: (1) within its statutory authority; (2) necessary and reasonable; (3) follows compliance with the required procedures; and (4) that any modifications Board made after the proposed rules were initially published in the State Register are within the scope of the matter that was originally announced.<sup>8</sup>

The Board panel at the hearing included Erik Misselt, Executive Director; Michael Monsrud, Assistant Executive Director; Angie Rohow, Standards Coordinator Supervisor; Alicia Popowski, Rules and Legislative Coordinator; and Luke Hennen, Chair.<sup>9</sup>

Approximately 15 people attended the public hearing.<sup>10</sup> The proceeding continued until all interested persons who were present were provided the opportunity to be heard. Three members of the public offered public comments.<sup>11</sup>

After the close of the hearing, the Judge kept the rulemaking record open for an additional ten days to permit the submission of further written comments. The record was then kept open an additional five days to permit any rebuttal comments to be submitted. The record closed on June 13, 2024. The issuance deadline for this Report was extended by the Chief Administrative Law Judge to July 23, 2024.<sup>12</sup>

Based upon the rulemaking record, the Judge now hereby issues the following:

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<sup>4</sup> *Id.*

<sup>5</sup> *Id.*

<sup>6</sup> *Id.*

<sup>7</sup> See Minn. Stat. §§ 14.131-.20 (2022).

<sup>8</sup> Minn. Stat. §§ 14.05, 14.25, and 14.50 (2022).

<sup>9</sup> See Public Hearing Digital Recording (May 22, 2024).

<sup>10</sup> *Id.*

<sup>11</sup> *Id.*

<sup>12</sup> Order Granting Extension (July 10, 2024); Order Granting Second Extension (July 22, 2024).

## FINDINGS OF FACTS

### I. Regulatory Background to the Proposed Rules

1. Police academy training certification began in 1967 when the legislature created the Minnesota Peace Officer Training Board (MPOTB).<sup>13</sup> The purpose of the MPOTB was to standardize police training across the state.<sup>14</sup>

2. In 1977, the legislature abolished the MPOTB and replaced it with the Minnesota Board of Peace Officer Standards and Training (Board).<sup>15</sup> Board established licensing and training requirements and set standards for law enforcement agencies and officers.<sup>16</sup>

3. Board continues to develop and enforce standards for the education, licensing, training and conduct of peace officers and law enforcement officers<sup>17</sup> in Minnesota.<sup>18</sup>

### II. Rulemaking Authority

4. Board cites Minn. Stat. § 626.843 (2022) as its source of statutory authority for the proposed rules. This statute grants Board, in relevant part, authority to:

adopt rules with respect to . . . (6) minimum standards of conduct which would affect the individual's performance of duties as a peace officer. These standards shall be established and published. The board shall review the minimum standards of conduct described in this clause for possible modification in 1998 and every three years after that time.<sup>19</sup>

5. The Judge concludes that Board has the statutory authority to adopt rules governing the training and licensing of peace officers.

### III. Procedural Requirements of Chapter 14

#### A. Publications

6. On December 18, 2023, Board published in the *State Register* a Request for Comments seeking comments on its plan to amend Minnesota Rules, part 6700.1600,

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<sup>13</sup> Ex. D at 5.

<sup>14</sup> *Id.*

<sup>15</sup> *Id.*

<sup>16</sup> *Id.*

<sup>17</sup> “Law enforcement officers” includes peace officers, state troopers who are part of the Minnesota State Patrol, conservation officers with the Department of Natural Resources, county sheriffs and sheriff’s deputies, and police officers; Ex. D at 5.

<sup>18</sup> Ex. D at 5.

<sup>19</sup> Minn. Stat. § 626.843, subd. 1.

to add that failure to comply with any Order issued by Board would constitute a standard of conduct violation.<sup>20</sup>

7. On December 6, 2023, Board requested approval of its Additional Notice Plan.<sup>21</sup>

8. By way of an Order dated December 8, 2023, Administrative Law Judge Ann O'Reilly approved Board's Additional Notice Plan.<sup>22</sup>

9. Board did not submit its Dual Notice and other required filings for review by the Office of Administrative Hearings before publishing it in the State Register as required by Minn. R. 1400.2080, subp. 5 (2023).<sup>23</sup> The public was able to meaningfully participate in the hearing and was provided the information in the Dual Notice when it was published in the State Register on March 18, 2024.<sup>24</sup> Accordingly, the Judge finds Board's failure in this instance to be harmless error.

10. On or about March 13, 2024, Board mailed and emailed a copy of the Dual Notice to all persons and entities who had registered their names with Board for the purpose of receiving such notice and to all persons and associations identified in the additional notice plan.<sup>25</sup>

11. On March 18, 2024, Board emailed a copy of the related Statement of Need and Reasonableness (SONAR) to the Legislative Reference Library to meet the requirement set forth in Minn. Stat. §§ 14.131 and 14.23 (2022).<sup>26</sup>

12. The Dual Notice identified the date and time of the remote hearing and provided information on how public members could access it to participate.<sup>27</sup>

13. The Dual Notice did not provide the process for submitting written comments after the public hearing as is required by Minn. R. 1400.2080, subp. 4(D) (2023).<sup>28</sup>

14. Given the process for submitting written comments after the hearing was appropriately presented during the public hearing on May 22, 2024, the Judge finds Board's failure to include the above information in its Dual Notice to be harmless error.<sup>29</sup> The information was made available to the public during Board's oral presentation, as

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<sup>20</sup> Ex. A.

<sup>21</sup> Letter to Chief Judge Jenny Starr and Judge Ann O'Reilly (December 6, 2023).

<sup>22</sup> Order on Additional Notice Plan (December 8, 2023).

<sup>23</sup> Ex. F.

<sup>24</sup> See Public Hearing Digital Recording.

<sup>25</sup> Ex. G1; Ex. G2; Ex. G3.

<sup>26</sup> Ex. E.

<sup>27</sup> Ex. F.

<sup>28</sup> *Id.*

<sup>29</sup> See Public Hearing Digital Recording.

well as visually in the accompanying Power Point slide presentation.<sup>30</sup> The public was not deprived of the opportunity to submit written comments after the hearing.

15. The Dual Notice did not provide the contact information for the Judge and inform recipients that questions about the hearing procedure could be directed to the Judge as is required by Minn. R. 1400.2080, subp. 4(E) (2023).<sup>31</sup>

16. Given the process for asking questions after the hearing was appropriately presented during the public hearing on May 22, 2024, the Judge finds Board's failure to include the above information in its Dual Notice to be harmless error.<sup>32</sup> The information was made available to the public during Board's oral presentation, as well as visually in the accompanying Power Point slide presentation.<sup>33</sup> The public was not deprived of the opportunity to ask questions after the hearing.

17. At the hearing on May 22, 2024, Board filed copies of the following documents as required by Minn. R. 1400.2220 (2023):

- (a) the Request for Comments as published in the *State Register* on December 18, 2023;<sup>34</sup>
- (b) the Revisor's Rule Certificate and Rule Draft;<sup>35</sup>
- (c) the SONAR;<sup>36</sup>
- (d) the Certificate and Transmittal Letter verifying the SONAR was sent to the Legislative Reference Library;<sup>37</sup>
- (e) the Dual Notice as published in the *State Register*;<sup>38</sup>
- (f) the Certification of Emailing the Dual Notice;<sup>39</sup>
- (g) the Certification of Mailing the Dual Notice;<sup>40</sup>
- (h) the Certificate of Accuracy of the Rulemaking Mailing List;<sup>41</sup>

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<sup>30</sup> *Id.*

<sup>31</sup> Ex. F.

<sup>32</sup> See Public Hearing Digital Recording.

<sup>33</sup> *Id.*

<sup>34</sup> Ex. A.

<sup>35</sup> Ex. C.

<sup>36</sup> Ex. D.

<sup>37</sup> Ex. E.

<sup>38</sup> Ex. F.

<sup>39</sup> Ex. G1.

<sup>40</sup> Ex. G2.

<sup>41</sup> Ex. G3.

- (i) the Certificate of Emailing the Request for Comments on the Additional Notice Plan;<sup>42</sup>
- (j) the Certificate of Mailing the Request for Comments on the Additional Notice Plan;<sup>43</sup>
- (k) the written comments received during the 30-day comment period;<sup>44</sup>
- (l) the Board's response to the comments received during the 30-day comment period;<sup>45</sup>
- (m) the Certificate and Letter of Sending the SONAR to legislators and the Legislative Coordinating Commission;<sup>46</sup>
- (n) the Order on Review of the Additional Notice Plan;<sup>47</sup>
- (o) Board's letter to Minnesota Management and Budget as required by Minn. Stat. § 14.131;<sup>48</sup>
- (p) the response from Minnesota Management and Budget;<sup>49</sup> and
- (q) the Certificate of Mailing a Notice of Hearing to Those Who Requested a Hearing.<sup>50</sup>

## **B. Additional Notice Requirements**

18. Minn. Stat. §§ 14.131 and 14.23 require that an agency include in its SONAR a description of its efforts to provide additional notification to persons or classes of persons who may be affected by the proposed rule; or alternatively, the agency must detail why these notification efforts were not made.

19. On or about December 18, 2023, Board provided the Dual Notice in the following manner, according to the Additional Notice Plan approved by the Office of Administrative Hearings:

- (a) Updated its website with the relevant information;
- (b) Notified stakeholders of the rulemaking activity by way of email and mail;

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<sup>42</sup> Ex. H1.

<sup>43</sup> Ex. H2.

<sup>44</sup> Ex. I1.

<sup>45</sup> Ex. I2.

<sup>46</sup> Ex. K1.

<sup>47</sup> Ex. K2.

<sup>48</sup> Ex. K3.

<sup>49</sup> Ex. K4.

<sup>50</sup> Ex. K5.



- (c) Provided specific email notice to all Minnesota licensed law enforcement officers with valid email addresses on file with Board;
- (d) Provided specific notice to law enforcement associations and labor representatives; community, professional and civic organizations and associations; and certain state agencies and other entities identified in the Additional Notice Plan section of the SONAR.<sup>51</sup>

## **C. Notice Practice**

### **1. Notice to Stakeholders**

20. On March 11 and 13, 2024, Board emailed and mailed a copy of the Dual Notice to its official rulemaking list (maintained under Minn. Stat. § 14.14), and to stakeholders identified in its Additional Notice Plan.<sup>52</sup>

21. The initial comment period on the proposed rules expired at 4:30 p.m. on April 19, 2024.<sup>53</sup>

22. There are 37 days between March 13, 2024, and April 19, 2024.

23. The Judge concludes that Board fulfilled its responsibilities under Minn. R. 1400.2080, subp. 6 (2023), to mail the Dual Notice “at least 33 days before the end of the comment period . . .”

### **2. Notice to Legislators**

24. On March 18, 2024, Board sent a copy of the Dual Notice and the SONAR to legislators as required by Minn. Stat. § 14.116 (2022).<sup>54</sup>

25. Minn. Stat. § 14.116 requires the agency to send a copy of the Notice of Intent to Adopt and the SONAR to certain legislators on the same date that it mails its Notice of Intent to Adopt to persons on its rulemaking list and pursuant to its additional notice plan.<sup>55</sup>

26. The Judge concludes that Board fulfilled its responsibilities to mail the Dual Notice “at least 33 days before the end of the comment period . . .”<sup>56</sup>

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<sup>51</sup> Ex. D; Ex. H1; Ex. H2.

<sup>52</sup> Ex. G1; Ex. G2; Ex. G3.

<sup>53</sup> Ex. F.

<sup>54</sup> Ex. K1.

<sup>55</sup> Minn. Stat. § 14.116.

<sup>56</sup> *Id.*

### **3. Notice to the Legislative Reference Library**

27. On March 18, 2023, Board emailed a copy of the SONAR to the Legislative Reference Library.<sup>57</sup>

28. Minn. Stat. §§ 14.131 and 14.23 require the agency to send a copy of the SONAR to the Legislative Reference Library when the Notice of Intent to Adopt is mailed.

29. The Judge concludes that Board fulfilled its responsibilities, to transmit the SONAR to the Legislative Reference Library.

#### **D. Impact on Farming Operations**

30. Minn. Stat. § 14.111 (2022) 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*.

31. The proposed rule does not impose restrictions or have an impact on farming operations. The Judge finds that Board was not required to notify the Commissioner of Agriculture.

#### **E. Statutory Requirements for the SONAR**

32. The Administrative Procedure Act obliges an agency adopting rules to address eight factors in its SONAR.<sup>58</sup> 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;
- (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

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<sup>57</sup> Ex. E.

<sup>58</sup> Minn. Stat. § 14.131.

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.

#### **1. The Board's Regulatory Analysis**

- (a) 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.**

33. Board identified licensed peace officers and applicants for licensure; chief law enforcement officers; sheriffs; and members of the public served by licensed peace officers as those most likely to be affected by the proposed rule changes.<sup>59</sup>

34. Board indicates it does not believe this rule amendment will generate any additional monetary costs to those affected by it.<sup>60</sup>

35. The stated class that will benefit from the proposed rule are members of the public seeking peace officer accountability in Minnesota.<sup>61</sup>

- (b) 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.**

36. Board contends that any fiscal effects brought on by this rule change would be negligible on all involved, including Board.<sup>62</sup> Board states that it may accrue fiscal costs for a disciplinary matter that may be referred to the Office of Administrative Hearings

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<sup>59</sup> Ex. D at 8.

<sup>60</sup> *Id.*

<sup>61</sup> *Id.*

<sup>62</sup> *Id.*

for a contested proceeding, however, Board also states that such cases are few and far between.<sup>63</sup>

37. Board does not anticipate any increased costs on other State agencies or individual license-holders.<sup>64</sup>

- (c) The determination of whether there are less costly methods or less intrusive methods for achieving the purpose of the proposed rule.**

38. The Board asserts that it has carefully considered the costs and burdens of the proposed rule change, including seeking input from interested parties, and found no less costly or less intrusive methods to achieve the purposes of the proposed rule.<sup>65</sup>

- (d) 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.**

39. Board did not identify methods other than rulemaking to provide the recommended regulatory relief.<sup>66</sup>

- (e) 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.**

40. Board states that any cost associated with compliance with the proposed rule change would be negligible on any related party.<sup>67</sup>

- (f) The probable costs or consequences of not adopting the proposed rule, including those costs borne by individual categories of affected parties, such as separate classes of governmental units, businesses, or individuals.**

41. While Board did not identify any monetary costs that would be borne by any affected parties, Board states that without the inclusion of the proposed rule, its ability to carry out its statutory authority and enforce the Orders it issues would be greatly

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<sup>63</sup> *Id.*

<sup>64</sup> *Id.*

<sup>65</sup> *Id.*

<sup>66</sup> *Id.* at 9.

<sup>67</sup> *Id.*

diminished.<sup>68</sup> Board further states that the proposed rule amendment is necessary to its continued mandate of providing licensure oversight and accountability.<sup>69</sup>

**(g) An assessment of any differences between the proposed rules and existing federal regulation and a specific analysis of the need for and reasonableness of each difference.**

42. Board asserts that there are no federal regulations pertaining to Minnesota law enforcement officer standards of conduct. As a result, the proposed rule is not different from, or potentially inconsistent with, regulations under federal law.<sup>70</sup>

**(h) An assessment of the cumulative effect of the rule with other federal and state regulations related to the specific purpose of the rule.**

43. Board did not identify any cumulative effects of the rule with other federal and state regulations.<sup>71</sup> The proposed rule restores and complements Board's enforcement authority over the Orders it issues.

44. The Judge finds that Board has met its obligation to complete the eight assessments, set forth in Minn. Stat. § 14.131, in the text of its SONAR.

**2. Consultation with the Commissioner of Minnesota Management and Budget (MMB)**

45. As required by Minn. Stat. § 14.131, by letter dated February 20, 2024, Board requested the Commissioner of MMB to evaluate the fiscal impact and fiscal benefits of the proposed rules on local units of government.<sup>72</sup> Board received a response from MMB on April 22, 2024, indicating that MMB did not find the rule amendment would impose a cost on local units of government.<sup>73</sup>

**3. Performance-Based Regulation**

46. The Administrative Procedure Act requires an agency to describe how it has considered and implemented the legislative policy supporting performance-based regulatory systems. 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 Board in meeting those goals.<sup>74</sup>

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<sup>68</sup> *Id.*

<sup>69</sup> *Id.* at 9.

<sup>70</sup> *Id.* at 9.

<sup>71</sup> *Id.*

<sup>72</sup> Ex. D at 12; Ex. K3.

<sup>73</sup> Ex. K4.

<sup>74</sup> Minn. Stat. §§ 14.002 and 14.131 (2022).

47. Board asserts the proposed rule is performance based because it would permit Board to carry out its statutory responsibility by ensuring licensees are complying with Board Orders and required standards of conduct.<sup>75</sup>

#### **4. Summary**

48. The Judge finds that Board has met the requirements set forth in Minn. Stat. § 14.131 for assessing the impact of the proposed rule, including consideration and implementation of the legislative policy supporting performance-based regulatory systems, and the fiscal impact on units of local government.

#### **F. Cost to Small Businesses and Cities under Minn. Stat. § 14.127 (2022)**

49. Minn. Stat. § 14.127, requires the 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 agency must make this determination before the close of the hearing record, and the Judge must review the determination and approve or disapprove it.<sup>76</sup>

50. Board determined that the cost of complying with the proposed rules in the first year after the rules take effect will not exceed \$25,000 for any applicable business.<sup>77</sup> While many small cities have police departments that may be impacted by the proposed rule, Board determined the cost of compliance will not exceed \$25,000.<sup>78</sup>

51. The Judge finds that Board has made the determinations required by Minn. Stat. § 14.127 and approves said determinations.

#### **G. Adoption or Amendment of Local Ordinances**

52. Pursuant to Minn. Stat. § 14.128 (2022), 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 Judge must review the determination and approve or disapprove it.<sup>79</sup>

53. Board determined that given the rule change would pertain to license-holders, there would be no need for any local government to amend or adopt any new ordinance or regulation in response to its implementation.<sup>80</sup>

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<sup>75</sup> Ex. D at 9-10.

<sup>76</sup> Minn. Stat. § 14.127, subds. 1 and 2.

<sup>77</sup> Ex. D at 12-13.

<sup>78</sup> *Id.*

<sup>79</sup> Minn. Stat. § 14.128, subd. 1. Moreover, a determination that the proposed rule requires adoption or amendment of an ordinance may modify the effective date of the rule, subject to some exceptions. Minn. Stat. § 14.128, subds. 2 and 3.

<sup>80</sup> Ex. D at 12.

54. The Judge finds that Board has made the determination required by Minn. Stat. § 14.128 and approves said determination.

#### **IV. Rulemaking Legal Standards**

55. The Judge must make the following inquiries: whether the agency has statutory authority to adopt the rule; whether the rule is unconstitutional or otherwise illegal; whether the agency has complied with the rule adoption procedures; whether the proposed rule grants undue discretion to government officials; whether the rule constitutes an undue delegation of authority to another entity; and whether the proposed language meets the definition of a rule.<sup>81</sup>

56. Pursuant to Minn. Stat. § 14.14, subd. 2 (2022), and Minn. R. 1400.2100, the agency must establish the need for, and reasonableness of, a proposed rule by an affirmative presentation of facts. In support of a rule, the agency may rely upon materials developed for the hearing record,<sup>82</sup> “legislative facts” (namely, general and well-established principles, that are not related to the specifics of a particular case, but which guide the development of law and policy),<sup>83</sup> and the agency’s interpretation of related statutes.<sup>84</sup>

57. 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.”<sup>85</sup> By contrast, a proposed rule will be deemed arbitrary and capricious where the agency’s choice is based upon whim, devoid of articulated reasons or “represents its will and not its judgment.”<sup>86</sup>

58. An important corollary to these standards is that when proposing new 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.<sup>87</sup> Thus, while reasonable minds might differ as to whether one or 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.<sup>88</sup>

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<sup>81</sup> See Minn. R. 1400.2100 (2023).

<sup>82</sup> See *Manufactured Housing Institute v. Pettersen*, 347 N.W.2d 238, 240 (Minn. 1984); *Minnesota Chamber of Commerce v. Minnesota Pollution Control Agency*, 469 N.W.2d 100, 103 (Minn. Ct. App. 1991).

<sup>83</sup> Compare generally, *United States v. Gould*, 536 F.2d 216, 220 (8th Cir. 1976).

<sup>84</sup> See *Mammenga v. Agency of Human Services*, 442 N.W.2d 786, 789-92 (Minn. 1989); *Manufactured Hous. Inst.*, 347 N.W.2d at 244.

<sup>85</sup> *Manufactured Hous. Inst.*, 347 N.W.2d at 244.

<sup>86</sup> 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).

<sup>87</sup> *Peterson v. Minn. Dep’t of Labor & Indus.*, 591 N.W.2d 76, 78 (Minn. Ct. App. 1999).

<sup>88</sup> *Minnesota Chamber of Commerce*, 469 N.W.2d at 103.

## V. Rule by Rule Analysis

### A. Minn. R. 6700.1600, subp. 1(F) – Standards of Conduct

59. Board proposes to revise its rules to re-include the standard of conduct relating to noncompliance with a Board Order. The proposed rule would read in relevant part as:

It is a violation of standards of conduct to:

F. fail to:

...

(3) cooperate with a board investigation; or

(4) comply with any order of the board; or

~~(4)~~ (5) comply with any other requirement in this chapter or Minnesota statutes for peace officers[.]

60. In sum, supporters of the amendment maintain that it is a legal necessity so that Board can continue to fulfill its statutory obligations.<sup>89</sup> They also contend the amendment is the only way Board can ensure compliance with the standards of conduct and that peace officer accountability remains intact.<sup>90</sup> Additionally, the supporters point out that said amendment was previously incorporated into the peace officer standards of conduct for at least 27 years without issue.<sup>91</sup> Finally, the supporters note that other Minnesota license discipline statutes do not carry the requirement of a “lawful” order being followed.<sup>92</sup>

61. However, in sum, opponents of the proposed amendment state they would have no issue with Board’s proposed language being incorporated as long as the word “lawful” is inserted before the word “order.”<sup>93</sup>

62. The opponents state the current landscape between Board and Minnesota law enforcement officers is strained, in part, due to Board’s recent rulemaking in 2023 in that “. . . the POST Board has granted itself unprecedented power and control over the professional lives of approximately 12,000 licensed peace officers and even more so for the approximately 420 CLEO’s [chief law enforcement officers] who hold a peace officer license.”<sup>94</sup>

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<sup>89</sup> See Public Hearing Digital Recording; Ex. I2.

<sup>90</sup> *Id.*

<sup>91</sup> *Id.*

<sup>92</sup> *Id.*

<sup>93</sup> Ex. I1.

<sup>94</sup> *Id.*; *Id.* at Richard Hodsdon Written Comments (March 18, 2024).



63. The proper method for dealing with any potential unlawful Orders of Board would be the legality review process through the Office of Administrative Hearings established by the Legislature pursuant to the Minnesota Administrative Procedure Act.

Based upon these Findings of Fact and the rulemaking record, the Judge now hereby issues the following:

### **CONCLUSIONS**

1. Based on the totality of the record, Board provided notice to interested persons in this matter.

2. Board has fulfilled all procedural requirements of Minn. Stat. § 14.14 (2022) and all other procedural requirements of law and rule.

3. The Judge concludes Board has fulfilled its additional notice requirements.

4. Board has demonstrated its statutory authority to adopt the proposed rule and has fulfilled all other substantive requirements of law and rule pursuant to Minn. Stat. §§ 14.05, sub. 1; and 14.50.

5. Other than as noted in Findings 9, 13, 14, 15, and 16, the proposed rule and SONAR complied with Minn. R. 1400.2080, subp. 5.

6. As it relates to Findings 9, 13, 14, 15, and 16, and for the reasons explained therein, the noted defects are deemed to constitute harmless error pursuant to Minn. Stat. § 14.15, subd. 5 (2022). The defects did not deprive any person or entity of an opportunity to meaningfully participate in the rulemaking process as reflected by public participation at the hearing.

7. Board has demonstrated the need for and the reasonableness of the proposed rule by way of an affirmative presentation of the facts in the record pursuant to Minn. Stat. §§ 14.14 and 14.50.

8. During the public comment process, a number of interested persons encouraged Board to modify the proposed rule language to indicate that only noncompliance with a “lawful” Order would constitute a violation of the standards of conduct. Board provided its rationale in declining to adopt said language, and this rationale is reasonable and well-grounded in the rulemaking record.

Dated: July 23, 2024



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KRISTIEN R. E. BUTLER  
Assistant Chief Administrative Law Judge

## NOTICE

This Report must be made available for review to all affected individuals upon request for at least five working days before the agency takes any further action on the rules. The Agency may then adopt the final rules or modify or withdraw its proposed rules. If the Agency makes any changes within the rules, it must submit the rules to the Chief Administrative Law Judge for a review of the changes prior to final adoption. Upon adoption of final rules, the Agency must submit a copy of the Order Adopting Rules to the Chief Administrative Law Judge. After the rules' adoption, the OAH will file certified copies of the rules with the Secretary of State. At that time, the Agency must give notice to all persons who requested to be informed when the rules are adopted and filed with the Secretary of State.

## MEMORANDUM

When under review by the Office of Administrative Hearings pursuant to Minn. Stat. § 14.26 (2022), a proposed rule must be disapproved if: (1) it was not adopted in compliance with procedural requirements, unless the judge finds that the error was harmless in nature and should be disregarded; (2) it is not rationally related to the agency's objectives or the agency has not demonstrated the need for and reasonableness of the rule; (3) it is substantially different than the rule as originally proposed and the agency did not comply with required procedures; (4) it grants undue discretion to the agency; (5) it is unconstitutional<sup>95</sup> or illegal; (6) it improperly delegates the agency's powers to another entity; or (7) the proposal does not fall within the statutory definition of a "rule."<sup>96</sup>

In the present rulemaking, the Judge has identified three defects, all of which are deemed to be harmless procedural error.

### **Procedural Defect under Minn. R. 1400.2100, Item A**

Minn. R. 1400.2080, subp. 5, requires agencies to obtain an administrative law judge's approval of any notice of hearing or dual notice prior to mailing it or publishing it in the State Register. Had Board adhered to this procedural requirement, the related defects of failing to include the process for submitting written comments after the hearing<sup>97</sup> and failing to provide the contact information for the Judge<sup>98</sup> would have been avoided.

A procedural defect can be considered a harmless error pursuant to Minn. Stat. § 14.26, subd. 3(d), if: "(1) the failure did not deprive any person or entity of an opportunity

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<sup>95</sup> In order to be constitutional, a rule must be sufficiently specific to provide fair warning of the type of conduct to which the rule applies. See, *Cullen v. Kentucky*, 407 U.S. 104, 110 (1972); *Thompson v. City of Minneapolis*, 300 N. W.2d 763, 768 (Minn. 1980).

<sup>96</sup> Minn. R. 1400.2100.

<sup>97</sup> Minn. R. 1400.2080, subp. 4(D).

<sup>98</sup> Minn. R. 1400.2080, subp. 4(E).

to participate meaningfully in the rulemaking process; or (2) the agency has taken corrective action to cure the error or defect so that the failure did not deprive any person or entity of an opportunity to participate meaningfully in the rulemaking process.”

Here, the public was provided the necessary information at the hearing and the procedural defects, fortunately, did not deprive any person or entity of an opportunity to participate meaningfully in the rulemaking process.

Based upon this record, the Judge concludes the noted failures did not deprive any person or entity of an opportunity to participate meaningfully in the rulemaking process. Therefore, the defects are harmless error.

**K. R. E. B.**