

STATE OF MINNESOTA
OFFICE OF ADMINISTRATIVE HEARINGS

FOR THE MINNESOTA BOARD OF
PEACE OFFICER STANDARDS AND TRAINING

In the Matter of the Proposed Rule
Amendments of the Minnesota Board
of Peace Officer Standards and
Training Governing Continuing
Education and Accreditation;
Minnesota Rules, Chapter 6700

**ORDER OF CHIEF ADMINISTRATIVE
LAW JUDGE ON REVIEW OF
RULES UNDER MINNESOTA
STATUTES, SECTION 14.26,
SUBDIVISION 3(b)**

The Minnesota Board of Peace Officer Standards and Training ("Board") has adopted the above-entitled rules pursuant to Minnesota Statutes, section 14.26. On February 8, 2008, the Office of Administrative Hearings received the documents filed by the Board as required by Minnesota Statutes, section 14.26 and Minnesota Rules, part 1400.2310. On February 22, 2008, the Administrative Law Judge issued the Order on Review of Rules Under Minnesota Statutes, Section 14.26. As set forth in the February 22, 2008 Order, a portion of the rules was disapproved.

Based upon a review of the written submissions and filings, Minnesota Statutes, Minnesota Rules, and the February 22, 2008 Order,

IT IS HEREBY ORDERED: that the findings of the Administrative Law Judge in the February 22, 2008 Order on Review of Rules Under Minnesota Statutes, Section 14.26, regarding the disapproval of a portion of the rules are approved. The reasons for the disapproval of the rules and the changes recommended to correct the defect found are as set forth in the attached Order.

Dated this 26th day of February, 2008.

s/Raymond R. Krause
RAYMOND R. KRAUSE
Chief Administrative Law Judge

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Governing Continuing Education and
Accreditation, *Minnesota Rules* Chapter 6700

**ORDER ON REVIEW OF
RULES UNDER MINNESOTA
STATUTES, SECTION 14.26**

The Minnesota Board of Peace Officer Standards and Training ("POST Board") is seeking review and approval of the above-entitled rules, which were adopted by the agency without a hearing. Review and approval is governed by Minn. Stat. § 14.26. On February 8, 2008, the Office of Administrative Hearings received the documents that must be filed by the agency under Minn. Stat. § 14.26 and Minn. R. 1400.2310. Based upon a review of the written submissions and filings, and for the reasons set out in the Memorandum which follows,

IT IS HEREBY ORDERED:

1. The agency has the statutory authority to adopt the rules.
2. The rules were adopted in compliance with all procedural requirements of Minnesota Statutes, chapter 14, and Minnesota Rules, chapter 1400.
3. With one exception as set forth in the Memorandum below, the rules are **APPROVED**. The definition of discrimination at Minn. R. 6700.0900, subpart 6a, and Minn. R. 6700.0902, subpart 9 is **DISAPPROVED** as not meeting the requirements of Minn. R. 1400.2100 (D).
4. Pursuant to Minnesota Statutes, section 14.26, subdivision 3 (b), and Minnesota Rules, part 1400.2300, subpart 6, the rules will be submitted to the Chief Administrative Law Judge for further review.

Dated: February 22, 2008

s/Eric L. Lipman
ERIC L. LIPMAN
Administrative Law Judge

SUMMARY OF CONCLUSIONS

In this case, the Administrative Law Judge has found a defect in one of the proposed rules.

Additionally, as required by Minn. Stat. § 14.127, the agency has made its determination regarding the effect of the rules upon small businesses and small cities. The Administrative Law Judge has reviewed the POST Board's determination and concurs with its finding that the costs of complying with the proposed rules in the first year after the rules take effect will not exceed \$25,000 for any one small business or any one small city.

Lastly, the undersigned has provided a series of recommendations – which are purely advisory in nature – which the Board may wish to consider prior to adoption of the approved rules.

MEMORANDUM

In December of 2007, the POST Board published in the *State Register* a Notice of Intent to Adopt Rules Without a Public Hearing. The proposed rules relate to the training and continuing education of licensed peace officers.

Pursuant to Minnesota Statutes, section 14.26, the agency has submitted these rules to the Office of Administrative Hearings for a legal review.

According to state law, there are several circumstances under which a rule must be disapproved by the Administrative Law Judge or the Chief Administrative Law Judge. A proposed rule is defective when it:

- (a) is not adopted in compliance with the procedural requirements of state law, unless the judge finds that the error was harmless in nature and should be disregarded;
- (b) is not rationally related to the agency's objectives or the agency has not demonstrated the need for and reasonableness of the rule;
- (c) is substantially different than the rule as originally proposed and the agency did not comply with required procedures;
- (d) grants undue discretion to the agency, is unconstitutional¹ or illegal²;
- (e) improperly delegates the agency's powers to another entity; or
- (f) falls outside of the statutory definition of a "rule."³

¹ In order to meet constitutional requirements, a rule must be sufficiently specific to provide fair warning of the type of conduct to which the rule applies. See, e.g., *Cullen v. Kentucky*, 407 U.S. 104, 110 (1972); *Thompson v. City of Minneapolis*, 300 N. W.2d 763, 768 (Minn. 1980).

² See, *Minnesota Statutes* §§ 14.05, 14.51 (2006); Minn. R. 1400.2100 (2007).

I. Defect in the Proposed Rule

Minn. R. 6700.0900, subpart 6a

Minn. R. 6700.0902, subpart 9

In revisions to Minn. R. 6700.0900, subpart 6a, and Minn. R. 6700.0902, subpart 9, the POST Board proposes to require course instructors to begin each class with the reading of a required statement regarding the conduct that constitutes “classroom discrimination.” The proposed rule provides that the instructor is to inform students that “[d]iscrimination is an act or comment of prejudice that offends another.” Additionally, Minn. R. 6700.0902, subparts 10 and 12, provides for the imposition of discipline upon course sponsors, faculty and students for violations of the anti-discrimination policies.

There are two difficulties presented by these sections. The first is that the rule provides no genuine warning as to what types of misconduct run afoul of the anti-discrimination rule. Based as it is on whether others take offense to the “act or comment,” the proposed rule is simply not sufficiently specific enough to instruct those who wish to abide by the rule what type of conduct is proscribed.⁴ Moreover, the standards that Board officials might use when gauging compliance with the proposed rules are not part of common understanding, so as to make the intended meaning clear.⁵

Second, there is genuine doubt that POST Board could permissibly sanction, or withdraw the benefits of course accreditation from, a sponsor, instructor or student on the grounds that another person was merely offended by their conduct in the classroom. As the U.S. Supreme Court noted in the case of *Street v. New York*, “[i]t is firmly settled that under our Constitution the public expression of ideas may not be prohibited merely because the ideas are themselves offensive to some of their hearers.”⁶ The proposed rule seems

³ See, *Minnesota Statutes* § 14.02 (2006); Minn. R. 1400.2100 (2007).

⁴ Compare, *In the Matter of the Proposed Adoption of Amendments to the Rules of the Department of Human Services Governing the Use of Aversive and Deprivation Procedures By Licensed Facilities Serving Persons with Mental Retardation or Related Conditions*, OAH Docket No. 1800-7471-1 (<http://www.oah.state.mn.us/aljBase/18007471.93.htm>) (quoting *Thompson v. City of Minneapolis*, 300 N.W.2d 763, 768 (Minn. 1980)).

⁵ Compare, e.g., *In the Matter of the Proposed Rules Governing the Licensure of Treatment Programs for Chemical Abuse and Dependency and Detoxification Programs*, *Minnesota Rules, Chapter 9530*, OAH Docket No. 3-1800-15509-1 (2004) (“The Administrative Law Judge finds the requirement that a program have a particular licensure, and ‘any additional certifications required by the department,’ to be impermissibly vague and a defect in the rule”) (<http://www.oah.state.mn.us/aljBase/180015509.rr.htm>).

⁶ *Street v. New York*, 394 U.S. 576, 592 (1969); compare also, *Cox v. Louisiana*, 379 U.S. 536 (1965); *Edwards v. South Carolina*, 372 U.S. 229 (1963); *Terminiello v. Chicago*, 337 U.S. 1 (1949).

poised to officially sanction some conduct that would otherwise be protected by the First Amendment. For these reasons, the Administrative Law Judge finds that the proposed standard for classroom discrimination is a defect in the proposed rule.

Among the alternatives that the Board may wish to consider is to revise the proposed rules so as to provide that instructors will inform students that classroom discrimination is prohibited and to define that term with greater precision elsewhere in the regulation. A longer definition – which is too clumsy to be recited at the beginning of each class, but which focuses on the evils that the POST Board hopes to eliminate – might be:

“Classroom discrimination” is defined as oral, written, graphic or physical conduct directed against any person or, group of persons, because of their race, color, creed, religion, national origin, sex, age, marital status, status with regard to public assistance, sexual orientation, disability, or veteran's status that has the purpose, or reasonably foreseeable effect, of demeaning or intimidating that person or group of persons.

Another possibility might be for the Board to reference the standard now found in Minn. Stat. § 363A.13, subdivision 1. This statute provides that it is an unfair discriminatory practice to:

discriminate in any manner in the full utilization of or benefit from any educational institution or the services rendered thereby to any person because of race, color, creed, religion, national origin, sex, age, marital status, status with regard to public assistance, sexual orientation, or disability, or to fail to ensure physical and program access for disabled persons.

Key aims of any such regulation should be to give those who are bound by the restriction fair warning of what conduct is proscribed and to avoid punishing conduct that is protected by the First Amendment.

In this respect, the decision of the United States District Court for the Eastern District of Michigan in *Doe v. University of Michigan*, 721 F.Supp. 852 (E.D. Mich. 1989) may be helpful to the POST Board. In a case that involved university rules which proscribed speech that tended to “stigmatize” other individuals, the Court carefully draws a distinction between speech that is lewd, obscene, profane, libelous or ‘fighting words’ – which may be subject to government regulation – and speech that is merely “shocking” or “offensive” – which is far more likely to enjoy 1st Amendment protections.⁷ Likewise, the Court’s detailed description of the relevant law may help the Board to craft any future anti-discrimination measures.

⁷ *Doe v. University of Michigan*, 721 F.Supp. at 862-63.

II. Editorial Revisions that the Board May Wish to Consider

Minn. R. 6700.0900, subpart 2

The proposed rule is unclear as to the methods by which licensees will be randomly selected for review of their continuing education credits. While the regulatory text clearly suggests that every licensee will have an equal chance of being selected for additional review, the proposed rule would be improved if some description of the Board's methods were included. Further, such an addition is needed and reasonable and would not be a substantial change to the rule.

Minn. R. 6700.0901, subpart 2

Minn. R. 6700.0902, subpart 2a

The proposed rules are clumsily worded and unclear. The Board may wish to consider the following revision to both subparts so as to improve the readability of the proposed rules: "Accreditation' means that the attendees of an approved course are eligible to receive continuing education credit." Such revisions are needed and reasonable and would not be a substantial change to the rules.

Minn. R. 6700.0902, subpart 2a (E)

While mindful that the proposed Minn. R. 6700.0902, subpart 2a (E) draws upon the text in the current version of Minn. R. 6700.0900, subpart 3 (D), the proposed rule is unclear as to the timeframes by which the Board will act upon the course approval applications that it receives. A revised rule that states timelines for action would contribute to the clarity of the text, is needed and reasonable, and would not be a substantial change to the rules.

Minn. R. 6700.0902, subpart 4a

The proposed rule would be more clearly worded if it advised accredited course sponsors that they would, at a minimum, be evaluated every five years to ensure compliance with the accreditation rules of Part 6700, but that course sponsors may be evaluated at intervals less than once every five years. Further, such a revision is needed and reasonable and would not be a substantial change to the rule.

Minn. R. 6700.0902, subpart 8

The phrasing of the proposed rule seems to suggest that the Board will make individualized determinations at the time of accreditation, for each course sponsor, as to the supporting documentation that must be maintained by the

sponsor in order to later demonstrate compliance with Part 6700. The rule would be more clearly worded, and perhaps easier to administer, if it provided that the types of listed documentation, plus any items specifically requested by the Board in an individual case, shall be retained by an accredited course sponsor.

Similarly, the last sentence of the proposed rule would be more clearly worded if it read: “The documentation must be maintained for five years or until evaluated **by the board** and shall be made available to the board upon request.” Such revisions would be needed and reasonable and would not be a substantial change to the rule.

Minn. R. 6700.0902, subpart 9

In order that the proposed rule would be clear and consistent with the text in 6700.0900, subpart 6a, the Administrative Law Judge urges the Board to consider the following revision at page 11, lines 24-26: “This course (name of the course), (course number) has been approved **by the POST Board** for continuing education credit.” Such a revision is needed and reasonable and would not be a substantial change to the rule.

E. L. L.