

STATE OF MINNESOTA
OFFICE OF ADMINISTRATIVE HEARINGS
FOR THE MINNESOTA STATE BOARD OF EDUCATION

Proposed Permanent Rules
Relating to Education; Administrative
and Supervisory Licensure; General
Revision, Minnesota Rules Chapters
3510; 3512; and 3517.

REPORT OF THE
ADMINISTRATIVE LAW JUDGE

The above-entitled matter came on for hearing before Administrative Law Judge Allen E. Giles at 9:00 a.m. on August 15 and 16, 1996, at the Capitol View Conference Center, 70 West County Road B2, Little Canada, Minnesota 55117. The hearing continued until all interested persons had been heard.

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 State Board of Education (hereinafter also referred to as 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 any modifications to the rules proposed by the Board after initial publication are substantially different.

Bernard E. Johnson, Assistant Attorney General, Suite 1200, NCL Tower, 445 Minnesota Street, St. Paul, MN 55101-2103, appeared for and on behalf of the Minnesota Department of Children, Families and Learning and the Minnesota State Board of Education. The Board's hearing panel consisted of the following persons: Dr. George B. Droubie, Minnesota Department of Children, Families and Learning; Robert St. Clair, Executive Director, Minnesota Secondary Principals' Association; Tom Myers, President of the Minnesota Elementary Principals' Association; Dale Jensen, Executive Director, Minnesota Association of School Administrators; Wayne Erickson, Minnesota Department of Children, Families and Learning; Ellen Sushak, Minnesota Department of Children, Families and Learning; Ted Suss, Director of Business Services, Independent School District No. 273, Edina; Judy McGilvrey, Minnesota Department of Children, Families and Learning; and Larry Jablinski, Personnel Director, Independent School District No. 12, Centennial.

Approximately 25 persons attended the hearing and 13 persons signed the hearing register on August 15 and 16. The following persons spoke at the hearing: Dr. Karl Salscheider, Associate Professor, Bemidji State University; Mary Lou Allen, Minnesota Association of Health, Physical Education, Recreation and Dance; Dr. Marilyn Kerns, Director, Community Education Center, University of St. Thomas, Garnet

Franklin, Minnesota Education Association and Steve Brisendine, Minnesota Community Education Association and Director, Paynesville Community Education. 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 hearing, to September 5, 1996. Pursuant to Minn. Stat. § 14.15, subd. 1, five working days were allowed for the filing of responsive comments. At the close of business on September 13, 1996 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 in written comments and at the hearing.

NOTICE

This Report must be available for review to all affected individuals upon request for at least five working days before the agency takes any further action on the rule(s). The agency may then adopt a final rule or modify or withdraw its proposed rule. If the Board of Education makes changes in the rule other than those recommended in this report, the Board must submit the rule with the complete hearing record to the Chief Administrative Law Judge for a review of the changes prior to final adoption. Upon adoption of a final rule, the agency must submit it to the Revisor of Statutes for a review of the form of the rule. The agency must also give notice to all persons who requested to be informed when the rule is adopted and filed with the Secretary of State.

When the Board files the rules 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

Nature of the Proposed Rules

1. The proposed licensure rules establish the qualifications for school administrators, supervisors and coaches. The rules are proposed at a time when many persons, including the Minnesota Legislature, school boards and the Governor, have called for an overall reduction in the number and scope of mandates and rules governing school district programs and operations. The goal of these proposals is to provide greater flexibility for school districts for administrative staffing and the filling of head varsity coaching positions. School districts have had increasing difficulty staffing schools with administrators who are licensed only for specific grade levels. School districts have increasingly requested exemptions from current rules requirements.

2. In 1993, the Minnesota Legislature enacted the Outcome-Based Licensure Law. Minn. Laws 1993, Ch. 224, Art. 12, § 34, which requires that "rules adopted by the State Board of Education and the Board of Teaching regarding licensure of teachers and

administrators shall, to the extent possible, be outcome-based". Instead of focusing on whether an individual has a certain level of classroom teaching experience or advanced degrees in education, the focus will be whether the individual is well qualified to perform the functions of a principal or superintendent based on their training, education and experience as a professional manager or executive. In an extraordinary move, at the time it passed the 1993 Outcome-Based Licensure Law, the Legislature repealed hundreds of rules regulating the standards and qualifications for administrative licensure.

3. The proposed rules adopt outcome-based standards such as knowledge, skill and behaviors necessary for becoming a successful superintendent, principal or other school administrator. The Board states in its SONAR that the standards proposed for adoption arise from "extensive national efforts to develop outcome-based standards for the preparation, licensing, and performance of school administrators". The National Policy Board for Educational Administration (NPB) was established in 1988, in part to promote the improvement of preparation programs for school administrators. The NPB publications provide a knowledge and skill base that serves as a comprehensive guide for the preparation, in-service and licensing of elementary, middle school and high school principals. The American Association of School Administrators (AASA) has been concerned with the knowledge and skills which make for successful school superintendents. AASA publications have identified the knowledge the skills related to professional standards for the preparation and licensing of superintendents.

4. The knowledge, skills and behaviors contained in the Board's proposed rules for licensure of school administrators incorporate the knowledge and skills/behaviors for superintendents and principals identified by the AASA and the NPB. The proposed rules are consistent with the legislative direction and accomplish the goal of establishing outcome-based licensure standards for school administrators.

Task Force

5. In 1990, the State Board of Education appointed a School Administrative Licensure Advisory Task Force to recommend changes in administrative licensure rules. Serving on this task force were individuals representing the Minnesota Association of School Administrators, Minnesota Elementary School Principals Association, Minnesota Association of Secondary School Principals, Minnesota Administrator's Academy, and higher education institutions with educational administration programs. A draft of the Proposed Rules Governing Administrative and Supervisory Licensure was completed in the fall of 1992. However as a result of passage of the 1993 Outcome-Based Licensure Law the draft was withdrawn for further study.

6. The Commissioner of Education appointed a School Administration Ad Hoc Committee in December 1993 to develop and recommend a new draft of rules consistent with the 1993 Outcome-Based Licensure Law. The Ad Hoc Committee was

composed of 13 nominated individuals representing the following organizations. Midwest Council for Educational Administration, Minnesota Association of Middle Level Educators, Minnesota Association of School Administrators, Minnesota Association of Secondary School Principals, Minnesota Education Association, Minnesota Elementary School Principals Association, Minnesota Federation of Teachers, Minnesota PTA\PTSA and the Minnesota School Board's Association. The Ad Hoc Committee met four times from January through May 1994. The Committee recommended the adoption of outcome based standards similar to those recommended by the American Association of School Administrators.

Rulemaking Legal Standards

7. An agency must comply with several rulemaking legal requirements as a prerequisite to the agency exercising the lawmaking authority delegated by the Legislature. In general, the agency must demonstrate (a) That it has statutory authority to adopt the proposed rule; (b) that it has fulfilled all relevant legal and procedural requirements of law or rule; (c) that the rule as finally proposed does not result in a rule substantially different from that published in the State Register; and finally (d) that the need for and reasonableness of each portion of the proposed rule has been established by an affirmative presentation of facts.

8. The Board prepared a Statement of Need and Reasonableness ("SONAR") in support of the repeal of the rule. At the hearing, the Board primarily relied upon the SONAR as its affirmative presentation of need and reasonableness for the proposed rules. The SONAR was supplemented by the comments made by the Board at the public hearing and in its written post-hearing comments.

9. Unless otherwise stated herein, the Judge finds that the Board has complied with all rulemaking legal standards imposed on it by the Legislature as a precondition to the promulgation of the proposed rule.

10. The following sections discuss the Board's compliance with these and other rulemaking legal requirements.

A. Statutory Authority

11. The Board of Education stated in its SONAR that it is authorized to adopt the proposed rules pursuant to authority contained in Minn. Stat. § 125.05 and Laws of Minnesota 1993 Chapter 224, article 12, section 34 and Laws of Minnesota 1996, Chapter 412, article 9, section 14. The Judge finds that the Board has statutory authority to adopt the proposed rules.

B. Need for and Reasonableness of the Proposed Rules

12. Under Minn. Stat. § 14.14, subd. 2, and Minn. Rule 1400.2100, one of the determinations which must be made in a rulemaking proceeding is 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 on legislative facts, namely general facts concerning questions of law, policy and discretion, or it may simply rely on interpretation of a statute, or stated policy preferences. Manufactured Housing Institute v. Pettersen, 347 N.W.2d 238, 244 (Minn. 1984); Mammenga v. Department of Human Services, 442 N.W.2d 786 (Minn. 1989).

13. 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. In re Hanson, 275 N.W.2d 790 (Minn. 1978); Hurley v. Chaffee, 231 Minn. 362, 367, 43 N.W.2d 281, 284 (1950). Arbitrary or unreasonable agency action is action without consideration and in disregard of the facts and circumstances of the case. Greenhill v. Bailey, 519 F.2d 5, 10 (8th Cir. 1975). A rule is generally found to be reasonable if it is rationally related to the end sought to be achieved by the governing statute. Mammenga v. Department of Human Services, 442 N.W.2d 786, 789-90 (Minn. 1989); Broen Memorial Home v. Minnesota Department of Human Services, 364 N.W.2d 436, 444 (Minn. Ct. App. 1985). The Minnesota Supreme Court has further defined the 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." Manufactured Housing Institute, *supra*, 347 N.W.2d at 244. An agency is entitled to make choices between possible approaches as long as the choice it makes 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 a rational person could have made. Federal Security Administrator v. Quaker Oats Company, 318 U.S. 2, 233 (1943).

14. In addition to need and reasonableness, the Administrative Law Judge must 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 delegation of authority to another, or whether the proposed language is not a rule. Minn. Rule 1400.2100.

15. Where changes are made to the rule after publication in the State Register, the Administrative Law Judge must determine if the new language is substantially different from that which was proposed originally. Minn. Stat. § 14.15, subd. 3 (Minn. Supp. 1995). The standards to determine if the new language is substantially different are found in Minn. Stat. § 14.05, subd. 2 (Minn. Supp. 1995).

16. Unless otherwise stated herein, the Judge finds that the Board has established the need and reasonableness of the proposed rule by an affirmative presentation of evidence.

17. Unless otherwise stated herein, the Judge finds that the Board's changes to the proposed rule subsequent to publication in the State Register do not result in a substantially different rule.

C. Procedural Requirements

18. On June 21, 1996, the Board filed the following documents with the Administrative Law Judge:

- (a) A copy of the proposed rules, certified as to form by the Revisor of Statutes;
- (b) A Notice of Hearing as submitted to the State Register with changes requested by OAH;
- (c) A copy of the Statement of Need and Reasonableness (SONAR) stamped or received by the LCRAR.
- (d) The Order for Hearing; and
- (e) Copies of the certificates of authorizing resolution.

19. On June 18, 1996, 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 to the persons who appear on the list of additional persons to receive the Notice of Hearing.

20. The Board proposed an Additional Notice Plan that included providing the notice to all superintendents of public school districts, all school principals of public schools, all special education directors, all community education directors, statewide educational organizations, all deans and chairpersons of colleges and universities that prepare educators, public libraries statewide and Minnesota state legislators. The Additional Notice Plan was approved as meeting the requirements of Minnesota Rules Part 1400.2060, subp. 2, item B and Minn. Stat. § 14.14. The mailing of the additional notice in accordance with the Additional Notice Plan was made on June 18, 1996.

21. On June 24, 1996, the Notice of Hearing and the proposed rules were published at 20 State Register 2739.

22. At the hearing, the Board filed the following documents with the Administrative Law Judge:

- (a) the Notice of Solicitation of Outside Opinion published at 20 State Register 346, on August 21, 1995;
- (b) a copy of the proposed rules certified by the Revisor of Statutes;

(c) a copy of the Notice of Hearing as published in the State Register, 20 State Register, p. 2739.

(d) the Statement of Need and Reasonableness (SONAR);

(e) affidavit of hand delivery of SONAR to the Legislative Commission to Review Administrative Rules;

(f) an Order for Hearing and Authorizing Resolution Adopted by the Board;

(g) a copy of the Notice of Hearing as mailed to persons on the Department's mailing list;

(h) a copy of the State Register pages containing the Notice of Hearing and its proposed rules;

(i) the Certification of Mailing the Notice to all persons on the Board's mailing list;

(j) the Certification of Additional Mailing; and,

(k) all the comments that the Department has received concerning the proposed rules.

Board's Exhibits 1-65.

D. Cost and Alternative Assessments in SONAR.

23. Minn. Stat. § 14.131 provides that state agencies proposing rules must identify classes of persons affected by the rule, including those incurring costs and those reaping benefits; the probable effect upon state agencies and state revenues; whether less costly or less intrusive means exist for achieving the rule's goals; what alternatives were considered and the reasons why any such alternatives were not chosen; the costs that will be incurred complying with the rule; and differences between the proposed rules and existing federal regulations.

24. In its SONAR, the Board concluded that there will be little, if any, costs to those persons or organizations affected by the proposed rules. The proposed rules for superintendents and principals required that a situational observation component be a part of the approved licensure preparation program of higher education institutions. There may be some minimal costs associated with this program. However, most institutions already have such a program and, therefore, it is not expected that there will be a significant cost increase for institutions to initiate the situational observation component of the proposed licensure rules. There are no expected costs to the Department of Children, Families and Learning and it is not expected that there will be any impact on state revenues. The proposed rules will benefit licensure applicants, higher education institutions, school districts and communities.

25. Alternative methods of achieving the purpose of the proposed rules were not reviewed because the 1993 Outcome-Based Licensure Law mandated outcome-based licensure rules. The Board did not make an assessment of any differences between the proposed rules and existing federal regulations because there are no federal regulations applicable to the licensure of superintendents, principals, directors or head varsity coaches.

26. The Administrative Law Judge finds that the Department has met the requirements of Minn. Stat. § 14.131 relating to cost and alternative assessments.

E. Impact on Farming Operations

27. Minn. Stat. § 14.111 (1996), imposes an additional notice requirement when rules are proposed that affect farming operations. The proposed rules will not affect farming operations and no additional notice is required.

Analysis of the Proposed Rules

28. This Report is generally limited to the discussion of the portions of the rule that received significant critical comment or otherwise need to be examined. Because most sections of the proposed rule were not opposed and were adequately supported by the SONAR, a detailed discussion of each subpart of the rule is unnecessary.

Minn. Rules part 3512.0800. Alternative Licensure for School Superintendents.

29. This part authorizes the Board to grant alternative licensure for school superintendents. This provision allows the school districts to consider and hire individuals with a non-traditional (i.e., no teaching experience) for superintendent of a school district. The provision is intended to expand the pool of individuals with leadership experience that qualify to be considered for superintendent. Several commentators, including the Minnesota Education Association, spoke against the alternative license for school superintendents. The MEA believed that when an alternative process is established, it must continue to guarantee the demonstration of essential skills and knowledge identified for school superintendents in other sections of the rule. The MEA did not favor the creation of a permanent alternative path to licensure that did not also satisfy the quality standards required for licensure. MEA objected to this provision because it would allow individuals to be routinely licensed without meeting quality standards.

30. The Board responded that the alternative license in no way obligates or requires a school district to employ someone with the alternative license. The Board explained that this gives school districts a choice to employ a person with this type of license or to employ a licensed superintendent prepared under a more traditional approach. The Board stated that this alternative has worked well for the Minneapolis Public School District and believed that the alternative should be made available on a wider basis.

31. The Judge agrees with the MEA that the alternative licensure discussed in this part is more appropriately language for waiver. However, neither the MEA nor the Judge has been given the authority to propose the subject rules. That responsibility belongs to the Minnesota Board of Education. The Board has proposed this provision and articulated a rational basis for it. The proposal is reasonable consistent with the Board's authority and should be adopted.

32. The Minnesota Education Association also indicated a need for a code of ethics in these licensure rules. The Board concurred but indicated that it could not proceed until specific legislative authority is granted for a code of ethics. The Judge finds that this conclusion is reasonable and consistent with the Board's statutory authority.

Minn. Rules part 3512.3100. Employment of Head Varsity Coaches of Interscholastic Sports.

33. This provision allows school districts to hire head varsity coaches of interscholastic sports who do not have classroom education experience and do not have the depth of training required under the current rules that relate to licensure of high school varsity coaches. By and large, this proposal has been the most controversial provision of the proposed rules and the Judge has received numerous comments on this issue. Most of these comments ask that the Judge continue the current coaching rules and not allow the repeal as proposed by the Board.

34. The Judge's research on this issue establishes that the Minnesota Legislature has already repealed the subject coaching licensure rules. In 1993, the Minnesota Legislature passed Laws of Minnesota chapter 224, article 12, §§ 39(c) and 41 which repealed the coaching rules. The Judge has directed persons expressing concern about the licensure of head varsity coaches to express their concern to the Minnesota Legislature instead of the State Board of Education. The Minnesota Legislature has mandated that the State Board of Education repeal the subject rules. The State Board of Education has no choice in the matter.

Minn. Rules part 3510.3100. Suspension and Revocation of Licenses.

35. Subpart 2 of this provision identifies the procedure for suspension and revocation of licenses. The Minnesota State Board's Association expressed concerns with subpart 2, clause A. The Minnesota State Board's Association believed that the complaint procedure identified there is too narrow because it does not allow for a third party such as a student, parent or community member to initiate a complaint before the State Board.

36. In response, the Board indicated that it would not object to an amendment that would allow a third party to initiate a complaint if this is recommended by the Administrative Law Judge. Upon consideration, the Judge believes that amending this section to allow third parties to initiate complaints would improve the section and make

the procedure parallel to the complaint procedure of the Board of Teaching. Therefore, the Judge recommends that the clause read as follows:

A written complaint that specifies the nature and character of the charges against the licensee is filed with the State Board of Education by either a student, parent, community member, the school board employing the person or by the Commissioner.

37. The Judge finds that the addition of the above language is reasonable, consistent with the Board's authority and does not result in a substantially different rule than that proposed in the State Register.

38. Several commentators made the observation that the proposed rules contained a requirement of classroom experience for licensing of school administrators. They oppose the requirement, stating in general that the requirement was not consistent with the outcome-based direction given by the Legislature.

39. In its response, the Board stated that the Task Force which consisted of representatives from many organizations, including members of the public, deemed it reasonable and appropriate to require classroom experience for administrative licensure. The Board stated that in cases where this is not possible, the alternative internship requirement could prevail as a substitute. In addition, the Board does not waiver and variance authority that could be used in unusual circumstances as it relates to the experience requirement.

40. The Judge finds that the inclusion of some classroom experience for administrative licensure is reasonable and appropriate and that the Board has acted consistently with the 1993 Outcome-Based Licensure Law. Given the Board's waiver and variance authority, the experience requirement should not pose as a substantial barrier to licensure of school administrators.

Clerical Errors

41. The Board cited three clerical errors in the proposed rules as published in the State Register. In three separate instances, the proposed rules provide for an effective date of July 1, 1996. This date is in error and should read December 31, 1996 so as to coincide with the legislative repeal of the State Board Licensure Rules. The clerical errors are located on page 14, line 12; page 34, line 11; and page 51, line 15.

42. The Judge finds that it is appropriate to correct these clerical errors and that the changes do not result in a substantially different rule from that previously published in the State Register.

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

CONCLUSIONS

1. The Minnesota Board of Education (the Board) gave proper notice of this rulemaking hearing.

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

3. The Board has demonstrated its statutory authority to repeal the rule, and has fulfilled all other substantive requirements of law or rule within the meaning of Minn. Stat. §§ 14.05, subd. 1, and 14.50 (i) and (ii).

4. The Board has demonstrated the need for and reasonableness of the repeal of the rule by an affirmative presentation of facts in the record within the meaning of Minn. Stat. §§ 14.14, subd. 2 and 14.50 (iii).

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 1400.2100C.

6. Any Findings which might properly be termed Conclusions are hereby adopted as such.

7. A finding or conclusion of need and reasonableness in regard to any particular rule subsection does not preclude and should not discourage the department from further modification of the proposed rules based upon an examination of the public comments, provided that the resulting rule is not substantially different 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 rule be adopted.

Dated this _____ of October, 1996.

ALLEN E. GILES
Administrative Law Judge