

STATE OF MINNESOTA
OFFICE OF ADMINISTRATIVE HEARINGS

FOR THE MINNESOTA BOARD OF CHIROPRACTIC EXAMINERS

In the Matter of Proposed
Rules Related to Acupuncture,
Independent Medical Examiners
Registration, and Rehabilitative
Treatment, Minn. Rules,
Pts. 2500.0100 to 2500.4000.

REPORT OF THE
ADMINISTRATIVE_LAW_JUDGE

The above-entitled matter came on for hearing before Administrative Law Judge Peter C. Erickson on February 25, 1991, at 9:00 a.m. in Conference Rooms A and B of the Colonial Office Building, 2700 University Avenue West, St. Paul, Minnesota.

This Report is part of a rulemaking proceeding held pursuant to Minn. Stat. §§ 14.131 to 14.20, to hear public comment, to determine whether the Minnesota Board of Chiropractic Examiners (the Board) has fulfilled all relevant substantive and procedural requirements of law applicable to the adoption of the rules, whether the proposed rules are needed and reasonable and whether or not modifications to the rules proposed by the Board after initial publication are impermissible, substantial changes.

Robert T. Holley, Special Assistant Attorney General, Suite 500, 525 Park Street, St. Paul, Minnesota 55103, appeared on behalf of the Board at the hearing. The hearing panel consisted of Joel B. Wulff, D.C., Executive Director of the Board; Robert Thatcher, D.C.; and Victor Youcha, D.C. The hearing continued until all interested persons, groups or associations had an opportunity to be heard concerning the adoption of these rules.

The record remained open for the submission of written comments for twenty calendar days following the date of the hearing, to March 18, 1991. Pursuant to Minn. Stat. § 14.15, subd. 1 (1988), three business days were allowed for the filing of responsive comments. At the close of business on March 21, 1991, the rulemaking record closed for all purposes. The Administrative Law Judge received written comments from interested persons

during the comment period. The Board submitted written comments responding to matters discussed at the hearing and proposing further amendments to the rules.

The Board must wait at least five working days before the agency takes any final action on the rule(s); during that period, this Report must be made available to all interested persons upon request.

Pursuant to the provisions of Minn. Stat. § 14.15, subd. 3 and 4, this Report has been submitted to the Chief Administrative Law Judge for his approval. If the Chief Administrative Law Judge approves the adverse findings

of this Report, he will advise the Board of actions which will correct the defects and the Board may not adopt the rule until the Chief Administrative

Law Judge determines that the defects have been corrected. However, in those instances where the Chief Administrative Law Judge identifies defects which relate to the issues of need or reasonableness, the Board may either adopt the Chief Administrative Law Judge's suggested actions to cure the defects or, in the alternative, if the Board does not elect to adopt the suggested actions, it must submit the proposed rule to the Legislative Commission to Review Administrative Rules for the Commission's advice and comment.

If the Board elects to adopt the suggested actions of the Chief Administrative Law Judge and makes no other changes and the Chief Administrative Law Judge determines that the defects have been corrected, then the Board may proceed to adopt the rule and submit it to the Revisor of Statutes for a review of the form. If the Board makes changes in the rule other than those suggested by the Administrative Law Judge and Chief Administrative Law Judge, then it shall submit the rule, with the complete hearing record, to the Chief Administrative Law Judge for a review of the changes before adopting it and submitting it to the Revisor of Statutes.

When the Board files the rule with the Secretary of State, it shall give notice on the day of filing to all persons who requested that they be informed of the filing.

Based upon all the testimony, exhibits, and written comments, the Administrative Law Judge makes the following:

FINDINGS OF FACT

Procedural Requirements

1. On December 24, 1990, the Board filed the following documents with the Chief Administrative Law Judge:

- (a) a copy of the proposed rules certified by the Revisor of Statutes;
- (b) the Order for Hearing;
- (c) the Notice of Hearing proposed to be issued;
- (d) the Statement of Need and Reasonableness (SONAR)

which contains a list of additional persons to receive the Notice of Hearing;

- (e) a memorandum from the Commissioner's representative of the Department of Finance approving proposed fees; and,
- (f) a copy of the Board's resolution authorizing this rulemaking.

2. On January 2, 1991, the Board mailed the Notice of Hearing to all persons and associations who had registered their names with the Board for the purpose of receiving such notice and the persons who appear on the list of additional persons to receive the Notice of Hearing.

3. On January 14, 1991, the Notice of Hearing and the proposed rules were published at 15 State Register 1561.

4 On January 22, 1991, the Board mailed its January, 1991 Newsletter with the Notice of Hearing attached to all persons and associations who normally receive that Newsletter for the purpose of providing additional discretionary notice.

5. On January 31, 1991, the Board filed the following documents with the Administrative Law Judge:

- (a) the Notice of Hearing as mailed;
- (b) a copy of the State Register pages containing the Notice of Hearing and its proposed rules;
- (c) a copy of the Notice of Solicitation of Outside Materials and all materials received pursuant to that Notice;
- (d) the names of agency personnel and witnesses called by the Board to testify at the hearing;
- (e) the Board's certification that its mailing list was accurate and complete;
- (f) the Affidavit of Mailing the Notice to all persons on the Board's mailing list; and,
- (g) the Affidavit of Additional Mailing.

6. On February 5, 1991, the Board filed documentation substantiating its request for fee approval by the Department of Finance.

Nature of the Proposed Rules and Statutory Authority

7. Under Minn. Stat. Chapter 148, the practice of chiropractic is defined, authorized as a healing art, and regulated. The Board is charged with various responsibilities to carry out the provisions of Chapter 148. Among its responsibilities, the Board must establish rules "necessary to administer sections 148.01 to 148.105 to protect the health, safety, and welfare of the public, including rules governing the practice of chiropractic and defining any terms Minn. Stat. § 148.08, subd. 2. The proposed rules define certain terms, set registration requirements for independent examiners, regulate the practice of acupuncture by chiropractors, and establish a scope for providing rehabilitative treatment. Where the issue of

statutory authority has been raised regarding a specific rule, that issue will be addressed below. Except as hereinafter modified, the Judge finds that the Board has documented its general statutory authority to adopt these rules.

Small Business Considerations in Rulemaking.

8. Minn. Stat. § 14.115, subd. 2, provides that state agencies proposing rules affecting small businesses must consider methods for reducing adverse impact on those businesses. The Board considered how the proposed rules would affect small businesses. In its SONAR, the Board stated that the requirements regarding acupuncture and rehabilitative treatment would not have a negative effect on small businesses. The proposed rules regarding independent examinations are intended to administer the statutorily mandated restrictions concerning who may provide such examinations. See, Minn. Stat. § 148.09 (1990). The Judge finds that the Board has met the requirements of Minn. Stat. § 14.115, subd. 2 by considering methods of reducing the impact of the rules on small businesses.

Fiscal Notice

9. Minn. Stat. § 14.11, subd. 1, requires the preparation of a fiscal notice when the adoption of a rule will result in the expenditure of public funds in excess of \$100,000 per year by local public bodies. The proposed rules will not require expenditures by local governmental units or school districts in excess of \$100,000 in either of the two years immediately following adoption, and thus no notice is statutorily required.

Impact on agricultural Land.

10. Minn. Stat. § 14.11, subd. 2 (1988), imposes additional statutory notice requirements when rules are proposed that have a "direct and substantial adverse impact on agricultural land in the state." The statutory requirements referred to are found in Minn. Stat. §§ 17.80 to 17.84. The proposed rules will have no substantial adverse impact on agricultural land within the meaning of Minn. Stat. § 14.11, subd. 2 (1988).

Proposed Rule 2500.0100 - Definitions.

11. The first subpart of proposed rule 2500.0100 sets forth the scope of the definitions contained in this rule part. The remainder of the rule part is composed of eight subparts defining various terms used in Chapter 148 and the proposed rules. Those definitions which received adverse comment will be discussed below. Concerning the remainder of the proposed rules, only those portions of the rules which require discussion or generated public comment will be discussed in this I Report. All other parts of the rules are found to be needed and reasonable.

Subpart 2. Accredited School .

12. Proposed rule 2500.0100, subpart 2 requires that for a school to be considered as accredited (and thereby qualify its graduates for licensure as chiropractors) it must have been "approved by the Council on Chiropractic Education or fully accredited by an agency approved by the United States Office of Education or its successor as of January 1, 1988." Leroy G. Moore, D.C., Executive Director of the Straight Chiropractic Academic Standards

Association, Inc. (SCASA); T.A. Gelardi, D.C., President of the Sherman College of Straight Chiropractic; and Ralph Boone, Ph.D., D.C., President of

I/ In order for an agency to meet the burden of reasonableness, it must demonstrate by a presentation of facts that the rule is rationally related to the end sought to be achieved. *Broen memorial Home v. Minnesota Department Human-Services*, 364 N.W.2d 436, 440 (Minn.App. 1985). This facts may either be adjudicative facts or legislative facts. *Manufactured_Housing_Institute v. Pettersen*, 347 N.W.2d 238, 244 (Minn. 1984). The agency must show that a reasoned determination has been made. *MANufactured HQusjng Institute*, at 246.

the Southern California College of Chiropractic, objected to the January 1, 1988 date by which a school must be accredited if the accreditation does not come from the Council on Chiropractic Education. These commentators argue that the Board has not shown that the limitation is needed or reasonable. They assert that the limitation has no legitimate regulatory basis and serves to exclude schools of chiropractic which are accredited by SCASA (SCASA was approved as an accrediting agency after January 1, 1988).

The Board responded that the definition is taken, almost verbatim, from Minn. Stat. § 148.06 and to change the definition would significantly differ from the statutory definition of what constitutes an "accredited school." The Judge agrees. Altering the Accreditation requirement would be outside the Board's statutory authority. Proposed rule 2500.0100, subpart 2 has been shown to be needed and reasonable.

Subpart-5 - Independent Medical Examination.

13. In the course of worker's compensation and other insurance-related cases, an independent examination is often requested to obtain a "second opinion" on the condition of an claimant. Over time, this examination has come to be called an "independent medical examination." Mary E. Prentnieks, General Legal Counsel for the Minnesota Medical Association (MMA) objected to the use of "medical" in describing the independent examinations defined in subpart 5 and suggested that the term be deleted to avoid confusion with examinations by licensed physicians. The examination is described as an "independent examination" in Minn. Stat. § 148.09. The Board agreed with MMA's suggestion and changed all references throughout the proposed rules from "independent medical examination" to "independent examination." The subpart, as modified, is needed and reasonable. The change prevents confusion and does not constitute a substantial change.

Subpart 6 Instructor.

14. Proposed rule 2500.0100, subp. 6 defines "instructor" as "a full time faculty member of an accredited school who is duly licensed in Minnesota, has practiced a minimum of three years in the state of Minnesota. The definition also requires instructors to hold a certain rank on the faculty and excludes certain other faculty positions. The Board has proposed this

2/ The Judge notes that the term "accredited school" appears in both the licensing statute (Minn. Stat. § 148.06) and the independent examination statute (Minn. Stat. § 148.09). As the rule presently reads, the same standard applies for both licensure and qualifying as an independent examiner. Should the Board intend a different result, the rule may be modified to limit the applicability of the definition to licensure or seek legislation to clarify what "accredited school" means for the purpose of each section of the statute. The modification mentioned in this footnote would not constitute a substantial change.

definition only to further qualify who may perform independent examinations which is governed by Minn. Stat. § 148.09. Medical Evaluations, Inc. through its attorney, Amy Levy, disputed the addition of any qualifications not present in Minn. Stat. § 148.09 (set forth below).

It is a well settled principle that administrative agencies cannot expand or restrict rights granted by statute. United Hardware Distributing Company v. Commissioner of Revenue 284 N.W.2d 820 (Minn. 1979); 115 N.W.2d 161, 163-64 (Iowa 1962). Minn. Stat. § 148.09 sets the requirements for a doctor of chiropractic to conduct independent examinations as:

- (1) the doctor of chiropractic must either be an instructor at an accredited school of chiropractic or have devoted not less than 50 percent of practice time to direct patient care during the two years immediately preceding the examination;
- (2) the doctor of chiropractic must have completed any annual continuing education requirements for chiropractors prescribed by the board of chiropractic examiners;
- (3) the doctor of chiropractic must not accept a fee of more than \$500 for each independent exam conducted;
- (4) the doctor of chiropractic must register with the board of chiropractic examiners as an independent examiner and adhere to all rules governing the practice of chiropractic.

The statute does not impose any experience requirement on instructors.

The Board was not granted specific rulemaking authority to impose additional requirements regarding these statutory provisions. The general rulemaking authority of the Board is expressly conditioned on the adopted rules not being inconsistent with Chapter 148. Minn. Stat. § 148.08, subd.

3. Clearly, the Legislature determined that status as an "instructor" was sufficient to assure a chiropractor's qualifications to perform independent examinations without any need for an experience requirement. The proposed definition is in conflict with a statutory provision and therefore lacks statutory authority. To correct this defect, the Board should alter proposed

subpart 6 to read:

"Instructor" means a full-time faculty member of an accredited school who is duly licensed in the state of Minnesota and has attained a status of professor, associate professor, assistant professor, or instructor. An instructor does not include adjunct faculty, post-graduate faculty, or part-time faculty.

Patricia R. Johnson, Vice President and General Counsel of the State Fund Mutual Insurance Company (State Fund), objected to the limitation in the second sentence of the definition. State Fund asserts that many persons (chiropractors who teach but are excluded from instructor status due to the rule limitation) who have expertise in both the clinical and practice areas will be excluded by this limitation, without any inquiry into an individual's qualifications. However, this comment overlooks the other option available to

register as an independent examiner. So long as the individual is involved in direct patient care and meets the statutory 50 percent requirement, status as an instructor is unnecessary to obtain registration. The second sentence of the definition is needed and reasonable to ensure that persons who have only a limited function with an accredited school are not thereby permitted to conduct independent examinations. The limiting language is consistent with the intent of the statute to set minimum standards for independent examiners. Proposed subpart 6, as modified, is needed and reasonable and the modifications do not constitute substantial changes.

Subpart 7 Invasive

15. The practice of chiropractic, as qualified by Minn. Stat. § 148.01, subd. 3, includes "those noninvasive means of clinical, physical, and laboratory measures and analytical X-ray of the bones of the skeleton which are necessary to make a determination of the presence or absence of a chiropractic condition." The Board has proposed a definition of invasive which reads as follows:

"Invasive" means the instrumental penetration of the viscera or nonsuperficial tissues of the body, specifically excluding venipuncture and acupuncture.

This definition is taken from the definitions of "invasive" or "invasive procedure" found in the Gould Medical Dictionary Fourth Edition and Taber's Cyclopedic Medical Dictionary, Sixteenth Edition. Those commentators who objected to the definition focussed on the excluded practices (acupuncture and venipuncture). They will each be discussed individually.

Venipuncture

16. Venipuncture, as used in these rules, is the procedure whereby a needle is inserted under the skin and into a vein for the purpose of withdrawing a blood sample. No instrumentality or substance is left behind in either the skin or the vein. The blood sample is used for diagnostic purposes. MMA argues that this procedure constitutes the practice of medicine and violates the express statutory limitation of "noninvasive means." Minn. Stat. § 148.01, subd. 3. The Board maintains that "invasive" only extends to

deep penetration into body cavities (viscera, skull, lungs, etc.), while venipuncture only penetrates slightly more than skin deep.

Venipuncture has been found to be both "invasive" within the meaning of Chapter 148 and constituting the practice of medicine within the meaning of Chapter 147. Minnesota Board of Medical Examiners v. Thomas E. Murr. D.C., Court File No. 89459 (April 14, 1981), aff'm_without_opinion, 325 N.W.2d 128 (Minn. 1982) (justices evenly divided). The District Judge determined that venipuncture was not performed for carrying out any procedure which complements the chiropractic adjustment. The District Judge stated:

... simple venipuncture is not a component part of chiropractic adjustment. It neither completes nor fills out the adjustment ... blood tests, among other things, aid in diagnosis, monitoring progression of a disease, establishing normal values for each patient, and varifying (sic) effectiveness of a treatment program.

The District Judge also noted that there is a difference of opinion in medical circles as to whether simple venipuncture is "invasive." Despite this difference of opinion, the District Judge concluded that the level of penetration required for venipuncture, described in detail in his Order, went beyond the statutory limits set in Minn. Stat. § 148.01, subd. 3. There has been no relevant change to either Chapters 147 or 148 since Murr was decided.

The Administrative Law Judge finds that excluding venipuncture from the definition of "invasive" is in conflict with Chapter 148, and thereby not statutorily authorized. Venipuncture is specifically found to be an invasive, diagnostic procedure. The Board should cure this defect by deleting "and venipuncture" from proposed subpart 7. This deletion is not a substantial change.

Acupuncture.

17. The other procedure excluded from the definition of "invasive" is acupuncture. Acupuncture, or meridian therapy, is performed by the insertion of fine needles into the patient's skin at specific points on the body to produce a positive effect in the patient. MMA objected to excluding acupuncture from the definition of "invasive" on the grounds that: 1) acupuncture is invasive; 2) acupuncture is within the practice of medicine; 3) acupuncture is not within the scope of chiropractic practice; and 4) harm to the public is likely through the practice of acupuncture.

The Board responded to MMA's objections by pointing out that acupuncture is presently unregulated in Minnesota. The Minnesota Department of Health (MDOH) considered imposing some form of regulation on acupuncture, but concluded that merely having acupuncturists file their credentials with MDOH would be adequate to protect the public health. All licensed health-care professionals (including chiropractors) would be exempt from this credentialing requirement. This articulated position of MDOH is evidentiary support for the conclusion that acupuncture does not constitute the practice of medicine.

An Attorney General's opinion has been cited for the position that acupuncture is outside the scope of chiropractic. That Attorney General's

opinion is based on a conclusion that acupuncture constitutes the practice of medicine. Op. Att. Gen. 303c-2 (March 10, 1975). However, acupuncture is currently practiced in Minnesota by persons not licensed as physicians seemingly without objection from the Minnesota Board of Medical Examiners (MBME). The ruling in Murr arose from action taken by the MBME to prohibit the practice of medicine by unlicensed persons. Since acupuncture is now widely practiced by unlicensed individuals, there is no basis on which to conclude that acupuncture constitutes the practice of medicine within the scope of this proceeding.

The Board has cited other states that include acupuncture within the scope of chiropractic practice. MMA has cited states which do not. The only question presented here is whether the Board has the statutory authority, under Minn. Stat. 148.08, subd. 3, to exclude "acupuncture" from the definition of "invasive." The Board does not maintain that acupuncture is a diagnostic technique. Rather, the Board asserts that acupuncture is used to complement chiropractic treatment by "preparing a patient for, or enhancement of the chiropractic adjustment." SONAR, at 5. Such additional procedures are

statutorily sanctioned by Minn. Stat. § 148.01, subd. 3 which states in pertinent part:

The practice of chiropractic may include procedures which are used to prepare the patient for chiropractic adjustment or to complement the chiropractic adjustment. The procedures may not be used as independent therapies or separately from chiropractic adjustment. No device which utilizes heat or sound shall be used in treatment of a chiropractic condition unless it has been approved by the Federal Communications Commission.

Chiropractic is defined by Minn. Stat. § 148.01, subd. 1 as "the science of adjusting any abnormal articulations of the human body, especially those of the spinal column, for the purpose of giving freedom of action to impinged nerves that may cause pain or deranged function." The two statutory provisions demonstrate the intent of the Legislature to permit chiropractors to accomplish adjustments using other modalities than manipulation, so long as those other modalities are used in conjunction with the manipulation.

As MMA points out, these complementary procedures are limited in scope. Any complementary procedure which constitutes the practice of medicine would be outside the scope of chiropractic practice. The Judge finds that the record of this proceeding shows acupuncture to be outside the scope of medical practice and not an invasive diagnostic procedure. Consequently, the Judge finds that the Board has the statutory authority to regulate the use of acupuncture by chiropractors in order to protect the health, safety, and welfare of the public. Excluding acupuncture from the definition of "invasive" is needed and reasonable to eliminate confusion as to whether that procedure is within the scope of chiropractic practice.

Subpart 8 - Qualified Staff

18. Proposed rule 2500.0100, subp. 8 defines "qualified staff" as "a person who has specific training in an area of rehabilitative therapy and who will administer rehabilitative therapies to a patient." Patricia C. Montgomery, Ph.D., P.T., Chair of the Physical Therapy Council of the Minnesota Board of Medical Examiners, and MMA objected to this definition as

being too vague. Subpart 8 does not set any specific minimum qualification for persons providing rehabilitative therapy.

However, the Judge points out that the use of assistants or aides in chiropractic care is explicitly authorized by Minn. Stat. § 148.10, subd. 1(13). That statute also makes aiding or abetting an unlicensed person in the practice of chiropractic a ground for adverse action against a chiropractor's license. Minn. Stat. § 148.10, subd. 1(13). The delegation of functions to qualified persons is expressly excluded from conduct violating that statute, so long as the delegate is truly qualified and the delegated function falls within the chiropractor's scope of practice. See, Minn. Stat. § 148.10, subd. 1(21).

The practice of not specifying the exact qualification for an assistant or aide is common in the regulation of health-care professions. For example, Minn. Rule 5601.1400 requires physical therapist assistants to have "sufficient didactic and clinical preparation." Given the wide variety in rehabilitation therapies available in chiropractic care, leaving the standard of qualification open ended has been shown to be needed and reasonable.

Subpart 9 - Rehabilitative Therapy

1 9 Proposed rule 2500.0100, subp. 9 was strongly criticized by two groups. The Knapp Rehabilitation Center, the Minnesota Chapter of the American Physical Therapy Association (MnAPTA), Lloyd T. Wood, M.D., and Patricia C. Montgomery, Ph.D., P.T., objected to the definition of rehabilitative therapy as intruding into the practice of physical therapy. Dennis A. Savaiano, Ph.D., Associate Professor and Director of Graduate Studies in Nutrition at the University of Minnesota (St. Paul campus) and the Minnesota Dietetic Association (MDA) objected to the definition as permitting chiropractors to advise patients on matters that require the qualifications of a nutritionist, without requiring degrees in nutrition. Each objection will be discussed separately.

Physical Therapy

20. The basis of the physical therapists' objection to subpart 8 is that the activities listed encroach upon the practice of physical therapy. However, due to the similarity of many of the treatments provided for chiropractic and physical therapy patients, some overlap is inevitable. The difference between chiropractic and physical therapy is the diagnosis of a chiropractic condition and the use of a chiropractic adjustment to correct that condition. Minn. Stat. § 148.01, subd. 3. Physical therapists are prohibited from using such adjustments to correct a chiropractic condition. Minn. Stat. § 148.76, subd. 2(c). Without a diagnosis of a chiropractic condition, a chiropractor cannot treat a patient. The use of additional modalities to complement the chiropractic adjustment is within the scope of chiropractic practice as authorized by statute and discussed in this Report at Finding 17. So long as the rehabilitative therapies listed in proposed subpart 9 are used only to complement the chiropractic adjustment, those therapies are properly within the scope of chiropractic. The listing of the therapies which may properly be used to complement the chiropractic adjustment is needed and reasonable.

Nutrition.

21. Professor Savaiano asserted that the provisions for "nutritional therapy" and "counseling on dietary regimen" must be deleted, since the qualifications of chiropractors without nutrition degrees were not adequate to properly and safely advise patients on nutrition. Further, several commentators argued that nutrition is not within the scope of practice of chiropractic. As with acupuncture, there are presently no licensure or registration requirements for persons who advise patients about nutrition. Nutrition is included among the subjects for which applicants for chiropractic licensure must be tested. Minn. Stat, § 148.06, subd. 1(b). The Administrative Law Judge concludes that advising patients on nutrition is within the scope of chiropractic practice as long as the advice complements a chiropractic adjustment.

The Minnesota Dietetic Association asserted that a form of nutritional diagnosis used by some chiropractors does not have a scientific basis. Case histories were introduced by MDA to show that harm may arise from the use of improper diagnostic and therapeutic methods. This rulemaking proceeding is

not the proper forum to determine if particular methods in a specific case are appropriate. That is a function of the Board's licensing authority. Rather, the issue in this rulemaking proceeding is whether the Board may include nutritional therapy as an appropriate complement to the chiropractic adjustment. The Judge has found that it is within the Board's authority to do so.

22. MMA objected to the word "medical" in the phrase "maximum medical improvement" on the ground that patients might be confused as to what type of treatment they were receiving. Use of the word "medical" has not been shown to be needed and reasonable. As with "independent medical examination," the term "medical" must be deleted to prevent confusion. As an alternative, the word functional could be substituted for "medical." The Judge finds that proposed rule 2500.0100, subd. 9 is needed and reasonable, as modified. Deleting "medical" clarifies the rule and does not constitute a substantial change.

Proposed Rule 2500.1160 - Independent Medical Examination Registration.

23. Proposed rule 2500.1160 is composed of three subparts. Subpart I requires documentation that the chiropractor who must register to provide independent examinations is qualified. The subpart also requires the applicant be licensed in Minnesota and have practiced in Minnesota for five years immediately prior to the registration. Similar to proposed rule 2500.0100, subp. 6 (discussed at Finding 14, above), the location and length of practice requirements are not present in the statute governing independent examinations. Minn. Stat. § 148.09. These requirements conflict with the statute and are thus defective. To cure the defect the location requirement must be deleted and the length of practice requirement either deleted or modified to two years as stated in the statute. The modification would conform the rule to Minn. Stat. § 148.09 (1). Once modified, Subpart 1 would read:

Subpart 1. Qualifications; proof. Documentation
establishing
that a chiropractor meets the qualifications must be included
with
the application to register with the board as an independent
examiner
under Minnesota Statutes, section 148.09. A chiropractor must
be
licensed to practice in Minnesota and must have been in practice
for
the two years immediately preceding registration.

The chiropractor/instructor must present to the board proof of
instructor status or attest to being involved in direct patient
care
for 50 percent of the time spent in practice during the two years
immediately preceding the independent examination of a patient.
An affidavit on a form as provided by the board must be filed
with
the board at the time of application to register.

Subpart 1, as modified, is needed and reasonable to establish a
registration
procedure and set forth minimum required information. The
modification is not
a substantial change.

24. Subparts 2 and 3 require fees for registration and renewal.
The
subparts also set dates by which registration and renewal must be
completed.
Thomas Boisen, D.C., objected to the Board requiring a fee for
registration as
an independent examiner. Dr. Boisen argues that, since
chiropractors already

pay a fee for licensure, no additional fee should be required for registration as an independent examiner. The Board is authorized to promulgate rules necessary to administer its statutory duties. Minn. Stat. § 148.08, subd. 3. Under Minn. Stat. § 214.06, subd. 1, all health-related licensing boards are authorized to set the amount of fees by rule as long as the fees are within the authority of the board, approved by the commissioner of finance, and calculated to equal anticipated expenditures. The Judge finds that the Board has met those requirements. Establishing a fee for registering independent examiners is needed and reasonable. The Board may wish to examine the citations for payment of the fee (Minn. Rule 2500.1150, items G and H) that appear in this part of the rule. These citations do not appear to refer to an existing rule. Altering those citations, should that be needed, would not constitute a substantial change.

Proposed Rule 2500.3000 - Acupuncture

25. Proposed rule 2500.3000 sets the standards for the use of acupuncture in chiropractic. Subpart 1 requires use of disposable needles or sterilization of needles before use. That subpart also requires that disposal of needles be done in accordance with the Infectious Waste Control Act (Minn. Stat. §§ 116.75 to 116.83). No commentator objected to subpart 1. That subpart has been shown to be needed and reasonable as proposed.

Subpart 2 requires a chiropractor who wants to engage in acupuncture to complete 100 hours of acupuncture education and pay a fee of \$100 prior to using that procedure. Continuing education in acupuncture technique is also required under this subpart. The Acupuncture Association of Minnesota (AAM) objected to the 100 hour education requirement and suggested that a minimum of 300 hours is necessary to obtain a fundamental understanding of the procedure. The Board based its requirement on the coursework required by the Northwestern College of Chiropractic (NWCC) to "certify" students in acupuncture. SONAR, at 11. Absent any evidence that the standard is not adequate, the Board may rely upon NWCC's standard for training in acupuncture. That standard appears to have been widely used in the

chiropractic profession in Minnesota, without widespread difficulty.
Proposed
rule 2500.3000 has been shown to be needed and reasonable to protect the
public welfare.

Proposed Rule 2500.4000 - Rehabilitative Treatment

26. MnAPTA objected to proposed rule 2500.4000 to the extent it
permits
the use of rehabilitative therapies "on days sequential to a day on which
a
chiropractic adjustment is rendered In its post-hearing comment,
MnAPTA
submitted scientific evidence to show that the effects of some therapies
do
not extend beyond an hour after the modality is applied. The Board
responded
as follows:

Concerns were raised regarding the length of time the modalities
are effective. Physical therapists and other technicians use
these modalities as independent therapies for weeks and months at
a time. The claim that the effect of these modalities is short
term is not supported by the bulk of the literature I am aware of
nor by the existence of these specialties. All of the modalities

listed are supported as effective either by research or by years of clinical experience or both.

Board Comment, March 18, 1991, at 7.

The Board did not submit any research or studies on this issue.

MnAPTA is not arguing that the therapies at issue have no effect. Rather, this group is challenging the Board's conclusion that these modalities are useful to "prepare the patient for the chiropractic adjustment or complement the chiropractic adjustment." Minn. Stat. § 148.01, subd. 3. Using these modalities "as independent therapies or separately from chiropractic adjustment" is expressly forbidden. Minn. Stat. § 148.01, subd. 3 (emphasis added). The Board has not made an affirmative showing that permitting rehabilitative therapies on days consecutive to chiropractic adjustment is necessary to either "prepare the patient for the chiropractic adjustment or complement the ... adjustment." Without facts in the record to show the rule complies with that statutory requirement, the rule part has not been shown to be needed and reasonable. *Manufactured-Housing-Institute-v. Pettersen*, 347 N.W.2d 238, 246 (Minn. 1984). The Board should cure this defect by altering the first sentence to read:

Rehabilitative therapy, within the context of the practice of chiropractic, may be done in conjunction with a chiropractic adjustment, provided the treating chiropractor initiates the development and authorization of the rehabilitative therapy.

The rule part, as modified, is needed, reasonable, and consistent with Minn. Stat. § 148.01, subd. 3 and does not constitute a substantial change.

Hearing Date.

27. J.R. Brandt, D.C., through his legal counsel, objected to the Board not holding hearings on both February 25 and 26. Dr. Brandt asserts that he lacked the opportunity to be heard in this matter because the hearing was only held on February 25, 1991. The Notice of Hearing published in this matter states:

NOTICE IS HEREBY GIVEN that a public hearing in the above-captioned matter will be held pursuant to Minnesota Statutes section 14.131 to 14.20 (1990) in Rooms A and B, Colonial Office Park, 2700 University Avenue West, St. Paul, MN 55114, on February 25, 1991, commencing at 9:00 a.m. If additional time is necessary to conclude the hearing

the Board will hold the next hearing on February 26, 1991,
commencing
at 9:00 a.m.

15 State Register 1562 (January 14, 1991) (emphasis added).

The notice clearly states that the second hearing date is contingent on a
need
for additional time. Concluding the public hearing after all persons
were
heard on February 25, 1991 does not constitute either a procedural or
constitutional defect in the proposed rulemaking proceeding.

Based upon the foregoing Findings of Fact, the Administrative Law Judge makes the following:

CONCLUSIONS

1. The Minnesota Board Chiropractic Examiners (Board) gave proper notice of this rulemaking hearing.

2. The Board has substantially fulfilled the procedural requirements of Minn. Stat. §§ 14.14, subs. 1, 1a and 14.14, subd. 2, and all other procedural requirements of law or rule so as to allow it to adopt the proposed rules.

3. The Board has demonstrated its statutory authority to adopt the proposed rules, and has fulfilled all other substantive requirements of law or rule within the meaning of Minn. Stat. §§ 14.05, subd. 1, 14.15, subd. 3 and 14.50 (i) and (ii), except as noted at Findings 14, 16, and 23.

4. The Board has demonstrated the need for and reasonableness of the proposed rules by an affirmative presentation of facts in the record within the meaning of Minn. Stat. §§ 14.14, subd. 2 and 14.50 (iii), except as indicated at Findings 22 and 26.

5. The additions and amendments to the proposed rules which were suggested by the Board after publication of the proposed rules in the State Register do not result in rules which are substantially different from the proposed rules as published in the State Register within the meaning of Minn. Stat. § 14.15, subd. 3, and Minn. Rule 1400.1000, subp. I and 1400.1100.

6. The Administrative Law Judge has suggested action to correct the defects cited at Conclusions 3 and 4 as noted at Findings 14, 16, 22, 23 and 26.

7. Due to Conclusions 3, 4 and 6, this Report has been submitted to the Chief Administrative Law Judge for his approval pursuant to Minn. Stat. § 14.15, subd. 3.

8. Any Findings which might properly be termed Conclusions and any Conclusions which might properly be termed Findings are hereby adopted as such.

9. A finding or conclusion of need and reasonableness in regard to any particular rule subsection does not preclude and should not discourage the Board from further modification of the proposed rules based upon an examination of the public comments, provided that no substantial change is made from the proposed rules as originally published, and provided that the rule finally adopted is based upon facts appearing in this rule hearing record.

Based upon the foregoing Conclusions, the Administrative Law Judge makes the following:

RECOMMENDATION

IT IS HEREBY RECOMMENDED that the proposed rules be adopted except where specifically otherwise noted above.

Dated this day of April, 1991.

ERICKSON
Administrative Law Judge

Reported: Colleen M. Koop, Janet R. Shaddix & Associates
One volume