

STATE OF MINNESOTA
OFFICE OF ADMINISTRATIVE HEARINGS

FOR THE BOARD OF ARCHITECTURE, ENGINEERING, LAND SURVEYING,
LANDSCAPE ARCHITECTURE, GEOSCIENCE & INTERIOR DESIGN

In the Matter of the Proposed Rules of
the State Board of Architecture,
Engineering, Land Surveying,
Landscape Architecture, Geoscience &
Interior Design Governing Oral
Examinations, Minnesota Rules Parts
1800.0800, 1800.2600, 1800.3600

**REPORT OF THE
ADMINISTRATIVE LAW JUDGE**

Administrative Law Judge (ALJ) Manuel J. Cervantes conducted a hearing concerning the above Rules on November 8, 2011, at Suite 295, Golden Rule Building, 85 E. 7th Place, St. Paul, Minnesota. The hearing was continued until all interested persons, groups, and associations had an opportunity to be heard concerning the proposed rules.

The Hearing and this Report are part of a rulemaking process governed by the Minnesota Administrative Procedure Act.¹ The legislature has designed the rulemaking process to ensure that state agencies have met all of the requirements that Minnesota law specifies for adopting rules. Those requirements include assurances that the proposed rules are necessary and reasonable, that they are within the agency's statutory authority, and that any modifications that the agency may have made after the proposed rules were initially published are not impermissible substantial changes.

The rulemaking process includes a hearing when a sufficient number of persons request that a hearing be held. The hearing is intended to allow the agency and the Administrative Law Judge reviewing the proposed rules to hear public comment regarding the impact of the proposed rules and what changes might be appropriate. The Administrative Law Judge is employed by the Office of Administrative Hearings, an agency independent of the Board of Architecture, Engineering, Land Surveying, Landscape Architecture, Geoscience & Interior Design (Board).

Christopher Kaisershot, Assistant Attorney General, appeared at the Rule Hearing on behalf of the Board. The members of the Board's hearing panel were Doreen Frost, Executive Director of the Board; Andrea Barker, Rules Coordinator for the

¹ Minn. Stat. §§ 14.131 through 14.20 (2010). Minnesota Statutes are cited to the 2010 Edition.

Board; Douglas Cooley, Board member and Professional Engineer; David Landecker, Board member and Land Surveyor; and Lisa Hanni, Board member and Land Surveyor.

Six people signed the hearing register, including one Board member and two Board staff, and one interested person spoke at the hearing. The proceedings continued until all interested persons, groups or associations had an opportunity to be heard concerning the proposed amendments to these rules.

The Board received no written comments on the proposed rules before the hearing. After the hearing ended, the record remained open until November 28, 2011, to allow interested persons and the Board an opportunity to submit written comments. Following the initial comment period, the record remained open for an additional five working days to allow interested persons and the Board the opportunity to file a written response to the comments submitted. The OAH hearing record closed for all purposes on December 5, 2011. All of the comments received were read and considered.

SUMMARY OF CONCLUSIONS

The Board has established that it has the statutory authority to adopt the proposed rules and that the proposed rules are necessary and reasonable.

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

FINDINGS OF FACT

Nature of the Proposed Rules

1. This rulemaking proceeding concerns proposed amendments to the rules eliminating oral examinations as a requirement for licensure as a professional engineer or land surveyor.

2. The elimination of oral examinations is intended to strengthen the Board's requirements for licensure by ensuring that the competence and qualification of all applicants are evaluated under established objective criteria. The current rules generally allow applicants for licensure who lack certain education, experience, or other requirements to take an oral examination to establish their qualifications to practice. The current rules, however, provide no guidance as to the content or procedure of the oral exams.

3. The Board proposes to eliminate the oral examination option in the rules because oral examinations are subjective, time consuming, expensive to create, proctor, and grade, and susceptible to legal challenges. In addition, the Board maintains that, in order to best protect the public's health, safety, and welfare, all applicants for licensure should complete specific education, examination, and experience requirements specifically identified in the rules to objectively demonstrate minimal competency.

4. This rulemaking proceeding was instituted by a Request for Comments published in the State Register on June 14, 2010.

Rulemaking Legal Standards

5. Under Minn. Stat. § 14.14, subd. 2, and Minn. Rule 1400.2100,² a determination must be made in a rulemaking proceeding as to whether the agency has established the need for and reasonableness of the proposed rule by an affirmative presentation of facts. In support of a rule, an agency may rely upon legislative facts, namely general facts concerning questions of law, policy, and discretion, or it may simply rely upon interpretation of a statute or stated policy preferences.³ The Board prepared a Statement of Need and Reasonableness (SONAR) in support of the proposed rules. At the hearing, the Board primarily relied upon the SONAR as its affirmative presentation of need and reasonableness for the proposed rule. The SONAR was supplemented by comments made by Board members at the public hearing and in written post-hearing submissions.

6. The question of whether a rule has been shown to be reasonable focuses on whether it has been shown to have a rational basis, or whether it is arbitrary, based upon the rulemaking record. Minnesota case law has equated an unreasonable rule with an arbitrary rule.⁴ Arbitrary or unreasonable agency action is action without consideration and in disregard of the facts and circumstances of the case.⁵ A rule is generally found to be reasonable if it is rationally related to the end sought to be achieved by the governing statute.⁶

7. The Minnesota Supreme Court has further defined an agency's burden in adopting rules by requiring it to "explain on what evidence it is relying and how the evidence connects rationally with the agency's choice of action to be taken."⁷ An agency is entitled to make choices between possible approaches as long as the choice made is rational. Generally, it is not the proper role of the Administrative Law Judge to determine which policy alternative presents the "best" approach since this would invade the policy-making discretion of the agency. The question is rather whether the choice made by the agency is one that a rational person could have made.⁸

8. In addition to need and reasonableness, the Administrative Law Judge must also assess whether the rule adoption procedure was complied with, whether the rule grants undue discretion, whether the Agency has statutory authority to adopt the rule, whether the rule is unconstitutional or illegal, whether the rule constitutes an undue

² Minnesota Rules are cited to the 2011 Edition.

³ *Mammenga v. Department of Human Services*, 442 N.W.2d 786 (Minn. 1989); *Manufactured Housing Institute v. Pettersen*, 347 N.W.2d 238, 244 (Minn. 1984).

⁴ *In re Hanson*, 275 N.W.2d 790 (Minn. 1978); *Hurley v. Chaffee*, 231 Minn. 362, 367, 43 N.W.2d 281, 284 (1950).

⁵ *Greenhill v. Bailey*, 519 F.2d 5, 19 (8th Cir. 1975).

⁶ *Mammenga*, 442 N.W.2d at 789-90; *Broen Memorial Home v. Department of Human Services*, 364 N.W.2d 436, 444 (Minn. Ct. App. 1985).

⁷ *Manufactured Housing Institute*, 347 N.W.2d at 244.

⁸ *Federal Security Administrator v. Quaker Oats Co.*, 318 U.S. 218, 233 (1943).

delegation of authority to another entity, or whether the proposed language is not a rule.⁹

9. In this matter, the Board has proposed a revision to the proposed rule language after the proposed rules were published in the State Register. Thus, the Administrative Law Judge must also determine if the new language is substantially different from that which was originally proposed.¹⁰

10. Minnesota Statutes § 14.05, subd. 2, instructs that a later modification does not make a proposed rule substantially different if “the differences are within the scope of the matter announced . . . in the notice of hearing and are in character with the issues raised in that notice,” the differences “are a logical outgrowth of the contents of the . . . notice of hearing and the comments submitted in response to the notice,” and the notice of hearing “provided fair warning that the outcome of that rulemaking proceeding could be the rule in question.”

11. In reaching a determination regarding whether modifications are substantially different, the Administrative Law Judge is to consider whether “persons who will be affected by the rule should have understood that the rulemaking proceeding . . . could affect their interests,” whether “the subject matter of the rule or issues determined by the rule are different from the subject matter or issues contained in the . . . notice of hearing,” and whether “the effects of the rule differ from the effects of the proposed rule contained in the . . . notice of hearing.”¹¹

12. The Administrative Law Judge has considered whether the issue of the proposed modification is the same as in the originally proposed rules, specifically, the elimination of any mention of oral examination, and concludes that the effects of the modification are the same. The Administrative Law Judge finds that the proposed modification would not constitute an impermissible substantial change.¹²

Procedural Requirements of Chapter 14

13. On June 14, 2010, the Board published a Request for Comments on the proposed rules. The Request for Comments was published at 34 S.R. 1765.¹³

14. By letter dated December 8, 2010, the Board asked the Commissioner of Minnesota Management and Budget (MMB) to evaluate the fiscal impact and benefit of the proposed rules on local units of government.¹⁴

15. In a memo dated December 29, 2010, MMB reviewed the Board’s proposed rule amendments and found that they will not impose a cost on local governments.¹⁵

⁹ Minn. R. 1400.2100.

¹⁰ Minn. Stat. § 14.15, subd. 3.

¹¹ Minn. Stat. § 14.05, subd. 2.

¹² See specific rule analysis in paragraphs 72 – 76, below.

¹³ Ex. A.

¹⁴ Ex. K6; Minn. Stat. § 14.131.

16. By letter dated April 21, 2011, the Board requested that the Office of Administrative Hearings schedule a hearing on the proposed rules and assign an Administrative Law Judge. Along with the letter, the Board filed a proposed Dual Notice of Intent to Adopt Rules without a Public Hearing and Notice of Hearing if 25 or More Requests for Hearing are Received, a copy of the proposed rules, and a draft of the SONAR. The Board also requested that the Office of Administrative Hearings give prior approval of its Additional Notice Plan.¹⁶

17. Under its Additional Notice Plan, the Board represented that it would mail a copy of the Dual Notice to professional organizations representing architects, engineers, professional surveyors, landscape architects, professional geologists, soil scientists, interior designers, land surveyors, and academic institutions offering accredited programs in engineering and land surveying. In addition, the Board stated that it would post the Dual Notice of Intent on its website and mail a postcard notification to all current licensees and certificate holders.¹⁷

18. Administrative Law Judge Manuel J. Cervantes was assigned to the rule hearing.

19. In a letter dated April 28, 2011, Administrative Law Judge Manuel Cervantes approved the Board's Notice of Hearing and Additional Notice Plan contingent upon the Board publishing its Dual Notice in its newsletter, *The Communicator*, and notifying the following additional organizations: all engineering programs at Minnesota State University - Mankato; St. Cloud State University; University of Minnesota – Duluth; University of Minnesota – Twin Cities; University of St. Thomas; and Winona State University; the land surveying programs as Dunwoody College of Technology; St. Cloud State University; and St. Paul College.

20. By letter dated May 6, 2011, Administrative Law Judge Manuel Cervantes granted the Board's request not to publish the Dual Notice in its newsletter due to the estimated cost of publication and mailing.

21. On May 26, 2011, the Board electronically mailed a copy of the SONAR to the Legislative Reference Library¹⁸ and mailed copies of the Dual Notice, proposed rules, and SONAR to the Chairs and Ranking Minority Members of the Senate Commerce and Consumer Protection Committee, the Senate Jobs & Economic Growth Committee, the House Government Operations & Elections Committee, and the House Jobs & Economic Development Finance Committee.¹⁹

22. On June 6, 2011, a copy of the Dual Notice was published in the *State Register* at 35 S.R. 1903. The hearing was scheduled for July 25, 2011.²⁰

¹⁵ Ex. K6.

¹⁶ Ex. 14.

¹⁷ SONAR at 6-7.

¹⁸ Ex. 5.

¹⁹ Ex. K5.

²⁰ Ex. K2.

23. The Board received more than 25 requests for a public hearing. However, due to the 20-day State government shutdown, the hearing was postponed. The Board mailed a Notice of Postponement to all persons who requested a hearing.²¹

24. On September 26, 2011, a copy of the Board's Notice of Hearing was published in the State Register at 36 SR 337. The hearing was scheduled for November 8, 2011.²²

25. On September 27, 2011, the Board mailed a copy of its Notice of Hearing scheduling the hearing for November 8, 2011, to all persons who requested a hearing.²³

26. On September 27, 2011, the Board mailed the Notice of Hearing and the proposed rules to all persons and associations on the Board's rulemaking mailing list.²⁴

27. On September 27, 2011, the Board mailed a copy of the Notice of Hearing to all persons and organizations identified in the Additional Notice Plan.²⁵

28. On the day of the hearing the Board placed the following documents into the record:

- The Request for Comments on Possible Amendment to Rules Governing Architecture, Engineering, Land Surveying, Landscape Architecture, Geoscience, and Certified Interior Design, published June 14, 2010, at 35 SR 1765;²⁶
- A copy of the proposed rules with Revisor's approval, dated August 4, 2010;²⁷
- A copy of the SONAR;²⁸
- Certificate of Mailing the SONAR to the Legislative Reference Library on May 26, 2011;²⁹
- A copy of the Notice of Hearing as published in the *State Register* on September 26, 2011, at 36 S.R. 337;³⁰
- Certificate of Mailing the Notice of Hearing to the Board's Rulemaking Mailing List and Certificate of Accuracy of the Mailing List;³¹

²¹ Ex. K3.

²² Ex. F.

²³ Ex. K4.

²⁴ Ex. G.

²⁵ Ex. H.

²⁶ Ex. A.

²⁷ Ex. C.

²⁸ Ex. D.

²⁹ Ex. E.

³⁰ Ex. F.

³¹ Ex. G.

- Certificate of Mailing the Notice of Hearing to individuals and organizations pursuant to the Additional Notice Plan on September 27, 2011;³²
- Written public comments received during the public comment period;³³
- Certificate of the Board's Authorizing Resolution;³⁴
- A copy of the Dual Notice as published in the *State Register* on June 6, 2011, at 35 S.R. 1903;³⁵
- Certificate of Mailing Notice of Postponement of Hearing on July 21, 2011;³⁶
- Certificate of Mailing Notice of Hearing to those who requested hearing on September 27, 2011;³⁷
- Certificate of Mailing the Notice of Hearing and the SONAR to Legislators on September 27, 2011;³⁸
- Copies of correspondence between the Board and the Minnesota Management and Budget regarding the fiscal impact of the proposed rule amendments.³⁹

29. The Board's response⁴⁰ and rebuttal,⁴¹ dated November 23, 2011 and December 5, 2011, respectively, received after the hearing were marked and placed in the record. The interested party's written public comment⁴² and rebuttal,⁴³ dated November 23, 2011 and December 5, 2011, respectively, were also marked and placed into the record.

Additional Notice

30. Minnesota Statutes §§ 14.131 and 14.23, require that the SONAR contain a description of the Agency's efforts to provide additional notice to persons who may be affected by the proposed rules. The Board submitted an additional notice plan to the Office of Administrative Hearings, which reviewed and approved it by letter dated April 28, 2011. In addition to notifying those persons on the Board's rulemaking mailing list

³² Exs. H1-3.

³³ Ex. I.

³⁴ Ex. K1.

³⁵ Ex. K2.

³⁶ Ex. K3.

³⁷ Ex. K4.

³⁸ Ex. K5.

³⁹ Ex. K6.

⁴⁰ Ex. M.

⁴¹ Ex. P.

⁴² Ex. N.

⁴³ Ex. O.

for these proposed rules, the Board represented that it would mail or electronically mail the Notice of Hearing to:

- The Minnesota Chapter of the American Institute of Architects (AIA);
- The Minnesota Society of Professional Engineers (MPSE) and the American Council of Engineering Companies of Minnesota (ACEC/MN);
- The Minnesota Society of Professional Surveyors (MSPS);
- The Minnesota Chapter of the American Society of Landscape Architects (MASLA);
- The Minnesota Section of the American Institute of Professional Geologists (AIPGMN);
- The Minnesota Association of Professional Soil Scientists;
- The Northland Chapter of the International Interior Design Association (IIDA) and the Minnesota Chapter of the American Society of Interior Designers (ASID);
- The Minnesota Association of County Surveyors;
- The Engineering Departments of Minnesota Academic Institutes that offer engineering degree programs accredited by the Accreditation Board for Engineering and Technology, Inc. (ABET): Minnesota State University – Mankato; St. Cloud State University; University of Minnesota – Duluth; University of Minnesota – Twin Cities; University of St. Thomas; and Winona State University;
- The Minnesota institutions that offer diploma or certificate level courses in land surveying, or college level courses in land surveying: Dunwoody College of Technology; St. Cloud State University; and St. Paul College;

31. A copy of the proposed rules, SONAR, and the Notice of Hearing were also posted on the Board's webpage.

32. The Board also mailed to all current licensees and certificate holders a postcard notification of the proposed rule changes with the website address where recipients will find the Dual Notice of Intent to Adopt, the proposed rules, and SONAR.⁴⁴

33. The Administrative Law Judge finds that the Board fulfilled its additional notice requirement.

⁴⁴ Ex. H2.

Statutory Authorization

34. Minn. Stat. § 326.06 gives the Board broad authority to make rules relative to the exercise of its powers and duties.

35. The Administrative Law Judge finds that the Board has the statutory authority to adopt the proposed rules. The issue whether the proposed rules are consistent with the governing statutes is addressed in the part-by-part analysis below.

Regulatory Analysis in the SONAR

36. The Administrative Procedure Act requires an agency adopting rules to consider seven factors in its Statement of Need and Reasonableness. The first factor requires:

- (1) **A description of the classes of persons who probably will be affected by the proposed rule, including classes that will bear the costs of the proposed rule and classes that will benefit from the proposed rule.**

The classes of persons who will probably be affected by the rule are generally all applicants for the professional engineer or land surveyor license who will fail to meet minimum educational, experience, or examination standards.

The elimination of the oral examination will not increase or decrease direct costs to candidates, applicants, certificate holders, or licensees (although, some applicants may bear additional costs associated with securing the alternative education, experience, or examination). The public would benefit from the proposed rule by improving the quality of licensed professionals. Both professional engineer and land surveyor applicants will benefit from the proposed rule as they will have one less requirement for licensure. The Board will benefit as the rules will be easier and less costly to administer.⁴⁵

- (2) **The probable costs to the Agency and to any other agency of the implementation and enforcement of the proposed rule and any anticipated effect on state revenues.**

The probable costs to the Board of the implementation of the proposed rule will include the costs associated with the rulemaking. The Board anticipates a decrease in operating costs pertaining to the implementation of the proposed rule since the new rules will eliminate the need to create, administer, grade, or defend oral examinations. The probable cost of enforcing the proposed rule will likely decrease for the same reason.

⁴⁵ SONAR at 3.

The Board is charged with the implementation and enforcement of the proposed rule. As such, it does not anticipate any probable costs to any other agency of implementation and enforcement of the proposed rule.⁴⁶

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

The cost of the oral examinations falls on the Board as there is no statutory authority for the Board to charge applicants for oral examinations. The elimination of the oral examination is the least costly method for the Board.⁴⁷

- (4) A description of any alternative methods for achieving the purpose of the proposed rule that were seriously considered by the agency and the reasons why they were rejected in favor of the proposed rule.**

No alternative methods were seriously considered.⁴⁸

- (5) The probable costs of complying with the proposed rule, including the portion of the total costs that will be borne by identifiable categories of affected parties, such as separate classes of governmental units, businesses, or individuals.**

The costs associated with creating, proctoring, grading, and, if applicable, defending oral examinations are currently absorbed by the Board. There will be no change in the cost of compliance with the proposed rule since affected parties currently do not pay for the oral examinations.⁴⁹

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

Not adopting the proposed rule results in continued costs for the Board associated with creating, proctoring, grading, and, if applicable, defending oral examinations from legal challenges. Currently, applicants are required to take an oral examination are only those who lack objective minimum requirements.

For the applicants provided with an oral examination, however, the Board does not have a databank of questions on hand for use in an oral examination. In such instances, the Board must solicit experts for the content of each individual examination, draft questions, administer and grade the examination, and, potentially, defend the

⁴⁶ *Id.*

⁴⁷ *Id.*

⁴⁸ *Id.*

⁴⁹ *Id.* at 4.

entire process against legal challenge. Creating and administering an oral examination for a single applicant can be quite costly and a time-consuming undertaking for the Board.

The rules already have in place requirements for education, written examination and experience to ensure protection of the public health, safety, and welfare. Requiring an oral examination in lieu of one of the requirements is costly, unnecessary, and potentially compromises the public health, safety, and welfare by granting licensure to applicants who have not been evaluated according to objective criteria applied to other applicants.

Additionally, the cost to defend any legal challenge raised by an examinee can be significant, including hearings at the Office of Administrative Hearings, and judicial review by appellate courts.

The adoption of the new rules will eliminate the costs associated with oral examinations.⁵⁰

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

The Board reports that the proposed rules do not conflict with federal regulations.⁵¹

Performance Based Rules

37. The Administrative Procedure Act⁵² also requires an agency to describe in its SONAR how it has considered and implemented the legislative policy supporting performance based regulatory systems. A performance based rule is one that emphasizes superior achievement in meeting the agency's regulatory objectives and maximum flexibility for the regulated party and the agency in meeting those goals.⁵³

38. The Board's remaining bases for evaluating applicants provide reasonable assurance that persons practicing within the Board's regulated professions are competent ethical practitioners qualified through education, examination, and experience so as to safeguard life, health, and property, and to promote the public welfare.⁵⁴

39. The Board states that the elimination of oral examinations promote superior achievement in the setting of objective standards for professional engineers and land surveyors.⁵⁵

⁵⁰ *Id.*

⁵¹ *Id.*

⁵² Minn. Stat. § 14.131.

⁵³ Minn. Stat. § 14.002.

⁵⁴ SONAR at 5.

⁵⁵ SONAR at 5-6.

40. The Administrative Law Judge finds that the Board has met the requirements set forth in Minn. Stat. § 14.131 for assessing the impact of the proposed rules, including consideration and implementation of the legislative policy supporting performance-based regulatory systems.

Consultation with the Commissioner of Finance

41. Under Minn. Stat. § 14.131, the Agency is also required to “consult with the commissioner of management and budget to help evaluate the fiscal impact and fiscal benefits of the proposed rule on units of local government.”

42. The Board consulted with MMB, and in a response dated December 29, 2010, MMB’s Executive Budget Officer Ryan Baumtrog concluded that the proposed rules “will not impose a cost on local governments.”⁵⁶

43. The Administrative Law Judge finds that the Board has met the requirements set forth in Minn. Stat. § 14.131.

Adoption or Amendment of Local Ordinances

44. Under Minn. Stat. § 14.128, an agency must determine if a local government will be required to adopt or amend an ordinance or other regulation to comply with a proposed agency rule. The agency must make this determination before the close of the hearing record, and the Administrative Law Judge must review the determination and approve or disapprove it.⁵⁷

45. The Board concludes that the proposed rules do not necessitate local government action because the proposed rules contain no provisions that would affect the law or regulations of any local governmental entity.⁵⁸

46. The Administrative Law Judge finds that the Board has made the determination required by Minn. Stat. § 14.128, and approves that determination.

Notification to the Commissioner of Agriculture

47. Minn. Stat. § 14.111 imposes an additional requirement calling for notification to the Commissioner of Agriculture when rules are proposed that affect farming operations.

48. The proposed rules do not impose restrictions on or have a direct impact on farming operations. Accordingly, the Administrative Law Judge concludes that the Board was not required to notify the Commissioner of Agriculture of these proceedings.

⁵⁶ Ex. K6.

⁵⁷ Minn. Stat. § 14.128, subd. 1.

⁵⁸ *Id.* at 7.

Costs of Compliance to Small Businesses and Cities

49. Under Minn. Stat. § 14.127, state agencies must “determine if the cost of complying with a proposed rule in the first year after the rule takes effect will exceed \$25,000 for: (1) any one business that has less than 50 full-time employees; or (2) any one statutory or home rule charter city that has less than ten full-time employees.”⁵⁹ Although this determination is not required to be included in the SONAR, the agency must make this determination before the close of the hearing record, and the Administrative Law Judge must review the determination and approve or disapprove it.⁶⁰

50. In the SONAR, the Board states that it has determined that the cost of complying with the proposed rule amendments in the first year after the rules take effect will not exceed \$25,000 for any one small business or small city. The Board’s determination is based upon its assessment in the SONAR of the probable costs of complying with the proposed rules.⁶¹

51. The Administrative Law Judge concludes that the Board has met the requirements set forth in Minn. Stat. § 14.127 for determining whether the cost of complying with the proposed rules in the first year after the rules take effect, will exceed \$25,000 for any small business or small city.

Analysis of the Proposed Rules

General

52. This Report is limited to discussion of the portions of the proposed rules that received significant comment or otherwise required close examination. Several sections of the proposed rules were not opposed by any member of the public and were adequately supported by the SONAR. Accordingly, this Report will not address each comment or rule part. When rules are adequately supported by the SONAR or the agency’s oral or written comments, a detailed discussion of the proposed rules is not necessary.

53. The Administrative Law Judge finds that the Board has demonstrated the need for and reasonableness of all rule provisions not specifically discussed in this Report by an affirmative presentation of facts. Further, the Administrative Law Judge finds that all provisions not specifically discussed are authorized by statute and there are no other problems that would prevent the adoption of the rules.

Discussion of Proposed Rules

Part-by-Part Analysis

PART 1800.0800 PROOF OF QUALIFICATION TO PRACTICE

⁵⁹ Minn. Stat. § 14.127, subd. 1.

⁶⁰ Minn. Stat. § 14.127, subd. 2.

⁶¹ See SONAR at 9-11.

54. The Board proposed amending Part 1800.0800, in relevant part, as follows by eliminating subpart B which states:

An applicant shall submit evidence to the board indicating that the applicant is qualified to practice in the profession or field of major practice in which the applicant seeks licensure or certification. The burden of proof is upon the applicant who should make every effort to present qualifications fully and clearly. Qualifications shall be established by one or more of the following methods:

- A. by passing a written examination;
- ~~B. by successfully completing an oral examination;~~

and by re-lettering the remaining subparts as follows:

B. by submitting satisfactory exhibits of technical qualifications;

* * *

D. by submitting a council record prepared by the National Council of Examiners for Engineering and Surveying (NCEES) for engineer applicants only....

* * *

E. for licensure by comity as an... engineer... under Minnesota Statutes, section 326.10, subdivision 1, paragraph (a), clause (2), and experience as the board may require together with evidence of current licensure and proof of good standing....

55. The Board explained these changes clarify how applicants may establish their qualifications. The Board determined that oral examinations are costly and subjective and, in some cases, diminish the Board's ability to ensure the protection of the public health, safety, and welfare. Applicants will not establish their qualifications through oral examination, but rather through objective written supporting documentation.⁶²

56. Only one member of the public submitted comments and rebuttal following the hearing.⁶³ Mr. Opela opposes the elimination of the oral examination for professional engineers.⁶⁴ He suggested three general revisions to the rules. First, he suggested that the rules do not provide a clear path to comity licensure, without an oral examination option.⁶⁵

⁶² SONAR at 9.

⁶³ Exs. N and O from Michael P. Opela, Sr.

⁶⁴ Mr. Opela has an appeal pending before the Minnesota Court of Appeals involving the Board's denial of a comity engineer license in 2010. A significant portion of Mr. Opela's comments relate to his comity engineer application and subsequent litigation. The Board objected to the consideration of these written comments. While all comments will be considered, the ALJ observes that Mr. Opela's written comments which relate to his comity application and litigation are not relevant to the issues of need and reasonableness of the proposed rules.

⁶⁵ Ex. N.

57. In response, the Board stated comity applications [from applicants licensed in other states] will be handled in a manner consistent with Minn. Stat. § 326.10, subd. 1 (a) (2).⁶⁶ This statute, in relevant part, states that the Board shall issue an engineer license:

[t]o any person who holds an unexpired certificate of registration or license issued by proper authority in... any state or territory of the United States... in which the requirements for registration or licensure of...engineers... at the time of registration or licensure in the other jurisdiction, were equal, in the opinion of the board, to those fixed by the board and by the laws of this state....

58. The Board specifically explained that when an application for a license as a professional engineer by comity is received, the Board staff determines from the application the applicant's original date of licensure in their base state. The staff then reviews the Board's governing statutes and rules from that date and prepares the application for Board review based on the laws in place at the time of the applicant's initial licensure.⁶⁷

59. The Board determines what education, examination, and experience requirements were in place in Minnesota at the time the applicant was originally licensed and reviews the applicant's credentials against Minnesota's requirements. The Board offered the following as an example:

...if the applicant was originally licensed in 1973, the applicant's credentials are compared to the requirements that were in place in Minnesota in 1973. If the applicant meets those 1973 education, examination and experience requirements, the applicant is approved for licensure [as an engineer] in Minnesota. If those requirements were not met, the applicant does not qualify for licensure in Minnesota by comity.⁶⁸

60. Next, Mr. Opela argued that the elimination of the oral examination will "inhibit" engineer applicants from other states who do not meet the comity requirements from obtaining a license in Minnesota.⁶⁹

61. The Board stated that this is what the new rules intend to accomplish, to preclude comity applicants who do not meet Minnesota's minimum licensing standards from becoming licensed engineers in Minnesota.⁷⁰

62. The Board further explained, the current oral examination rule is a procedural opportunity to a comity applicant for engineer licensure whose written application does not appear to meet the objective minimum education and/or

⁶⁶ Ex. M.

⁶⁷ *Id.*

⁶⁸ *Id.*

⁶⁹ Ex. N.

⁷⁰ Ex. M.

experience criteria.⁷¹ The current rules generally allow these applicants to take an oral examination to establish their qualifications to practice. This option has proven to be subjective, costly to develop, and potentially costly to defend.⁷² Oral examinations have proven to be an ineffective measure of an applicant's competence to hold a license or to protect the public interest.⁷³ The new rules are intended to close "a loop-hole that may have allowed unqualified individuals to become licensed."⁷⁴

63. The Board further stated that in order to protect the health, safety, and welfare of the public, minimum standards for education, examination, and experience have been developed to ensure that the applicant is competent to perform the activities of a professional engineer. Education, examination, and experience create a three-legged stool. If any of the legs are missing, this could potentially cause risk to the public.⁷⁵

64. The Board summarized that this is not to say that comity applicants who do not meet the comity licensing requirements are without licensing recourse in Minnesota. They may still be licensed "after satisfying the applicable educational requirements, meeting the applicable experience requirements, and achieving successful passage of the applicable examination requirements."⁷⁶

65. Next, Mr. Opela suggested that the Board establish a due process policy for applicants when a license is denied.

66. This request is outside the scope of the rule amendments currently being considered in this proceeding. The request is may be related to the current litigation between Mr. Opela and the Board and any perceived deficiency could have been raised in the proceeding before the ALJ hearing the licensure denial or on appeal. It is not appropriate for consideration in this proceeding.

67. This point notwithstanding, the Board made reference to the hearing rights contained in its governing statute. The ALJ notes the right to hearing referenced in Minn. Stat. § 326.111, subd. 4 (a) (8) and (d) and to the contested hearing rules contained in Minnesota Rules Chapter 1400. It is also noted from Mr. Opela's comments that he has availed himself of the right to hearing before the Office of Administrative Hearings and to judicial review.

68. Finally, on numerous occasions, Mr. Opela raised a concern of potential exposure to "untold litigation expenses" if these rules are promulgated as proposed. The only litigation expenses of record that the Board has incurred have been the expenses in defending its decision denying Mr. Opela's comity application.

⁷¹ *Id.*

⁷² SONAR at 3.

⁷³ Ex. P.

⁷⁴ *Id.* at 2.

⁷⁵ *Id.*

⁷⁶ *Id.*, Minn. R. 1800.0200, C.

69. In response to this concern, the Board said that in its opinion the amended rules would “save the State from the on-going financial burden of creating, proctoring, and grading oral examinations, as well as the litigation expenses incurred upon defending them during contested case proceedings, and subsequent appeals.”⁷⁷ The Board has made a reasonable determination that its proposed change will be likely to reduce litigation, not increase it.

70. The Administrative Law Judge finds that the Board has demonstrated the need for and reasonableness of the proposed amendments to Part 1800.0800.

PART 1800.2600 ORAL EXAMINATION.

71. The Board initially proposed amending Part 1800.2600 as follows:

1800.2600 ORAL EXAMINATION.

An applicant shall appear before the board for oral examination and shall submit two exhibits of engineering work the applicant has performed if:

- ~~A. the applicant’s experience record, in the sole opinion of the board, does not clearly indicate the required qualifying experience;~~
- ~~B. the applicant does not hold a degree from an approved engineering curriculum; or~~
- C. the applicant qualifies for waiver of the fundamentals of an approved engineering examination as provided in part 1800.2800.

72. The Board proposed replacing “examination” with “interview” in subparts 1 and 5 of 1800.0900 in its post-hearing submission as follows.⁷⁸

1800.2600 EXAMINATION-INTERVIEW.

An applicant shall appear before the board for oral ~~examination~~ interview and shall submit two exhibits of engineering work the applicant has performed if the applicant qualifies for waiver of the fundamentals of engineering examination as provided in part 1800.2800.

73. In support of these modifications, the Board stated that applicants applying for a waiver from taking the fundamentals of engineering examination are still required to submit to an oral interview. The interview is an opportunity on the part of an applicant to demonstrate that he or she possesses the requirements for a waiver

⁷⁷ Ex. P at 4 - 5.

⁷⁸ Ex. M.

enumerated in Minn. R. 1800.2800. The interview will not be graded pass or fail and as such, is not considered an examination. The applicant is still expected to meet the education, experience, and professional engineer examination requirements.

74. The Administrative Law Judge finds that the Board has demonstrated the need for and reasonableness of the proposed amendments to Part 1800.2600.

75. The Administrative Law Judge has considered whether the proposed post-hearing modification is similar in nature to the originally proposed rules, and whether the effects of the modification would be the same.⁷⁹ The Administrative Law Judge finds that the proposed modifications would not constitute impermissible substantial changes.

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

CONCLUSIONS

1. The Board gave proper notice of the hearing in this matter.
2. The Board has fulfilled the procedural requirements of Minnesota Statutes § 14.14 and all other procedural requirements of law or rule.
3. The Board has demonstrated its statutory authority to adopt the proposed rule 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).
4. The Board has documented the need for and reasonableness of its proposed rule with an affirmative presentation of facts in the record within the meaning of Minn. Stat. §§ 14.14, subd. 2, and 14.50 (iii).
5. Any proposed modifications subsequent to the publication of the rules in the State Register would not constitute impermissible substantial changes.

Based on the Conclusions, the Administrative Law Judge makes the following:

RECOMMENDATION

IT IS RECOMMENDED that the proposed rules be adopted, as finally proposed.

Dated: January 11, 2012

/s/ Manuel J. Cervantes
MANUEL J. CERVANTES
Administrative Law Judge

Digitally Recorded.

⁷⁹ Minn. Stat. § 14.05, subd. 2.

NOTICE

The Board must make this Report available for review by anyone who wishes to review it for at least five working days before the Board takes any further action to adopt final rules or to modify or withdraw the proposed rules. If the Board makes changes in the rules, it must submit the rules, along with the complete hearing record, to the Chief Administrative Law Judge for a review of those changes before it may adopt the rules in final form.

After adopting the final version of the rules, the Board must submit the final version to the Revisor of Statutes for a review as to its form. If the Revisor of Statutes approves the form of the rules, the Revisor will submit certified copies to the Administrative Law Judge, who will then review the same and file them with the Secretary of State. When the final rules are filed with the Secretary of State, the Administrative Law Judge will notify the Board, and the Board will notify those persons who requested to be informed of their filing.

When the rule is filed with the Secretary of State by the Office of Administrative Hearings, the Board must give notice to all persons who requested that they be informed of the filing.