

STATE OF MINNESOTA  
OFFICE OF ADMINISTRATIVE HEARINGS

In the Matter of the Board of  
Cosmetologist Examiners' Proposed  
Permanent Rules Governing Advanced  
Practice Estheticians; Minnesota Rules  
Chapters 2105 and 2110

**REPORT OF THE CHIEF  
ADMINISTRATIVE LAW JUDGE**

This matter came before the Chief Administrative Law Judge pursuant to the provisions of Minn. Stat. § 14.15, subd. 3 (2016), and Minn. R. 1400.2240, subp. 4 (2017). These authorities require that the Chief Administrative Law Judge review an Administrative Law Judge's findings that a proposed agency rule should not be approved.

Based upon a review of the record in this proceeding, the Chief Administrative Law Judge agrees with and hereby **CONCURS** with the disapproval of the rules contained in the Report of the Administrative Law Judge dated February 21, 2018.

The changes or actions necessary for approval of the disapproved rules are as identified in the Administrative Law Judge's Report.

If the Board elects not to correct the defects associated with the proposed rules, the Board must submit the rule to the Legislative Coordinating Commission and the House of Representatives and Senate policy committees with primary jurisdiction over state governmental operations, for review under Minn. Stat. § 14.15, subd. 4 (2016).

Dated: February 22, 2018



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TAMMY L. PUST  
Chief Administrative Law Judge

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**REPORT OF THE  
ADMINISTRATIVE LAW JUDGE**

Administrative Law Judge Jeffery Oxley conducted a public hearing on this rulemaking proceeding at 10:00 a.m., on January 8, 2018, at the Board of Cosmetologist Examiners, 1000 University Avenue West, Suite 100, St. Paul, MN 55104. The hearing continued until everyone present had an opportunity to be heard concerning the proposed rules.

The Board proposes to adopt rules and amend current rules to provide for the advanced practice esthetician license, including the educational and training requirements, scope of practice, and the conditions and process for issuing and renewing the license.

The public hearing and this Report are part of a rulemaking process governed by the Minnesota Administrative Procedure Act.<sup>1</sup> The Minnesota Legislature designed the rulemaking process to ensure that state agencies meet all of the requirements that Minnesota law specifies for adopting rules.<sup>2</sup> The rulemaking process also includes a hearing when 25 or more persons request one or when ordered by the agency.<sup>3</sup>

The hearing was conducted to allow the Board's representatives and the Administrative Law Judge reviewing the proposed rules to hear public comment regarding the impact of the proposed rules and what changes might be appropriate.<sup>4</sup> Further, the hearing process is intended to provide the general public an opportunity to review, discuss, and critique the proposed rules.

The Board must establish that the proposed rules are within the Board's statutory authority; necessary and reasonable; follow from compliance with the required procedures; and that any modifications that the Board made after the proposed rules were

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<sup>1</sup> Minn. Stat. §§ 14.131-.20 (2016).

<sup>2</sup> See Minn. Stat. §§ 14.05-.20 (2016); Minn. R. 1400.2000-.2240 (2017).

<sup>3</sup> See Minn. Stat. § 14.25 (2016).

<sup>4</sup> See Minn. Stat. § 14.14 (2016); Minn. R. 1400.2210-.2230.

initially published in the State Register are within the scope of the matter that was originally announced.<sup>5</sup>

Rebecca Gaspard, the Board's Policy Analyst, represented the Board at the hearing. The other members of the Board's hearing panel (Board Panel) included: Gina Fast, Executive Director; and Catrina Mairose, Chief of Staff. Also in attendance at the hearing were Rhonda Besel, Board Chair; Chelsey Anderson, Board member; and Alex Herbert, Board staff member.

The Board received approximately 123 written comments on the proposed rules between June 13, 2017, and August 1, 2017.<sup>6</sup> Based on comments received, the Board modified its proposed rules on December 15, 2017.<sup>7</sup>

Approximately 36 people attended the hearing on January 8, 2018, and six public exhibits were received during the hearing.<sup>8</sup> After the close of the hearing, the Administrative Law Judge kept the rulemaking record open for an additional 20 calendar days, until January 29, 2018, to allow interested persons and the Board to submit written comments. Thereafter, the record remained open for an additional five business days, until February 5, 2018, to allow interested persons and the Board to file written responses to any comments received during the initial comment period.<sup>9</sup>

Approximately 65 written comments were received from members of the public after the hearing, along with two responses from the Board.<sup>10</sup> To aid the public in participating in this matter, all comments submitted after the hearing were posted at the Office of Administrative Hearings' Rulemaking eComments website.

The hearing record closed for all purposes on February 5, 2018.

### **SUMMARY OF CONCLUSIONS**

The Board failed to establish that it complied with statutory procedural requirements to promulgate the proposed rules. The Board's failure to give proper notice of the January 8, 2018, rule hearing is a substantive defect and not a harmless error. Therefore, the Administrative Law Judge **DISAPPROVES** the proposed rules.

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

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<sup>5</sup> Minn. Stat. §§ 14.05, 14.23, 14.25, 14.50 (2016).

<sup>6</sup> Exhibit (Ex.) I.

<sup>7</sup> See Final Response to Comments (Feb. 5, 2018).

<sup>8</sup> Hearing Exhibits 1-6.

<sup>9</sup> See Minn. Stat. § 14.15, subd. 1.

<sup>10</sup> See Board Response to Comments (Jan. 24, 2018); Final Board Response to Comments (Feb.5, 2018).

## FINDINGS OF FACT

### I. Background to the Proposed Rules

1. The Board licenses and regulates cosmetologists, manicurists, estheticians, eyelash technicians, nail technicians, salons, salon managers, cosmetology instructors, cosmetology schools, and cosmetology school managers in Minnesota.<sup>11</sup> The Board's mission is to protect the health and safety of the public in the practice of cosmetology.<sup>12</sup>

2. Regulation of cosmetology began in Minnesota in 1927, with the establishment of the Board of Hairdressing and Beauty Culture Examiners.<sup>13</sup> In 1971, the Board's name changed to Board of Cosmetology.<sup>14</sup> In 1981, the Board was abolished and regulatory authority was transferred to the Commissioner of Commerce.<sup>15</sup> In 2003, the licensing and regulatory responsibility transferred to the Barbers Examiners Board, which was renamed the Board of Barber and Cosmetologist Examiners.<sup>16</sup> In 2009, the Minnesota Legislature created the current Board of Cosmetologist Examiners.<sup>17</sup>

3. In 2015, the Legislature directed the Board to "adopt rules governing the advanced practice esthetician license, including the educational and training requirements, scope of practice, and the conditions and process of issuing and renewing the license."<sup>18</sup>

4. Pursuant to that legislative directive, this rulemaking concerns the Board's proposal to adopt new rules and amend its current rules to provide for the advanced practice esthetic license.

### II. Rulemaking Authority

5. The Board cites 2015 Minn. Laws ch 77, art. 2, § 81(b) as its specific source of statutory authority for these proposed rules.

6. 2015 Minn. Laws ch. 77, art. 2, § 81(b) provides:

The Board of Cosmetologist Examiners shall adopt rules governing the advanced practice esthetician license, including educational and training requirements, scope of practice, and the conditions and process of issuing and renewing the license.

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<sup>11</sup> Minn. Stat. §§ 155A.20-.36 (2016).

<sup>12</sup> Minn. Stat. § 155A.21.

<sup>13</sup> Ex. D (SONAR) at 5.

<sup>14</sup> *Id.*

<sup>15</sup> *Id.*

<sup>16</sup> *Id.*

<sup>17</sup> *Id.*; See 2009 Minn. Laws, ch. 78, art. 6, §§ 14, 26.

<sup>18</sup> See 2015 Minn. Laws, ch. 77, art. 2, § 81(b).

7. The effective date of 2015 Minn. Laws ch. 77, art. 2, § 81(b) is January 1, 2016, and it expires January 1, 2019.<sup>19</sup>

8. The Board also relies upon its general rulemaking authority under Minn. Stat. § 155A.26, which provides:

The Board may develop and adopt rules according to chapter 14 that the Board considers necessary to carry out sections 155A.21 to 155A.36.

9. With respect to regulating salons, the Board also relies on Minn. Stat. § 155A.29, subd. 2. This statute provides that “the conditions and process by which a salon is licensed shall be established by the Board by rule.” Additionally, Minn. Stat. § 155A.29, subd. 3, provides that “minimum infection control standards for the operation of a salon shall be established by rule.”

10. The Administrative Law Judge concludes that the Board has the statutory authority to adopt the proposed rules.

### **III. Procedural Requirements of Chapter 14 (2016)**

#### **A. Publications**

11. On February 22, 2016, the Board published a Request for Comments in the State Register, seeking comments on “its plans to amend Minnesota Rules chapter 2105 to provide for regulation on Advanced Practice Esthetics.”<sup>20</sup> The Board noted it was considering rules that address the licensure, operation, and practice requirements for Advanced Practice Estheticians, Advanced Practice Esthetician Salon Managers, and Advanced Practice Esthetic Salons.<sup>21</sup>

12. On May 23, 2017, the Board requested review and approval of its Additional Notice Plan and proposed Notice of Intent to Adopt Rules Without a Public Hearing Unless 25 or More Persons Request a Hearing, and Notice of Hearing if 25 or More Requests for Hearing are Received (Dual Notice). The Dual Notice stated that if 25 or more persons submitted written requests for a hearing, the Board would hold a public hearing at the Board’s offices on Friday, October 27, 2017.<sup>22</sup>

13. On May 30, 2017, Administrative Law Judge Ann O’Reilly issued an Order approving the Additional Notice Plan and Dual Notice. This Order recommended certain typographical changes for clarity.<sup>23</sup>

14. On June 13, 2017, the Board sent an email noticing its intent to adopt the proposed rules, with links to its Dual Notice, the proposed rules, and its Statement of

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<sup>19</sup> *Id.*

<sup>20</sup> Ex. A; 40 State Register 1033 (Feb. 22, 2016).

<sup>21</sup> *Id.*

<sup>22</sup> Ex. F1.

<sup>23</sup> See Order on Review of Additional Notice Plan and Dual Notice of Intent to Adopt Rules (May 30, 2017).

Need and Reasonableness (SONAR), to all persons and associations on its rulemaking mailing list.<sup>24</sup>

15. Over the course of four days, beginning June 14, 2017, the Board also sent emails noticing its intent to adopt the proposed rules with links to the Dual Notice, proposed rules, and SONAR to all the persons and associations identified in its Additional Notice Plan, including 31,200 licensees.<sup>25</sup>

16. Pursuant to its Additional Notice Plan, the Board also posted links to its Dual Notice, proposed rules, and SONAR on its website from June 13, 2017, through December 15, 2017.<sup>26</sup> The Board also posted information about the proposed rules and the links to the Dual Notice, proposed rules, and SONAR on its Facebook page.<sup>27</sup>

17. On June 26, 2017, the Board published the Dual Notice in the State Register.<sup>28</sup>

18. The Board complied with the requirement under Minn. Stat. § 14.125 that it publish the Dual Notice within 18 months of the effective date of the law authorizing it to adopt the proposed rules.<sup>29</sup>

19. By August 1, 2017, more than 25 persons had requested a hearing on the Board's proposed rules.

20. On August 1, 2017, Chief Judge Tammy Pust notified the Board that its rulemaking matter had been reassigned to Administrative Law Judge Jeffery Oxley.

21. On August 3, 2017, Rebecca Gaspard notified the Office of Administrative Hearings by email that the Board needed to cancel the hearing scheduled for October 27, 2017. Ms. Gaspard requested that the hearing be rescheduled for early 2018.

22. On August 8, 2017, the Board requested that the rulemaking hearing be rescheduled for January 8, 2018.

23. On October 13, 2017, the Board gave notice of the rescheduled rulemaking hearing by sending an email with an attached "Notice of Rescheduled Hearing to Persons Who Requested a Hearing" (Notice of Rescheduled Hearing) to all persons who had either commented on the proposed rules or requested a hearing during the prior comment period.<sup>30</sup> The Board also posted information about the rescheduled hearing with a link to the Notice of Rescheduled Hearing on the Board's website.<sup>31</sup>

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<sup>24</sup> Ex. G1. A copy of the transmittal email was not attached to the Certificate of Mailing the Dual Notice.

<sup>25</sup> Ex. H1. A copy of the transmittal email was not attached to the Certificate of Giving Additional Notice.

<sup>26</sup> *Id.*

<sup>27</sup> Exs. H1 and H2.

<sup>28</sup> Ex. F1; 41 *State Register* 1475 (June 26, 2017).

<sup>29</sup> The June 26, 2017, publication of the Dual Notice is within 18 months of January 1, 2016.

<sup>30</sup> Exs. F2, G4.

<sup>31</sup> Ex. G4.

24. The Board did not submit the Notice of Rescheduled Hearing to Administrative Law Judge Oxley for prior approval. The Notice of Rescheduled Hearing incorrectly stated that the rulemaking hearing would be held on January 8, 2017, before Administrative Law Judge Barbara Case.<sup>32</sup>

25. On December 20, 2017, the Board notified the Office of Administrative Hearings that it had emailed a Notice of Rescheduled Hearing on October 13, 2017, and a “Rulemaking Notice” on December 19, 2017, that contained incorrect information, including the wrong name of the assigned Administrative Law Judge.<sup>33</sup>

26. On December 21, 2017, after consulting with the Office of Administrative Hearings, the Board revised its “Rulemaking Notice” to reflect the correct name of the assigned Administrative Law Judge.

27. On December 22, 2017, the Board sent by email the revised “Rulemaking Notice” to everyone who submitted comments on the proposed rules, all licensed cosmetologists and estheticians, and everyone on the Board’s rulemaking mailing list.<sup>34</sup> The email included links to the proposed rules and the Board’s website.<sup>35</sup>

28. In the “Rulemaking Notice,” the Board identified modifications to its proposed rules that were approved by the Board on December 4, 2017.

29. The Board did not send the revised “Rulemaking Notice” to all persons and associations identified on its Additional Notice Plan.

30. The rulemaking hearing was held on January 8, 2018, at the offices of the Board of Cosmetology.

31. At the hearing, the Board filed copies of the following documents as required by Minn. R. 1400.2220:

- a. The Board’s Request for Comments as published in the *State Register* on February 22, 2016;<sup>36</sup>
- b. [N/A – petition for rulemaking]
- c. Proposed rules dated May 15, 2017, including the Revisor’s approval;<sup>37</sup> and revised proposed rules dated December 15, 2017, including the Revisor’s approval;<sup>38</sup>

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<sup>32</sup> Ex. F2.

<sup>33</sup> See Exs. F2, F3.

<sup>34</sup> Ex. F3.

<sup>35</sup> *Id.*

<sup>36</sup> Ex. A; 40 State Register 1033 (Feb. 22, 2016).

<sup>37</sup> Ex. C1.

<sup>38</sup> Ex. C2.

- d. The Board's SONAR;<sup>39</sup>
- e. A copy of the transmittal letter showing the Board sent a copy of the SONAR to the Legislative Reference Library on June 13, 2017;<sup>40</sup>
- f. The Dual Notice as mailed and as published in the State Register on June 26, 2017;<sup>41</sup> the Notice of Rescheduled Hearing as mailed on October 13, 2017, to persons who requested a hearing;<sup>42</sup> and the email correcting the Board's "Rulemaking Notice," mailed December 22, 2017;<sup>43</sup>
- g. Certificate of Mailing the Dual Notice to the Board's rulemaking mailing list on June 13, 2017;<sup>44</sup> Certificate of Accuracy of the Mailing List dated June 14, 2017,<sup>45</sup> with a copy of the Board's rulemaking email list as of June 13, 2017;<sup>46</sup> and Certificate of Giving Notice of Rescheduled Hearing (to all persons who commented or requested a hearing) dated October 13, 2017.<sup>47</sup>
- h. Certificate of Providing Additional Notice dated August 2, 2017;<sup>48</sup> and a copy of a posting on Facebook in compliance with the Additional Notice Plan dated June 14, 2017;<sup>49</sup>
- i. Written comments received during the comment period;<sup>50</sup>
- j. [Not applicable - Chief Judge's authorization to omit from the notice of hearing published in the State Register the text of the proposed rules];
- k. Memorandum from the Minnesota Department of Management and Budget dated June 15, 2017;<sup>51</sup> and copy of the June 16, 2017, transmittal letter to Minnesota Legislators enclosing the Dual Notice, SONAR and proposed rules.<sup>52</sup>

**B. Additional Notice Requirements**

32. Minn. Stat. §§ 14.131 and 14.23 require that an agency include in its SONAR a description of its efforts to provide additional notification to persons or classes

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<sup>39</sup> Ex. D.

<sup>40</sup> Ex. E.

<sup>41</sup> Ex. F1.

<sup>42</sup> Ex. F2.

<sup>43</sup> Ex. F3.

<sup>44</sup> Ex. G1.

<sup>45</sup> Ex. G2.

<sup>46</sup> Ex. G3.

<sup>47</sup> Ex. G4.

<sup>48</sup> Ex. H1.

<sup>49</sup> Ex. H2.

<sup>50</sup> Ex. I.

<sup>51</sup> Ex. K1.

<sup>52</sup> Ex. K2.

of persons who may be affected by the proposed rule or, alternatively, the agency must detail why these notification efforts were not made.

33. The Board published a Request for Comments in the State Register on February 22, 2016, and posted the Request for Comments on its website and Facebook page.<sup>53</sup> The Board also emailed the Request for Comments to all licensed cosmetologists and estheticians with an email address on file with the Board; the Salon and Spa Professional Association; the Beauty Certified Education Association; the Minnesota Medical Association; and the Minnesota Board of Medical Practice.<sup>54</sup>

34. In the fall of 2016, the Board appointed an Advisory Committee on Advanced Practice Esthetics (ACAPE). The ACAPE consisted of 13 members, including licensed cosmetologists and estheticians, salon owners, esthetic instructors, and representatives of professional associations the Minnesota Medical Association and the Dermatology Association of Minnesota.<sup>55</sup>

35. The ACAPE met 12 times beginning in October 2016, to discuss the scope of practice for the Advanced Practice esthetic license and possible grandfathering provisions.<sup>56</sup> The ACAPE members also provided input on issues related to safety and training curriculum.<sup>57</sup>

36. The Board states in its SONAR that the ACAPE's final recommendations and conclusions are included in Appendix A of the SONAR.<sup>58</sup> The SONAR submitted into the record did not include an Appendix A.<sup>59</sup>

37. During the May 17, 2017, meeting of the Board, the Board passed a resolution approving the proposed rules and authorized the publication of a Dual Notice.<sup>60</sup>

38. On May 30, 2017, Administrative Law Judge Ann C. O'Reilly approved the Board's Additional Notice Plan.

39. On June 13, 2017, the Board provided notice of its intent to adopt the proposed rules in the following manner according to its Additional Notice Plan:

- a. emailed the Dual Notice along with links to the proposed rules and SONAR to every licensed cosmetologist and esthetician, every cosmetology school, school manager, and instructor who has an email address listed with the Board;<sup>61</sup>

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<sup>53</sup> Ex. A.

<sup>54</sup> Ex. D (SONAR) at 6.

<sup>55</sup> *Id.*

<sup>56</sup> *Id.*

<sup>57</sup> *Id.*

<sup>58</sup> *Id.*

<sup>59</sup> Ex. D.

<sup>60</sup> *Id.* at 6.

<sup>61</sup> Ex. H1.

b. posted the Dual Notice on its website and Facebook page with links to the proposed rules and SONAR;<sup>62</sup>

c. emailed the Dual Notice with links to the proposed rules and SONAR to the Salon and Spa Professional Association; the Beauty Certified Education Association; the Minnesota Board of Medical Practice; the Minnesota Medical Association; and the Minnesota Dermatological Society;<sup>63</sup> and

d. emailed the Dual Notice with links to the proposed rules and SONAR to everyone registered on the Board's rulemaking mailing list.<sup>64</sup>

### **C. Notice Practice**

40. Minn. Stat. § 14.14, subd. 1a requires that an agency give notice of rule proceedings by providing notice of its intent to adopt rules to all persons on its rulemaking list and publishing the notice in the State Register at least 30 days before the date of the hearing. The notice must include the date, place, and time of the public hearing.<sup>65</sup>

41. Over the course of five days, beginning June 13, 2017, the Board provided a copy of the Dual Notice to its official rulemaking list (maintained under Minn. Stat. § 14.14) and to stakeholders identified in its Additional Notice Plan, including 31,200 licensees.<sup>66</sup>

42. The Dual Notice indicated that, if 25 or more persons requested a hearing, a hearing would be held on October 27, 2017.

43. The Board fulfilled its obligations under Minn. Stat. § 14.14, subd. 1a to provide notice of the October 27, 2017, rule hearing.

44. On August 8, 2017, the Board cancelled the rulemaking hearing scheduled for October 27, 2017, and rescheduled the hearing to take place on January 8, 2018.

45. On October 13, 2017, the Board sent via email a Notice of Rescheduled Hearing to those persons who had commented or requested a hearing.<sup>67</sup> The Board also posted the Notice of Rescheduled Hearing on its website. Because of a typographical error, the Notice of Rescheduled Hearing incorrectly stated that the hearing would take place on January 8, 2017.<sup>68</sup>

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<sup>62</sup> *Id.*; Ex. H2.

<sup>63</sup> Ex. H1.

<sup>64</sup> Ex. G1.

<sup>65</sup> Minn. Stat. § 14.14, subd. 1a.

<sup>66</sup> Exs. G1, G2, H1.

<sup>67</sup> Ex. F2.

<sup>68</sup> *Id.*

46. The Board did not publish the Notice of Rescheduled Hearing in the State Register at least 30 days before the date set for hearing.<sup>69</sup>

47. The Board did not send the Notice of Rescheduled Hearing to all persons on its rulemaking list.<sup>70</sup>

48. The Board did not send the Notice of Rescheduled Hearing to all persons and associations identified in its approved Additional Notice Plan, including the 31,200 licensees.<sup>71</sup>

49. The Board failed to fulfill its obligations under Minn. Stat. § 14.14, subd. 1a to provide notice of the January 8, 2018, rule hearing.

50. The Board's failure to comply with procedural notice requirements of chapter 14 with respect to the rescheduled rule hearing was a substantive defect that may have deprived persons or entities of the opportunity to participate meaningfully in the rulemaking process.<sup>72</sup> It, therefore, was not a harmless error within the meaning of Minn. Stat. § 14.15, subd. 5.<sup>73</sup>

51. Given the above findings, the Administrative Law Judge will not conduct a review of the Board's compliance with other procedural requirements, including the regulatory analysis under Minn. Stat. § 14.131, or analyze the Board's proposed rules and subsequent modifications for need and reasonableness.

Based upon the Findings of Fact and the contents of the rulemaking record, the Administrative Law Judge makes the following:

### **CONCLUSIONS OF LAW**

1. The Board failed to give proper notice of the January 8, 2018, hearing in this matter, pursuant to Minn. Stat. § 14.14, subd. 1(a).

2. The Board's failure to give proper notice of the rule hearing was a substantive defect that may have deprived persons or entities of an opportunity to participate meaningfully in the rulemaking process.<sup>74</sup>

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<sup>69</sup> Ex. G4.

<sup>70</sup> *Id.*; See Minn. Stat. § 14.14, subd. 1a.

<sup>71</sup> Ex. G4.

<sup>72</sup> See Minn. Stat. § 14.15, subd. 5.

<sup>73</sup> See Minn. Stat. § 14.15, subd. 5 ("The administrative law judge shall disregard any error or defect in the proceeding due to the agency's failure to satisfy any procedural requirement imposed by law or rule if the administrative law judge finds: (1) that the failure did not deprive any person or entity of an opportunity to participate meaningfully in the rulemaking process; or (2) that the agency has taken corrective action to cure the error or defect so that the failure did not deprive any person or entity of an opportunity to participate meaningfully in the rulemaking process").

<sup>74</sup> See Minn. R. 1400.2100, subp. A and Minn. Stat. § 14.15, subd. 5.

3. The Board's failure to comply with the procedural requirements of Minn. Stat. § 14.14, subd. 1(a) was not a harmless error and invalidates the proposed rules.<sup>75</sup>

4. The proposed rules are **DISAPPROVED**.

5. The Board is required to restart the rulemaking proceeding from the point of publication of a Notice of Rescheduled Hearing.<sup>76</sup> The published notice must include the most recent version of the Board's proposed rules approved as to form by the Revisor of Statutes.<sup>77</sup>

6. Due to the disapproval of the proposed rules, this Report has been submitted to the Chief Judge for her approval pursuant to Minn. Stat. § 14.15, subd. 3.

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

### **RECOMMENDATION**

It is recommended that the proposed rules be **DISAPPROVED**.

Dated: February 21, 2018

  
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JEFFERY OXLEY  
Administrative Law Judge

### **NOTICE**

The Board must make this Report available for review by anyone who wishes to review it for at least five working days before the Board takes any further action to adopt final rules or to modify or withdraw the proposed rules. If the Board makes changes in the rules other than those recommended in this report, it must submit the rules, along with

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<sup>75</sup> See Minn. R. 1400.2100, subp. A (A rule must be disapproved by a judge if the rule was not adopted in compliance with procedural requirements of Minn. Stat. ch. 14, or other law or rule unless the error was "harmless" within the meaning of Minn. Stat. § 14.15, subd. 5). See also, *White Bear Lake Care Ctr., Inc. v. Minn. Dep't of Pub. Welfare*, 319 N.W. 2d 7, 9 (Minn. 1982) ("Rules must be adopted in accordance with specific notice and comment procedures established by statute, and the failure to comply with necessary procedures results in invalidity of the rule."); *Builders Ass'n of Twin Cities v. Minnesota Dept. of Labor and Industry*, 872 N.W.2d 263, 272-74 (Minn. Ct. App. 2015).

<sup>76</sup> Minn. Stat. § 14.14, subd. 1a. See *ITMO Rules of the Minnesota Housing Finance Agency Relating to Capital Contribution of Investors*, No. 76-4600-14140, ORDER ON REVIEW OF RULES (Minn. Office Admin. Hearings Feb. 23, 2001) (requiring agency to restart rulemaking by republishing notice in State Register to cure procedural defect).

<sup>77</sup> Minn. Stat. § 14.14, subd. 1a.

the complete hearing record, to the Chief Administrative Law Judge for a review of those changes before it may adopt the rules in final form.

Because the Administrative Law Judge has determined that the proposed rules are defective in certain respects, state law requires that this Report be submitted to the Chief Administrative Law Judge for her approval. If the Chief Administrative Law Judge approves the adverse findings contained in this Report, she will advise the Board of actions that will correct the defects, and the Board may not adopt the rules until the Chief Administrative Law Judge determines that the defects have been corrected. However, if the Chief Administrative Law Judge identifies defects that relate to the issues of need or reasonableness, the Board may either adopt the actions suggested by the Chief Administrative Law Judge to cure the defects, or, in the alternative, submit the proposed rules to the Legislative Coordinating Commission for the Commission's advice and comment. The Board may not adopt the rules until it has received and considered the advice of the Commission. However, the Board is not required to wait for the Commission's advice for more than 60 days after the Commission has received the Board's submission.

If the Board elects to adopt the actions suggested by the Chief Administrative Law Judge and make no other changes, and the Chief Administrative Law Judge determines that the defects have been corrected, it may proceed to adopt the rules. If the Board makes changes in the rules other than those suggested by the Administrative Law Judge and the Chief Administrative Law Judge, it must submit copies of the rules showing its changes, the rules as initially proposed, and the proposed order adopting the rules to the Chief Administrative Law Judge for a review of those changes before it may adopt the rules in final form.

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