69-2402-9512-1

STATE OF MINNESOTA
OFFICE OF ADMINISTRATIVE HEARINGS

FOR THE BOARD OF PEACE OFFICER
STANDARDS AND TRAINING

In the Matter of the Proposed Adoption of Amendments to the Rules of the Minnesota Board of Peace Officer Standards and Training Governing Standards of Conduct for Peace Officers and Deadly Force Training

REPORT OF THE ADMINISTRATIVE LAW JUDGE

The above-entitled matter came on for hearing before Administrative Law Judge Steve M. Mihalchick on May 2, 1995, at 9:00 a.m. in Room 230 of the Minnesota Judicial Center, 25 Constitution Avenue, St. Paul, Minnesota.

This Report is part of a rulemaking proceeding held pursuant to Minn. Stat. §§ 14.131 to 14.20, to hear public comment, to determine whether the Minnesota Board of Peace Officer Standards and Training (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 modifications to the rules proposed after initial publication are permissible, nonsubstantial changes.

David Flowers, Assistant Attorney General, Suite 500, 525 Park Street. St. Paul, Minnesota 55103, appeared on behalf of the Board at the hearing. John Laux, Executive Director of the Board; George Wetzel, Deputy Director, Rodney Nyenhuis, Board Standards Chair, and Hope Jensen, Rule Coordinator, Department of Public Safety, appeared on behalf of the Board. Several members of the Board were also present.

Three persons other than Board members signed the hearing register. The hearing continued until all interested persons, groups or associations had an opportunity to be heard concerning the adoption of these rules. The Administrative Law Judge received four written comments on the proposed rules during the posthearing public comment period, ending on May 9, 1995, as established at the hearing. The five working-day response period authorized by Minn.Stat. § 14.15, subd.1, ended on May 16, 1995, when the record of this proceeding closed. No responses were filed during that period.

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

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

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

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

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

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

FINDINGS OF FACT

Procedural Requirements

1. On March 1, 1995, the Board filed the following documents with the Chief Administrative Law Judge:

   a) a copy of the proposed rules certified by the Revisor of Statutes;
   b) the Statement of Need and Reasonableness (SONAR);
   c) the Notice of Hearing proposed to be issued;
   d) the Order for Hearing and Authorizing Resolution of the Board; and
   e) a letter estimating the length of the hearing and number of persons expected to attend and a statement that the Board did not intend to provide discretionary additional notice.

2. On March 10, 1995, the Board mailed the Notice of Hearing to all persons and associations who had registered their names with the Board or the Department of Public Safety for the purpose of receiving such notice.

3. On March 27, 1995, the Notice of Hearing and proposed rules were published at 19 State Register 2000.

4. On April 4, 1995, the Board filed the following documents with the Chief Administrative Law Judge:

a) the Notice of Hearing as mailed;
b) the Board's certification that its mailing list was accurate and complete as of April 3, 1995;
c) the Affidavit of Mailing the Notice to all persons on the Board's and Department of Public Safety's mailing lists;
d) a Notice to Solicit Outside Information published at 18 State Register 2260 (April 18, 1994), and all materials received following that Notice, and
e) a list of persons expected to appear on behalf of the Board.

5. On April 12, 1995, the Board filed a copy of the Notice of Hearing and proposed rules as published at 19 State Register 2000 (Mar. 27, 1995).

Small Business Considerations in Rulemaking

6. Minn. Stat. § 14.115, subd. 2, provides that state agencies proposing rules affecting small businesses must consider methods for reducing adverse impact on those businesses. The proposed rules will have no direct impact on small businesses.

Fiscal Notice.

7. Minn. Stat. § 14.11, subd. 1, requires the preparation of a fiscal notice when the adoption of a rule will result in the expenditure of public funds in excess of $100,000 per year by local public bodies. The notice must include an estimate of the total cost to local public bodies for a two-year period. The proposed rules will not require increased expenditures by local governmental units or school districts in excess of $100,000 in either of the two years immediately following adoption and thus no notice is required.

Impact on Agricultural Land.

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

Nature of the Proposed Rules and Statutory Authority

9. The rules proposed here modify existing rules and add new rules. A new subpart on deadly force training is added to Minn. R. 6700.0900, which describes continuing education. The majority of the proposed rules deal with standards of conduct and related requirements.

10. The Board is required by Minn. Stat. § 626.843, subd. 1, to adopt rules with respect to several specified subjects. In particular, Minn. Stat. § 626.843, subd. 1(e), requires it to adopt rules with respect to "Minimum standards of conduct which would affect the individual's performance of duties as a peace officer." Minn. Stat. § 626.845, subd. 1(i), grants the Board the power and duty to perform such acts as may be necessary and appropriate to carry

out the powers and duties set forth in the provisions of Minn. Stat. §§ 626.841 to 626.855. Thus, the Board has the statutory authority to adopt and modify rules dealing with standards of conduct. Similarly, Minn. Stat. § 626.8452, subds. 2 and 3, require local and state law enforcement agencies to provide instruction on the use of force, deadly force and firearms based upon instructional materials required by the Board. Thus, the Board has statutory authority to adopt rules regarding deadly force training.

Need for and Reasonableness of Proposed Rules

11. The question of whether a rule is reasonable focuses on whether it has a rational basis. The Minnesota Court of Appeals has held a rule to be reasonable if it is rationally related to the end sought to be achieved by the statute. Broen Memorial Home v. Minnesota Department of Human Services, 364 N.W.2d 436, 440 (Minn.App. 1985); Blocker Outdoor Advertising Company v. Minnesota Department of Transportation, 347 N.W.2d 88, 91 (Minn.App. 1984). The Supreme Court of Minnesota has further defined the burden by requiring that the agency "explain on what evidence it is relying and how the evidence connects rationally with the agency's choice of the action to be taken." Manufactured Housing Institute v. Pettersen, 347 N.W.2d 238, 244 (Minn. 1984). In support of the adoption of the proposed rules, the Board prepared the SONAR for the rule. The Board supplemented the SONAR with the presentation made at the public hearing in this matter. This Report will not discuss each rule part. The Report will focus on those provisions that members of the public questioned or that were noted by the Administrative Law Judge. Any part not specifically commented on in this Report is hereby found to be needed and reasonable and within the statutory authority of the Board. It is further found as to such parts that the Board has documented their necessity and reasonableness with an affirmative presentation of facts.

Minn. R. 6700.0900 Continuing Education

12. The Board proposes to add a new Minn. R. 6700.0900, subp. 18, entitled Deadly Force Training. It requires that at least once during each calendar year each peace officer must complete the use of force and deadly force "learning objectives as set forth and approved by the Board" and that the chief law enforcement officer of each law enforcement agency maintain documentation that demonstrates that each peace officer employed by the agency has completed such training. A Memorandum prepared for Lieutenant Tom Wilske of the Airport Police Department at Minneapolis-St. Paul International Airport by a CSO Kedroski and filed with the Department of Public Safety on May 4, 1995, Ex. 17, (the APD Memo) raises some questions about this proposed rule. The vagueness of the term "Learning Objectives" was noted. As proposed, and as noted by the APD Memo, there are no standards established to guide and limit the Board in adopting the learning objectives as to content, frequency of change, burden placed upon small police departments, and whether the input of such departments must be considered. The concerns raised by the APD Memo are legitimate; it is impossible to tell from the rule what the Board has in mind for use of force and deadly force learning objectives. Minn. Stat. § 626.843, subd. 1(f), (g), and (h), require the Board to adopt rules specifying "Minimum Basic Training," "Minimum Specialized Training," and "Content of Minimum Basic Training Courses" for various peace officers and courses. These statutory provisions indicate a legislative intent that the Board must specify by rule the content of the training it approves. Without such

standards, the rule is simply a restatement of Minn. Stat. § 626.8452's requirement that local and state law enforcement agencies provide instruction on use of force, deadly force and the use of firearms, based upon their own written policies and "the instructional materials required by the Board." Therefore, the Board has failed to demonstrate the need for and reasonableness of the first sentence of proposed Minn. R. 6700.0900, subp. 18. This sentence must be deleted.

13. The requirement for each law enforcement agency to maintain documentation demonstrating that the statutory required training has been given on an annual basis is obviously reasonable. The APD Memo raises some questions about requiring the chief law enforcement officer of each agency to be responsible for such training and wonders if there is a question of who pays for the training, the agency or the officer. Minn. Stat. § 626.8452 is very explicit that it is the head of every local and state law enforcement agency that "shall provide" the instruction, so there is no legitimate question. However, until the Board sets forth the learning objectives for the training, it will be difficult for the local agencies to proceed. Until the Board adopts such standards, requiring documentation of compliance is not reasonable. Thus, the remaining provision of subp. 18 must also be deleted.

Minn. R. 6700.1600 Violations of Standards of Conduct

14. Existing Minn. R. 6700.1600 provides that "Violations of the following standards of conduct by a licensee shall be grounds for revocation, suspension, or nonrenewal of license:" It then lists eight items. The proposed rules delete all eight items and replace them with sixteen new items, some of which are restatements of the existing items. The APD Memo , Ex. 17, raises two questions regarding the introductory sentence of this rule, which is not being changed from the existing rule. It notes that the use of the word "Violations" makes it appear to require more than one violation to constitute grounds for discipline. Clearly it is the intent of the Board that one violation of a standard of conduct could constitute grounds for discipline. Therefore, even though this particular sentence has not been proposed for modification, changing the word to "Violation" would be a correction of an erroneous term and would not be a substantial change from the rules proposed. Similarly, the APD Memo notes that the use of the term "shall be grounds" appears to require that the license be revoked, suspended or not renewed. Lesser forms of discipline are always available to licensing boards under Minn. Stat. Ch. 214 and are specifically contemplated by the Board in its proposed Minn. R. 6700.1710. Again, it would be helpful to clarify the rule by changing "shall be" to "is" or by changing the introductory sentence to read, "Violation of and of the following standards of conduct by a licensee constitutes grounds for disciplinary action:" The foregoing suggestions are offered for improvement of the existing rule. Since that particular sentence is not proposed for change, it cannot be said to be unneeded or unreasonable as it now exists.

Minn.R. 6700.1600 A.

15. Proposed Minn. R. 6700.1600 A. makes violation of the following grounds for disciplinary action:

> A. engaging in conduct prohibited by, or listed as, grounds for disciplinary action in this chapter, Minnesota Statutes, chapter 214,

> or sections 626.84 to 626.90, or engaging in conduct which violates any statute enforced by the boards;

16. The APD Memo, Ex. 17, raises a number of questions regarding this provision, some of which apply to other provisions of this rule. Primarily, there are questions of due process: What is the burden of proof? What if the officer is found not guilty in a criminal proceeding? Are peace officers being held to a higher standard of conduct than nonofficers? Is there a right to confront witnesses? Is there double jeopardy if an officer faces both a criminal proceeding and a licensing proceeding?

17. The due process rights of the licensees are protected by procedures established in Minn. Stat. Ch. 214. That chapter of the statutes provides the procedural rights for most of the licensing boards of the state, including the Board of Peace Officer Standards and Training. Very specific procedures are set forth to be used by the Board. Minn. Stat. § 214.10, subds. 10-13. The APD Memo is correct in assuming that the burden of proof is the preponderance of the evidence, so it is possible that the Board may proceed with an action against a peace officer for conduct for which the officer has been acquitted in a criminal trial. There has been litigation on the issue and the courts have generally held that the licensing function is separate from the criminal action and does not constitute double jeopardy. Peace officers are treated no differently than any other licensee in this regard.

18. The APD Memo also questions the use of the term "Conduct which violates any statute <u>enforced</u> by the Board." The ADA Memo seems to be based on the assumption that this means any statute which the Board chooses to enforce, whether or not such statute is within its jurisdiction. But that is a misreading of the rule. It actually means, "Any statute which the Board is empowered to enforce," which is the language used in Minn. Stat. § 214.10, subd. 10, and other places.

19. The APD Memo also suggests another twist on the double jeopardy argument stating that if a Court does find an officer guilty of a crime and punishes the officer, how can the Board then punish the officer again? It is indeed not the function of a licensing board to punish a licensee for a crime. But it is the function of a licensing board to determine what implications conduct that may be criminal has on the fitness of the person to hold a license. The statutes grant the Board the licensing authority and the Board has demonstrated that proposed Minn. R. 6700.1600 A is necessary and reasonable.

Minn.R. 6700.1600 B.

20. Proposed Minn. R. 6700.1600 B. makes obtaining a license by fraud or cheating or attempting to subvert the examination process grounds for disciplinary action. The APD Memo suggests that the term "license" is improperly not limited to the license issued by the Board and that the term "subvert" is undefined and vague. In the SONAR the Board stated that the rule was necessary so that it could protect the integrity of its licensing process. Since that was the Board's intent, the provision must be modified to ensure that it refers only to the Board's licensing process by modifying the term to be "license from the board . . ." Without such a change the rule is vague and does not carry out the intent of the Board. The change would not be a substantial change. The use of the word "subvert" on the other hand, is not unreasonable. The term can be understood by its common meaning, particularly in the context of the rule. This rule parallels Minn. Stat. § 147.091, subd. 1(b), which makes it grounds for disciplinary action against a physician to obtain a license by fraud or cheating or attempting to subvert the examination process. The statute goes on to cite some examples of such conduct, including obtaining copies of tests, copying other's examinations, permitting an impersonator to take the examination on ones own behalf, etc. Even without such examples, the term is sufficiently clear.

Minn.R. 6700.1600 C.

21. Proposed Minn. R. 6700.1600 C. makes the following grounds for disciplinary action:

> Being convicted of an offense in this State, including a finding or verdict of guilt, whether or not the adjudication of guilt is withheld or not entered, an admission of guilt, or a no contest plea of a felony or gross misdemeanor;

The existing rule that is being replaced spoke of conviction of a felony in this state or any other jurisdiction of an offense that would have been a felony if committed in Minnesota. The substance of the proposed rule is to add gross misdemeanors as grounds and "clarifies" that a conviction includes a finding or verdict of guilt whether or not the adjudication of guilt is withheld or not entered. According to the SONAR, these amendments are necessary because conviction of a gross misdemeanor is a matter of serious professional concern, because licensees are peace officers charged with the duty and responsibility of enforcing criminal laws, because certain gross misdemeanors involve behaviors which raise serious questions as to a person's competence for performing peace officer duties, and because there have been several recent high-profile cases involving Minnesota peace officers who have been convicted of gross misdemeanors and the Board had no authority to review the matters and discipline such officers. The SONAR also states that including convictions whether or not adjudication of guilt is withheld or not entered is also reasonable and necessary so that the Board can consider all convictions whatever the final disposition of the criminal case may be.

22. The APD Memo, Ex. 17, seems to question the wisdom of including gross misdemeanors, stating that this standard would include repeat DWIs, some drivers license

violations and some damage to property violations. However, the Board has presented a rational basis for including gross misdemeanors as conduct that may raise a question as to fitness of a peace officer. However, in every individual case, the precise nature of the conduct and the relationship of the conduct to the fitness of the officer and the impact on the integrity of the profession will have to weighed by the Board in determining the appropriate discipline.

23. The APD Memo also suggests that the rule might specifically mention Minn Stat. § 609.135 so that agreements made under that statute would be clearly included. Section 609.135 allows courts to stay imposition or execution of a sentence and place the defendant on probation upon conviction of a crime. It would appear that that situation is covered by the language "whether or not the adjudication of guilt is withheld or entered," but the Board may add a specific reference to Minn. Stat. § 609.135 if it desires and that would not be a substantial change.

24. At the hearing Lloyd F. Rivers of the Minnesota Chiefs of Police Association noted that this provision had failed to carry over the language in the existing provision that covers crimes in other states that constitute felonies or gross misdemeanors in Minnesota. The Board agreed that that was an oversight and that the rule should be amended to include such crimes. Such a change would be reasonable and would not be a substantial change. The Administrative Law Judge would recommend that the provision be modified to read:

> Being convicted of ~~an offense~~ a felony or gross misdemeanor in this state, or in any other state or federal jurisdiction of an offense that would constitute a felony or gross misdemeanor if committed in Minnesota, including a finding or verdict of guilt, whether or not the adjudication of guilt is withheld or not entered, an admission of guilt, or no contest plea ~~of a felony or gross misdemeanor~~.

Minn.R. 6700.1600 D.

25. Proposed Minn. R. 6700.1600 D. makes it grounds for disciplinary action to have been the subject of revocation, suspension, or surrender of a peace officer license or certificate in resolution of a complaint or other adverse action relating to licensing or certification in another jurisdiction. According to the SONAR, this rule is necessary because discipline in another state indicates a possible condition that could affect the peace officers fitness, which the Board should be able to review. The APD Memo suggests that this rule could be seen as "double jeopardy" in that the officer is being twice punished for the same problem. Again, punishment for crimes is administered by the criminal justice system and the licensing function is to ensure the fitness of the officer and the protection of the public. The APD Memo also suggests that the officer may have been disciplined in the other jurisdiction for something that is not a violation of the standards of conduct in Minnesota. That is possible, but nothing in this rule requires the Board to actually take disciplinary action. Like all other factual situations, it will have to make a judgment as to whether and what disciplinary action may be appropriate.

Minn.R. 6700.1600 E.

26. Proposed Minn. R. 6700.1600 E. makes it grounds for disciplinary action to fail to report a disciplinary action in another jurisdiction. The SONAR states that this is necessary so that licensees know that they are under a duty to report such matters and it allows the Board to make an informed decision on licensure if there has been a disciplinary action in another jurisdiction. The APD Memo endorses this provisions and suggests that officers should be required to report immediately any investigation against the officer which may affect their license. Such a provision already appears at proposed Minn. R. 6700.1610, subp. 2. The rule as proposed is necessary and reasonable.

Minn.R. 6700.1600 F.

27. Proposed Minn. R. 6700.1600 F. makes it grounds for disciplinary action to be convicted of a state or federal narcotics or controlled substance law irrespective of any proceedings under Minn. Stat. § 152.18 or any similar law. Minn. Stat. § 152.18 allows a Court, after a person is found guilty of possession of a controlled substance after trial or a plea, to defer further proceedings and to place the person on probation without entering a judgment of guilt. This particular provision appears to be unnecessary because it is already covered by proposed Minn. R. 6700.1600 C. However, as stated in the SONAR, peace officers are charged with enforcing drug laws, the public views that as an important law enforcement function, it is important for the public to have confidence if peace officers will remain free from drugs which inhibit their ability, especially since they are charged with the responsibility of processing and securing confiscated drugs as evidence. For those reasons, the rule is necessary and reasonable as proposed.

Minn.R. 6700.1600 G.

28. Proposed Minn. R. 6700.1600 G. makes it grounds for disciplinary action to be adjudicated as incapacitated, mentally incompetent, chemically dependent, mentally ill and dangerous to the public or as having a psychopathic personality. According to the SONAR, this rule is necessary to give the Board the authority to examine the fitness of licensees as to mental capacity because the performance of peace officer duties requires the ability to reason, think quickly and to make sound decisions and it is necessary to remove from the profession those individuals who may not be competent to perform police officer duties and who may pose a threat to the public. A comment on this provision was submitted by Ann E. Walther of Gregg M. Corwin & Associates on behalf of the Police Officers Federation of Minnesota. (Ex. 16). She notes that there is no requirement that the officer be using a chemical, only that the officer be chemically dependent and, thus, even if the officer has been sober for many years, the officer could lose his or her license. She notes that there is no definition of chemically dependent and therefore, that the Board could consider a finding of DWI to be an adjudication of chemical dependency. Finally, she notes that the proposed rule may violate the Americans with Disabilities Act (ADA) insofar as a chemically dependent person who is abstaining from chemicals is "disabled" and cannot have adverse action taken against him or her because of the disability.

29. This rule is similar to Minn. Stat. § 147.091, subd. 1(j), which makes it grounds for disciplinary action for a physician to be adjudicated, among other things, as a chemically

dependent person. While such laws as the ADA and the Minnesota Human Rights Act prohibit discrimination by licensing agencies against persons on account of their disabilities, such laws all contain exceptions for the situation where the disability makes a person unable to perform the duties of the position or creates a danger to the public. Again, the Board must have the ability to review such situations and make a reasoned judgment as to the appropriate action to be taken.

Minn.R. 6700.1600 H.

30. Proposed Minn. R. 6700.1600 H. makes it grounds for disciplinary action to violate any order issued by the Board. According to the SONAR, this rule was necessary to place licensees on notice of their obligations to obey Board orders and to allow the Board to enforce its orders. The SONAR goes on to state that the Board may, after a contested case hearing, issue an order and that licensees are expected to obey such orders. The APD Memo, Ex. 17, states that this rule grants too much power to the Board, that the Board could give an order to an officer and demand that it not be violated, and that the Board could issue any order that it desired, including invalid and irresponsible orders and orders to Chiefs of Police to do something. The APD Memo's fears are unfounded. While the language could be read as broadly as the Memo suggests if there were no other laws, there are other statutes and rules that control what the Board can do. The Board's authority is strictly limited to that which it is granted by statute and is subject to the limitations imposed by statute. Thus, any disciplinary orders it issues are subject to the procedural rights of the licensee to notice, a contested case hearing, a final decision by the Board and appeals to court. The rule is necessary and reasonable as proposed.

Minn.R. 6700.1600 K.

31. Proposed Minn. R. 6700.1600 K. makes it grounds for disciplinary action to engage in sexual penetration or contact without consent as defined in Minn. Stat. § 609.341 or in conduct that violates Minn. Stat. § 617.23. The rule excludes contact that is part of standard police procedure such as search and arrest. Minn. Stat. § 609.341 defines "sexual penetration," "sexual contact," and "consent" which are then used in the definitions of criminal sexual conduct in following sections of the statute. Minn. Stat. § 617.23 is the statute defining indecent exposure. According to the SONAR, nonconsensual sexual contact is illegal and constitutes conduct which would adversely affect an individuals performance of duties as a peace officer and abuse of authority. The Board believes it is necessary to establish a rule prohibiting nonconsensual sexual conduct, except where part of standard police procedure, and indecent exposure. According to testimony at the hearing, several instances have arisen recently of such conduct and it is the Board's position that the public has the right to expect that peace officers sworn to uphold the law will, in particular, not violate these laws.

32. The Minnesota Police & Peace Officers Association submitted a comment (Ex. 14) stating its position that the standard should be violated by conviction of the offenses as opposed to engaging in the conduct. It states that the Board should not try to be a judicial body, nor is it qualified to be such, that to do so would violate due process, and that it creates a double jeopardy situation. The Police Officers Federation of Minneapolis raised a similar issue in its comments (Ex. 16). It stated that without a requirement for conviction of a crime, " a mere

allegation of inappropriate contact could suffice to revoke an officers license." The APD Memo, Ex. 17, raises similar issues, as it had in connection with previous rules. The argument of the commentors as to requiring a conviction is not well taken. As stated above a number of times, Minn. Stat. § 214.10, subd. 10, provides peace officers a great deal of procedural protection, including investigation by an appropriate law enforcement agency of any complaint, review by a three-member committee of the Board consisting of two members who are peace officers to determine whether any licensing action should be proposed, a hearing before an Administrative Law Judge, a final agency decision by the Board itself and appeal to the Court of Appeals and Supreme Court. The process assures to a reasonable degree that the Board's determinations will be made upon correct findings. The rule as proposed is necessary and not unreasonable.

Minn.R. 6700.1600 M.

33. Proposed Minn. R. 6700.1600 M. makes failing to cooperate with an investigation of the Board grounds for disciplinary action. According to the SONAR this rule is necessary because the Board is charged with the duty to investigate and adjudicate licensing complaints which, in turn, requires that licensees cooperate with the investigation so that the Board can obtain full and complete information and can more efficiently process complaints. This rule is a counterpart to proposed Minn. R. 6700.1610, subp. 4, which places a specific requirement upon licensees who are the subject of an investigation to cooperate fully with the investigation and goes on to describe what cooperation means. The Police Officers Federation of Minneapolis comments, Ex. 16, suggests that these rules potentially violate the officer's right to remain silent under the Fifth Amendment to the United States Constitution. They argue that the Board cannot require an officer to waive his or her Fifth Amendment rights under threat of action against the officer's license and that the Board would be in violation of the Constitution if it took action against the license of an officer who refused to answer questions. They also argue that peace officers are often the subject of spurious complaints and high profile attention by the media and it is therefore imperative that officers' constitutional rights and the right to be fairly judged be safeguarded in the proposed rules. The comments of the Minnesota Police & Peace Officers Association, Ex. 14, are similar; they suggest that the language is overbroad and vague and, therefore, unconstitutional and that the obligation to cooperate with an investigation should be made expressly subject to the licensee's right to evoke the Fifth Amendment. The APD Memo, Ex. 17, raises similar issues and also suggests that the rule is vague that because "failing to cooperate" is not defined.

34. The proposed rule is fairly common among the standards of conduct of other licensing boards. For example, Minn. Stat. § 147.091, subd. 1(u), makes failure to cooperate with an investigation of the Board of Medical Practice as required by Minn. Stat. § 147.131 grounds for disciplinary action against a physician. Proposed Minn. R. 6700.1610, subp. 4, seems to be based upon Minn. Stat. § 147.131, which requires physician cooperation in investigations conducted by the Board of Medical Practice. Again, there is a distinction between criminal matters and licensing matters. Certainly the Board, as a state agency, cannot force a licensee to waive Fifth Amendment privileges. But, since licensing is not a criminal matter, adverse inferences can be drawn from an licensee's failure to answer without violating any constitutional rights. In practice, most licensing actions will be deferred until at least the trial court level determination in a criminal matter. The rule is not unconstitutional or illegal and is

necessary and reasonable as proposed. It might be helpful, in response to the comment in the APD Memo, to better define "failing to cooperate" by modifying the rule to read:

> Failing to cooperate with an investigation of the Board as required by part 6700.1610, subp. 4.

Such a change would not be a substantial change.

Minn.R. 6700.1600 N.

35. Proposed Minn. R. 6700.1600 N. makes engaging in sexual harassment, as defined by Minn. Stat. § 363.01, subd. 41, grounds for disciplinary action. According to the SONAR, this rule is necessary because the Board believes that sexual harassment by a peace officer should not be tolerated and that to ensure that they refrain from such conduct a rule is necessary specifically prohibiting it. The Board also believes that the rule is necessary as a means for allowing citizens an avenue of complaint when they believe that they have been sexually harassed by a peace officer and that the rule is reasonable because it sets forth the policy in plain terms and imposes no greater duty than currently exists under Minn. Stat. Ch. 363, which prohibits sexual harassment in the workplace. This rule was strongly endorsed by the Minnesota Association of Women Police in its prehearing comment, Ex. 12. Sexual harassment, both in and outside of the workplace, is one of the top concerns of their membership and they believe in "zero tolerance".

36. The Minnesota Police & Peace Officers Association comments, Ex. 14, suggests that the Board is not qualified to make a determination as to the existence of sexual harassment and that the rule should be modified to require an adjudication by a court of competent jurisdiction. The APD Memo, Ex. 17, raises a similar argument. In its comments, Ex. 16, the Police Officers Federation of Minneapolis argues that the proposed rule provides no safeguard to ensure that an officer will be entitled to a hearing to determine whether she or he engaged in sexual harassment as that term is defined in statutes and case law and that an officer may have his or her license revoked by the Board having a much broader definition of sexual harassment than set forth in the law. Law Enforcement Labor Associates, Inc., an organization representing 3,100 peace officers throughout the state, also submitted comments on this rule. Ex. 15. They suggest that there are not universal standards for sexual harassment and that sexual harassment policies have not yet been established by all law enforcement departments. They suggest that there should be mandated training for officers so that they can know the standards. They believe that including sexual harassment in the proposed standards of conduct will have the Board unnecessarily micromanaging police departments because victims of sexual harassment already have ample outlets for redress and violators are already subject to discipline by their own employers.

37. The rule is necessary and reasonable as proposed. The Board has perceived a particular problem of sexual harassment in police departments and it is not unreasonable for it to make it the subject of a separate, specific, standard of conduct. There is certainly a great deal of litigation involving sexual harassment in the workplace and in the provision of public services and all the law on the subject must be considered if such a matter arises. Again, peace officers will be entitled to a contested case hearing before Administrative Law Judges and who happen to

be the same Administrative Law Judges that decide sexual harassment cases under Minn. Stat. Ch. 363.

Minn.R. 6700.1600 P.

38. Proposed Minn. R. 6700.1600 P. makes it grounds for disciplinary action to be convicted of crimes related to prostitution under Minn. Stat. §§ 609.322 and 609.324. According to the SONAR, the Board views patronage of prostitutes by peace officers as a matter of serious public concern that jeopardizes the integrity of the profession and effectiveness of law enforcement efforts. The APD Memo, Ex. 17, notes that this standard requires a conviction and wonders about similar violations in other states. Consistent with the change suggested for proposed Minn. R. 6700.1600 C, the Board may, if it desires, add a provision to this rule that would make it apply to being convicted of a similar crime in another state or federal jurisdiction that would be a violation of the Minn. Stat. §§ 609.322 or 609.324 if committed in Minnesota. Such a change would not be a substantial change.

Minn.R. 6700.1610 Reporting Obligations and Cooperation.

39. Proposed Minn. R. 6700.1610 is an entirely new rule dealing with reporting obligations and cooperation. Again, it parallels similar provisions in the statute that applies to discipline of physicians under Minn. Stat. § 147.111.

40. Proposed Minn. R. 6700.1610, subp. 1., provides that any person with knowledge of conduct constituting grounds for disciplinary action may report the violation to the Board. According to the SONAR, this subpart is necessary to make explicit the Board's policy that any person my file a complaint with the Board and is reasonable because it simply makes clear that the public may utilize the Board in scrutinizing the conduct of peace officers. The APD Memo, Ex. 17, notes that the use of the word "may" does not place any obligation on a person to report. Minn. Stat. § 214.10 gives the Board the authority to investigate any complaint it receives. However, it is necessary and reasonable to have a rule that makes clear that any person, including the public, may report a violation to the Board. The proposed rule also makes it clear that the Board may receive and act upon such complaints. It is necessary and reasonable.

41. Proposed Minn. R. 6700.1610, subp. 2, requires a licensee to report to the Board, and Chief Law Enforcement Officer, any condition of that licensee which the licensee reasonably believes would constitute the grounds for disciplinary action under the Board's "regulatory provisions." According to the SONAR, this rule is necessary because self-reporting is the only method by which the Board can learn of many violations and is reasonable because licensees have a duty to comply with the rules of the Board, the requirement is not overburdensome and because individuals who hold licenses do so subject to the rules of the Board. The APD Memo, Ex. 17, suggests that the language of the rule bases the determination of reasonableness upon the officer's perception and that this can lead to disagreements. That may be correct, but the use of the term "which the licensee reasonably believes would constitute grounds" actually provides some leniency for the licensee and allows the licensee to argue that he or she did not hold such a belief. The rule is necessary and reasonable as proposed.

42. Proposed Minn. R. 6700.1610, subp. 4, requires licensees to cooperate in any investigations of them by the Board. The comments regarding this part and the justifications for it were discussed in connection with proposed Minn. R. 6700.1600 M. above. The Board has demonstrated the need for and reasonableness of the proposed rule.

Minn.R. 6700.1710 Disciplinary Action for Violations of Administrative Rules.

43. Proposed Minn. R. 6700.1710 is a new rule. Subpart 1 of the rule provides that a complaint investigation committee of the Board may petition the District Court for a temporary restraining order if the committee finds that the licensee has violated the rule the Board is empowered to enforce and continued practice by the licensee would create an imminent risk or harm to others. According to the SONAR, this rule is necessary to allow the Board to take swift action to reduce or eliminate activities that create an imminent risk of harm to others. According to the APD Memo, Ex. 17, this rule is a good idea, but the use of TROs should be limited. The rule is necessary and reasonable as proposed.

44. Proposed Minn. R. 6700.1710, subp. 2. provides as follows:

> Subp. 2. **Grounds**. When grounds exist under any of the board's administrative rule regulatory provisions set forth in this chapter, the board may take one or more of the following disciplinary actions:
>
> A. deny an application for a license;
> B. revoke the license;
> C. suspend the license
> D. impose limitations on the licensee's ability to practice;
> E. impose conditions on the licensee;
> F. censure or reprimand the licensee; or
> G. take any other action justified by the facts of the case.

The Administrative Law Judge would first note that the term "the Board's administrative rule regulatory provisions" is a rather unusual term and possibly confusing. It does not rise to the level of making the rule unreasonable, but the Administrative Law Judge would suggest that the introductory sentence be modified to read: "When grounds exist under any of the provisions set forth in this chapter . . ." That would not be a substantial change and would be more clear.

45. In its comments, Ex. 15, Law Enforcement Labor Services, Inc. expressed serious concern about the subjectivity of the proposed standards. Pointing out that "criminals have the benefit of sentencing guidelines which level out the playing field for similar crimes or offenses," they argue that there is no objectivity in the proposed standards and therefore no limit on the authority of the Board. They argue that a peace officer has no ability to anticipate which of the listed sanctions will fit with each of the standards of conduct. The Minnesota Police and Peace Officers Association, Ex. 14, opposed items D, E, and G as overreaching and beyond what the Board should be able to do. They suggest that these provisions are overbroad and vague and , therefore, unconstitutional, as well as arbitrary and capricious. They argue that imposition of conditions or limitations on a licensee will have the net effect of a suspension or revocation

because the officer's employer has an expectation of unrestricted use of its officers. They believe that any Chief of Police or Sheriff handicapped with only being able to use an officer in certain circumstances would be within their right to relieve the officer of his or her duties. In general, the Association opposed several of the proposed rules because they encroached on employment functions and went beyond licensing functions.

46. Choosing the appropriate discipline for particular acts of misconduct usually depends upon the specific facts of the situation and specifying the sanction for every possible violation is not required. The procedures established by statute and rule, including the composition of the Board and complaint committees are designed to assure to the extent possible that the Board's disciplinary actions are reasonable. Again, it is not unusual for the possible disciplinary actions simply to be listed in a rule, and, again, this particular rule seems patterned after the forms of disciplinary action that may be imposed against a physician under Minn. Stat. § 147.141. It is reasonable for the Board to have the ability to impose limitations on practice and conditions on a license, but the Board will have to be aware of the impact upon the peace officers employment that such imposition may cause. Those particular provisions are not unreasonable. However, subpart 2.G. which allows the Board to "to take any other action justified by the facts of the case" is, a rule that provides the Board with unbridled agency discretion. It would be an illegal rule for that reason. Moreover, it appears unnecessary because it is difficult to imagine any other disciplinary action that is not covered by the other portions of the proposed rule. Subpart 2.G. must be deleted because it has not been shown to be needed and reasonable.

47. The remaining subparts of Proposed Minn. R. 6700.1710 authorize the Executive Director to enter into settlement agreements for corrective action and authorize the Board to impose a reinstatement fee and to issue cease and desist orders to stop unlicensed persons from violating a rule or order. No comments were received on these provisions and they are necessary and reasonable for the reasons stated in the SONAR.

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

CONCLUSIONS

1. 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 adopt the proposed rules.

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

4. The Board has demonstrated the need for and reasonableness of the proposed rules by an affirmative presentation of facts in the record within the meaning of Minn. Stat. §§ 14.14, subd. 2 and 14.50 (iii), except as noted in Findings 12, 13, 20 and 46.

5. The Administrative Law Judge has suggested action to correct the defects cited in Conclusion 4.

6. The amendment to the proposed rules suggested by the Administrative Law Judge in this Report do not result in rules that 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. R. 1400.1000, subp. 1, and 1400.1100.

7. Due to Conclusion 4, this Report has been submitted to the Chief Administrative Law Judge pursuant to Minn. Stat. § 14.15. subd. 3.

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

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

RECOMMENDATION

IT IS HEREBY RECOMMENDED that the proposed rules be adopted, except where otherwise indicated, and with the modifications suggested above.

Dated this ____ day of June, 1995.

_____
STEVE M. MIHALCHICK
Administrative Law Judge

Reported: Tape Recorded; No Transcript.