

Procedural Defects Cases from Rule Reports

Dept. of Education: Mihalchick/Lindstrom – Approval

Academic Standards in Science, Minnesota Rules, Chapter 3501

Defect	Recommendation
<p align="center">Submission of SONAR to Legislative Reference Library</p> <p>In accordance with Minn. R. 1400.2070, subp. 3, an agency is required to send a copy of the Statement of Need and Reasonableness (SONAR) to the Legislative Reference Library when it mails the Notice of Intent to Adopt Rules to its rulemaking mailing list. The Department mailed its Notice of Intent on January 15, 2010, four days prior to the publication of the Notice in the <i>State Register</i>. The Department, however, did not send the SONAR to the Legislative Reference Library until January 26, 2010.</p>	<p>A procedural defect can be considered a harmless error under Minn. Stat. § 14.26, subd. 3 (d), if: “(1) the failure did not deprive any person or entity of an opportunity to participate meaningfully in the rulemaking process; or (2) the agency has taken corrective action to cure the error or defect so that the failure did not deprive any person or entity of an opportunity to participate meaningfully in the rulemaking process.”</p> <p>The Department’s Notice of Intent listed two ways to obtain a copy of the SONAR, including the agency’s website. The Legislative Reference Library likely received the SONAR or on about January 28, 2010, and the comment period ended on February 19, 2010. The SONAR was available at the Reference Library for approximately 23 days before the comment period ended. The Administrative Law Judge finds that the delay in providing the SONAR to the Legislative Reference Library did not deprive any person of the opportunity to meaningfully participate in the rulemaking process. Accordingly, this procedural defect is a harmless error under Minn. Stat. § 14.26, subd. 3 (d)(1) and (2).</p>

Defect	Recommendation
<p style="text-align: center;">30-day Comment Period</p> <p>In accordance with Minn. Stat. § 14.389, subd. 2, an agency must allow 30 days after publication in the <i>State Register</i> for comment on a proposed rule.</p> <p>The Department’s Notice was published in the <i>State Register</i> on December 7, 2009, and stated that the comment period ended on January 5, 2010.</p> <p>“To count a time period, the day of . . . publication . . . is not counted and the last day of the time period is counted.” Accordingly, the Board’s comment period should have ended no sooner than January 6, 2010. A 29-day comment period is a procedural defect.</p> <p>A procedural defect can be considered a harmless error under Minn. Stat. § 14.26, subd. 3 (d), if: “(1) the failure did not deprive any person or entity of an opportunity to participate meaningfully in the rulemaking process; or (2) the agency has taken corrective action to cure the error or defect so that the failure did not deprive any person or entity of an opportunity to participate meaningfully in the rulemaking process.”</p>	<p>The defect in this case likely followed from an arithmetic error and appears to have been unnoticed by the Department – which did not address a truncated comment period in any of the submissions to the Administrative Law Judge. Importantly, the Department has undertaken a significant outreach effort on the substance of the proposed rules to stakeholders and other members of the public. In addition to a Notice sent to the Department’s rulemaking list, the Department worked with a 14-member Steering Committee, seven subcommittees and four additional workgroups on this rule. The record reflects a number of opportunities for public comment throughout the rule development process.¹ Against the backdrop of these broader opportunities for public involvement, the Administrative Law Judge finds that a 29-day comment period did not deprive any person or entity of a meaningful opportunity to participate in the rulemaking process. Therefore, this procedural lapse is a harmless error.</p> <p>The Administrative Law Judge concludes that the Department has complied with all of the procedural requirements of Minnesota Statutes, Chapter 14, and Minnesota Rules, Chapter 1400.</p>

¹ Department Memorandum, Request for Approval of Baskets of Care Rule, OAH 70-0900-21119-1 at 3 (February 1, 2010).

Board of Chiropractic Examiners: Lipman/Lindstrom – Disapproved
Licensing Reinstatement, Minnesota Rules, Chapter 2500

Defect	Recommendation
<p>Procedural Defects under Minn. R. 1400.2100, Item A</p> <p>Additional notice</p> <p>The Administrative Law Judge finds that a procedural error has occurred in this rulemaking process. Minnesota Statutes section 14.22 requires that, in addition to publishing proposed rules and a Notice of Intent to Adopt Rules Without a Public Hearing in the State Register and mailing the proposed rules and Notice to the agency’s rulemaking mailing list, the agency must also “make reasonable efforts to notify persons or classes of persons who may be significantly affected by the rule by giving notice of its intention in newsletters, newspapers, or other publications, or through other means of communication. Minnesota Statutes section 14.23 requires that the agency describe its “efforts to provide additional notification . . . or . . . explain why these efforts were not made” in its Statement of Need and Reasonableness (SONAR).</p> <p>In its SONAR, the</p>	<p>The Administrative Law Judge finds that the Board’s additional notice plan was insufficient to meet the requirements of Minn. Stat. § 14.22. This procedural error is not merely technical in nature. The failure to develop and implement an additional notice plan has deprived interested persons or entities of an opportunity to participate meaningfully in the rulemaking process.⁴</p> <p>More problematic still, the Board’s failure to undertake a wider notification effort is a recurring issue. The same defect was found in the Board’s next most recent rulemaking process. <i>See, In the Matter of the Proposed Rules of the Board of Chiropractic Examiners Governing Records Retention and Access, Minnesota Rules, Chapter 2500, OAH Docket No. 70-0901-19396-1 (2007).</i></p> <p>According to the SONAR, the proposed rule was drafted to establish consistent conditions for reinstating licenses that make the rules easier to apply and enforce.⁵ The proposed rules describe the license reinstatement process for individuals whose licenses have been terminated, voluntarily retired, or placed in emeritus status. These proposed rules raise a number of policy issues. The Board may have been well served in this process by the input from the broader affected community.</p> <p>The Administrative Law Judge finds that the Board’s failure to include groups such as retired or terminated licensees, institutions that offer continuing Chiropractic education, public health associations, health care consumer associations or companies that offer chiropractic malpractice insurance in Minnesota, renders the additional notice plan defective.</p> <p>The additional notice plan requirement furthers several of the important purposes of the Administrative Procedure Act, including those which are to:</p> <ul style="list-style-type: none"> (a) provide oversight of powers and duties delegated to administrative agencies; (b) increase public accountability of administrative agencies; (c) increase public access to governmental information;

⁴ See Minn. R. 1400.2100 A. and Minn. Stat. § 14.26, subd. 3 (d).

⁵ SONAR at page 2.

<p>Board stated that it maintains a rulemaking list and mails notification to everyone on that list. Included on the rulemaking list is the “professional association which represents the interests of the profession at large.” In addition, the Board described its additional notice plan, stating that it mails its newsletter to all licensees as well as to others who express interest in getting the newsletter. The newsletter routinely includes “[n]otices regarding rule subject matter and invitations to acquire information on rules being promulgated” The Board also asserts that it maintains a website which includes “all statutorily required postings.”²</p> <p>Other than these efforts, the Board states that “no extraordinary methods were utilized for notification” because the Board maintains no reliable contact information on those persons who do not keep current their license status with the Board.³</p>	<p>and to (d) increase public participation in the formulation of administrative rules.⁶</p> <p>While the Legislature was quick to point out that these purposes do not necessarily result in separate guarantees of substantive rights for regulated parties, it was the lawmakers’ collective “expectation that better substantive results will be achieved in the everyday conduct of state government by improving the process by which those results are attained.”⁷ It is widely acknowledged that direct lines of <u>two-way</u> communication, between government agencies and regulated parties, benefit the agency, the regulated parties and the broader public.⁸</p> <p>The rules of the Office of Administrative Hearings (OAH) permit an agency to ask OAH for prior approval of the additional notice plan before publishing the request for comments or the notice of proposed rules.⁹ Once the additional notice plan is approved, the approval is final and the agency can proceed with the rulemaking knowing that an inadequate notice plan will not require the agency to return to the early rulemaking stages. This optional prior approval procedure is frequently used by agencies and boards – and even by the Board of Chiropractic Examiners in the past.¹⁰</p> <p>In this case, however, the Board did not seek prior approval of its additional notice plan. Had it done so, the shortcomings in its notice plan would have been identified and remedied at an earlier stage of the process. Moreover, had the Board circulated its rulemaking proposals to a wider set of outside stakeholders (like those that are suggested above), their input might have helped the Board to identify and remedy the defects in its proposal before it was submitted to this Office for review.</p>
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² SONAR at page 11. The Administrative Law Judge notes that the information regarding rulemaking that appeared in the Board’s Spring-Summer 2008 newsletter was general in nature and not specific to this rulemaking effort.

³ *Id.*

⁶ See, *Minnesota Statutes* § 14.001 (1), (2), (4) and (5) (2008).

⁷ See, *Minnesota Statutes* § 14.001 (2008).

⁸ See, *U. S. Dep’t of Labor v. Kast Metals Corp.*, 744 F.2d 1145, 1152 n. 11 (5th Cir. 1984) (There is a “widely-shared recognition that administrative agencies need direct lines to the public voice because of their distance from the elective process”); *Jewish Community Action, et al. v. Comm’r of Public Safety*, 657 N.W.2d 604, 610 (Minn. App. 2003) (“an administrative agency needs public input to remain informed”); accord, U.S. Senate Report on the federal Administrative Procedure Act of 1946, S.Doc. No. 248, 79th Cong., 2d Sess. 19-20 (1946) (“Public participation . . . in the rulemaking process is essential in order to permit administrative agencies to inform themselves, and to afford safeguards to private interest”).

⁹ Minn. R. part 1400.2060.

Minnesota Board of School Administrators: Lipman/Lindstrom: Disapproved
Educational Administrative Licensure

Cure: Supplement SONAR before republication of Notice of Intent to Adopt Rules.

No submissions in the SONAR in support of proposed rules:

3512.0100; 3512.0200, subpart 1 and 2; 3512.0300, subparts 1, 2, 4, and 6; 3512.0400; 3512.0800; 3512.1200; 3512.1300; 3512.1500; 3512.1600; 3512.1700; 3512.2000; 3512.2100; 3512.2400; 3512.2500; 3512.2600; 3512.2700 or 3512.5200; the rules are disapproved as not meeting the requirements of Minn. R. pt. 1400.2100 item B.

1400.2100 STANDARDS OF REVIEW.

A rule must be disapproved by the judge or chief judge if the rule:

B. is not rationally related to the agency's objective or the record does not demonstrate the need for or reasonableness of the rule;

Defects: 11 procedural defects (3 harmless)

-Failure to provide the Notice of Intent to Adopt a Rule to certain legislators;

-*Cure: resubmit the required materials to the appropriate legislative leaders at least 33 days before the end of the new comment period.*

-Cost threshold determination.

- *Cure: Submit a supplement to rule record reflecting information.*

-Probable costs of not adopting the rule – SONAR stated “[n]ot applicable for this particular rule change request.”

Cure: Supplement SONAR so as to detail both its estimate of the probable costs or consequence of not adopting the proposed rule and the basis for its claims.

-Performance-Based Review not addressed in SONAR

-*Cure: Supplement the SONAR with information*

-Consultation with Commissioner of Finance – Not clear from record consultation occurred or that Finance Commissioner rendered an assessment. Board consulted with Finance as to the fiscal impact of the legislation that authorized the rulemaking. But measuring the costs of promulgating rules is not the same as measuring the cost impacts of the rules that are promulgated.

Cure: Supplement hearing record in a way that demonstrates that it has consulted with Finance.

Notice of Intent to Adopt Rules as Mailed – No Dual Notice as mailed provided.

Cure: Submit both documents to OAH with other supplementary materials.

-Certificate of Mailing and Certificate of Accuracy – No Certificate of Mailing submitted. Board argued that formal rulemaking mailing list is not needed, and if it were, the functions such a list would serve have been satisfied. Board received no requests to have names placed on a rulemaking mailing list. Therefore it did not have a list that was “specifically for rulemaking.” Because it did not have any requests, it did not believe it was required to send a Notice of Intent to Adopt Rules. Additionally Board argued it sent information to its “regular mailing list” with additions of persons it believed would be affected by the rule revision. Board asserted that it had held over 80 hours of meeting

¹⁰ See, *In the Matter of the Request for Comments for Proposed Rules of the Minnesota Board of Chiropractic Examiners Relating to Animal Chiropractic*, OAH Docket No. 70-0901-20002-1 (2008).

with those I/A parties and their “person to person” contact with affected groups met and surpassed the intent of Minn. R. Chapter, 1400.

ALJ response. Outreach commendable, but regulations require agency maintain a separate rulemaking mailing list and no clear record of that or regulatory materials required to be mailed occurred. No cure indicated, assuming renoticing is cure.

Overall Cure: Agency shall correct defects by:

- (a) No later than July 21, 2008, re-publishing in the State Register its Notice of Intent to Adopt a Rule. This Notice of Intent must include a statement that re-publication is made to correct certain procedural defects and that the agency will provide, upon request, copies of the supplemental materials required by the ALJ’s report;
- (b) Sending (by either first-class or electronic mail) a copy of the Notice of Intent to Adopt a Rule with the supplemental materials as described in this report to the Board’s rulemaking mailing list and list of legislative leadership, so that the materials are received no later than July 21, 2008; and
- (c) Re-submitting the proposed rules to OAH with:
 - a. The supplementary materials described in this Report;
 - b. Documentary evidence that the Board has complied with steps (a) and (b), above;
 - c. Copies of any comments received during the comment period; and,
 - d. Copies of any response made by the agency to commentators.These materials shall be submitted to the ALJ for approval following the close of the thirty-day comment period required after re-publication of the Notice of Intent to Adopt a Rule.

Rules will be submitted to the CALJ for review.

Harmless error defects:

- No prior approval of dual notice – ALJ contacted and hearing scheduled, but Dual Notice (DN) not approved before publication in SR . DN reviewed and deemed okay (didn’t deprive any person or entity of opportunity to participate meaningfully in the rulemaking process)
- SONAR not provided to Legislative Reference Library – Keep in mind for future rulemakings
- No Additional Mailing list used – failure to develop Additional Notice Plan or explain why not done in SONAR. (didn’t deprive any person or entity of opportunity to participate meaningfully in the rulemaking process)

Recommended 3 Technical Corrections to rule for clarification.

Defect	Recommendation
<p>Part 7890.0150</p> <p>The Commission proposes to amend part 7890.0150, Disclosure of Approved Medications to the public, as follows:</p> <p>The names of all horses that have been approved for race day use of NSAIDS or furosemide must be identified in the daily racing program. The names of all horses that have been treated with NSAIDS shall be posted on the public information boards in the grandstand by the association by one hour before post time for the first race on the day such horses are to race. Horses that are racing for the first time using furosemide, must be so identified in the daily racing program.</p>	<p>The Commission’s SONAR, dated April 26, 2010, does not offer any rationale for the proposed deletion in Part 7890.0150. The only acknowledgement of the proposed change appears in the Introduction section of the SONAR where the Commission states that it is “deleting obsolete language regarding disclosing the use of approved medications.”</p> <p>Among the statutory procedural requirements that the ALJ is required to review is “whether the record demonstrates a rational basis for the need for and reasonableness of the proposed rule.” The SONAR is a critical part of the rulemaking process because it promotes meaningful public participation in the rulemaking process and provides guidance on how a rule should be interpreted. Minn. Stat. § 14.23 emphasizes the importance of the SONAR: “By the date of the section 14.22 notice (Dual Notice), the agency shall prepare a SONAR, which must be available to the public.” Minn. Stat § 14.131 provides that “the agency must prepare, review, and make available for public review a SONAR of the rule.” Minn. Stat § 14.131 goes on to list the items of information that must be included to establish the need for and reasonableness of a rule provision.</p> <p>The Commission’s SONAR contains no facts supporting the need for and reasonableness of Part 7890.0150. The Commission asserted in the introductory section of the SONAR that the sentence proposed for deletion was “obsolete.” The information provided by the Commission upon the request of the ALJ states that industry practice no longer requires posting of the list of treated horses and that the practice is now unnecessary duplication of requirements in the rule. Had the proposed change been a direct result of a change in the Commission’s governing statutes, the ALJ may have looked less critically at the Commission’s lack of justification for the change to Part 7890.0150.</p> <p>Because affirmative presentation of facts for the SONAR does not address why the names of all horses that have been treated with NSAIDS no longer must be posted in the grandstand, and because the justification provided by the Commission was</p>

not part of the record during the public comment period, the Commission has failed to fulfill the need and reasonableness requirements of Minn. R. 1400.2100, item B. The ALJ finds that this defect can be cured in one of two ways:

- The commission may withdraw the proposed amendments to Part 7890.0150; or
- The Commission may distribute to its rulemaking mailing list and according to its Additional Notice Plan an addendum to the SONAR setting forth an affirmative presentation of facts in support of the deletion of Part 7890.0150. The information distributed by the Commission must notify all recipients of a second 30-day public comment period, including specifying the date the second comment period will close. Following the close of the second 30-day comment period, the Commission shall submit to the ALJ the information described in this paragraph along with any public comments submitted during the second comment period and any Commission responses to those comments.

The change described in the first option is needed and reasonable and would not result in a rule that is substantially different from the rules as proposed and published in the State Register. If the Commission chooses the second option, the ALJ will make a determination as to substantial change upon resubmission of the proposed rules.

State Boxing Commission: Sheehy/Lindstrom: Approved as to legality.

Three negative procedural findings, all determined to be harmless errors.

1. Cost threshold determination analysis. Submitted within 14 days review period.
2. Failure to publish RFC within 60 days of effective date of the authorizing statute.
 - July 2, 2006, laws creating MN Boxing Commission became effective and gave Commission authority to adopt rules. Commission adopted rules at a duly-called Commission meeting and believed it had satisfied statutory rulemaking requirements.
 - December 6, 2007, Commission took action to engage in rulemaking activities once it became aware it must go through APA process to have rules that have the full force and effect of law. December 17, 2007, good faith effort to comply with Minn. Stat. §14.101 by publishing the RFC with the draft rule language. ALJ stated § “language of §14.101 is directory in nature and not mandatory. There is no specified penalty under 14.101 for failure to comply. This differs from § 14.125, which explicitly states that an agency’s authority will expire if it fails to comply with the statute. Presumably, the purpose of a requirement that an agency publish a RFC within 60 days of the effective date of its authorizing legislation is to ensure that an agency begins the process of public notification so that it will stay on schedule to publish its NOIA within 18 months, as required by Minn. Stat. § 14.125.
 - Commission did not realize it had to comply with the rulemaking requirements of the APA. Once it became aware of its obligations, the Commission moved quickly, in good faith, to publish its RFC. Provided notice to I&AP and received no comments. Commission also provided for an extended comment period (63) after publication of the NOIA. Because the language of §14.101 is directory and not mandatory, and because the ALJ does not believe that this procedural error deprived anyone of the opportunity to meaningfully participate in the rulemaking process, the ALJ finds the procedural defect harmless.
3. Failure to wait at least 60 days between publication of RFC and the NOIA. Agency argued it had to publish so as not to lose statutory authority & provided 63 days instead of 30. OAH agreed based on corrective actions agency took and other circumstances: no comments on rule, I&AP notified, consistency of proposed rule with current practices, and legislative intent. The Legislature built provisions into Min. Stat. § 14.101 that prohibit OAH from invalidating a rule on the grounds that the contents of the RFC are insufficient or inaccurate and that allow the Chief ALJ to reduce the time period before publication of the NOIA from 60 to 30 days for good cause, then it isn’t Legislature’s intent to invalidate rules based on problems with RFC.

Board of Chiropractic Examiners: ALJ Barbara Neilson – Approved in part, Disapproved in part. *Rules relating to Chiropractic Prepay Plans*

Subject Matter: These rules place certain limits on the use of prepay plans for chiropractic services. The rules provide consumer protection measures:

- Deposit prepay funds in escrow accounts
- Use of written plans specifying terms and services
- Limit the number of visits per plan
- Provide right of early cancellation and refund

Procedural notes: Two procedural defects were noted.

- A. The Board failed to notify “ranking minority members” of its legislative committees. Notice was provided to committee chairs, the LCC and “broadly to the public” therefore, this defect was found to be harmless error.
- B. The ALJ found a procedural defect in that the Board did not adequately address cost issues in the SONAR (who will bear and who will benefit, as well as the probable costs of compliance). However, this was found to be harmless error because the Board satisfied its obligation by providing testimony on costs at the hearing.

Defects: In addition to the procedural defects noted above, the ALJ found the following defects:

- A. The proposed rules required the plans to be in writing and to include: “A list of *all services* which are covered and which are not covered by the plan”. The ALJ concluded that this language was defective because the list of all services “not covered” could be endless. The ALJ recommended simply limiting the list to covered services.
- B. The written plans were also required to provide a clear explanation of reimbursement policies. (ie. how a patient would obtain reimbursement is they canceled the plan.) The rule stated “As part of this explanation, a representative example should be provided to the patient”. The ALJ found that the language was unclear as to what constitutes a “representative example”. She also found that using “should” makes it discretionary, rather than required. The options for correcting the defects were to delete the sentence entirely OR provide more explanation regarding the example and change “should” to “shall”.

Issues:

- A. The potential cost to providers was an issue. There was considerable controversy over the \$25,000 threshold of section 14.127. Several commenters speculated that they would have to incur significant costs in accounting software and personnel in order to comply. The Board countered with testimony and affidavits from several board members (licensed chiropractors) with specific information on the cost of escrow accounts and available software packages that allow for the necessary account tracking. Based upon the evidence, the ALJ approved the Board’s determination that the rule requirements would not exceed the \$25,000 threshold.
- B. Two items were left “hanging” - however, they were not identified as “defects.”
 - (a) The provisions governing the written agreement required patient initials at several places. Concerns were raised about this requirement and the ability to use electronic agreements. The Board indicated its intent to propose a modification to address this – but did not.
 - (b) There were questions regarding the application of the “50 visit limit” for a plan and whether it would apply to both individual and family plans. The Board indicated its intent to provide clarifying language but did not.