

STATE OF MINNESOTA  
OFFICE OF ADMINISTRATIVE HEARINGS  
FOR THE DEPARTMENT OF HEALTH

In the Matter of the Proposed Expedited  
Rules of the Department of Health  
Governing Medical Cannabis Patients,  
Caregivers and Health Care Practitioners

**ORDER ON REVIEW  
OF RULES UNDER  
MINN. STAT. § 14.389  
AND MINN. R. 1400.2410**

On April 21, 2015, the Minnesota Department of Health (Department) filed documents with the Office of Administrative Hearings (OAH) seeking review and approval of the above-entitled rules under Minn. Stat. § 14.389 (2014) and Minn. R. 1400.2410 (2013).

Based upon a review of the written submissions by the Department and the contents of the rulemaking record,

**IT IS HEREBY ORDERED THAT:**

1. The proposed rules were adopted in compliance with the procedural requirements of Minnesota Statutes, chapter 14, and Minnesota Rules, chapter 1400 (2014).
2. According to 2014 Minn. Laws ch. 311, the Department has the statutory authority to adopt these proposed rules using the expedited rulemaking process.
3. The proposed changes to the rules do not make the proposed rules substantially different.
4. The proposed rules are **APPROVED**.
5. The Department should consider making the technical changes set forth in the attached memorandum.

Dated: May 4, 2015

s/LauraSue Schlatter  
LAURASUE SCHLATTER  
Administrative Law Judge

## MEMORANDUM

### I. Standards of Review

In expedited rulemaking, the legal review of the proposed rules is conducted according to the standards of Minn. R. 1400.2100, items A and C to H.<sup>1</sup> These standards require that the rule must be approved by the judge or chief judge unless the rule:

- A. was not adopted in compliance with procedural requirements of this chapter, Minnesota Statutes, chapter 14, or other law or rule, unless the judge decides that the error must be disregarded under Minnesota Statutes, section 14.15, subdivision 5, or 14.26, subdivision 3, paragraph (d);
- ...
- C. is substantially different than the proposed rule, and the agency did not follow the procedures of part 1400.2110;
- D. exceeds, conflicts with, does not comply with, or grants the agency discretion beyond what is allowed by its enabling statute or other applicable law;
- E. is unconstitutional or illegal;
- F. improperly delegates the agency's powers to another agency, person or group;
- G. is not a "rule" as defined in Minnesota Statutes, section 14.02, subdivision 4, or by its own terms cannot have the force and effect of law; or
- H. is subject to Minnesota Statutes, section 14.25, subdivision 2, and the notice that hearing requests have been withdrawn and written responses to it show that the withdrawal is not consistent with Minnesota Statutes, section 14.001, clauses (2), (4), and (5).

These proposed expedited rules meet the required standards, but there are several portions of the rule as discussed in this Memorandum that the Administrative Law Judge recommends the Department amend for purposes of clarity or ease of administration. These recommendations do not reflect defects in the rules and the agency may choose whether to adopt any or all of them. The Administrative Law Judge finds that, to the extent the Department chooses to make any of the recommended

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<sup>1</sup> See, Minn. R. 1400.2410, subp. 3.

changes, none of the changes would make the rules substantially different pursuant to Minn. Stat. § 14.05. subd. 2.

## II. Recommended Changes

### A. Part 4770.4002, subp. 5:

The Administrative Law Judge recommends that the Department clarify the wording of the definition of “evidence-based medicine” to read as follows:

“Evidence-based medicine” means documentation of published, peer-reviewed ~~best evidence on~~ research related to the use of medical cannabis. Such documentation shall ~~which~~ includes up-to-date information from relevant, valid evidence-based research about the effects of medical cannabis on different forms of diseases and conditions, its use in health care, the potential for harm from exposure, a clinical assessment of the effectiveness of medical cannabis in an ongoing treatment paradigm, and any other relevant medical information.

### B. Part 4770.4003, subp. 2 and subp. 6:

Subparts 2 and 6 provide mechanisms for people to request the commissioner to add a qualifying condition and a delivery method for medical cannabis. The two subparts begin with similar language, which is unclear. Subpart 2 states:

Any person may request the commissioner to add a qualifying medical condition not listed in Minnesota Statutes, section 152.22, subdivision 14, to the list by applying on a form provided by the commissioner *beginning June 1, 2016*.

[Emphasis added.] It is not clear from this language whether a person may apply beginning June 1, 2016, or whether the forms will be available from the commissioner beginning June 1, 2016. Assuming the Department intends the former, the Administrative Law Judge suggests the following language:

Any person may request the commissioner to add a qualifying medical condition not listed in Minnesota Statutes, section 152.22, subdivision 14, to the list by applying on a form provided by the commissioner. Requests under this subpart will be accepted beginning June 1, 2016.

If the Department makes this, or a similar clarifying change, it should be made to the first paragraph at Part 4770.4003, subparts 2 and 6.

**C. Part 4770.4003, subp. 3:**

This subpart defines the composition of the Medical Cannabis Advisory Panel. Subparagraph A (1) requires that there be “one medical cannabis patient advocate” on the panel. The term “medical cannabis patient advocate” is not defined elsewhere in the rule. A “patient advocate” could be a lobbyist or other person who is not personally involved with the experience of being or caring for a patient who uses medical cannabis. If the Department’s intent is to reserve one seat for a registered patient, or a patient’s registered designated caregiver, parent or guardian, the Administrative Law Judge recommends that the subparagraph use one or more of those terms, as appropriate. If the Department’s intent is to allow more latitude for the seat defined by subparagraph A (1), the Administrative Law Judge recommends that the rule include a definition of “patient advocate.”

**D. Part 4770.4003, subp. 3.C:**

This subparagraph states that members of the Medical Cannabis Advisory Panel serve three year terms “or until a successor is appointed *and qualified.*” (Emphasis added.) There is no language in the rule regarding a qualification process for Advisory Panel members. The Commissioner alone has the authority to appoint the members. The Administrative Law Judge recommends that the words “and qualified” be deleted or, if the Department anticipates implementing a qualification process, that a subparagraph defining that term be added.

**E. Part 4770.4003, subp. 5.A and subp. 6.A:**

Minnesota Rules, part 4770.4003, subpart 5.A requires the commissioner to render a final decision regarding adding a medical condition to the list of qualifying medical conditions within 30 days of receiving the Medical Cannabis Advisory Panel’s recommendation. The commissioner must either approve the request, reject the medical condition, or defer a decision “for further review.” Subpart 6.A provides that the commissioner act within 90 days on a request to add a delivery method. The commissioner must either approve the request, reject the delivery method, or defer a decision “for further review.”

The Administrative Law Judge notes that there is no time limit attached to requests for adding a medical condition or delivery method which are held over for further review. Given the timelines specified for acceptance or rejection of such requests, it appears inconsistent to permit requests to sit indefinitely in “further review” status. The Administrative Law Judge recommends that the Department add the following language, or similar language, to part 4770.4003, subparts 5.A and 6.A:

The commissioner must accept or reject a request which is deferred for further review within 180 days from the date the request was deferred.

**F. Part 4770.4003, subp. 4.B:**

The Administrative Law Judge recommends that subpart 4.B. be amended as shown below, for clarity and to include a requirement that the public be notified of how to submit public comments:

The commissioner must publish a notice on the department's medical cannabis Web site ~~of an advisory panel meeting~~ at least 30 days in advance of an advisory panel meeting. Notice must include the date, time, and location of the meeting, a brief description of the requests received, and information on how the requirements for public comment will be received, including a deadline, if any, for public comment.

**G. Part 4770.4003, subp. 4.C:**

The Administrative Law Judge recommends that subpart 4.C. be amended as shown below for consistency and clarity:

A person may request to close a portion of the meeting to protect private data from disclosure. The request for closure of the ~~hearing meeting~~ must be submitted to the commissioner at least 48 hours before the ~~hearing meeting~~ meeting.

**H. Part 4770.4003, subp. 5.C:**

The Administrative Law Judge recommends that subpart 5.C. be amended as shown below for clarity and readability:

The commissioner must forward ~~an~~ a newly approved qualifying medical condition to ~~be added to~~ the chairs and ranking minority members of the legislative policy committees having jurisdiction over health and public safety as required by Minnesota Statutes, section 152.27, subdivision 2, ~~and if the legislature does not provide otherwise by law, the commissioner must~~ publish the addition newly approved qualifying medical condition in the State Register and on the department's medical cannabis Web site.

**I. Part 4770.4003, subp. 6.A:**

Subpart 6 establishes a procedure for persons to request that the commissioner add a delivery method of medical cannabis not listed in the statute. The commissioner is required, under subpart 6.A., to "consider the request and any written comments from the public" and to act on the request in 90 days. There is no provision for notifying the public of the request, or for requesting public comment. The Administrative Law Judge recommends that the Department add a subparagraph, before the current subparagraph 6.A., as follows:

The commissioner must publish the request to add a delivery method, along with information regarding how to submit public comment about the request, on the department's medical cannabis Web site. The information required to be published by this subparagraph shall allow at least 30 days for public comment.

The subparagraphs that follow would be renumbered accordingly.

**J. Part 4770.4003, subp. 6.C:**

The Administrative Law Judge recommends the subpart 6.C. be amended as shown below for clarity and readability:

The commissioner must forward ~~an~~ a newly approved delivery method to ~~be added to~~ the chairs and ranking minority members of the legislative policy committees having jurisdiction over health and public safety as required by Minnesota Statutes, section 152.27, subdivision 2, ~~and if the legislature does not provide otherwise by law, the commissioner must publish the addition~~ newly approved delivery method in the State Register and on the department's medical cannabis Web site.

**K. Part 4770.4005, subp.1.B:**

The Department's memorandum accompanying these expedited rules provided an explanation of the purpose of each proposed rule part. The explanation to part 4770.4005, which establishes patient application requirements and procedures for the medical cannabis patient registry, states that the Department "modeled the identification required for proof of residency on the rules for establishing residency when registering at the polls to vote."<sup>2</sup>

The Administrative Law Judge notes that the rules requiring proof of residency for the medical cannabis patient registry differ from the election-day voter registration rules. Part 4770.4005, subpart 1.B. requires *either* a state driver's license, state, federal or tribal government-issued identification card *or* other documentation showing residency, such as a mortgage, lease or rental agreement, state tax documents, a recent utility bill, etc. The election-day voter registration rules require that, if a person does not present a driver's license, or other tribal or state-issued identification card,

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<sup>2</sup> Memorandum from Commissioner Edward Ehlinger at 7 (April 20, 2015).

then the alternative documents, such as a bill or rent receipts, must be accompanied by some form of photo identification, such as a U.S. passport, or a military or student identification card.<sup>3</sup>

In noting the difference between the voting rules and the patient registration rules as proposed, the Administrative Law Judge is not recommending that the election-day voter rules are necessarily preferable in this context. The election-day voter rules provide a mechanism for confirming a person's identity (through the photo identification) and residence (through the option of also providing a bill or other specified document). The patient registration rules, as proposed, will not necessarily assure the Department of a person's identity and residence at the same time. Because the patient who is applying for the medical cannabis patient registry will also have to submit a statement from a health care practitioner certifying the patient's qualifying condition, it is possible that the Department does not need the additional confirmation of identity with the patient's proof of residency. The Administrative Law Judge recommends that the Department change the proposed rule only if it does wish this provision to parallel the confirmations of both identity and residence that are built into Minn. R. 8200.5100.

**L. Part 4770.4009, subp.3.B:**

This rule part governs the revocation or suspension of a qualifying patient or designated caregiver registration. Part 4770.4009 subpart 2.C requires suspension of the patient's registration "[i]f the qualifying patient, together with the qualifying patient's designated caregiver where applicable, obtains more than a 30-day supply of medical cannabis within a 23-day period. . . ." Part 4770.4009, subp. 3.B is a parallel provision which applies to the designated caregiver. However, the proposed language in subpart 3.B. does not completely mirror the proposed language in subpart 2.C. The Administrative Law Judge recommends the following amendment to part 4770.4009, subpart 3.B.:

the designated caregiver, together with the designated caregiver's patient,  
where applicable, obtains more than a 30-day supply . . . .

Because the "where applicable" language is part of subpart 2.C., leaving it out of subpart 3.B. could lead to an interpretation that a caregiver cannot be sanctioned for obtaining a larger supply than otherwise allowed by the rule simply because the caregiver's patient could not be found to be part of the plan to do so. Adding the parallel language to subpart 3.B. eliminates this concern.

**L.S.**

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<sup>3</sup> See Minn. R. 8200.5100, subs. 1, 2 (2013). The proposed patient registration rule does include an option for the patient to submit an affidavit from the caregiver or a health or social services provider vouching for the patient's residency, which is similar to the "vouching" provision in the voter registration rules. Compare Minn. R. 4700.4005, subp.1.B.(f) and Minn. R. 8200.5100, subp. 1.D.