

STATE OF MINNESOTA
OFFICE OF ADMINISTRATIVE HEARINGS

FOR THE BOARD OF COSMETOLOGIST EXAMINERS

In the Matter of the Proposed Exempt Permanent Rules of the Board of Cosmetology relating to Cosmetology Salons and Cosmetologist Examiners Request for Review and Approval of Good Cause Exempt Rules Under Minnesota Statutes, Section 14.388.

**ORDER ON REVIEW
OF RULES UNDER
MINN. STAT. § 14.388
AND MINN. R. 1400.2400**

This matter came before Administrative Law Judge James E. LaFave upon the application of the Minnesota Board of Cosmetologist Examiners (Board) for a legal review under Minn. Stat. § 14.388 and Minn. R. 1400.2400.

On September 10, 2013, the Board filed documents with the Office of Administrative Hearings seeking review and approval of the above-entitled rules.

Based upon a review of the written submissions by the Board, the one stakeholder comment that was received, and the entire rulemaking record,

IT IS HEREBY ORDERED THAT:

The adopted rules are **DISAPPROVED**.

Dated: September 24, 2013

S/James E. LaFave

JAMES E. LAFAVE
Administrative Law Judge

NOTICE

Minnesota Rules part 1400.2400, subpart 4a, provides that when a rule is disapproved, the agency must resubmit the rule to the Administrative Law Judge for review after it has revised the proposed rules. The Administrative Law Judge has five (5) working days to review and approve or disapprove the rule. Minnesota Rule part 1400.2400, subpart 5, provides that an agency may ask the Chief Administrative Law Judge to review a rule that has been disapproved by an Administrative Law Judge. The request must be made within five (5) working days of receiving the Administrative Law Judge's decision. The Chief Administrative Judge must then review the agency's filing, and approve or disapprove the rule within 14 days of receiving it.

MEMORANDUM

Issue

Minnesota law allows a "good cause" exemption from the normal rulemaking process if the proposed rules incorporate changes set forth in applicable statutes when no interpretation of the law is required.¹ The Board proposed rules it believed were consistent with the legislative intent and were necessary to implement the legislation. Should the rules be approved?

While the Board acted with the best of intentions, the Administrative Law Judge concludes the proposed rules include interpretations of the law passed by the Legislature and therefore fall outside the "good cause" exemption. Disapproval of the rules is the appropriate result.

Background

Legislation affecting the practice of cosmetology was enacted during the 2013 Minnesota legislative session. 2013 Minn. Laws, ch. 85, art. 5, §§ 20 through 31 contain changes related to fines for certain violations, continuing education requirements for operators and salon managers, transfer of licenses from other states and other requirements related to the licensure and the practice of cosmetology. The Legislature specifically authorized the Board to use the "good cause" exemption under Minn. Stat. § 14.388, subd. 1(3) to amend Minnesota Rules to conform with the legislation.²

As required by law, on September 5, 2013, the Board electronically mailed notice to the persons on its current rulemaking list and posted the Notice of Submission and drafted rules on the Board's website.³

¹ See, Minn. Stat. § 14.388, subd 1(3).

² 2013 Minn. Laws, ch. 85, art. 5, § 45.

³ See, Minn. Stat. §14.388, subd. 2.

On September 10, 2013, the Board filed with the Office of Administrative Hearings the following documents, requesting approval of the rule changes under the good cause exemption to rulemaking under Minn. Stat. § 14.388:

- 1) three copies of the proposed Rules with Revisor's approval;
- 2) a proposed Order Adopting Rules; and
- 3) an Explanatory Note.

During the five-business day comment period, the Office of Administrative Hearings received one comment from an interested stakeholder. That commentator challenged the Board's proposed definition of what qualifies as a "professional association" under Minn. R. 2105.0010, subp. 11(a).

The Good Cause Exemption

Minn. Stat. § 14.388 provides for a streamlined set of procedures for promulgating new rules when "good cause" is present. The Legislature directed the Board to use the "good cause" exemption under Minn. Stat. § 14.388, subd. 1(3).

The "good cause" exemption is allowed under clause (3) if the proposed rules "incorporate specific changes set forth in the applicable statutes when no interpretation of the law is required."⁴ Rules adopted under clause (3) are permanent and effective upon publication in the State Register.⁵

Because rules adopted pursuant to Minn. Stat. § 14.388, subd. 1(3) are permanent, the board or agency proposing the rules has little discretion in selecting from various policy alternatives. This exemption contemplates that the policy choices underlying the new rules was made through an earlier, publicly-accessible process such as prior rulemaking or the Legislature's enactment of a statute which sets forth the specific requirements.⁶

Standard of Review

The legality determination of the proposed rules by the Office of Administrative Hearings is governed by Minn. R. 1400.2400, subp. 3, which states that in reviewing a filing the judge must decide whether the rule meets the standards of part 1400.2100, Items A and D to G. Those standards of review provide as follows:

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

⁴ Minn. Stat. § 14.338, subd. 1(3).

⁵ Minn. Stat. § 14.338, subd. 1(4).

⁶ See, Minn. Stat. § 14.388, subd. 1 (1)-(4).

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 14.36, subdivision 3, paragraph (d);

...

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. . . .

As detailed below, the rules proposed by the Board make interpretive revisions that cannot be accomplished through the chosen exemption. Because the proposed rules fail to meet the threshold for exempt rulemaking, the Board must amend or withdraw the proposed rules.

Analysis of the Board's proposed rules

The Board, at the direction of the Legislature, submitted the proposed rules under Minn. Stat. § 14.388, subd. 1(3). Exempt rulemaking is an exceptional procedure.⁷ One proper use of that procedure is to make non-substantive changes or clarifications to the existing rules or law.⁸ As the Minnesota Court of Appeals has noted, the abbreviated exempt rulemaking process obviates the public's opportunity to bring to the agency's attention all relevant aspects of the proposed rules, which was intended to enhance the quality of the agency decision.⁹ The exempt process has a negative impact on the statutory goal of "increase[ing] public accountability of administrative agencies."¹⁰ Consequently, it should be used sparingly and must be viewed with scrutiny.

Even under a generous reading, the rules proposed by the Board do far more than merely "incorporate specific changes set forth in applicable statutes when no

⁷ See *Jewish Community Action v. Commissioner of Public Safety*, 657 N.W.2d 604, 610 (Minn. Ct. App. 2003).

⁸ See Minn. Stat. § 14.388, subd. 1 (3).

⁹ *Id.*

¹⁰ *Id.*, citing Minn. Stat. § 14.001(2).

interpretation of the law is required” The Board admits as much in the Explanatory Note and its letter responding to the public comment.¹¹

In the Explanatory Note the Board, discussing the new penalties, stated “The legislation does not specify to whom the new penalty should be applied in 7 of the 10 new penalties for identified violations.”¹² The “Board members discussed these 7 penalties where the legislation was silent on to whom the penalty would be applied, . . . and determined *which* entity . . . would be assessed the described penalty.”¹³ “The **Board’s decisions** are reflected in the proposed exempt rule draft.”¹⁴

The Board’s “decisions” regarding which entities would be assessed penalties are interpretations of the statute and reflect policy choices that may or may not have been intended by the Legislature. Those types of choices are not allowed under a “good cause” exemption in rulemaking.

In responding to the public comment challenging the Board’s proposed definition of “professional association” the Board explained its rationale in adopting the definition. It stated “In anticipation of further inquiries, the Board determined that a rule definition of ‘professional association’ was appropriate.”¹⁵ The Board went on to observe “Professional association is not defined in the Merriam Webster dictionary and **no definitions were found in state statutes.**”¹⁶

The enabling legislation does not contain a definition of “professional association.” The Board’s decision to adopt such a definition, even if they were correct in their belief that it was needed, goes beyond what was authorized by the Legislature.

While a catalogue of many examples could be listed here, because all the proposed rules are disapproved, it suffices to say that the proposed rules relating to (a) definition of “professional association,”¹⁷ (b) inspections,¹⁸ (c) managers,¹⁹ (d) endorsement or transfer of licenses from other states or countries,²⁰ (e) continuing education providers,²¹ (f) procedure for activating an expired or inactive license,²² (g) specific types of salon licenses,²³ (h) inspections,²⁴ (i) esthetician training,²⁵ (j)

¹¹ See, Explanatory Note; Letter from Rebecca Gaspard to The Honorable James E. LaFave (September 18, 2013).

¹² Explanatory Note at p. 1.

¹³ *Id.* at p. 2. (Emphasis in the original.)

¹⁴ *Id.* (Emphasis added.)

¹⁵ Letter from Rebecca Gaspard to The Honorable James E. LaFave (September 18, 2013) at p. 2.

¹⁶ *Id.* (Emphasis added.)

¹⁷ See, Proposed Rule 2105.0010, subp. 11a.

¹⁸ See, Proposed Rule 2105.0120, subp. 1.

¹⁹ See, Proposed Rule 2105.0160.

²⁰ See, Proposed Rule 2105.0180.

²¹ See, Proposed Rule 2105.0185.

²² See, Proposed Rule 2105.0210.

²³ See, Proposed Rule 2105.0400, subp. 3.

²⁴ See, Proposed Rule 2110.0120.

²⁵ See, Proposed Rule 2110.0520.

continuing education credit classes,²⁶ and (k) display of licenses,²⁷ are not drawn from the statutory text.

Conclusion

The Board was in a difficult position. It was conscientiously endeavoring to provide rules that were clear to inspectors and license holders alike. As sensible as the policies contained in the proposed rules may be, the authorization for rulemaking under Minn. Stat. § 14.388, subd. 1(3), requires a direct connection between the language used by the Legislature in the authorizing statute and the Board's response in issuing rules to those legislatively established specifications. Here, the rules developed by the Board do not follow directly from the statutory text. They interpret and expound upon the enabling legislation. The proposed rules are thus too expansive and different from the statute to be approved under the comparatively strict requirements of Minn. Stat. § 14.388, subd. 1(3).

The appropriate result, therefore, is to disapprove the adopted rules.

J. E. L.

²⁶ See, Proposed Rule 2110.0570.

²⁷ See, Proposed Rule 2110.0720.