

STATE OF MINNESOTA  
OFFICE OF ADMINISTRATIVE HEARINGS

In The Matter of the Proposed Rules of the Minnesota State Arts Board Governing the Procedures and Criteria Followed in the Distribution of Grants and Other Assistance in the Furtherance of the Arts in Minnesota, *Minnesota Rules Chapter 1900*

**ORDER OF CHIEF  
ADMINISTRATIVE LAW JUDGE  
ON REVIEW OF RULES UNDER  
MINN. STAT. § 14.26, SUBD. 3(b)**

The Minnesota State Arts Board (Board) requested review and approval of the above-entitled rules pursuant to Minn. Stat. § 14.26 (2014).

On April 6, 2016, the Office of Administrative Hearings received the documents that must be filed under Minn. Stat. § 14.26 and Minn. R. 1400.2310 (2015). Based upon a review of the Board's submissions and filings, Minnesota Statutes, Minnesota Rules, and the rulemaking record,

**IT IS HEREBY ORDERED THAT:**

The finding of the Administrative Law Judge in the April 15, 2016 Order on Review of Rules, regarding the disapproval of proposed Minn. R. 1900.1110, subp. 3, is approved.

The reasons for the disapproval of the rules and the changes recommended to correct the defects found are as set forth in the attached Order.

Dated: April 15, 2016



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TAMMY L. PUST  
Chief Administrative Law Judge

STATE OF MINNESOTA  
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In The Matter of the Proposed Rules of the Minnesota State Arts Board Governing the Procedures and Criteria Followed in the Distribution of Grants and Other Assistance in the Furtherance of the Arts in Minnesota, *Minnesota Rules Chapter 1900*

**ORDER ON REVIEW OF  
RULES UNDER  
MINN. STAT. § 14.26**

The Minnesota State Arts Board (Board) requested review and approval of the above-entitled rules.

On April 6, 2016, the Office of Administrative Hearings received the documents that must be filed under Minn. Stat. § 14.26 (2014) and Minn. R. 1400.2310 (2015). Based upon a review of the Board's submissions and filings, Minnesota Statutes, Minnesota Rules, and for the reasons in the Memorandum that follows,

**IT IS HEREBY DETERMINED THAT:**

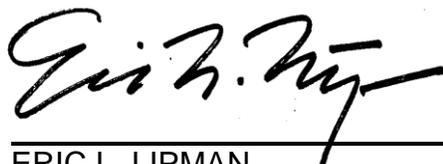
Except as to proposed Minn. R. 1900.1100, subp. 3,

1. The Board has the statutory authority to adopt the rules.
2. The rules were adopted in compliance with the procedural requirements of Minnesota Statutes, Chapter 14 (2014), and Minnesota Rules, Chapter 1400 (2015).
3. The record demonstrates the rules are needed and reasonable.

**IT IS HEREBY ORDERED THAT:**

1. Proposed Minn. R. 1900.1110, subp. 3 is **DISAPPROVED**.
2. Except proposed Minn. R. 1900.1110, subp. 3, the rules are **APPROVED**.

Dated: April 15, 2016



ERIC L. LIPMAN  
Administrative Law Judge

## MEMORANDUM

When undertaking a legal review of proposed rules, the Administrative Law Judge must assess whether the proposed rules comport with applicable legal standards – including the prohibition against unduly vague rules.<sup>1</sup> A rule must be sufficiently specific to provide fair warning of the type of conduct to which the rule applies.<sup>2</sup>

### **Minn. R. 1900.1110, subp. 7(c) – Conflict of Interest of Member**

The Board proposed Minn. R. 1900.1110, subp. 3, which reads:

Subp. 3. Disputed decision. An applicant does not have the right to request that the board reconsider its decision. If the applicant continues to dispute the board's decision, the applicant shall notify the board in writing within 14 business days of the date of the letter notifying the applicant of the board's decision. Upon receipt of notification of dissatisfaction from the applicant, the board shall refer the matter to the Office of Administrative Hearings for a contested case proceeding. Once the board has referred the matter to the Office of Administrative Hearings, the board shall not consider the matter, pending receipt of **the decision from the Office of Administrative Hearings**.<sup>3</sup>

In the view of the Administrative Law Judge, when referencing “the decision from the Office of Administrative Hearings,” the proposed rule does not make clear whether the Board is committing itself, in rule, to having the determinations of the Administrative Law Judge stand as the final agency decision in these matters.

Minnesota law does not require that Administrative Law Judges make the final agency decision in such cases. Instead, it permits the Board to select, on a case-by-case basis, whether it wishes to receive a recommendation for action from the Administrative Law Judge or to designate the Judge as the official who will render a final agency decision.<sup>4</sup> For example, in the most-recently reported contested case referred by the Board – a matter that involved a dispute between the Board and a potential grantee – the Board elected to receive a report and recommendation from the Administrative Law Judge.<sup>5</sup>

Among the possible cures to this ambiguity, would be to revise the rule to eliminate the reference to a “decision,” or instead clarify that the Administrative Law Judge will

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<sup>1</sup> Minn. R. 1400.2100 (E); *see also* Minn. R. 1400.2300, subp. 3.

<sup>2</sup> *Cullen v. Kentucky*, 407 U.S. 104, 110 (1972); *Thompson v. City of Minneapolis*, 300 N.W.2d 763, 768 (Minn. 1980).

<sup>3</sup> Ex. B at 15 (emphasis added).

<sup>4</sup> Minn. Stat. § 14.57 (a) (“Upon initiation of a contested case proceeding, an agency may, by order, provide that the report or order of the administrative law judge constitutes the final decision in the case”).

<sup>5</sup> *See generally*, *In the Matter of the Appeal of Hennepin Theater Trust*, OAH Docket No. 11-0550-23000 (2013) ([https://mn.gov/oah/assets/0550-23000-hennepin-theater-trust-report\\_tcm19-164166.pdf](https://mn.gov/oah/assets/0550-23000-hennepin-theater-trust-report_tcm19-164166.pdf)).

render a “final agency decision” in all such matters. If the Board wishes to retain the option to receive a Report and Recommendation in a future contested cases, such a revision might read:

Once the board has referred the matter to the Office of Administrative Hearings, the board shall not consider the matter, pending receipt of **the Administrative Law Judge’s report.**<sup>6</sup>

Revising proposed Minn. R. 1900.1110, subp. 3, to clarify the type of contested case referrals made by the Board, is needed and reasonable and would not be a substantial change from the rules as proposed.

### Technical Corrections

The Administrative Law Judge recommends two technical corrections to the rules for the Board’s review and consideration. Technical corrections are not defects in the rules. The suggested corrections are recommendations that the agency may choose to adopt, if it sees fit, to aid in the administration of the rules.

#### 1. Minn. R. 1900.0410, subp. 5 – Conflict of Interest of Member

Following the recommendations in a 2011 Evaluation Report from the Office of the Legislative Auditor, the Board seeks in this rulemaking to strengthen its internal controls against conflicts of interests in grant-making.<sup>7</sup> Among the observations made by the Legislative Auditor was:

A potential conflict of interest occurs when a person in a public position has a **relationship, affiliation, or other interest that**, according to applicable laws [and] policies, **would create an inappropriate influence if the person is called on to make a decision or recommendation** that would affect one or more of those relationships, affiliations, or interests. Conflict of interest laws and policies typically provide a process — such as recusal from a decision or recommendation — to ensure that a potential conflict does not become an actual conflict.<sup>8</sup>

In this proceeding the Board proposes to revise its existing conflicts of interest rule so that it reads:

Subp. 5. Conflict of interest of member. A conflict of interest exists when a member of an advisory panel is affiliated as listed in items A to D with an applicant whose application is before the panel for review:

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<sup>6</sup> See generally, Minn. R. 1400.8100; see also Minn. R. 1400.8200.

<sup>7</sup> Ex. C at 31.

<sup>8</sup> *The Legacy Amendment: Evaluation Report*, at 58 (Office of the Legislative Auditor, Nov. 2011) (emphasis added) (<http://www.auditor.leg.state.mn.us/ped/pedrep/legacy.pdf>).

A. receives direct financial benefit from the applicant organization or proposal being reviewed;

B. has served within the last two years as an employee or governing board member of an applicant organization being reviewed;

C. has served with or without payment as a consultant to an applicant being reviewed; or

D. has a familial relationship with an applicant or with a staff or board member of an applicant organization.<sup>9</sup>

In the view of the Administrative Law Judge, the proposed rule does a good job of addressing a set of potentially problematic professional relationships between Board officials and applicants, but less so the types of personal relationships that could present a conflict.<sup>10</sup> Accordingly, the Administrative Law Judge suggests that the Board consider revising proposed Minn. R. 1900.0410, subp. 5 (D) so that it reads: “has a familial or romantic relationship with an applicant or with a staff or board member of an applicant organization.”

A revision that addresses potential conflicts of interest that are neither familial nor professional is needed and reasonable and would not be a substantial change from the rules as proposed.

## **2. Minn. R. 1900.0610 (B) – Review Criteria Used By Advisory Panels**

The Board proposes to authorize partial funding of projects when the application of an otherwise worthy project includes costs that may not be underwritten. The proposed rule reads in part: “Partial funding may be awarded if the panel finds that an application includes activities or costs that are not allowed in the applied for program.”<sup>11</sup>

In the view of the Administrative Law Judge, the sentence is awkwardly phrased. Accordingly, the Administrative Law Judge suggests that the Board consider revising proposed Minn. R. 1900.0610 (B) so that it reads: “Partial funding may be awarded if the panel finds that an application includes activities or costs that are not allowed in the program from which funding is requested.”

A revision that makes useful editorial revisions to the text of a rule, but does not alter its import or meaning, is needed and reasonable and would not be a substantial change from the rules as proposed.

## **E. L. L.**

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<sup>9</sup> Ex. B at 6.

<sup>10</sup> See generally, *The Legacy Amendment: Evaluation Report, supra*, at 66 (Hypothetical Situation 3: Different Disclosure Requirements).

<sup>11</sup> Ex. B at 7.