OAH 80-9043-35023
Revisor R-4441

STATE OF MINNESOTA
OFFICE OF ADMINISTRATIVE HEARINGS

In the Matter of the Rules of the Board of Optometry Relating to the Practice of Optometry

**REPORT OF THE CHIEF ADMINISTRATIVE LAW JUDGE**

This matter came before the Chief Administrative Law Judge pursuant to the provisions of Minn. Stat. § 14.26, subd. 3 (2016), and Minn. R. 1400.2300, subp. 6 (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 all disapprovals contained in the Report of the Administrative Law Judge dated April 30, 2018.

The Chief Administrative Law Judge **CONCURS** that the following proposed rules are **DISAPPROVED:**

Minn. R. 6500.0100, subp. 2;

Minn. R. 6500.2000, subp.4a; and

Minn. R. 6500.3000, subp. 2F.

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

If the Department elects not to correct the defects associated with the proposed rules, the Department must submit the proposed rules 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. § 14.26, subd. 3(c) (2016).

Dated: May 1, 2018

TAMMY L. PUST
Chief Administrative Law Judge

[111869/1]

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STATE OF MINNESOTA
OFFICE OF ADMINISTRATIVE HEARINGS

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| In the Matter of the Rules of the Board of Optometry Relating to the Practice of Optometry | **ORDER ON REVIEW OF RULES UNDER MINN. STAT. § 14.26** |

The Minnesota Board of Optometry (Board) is seeking review and approval of the above-entitled rules, which were adopted by the agency pursuant to Minn. Stat. § 14.26 (2016). On April 16, 2018, the Office of Administrative Hearings (OAH) received the documents that must be filed by the Board under Minn. Stat. § 14.26 and Minn. R. 1400.2310 (2017). Based upon a review of the written submissions and filings, Minnesota Statutes, Minnesota Rules, and for the reasons in the Memorandum that follows,

**IT IS HEREBY DETERMINED:**

1. The Board has the statutory authority to adopt the rules pursuant to Minn. Stat. §§ 148.53 and 214.06 (2016).

2. The Board does not have statutory authority to adopt rules pursuant to Minn. Stat. § 145.711 (2016).

3. The rules were adopted in compliance with the procedural requirements of Minnesota Statutes, chapter 14 (2016), and Minnesota Rules, chapter 1400 (2017).

4. Except as to the rules that are disapproved, the record demonstrates the rules are needed and reasonable.

**IT IS HEREBY ORDERED THAT:**

1. The revisions to the following rule parts are **DISAPPROVED:**

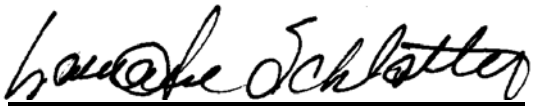
Minn. R. 6500.0100, subp. 2

Minn. R. 6500.2000, subp.4a

Minn. R. 6500.3000, subp. 2F

2. Except as to the proposed rule parts that are disapproved, and listed immediately above, the rules are **APPROVED.**

Dated: April 30, 2018



LAURASUE SCHLATTER
Administrative Law Judge

## MEMORANDUM

Pursuant to Minn. Stat. § 14.26, the Board submitted these rules to the Administrative Law Judge for review as to legality. No requests for a public hearing were made, so the rules were adopted without a public hearing pursuant to Minn. R. 1400.2300. Because several of the rules are disapproved, the written reasons for the disapproval are submitted to the Chief Administrative Law Judge for review pursuant to Minn. R. 1400.2300, subp. 6.

### I. Disapproved Rules

#### A. Applicable Standards

Minnesota Rules part 1400.2100 identifies several types of circumstances under which a rule must be disapproved by the Administrative Law Judge. These circumstances include:

(1) The rule was not adopted in compliance with the procedural requirements of Minn. Stat. ch. 14 or other law or rule, unless the judge decides that the error was harmless and should be disregarded;

(2) The rule is not rationally related to the agency's objective or the record does not demonstrate the need for or reasonableness of the rule;

(3) The rule is substantially different from the proposed rule and the agency did not follow the procedures of Minn. R. 1400.2110;

(4) The rule exceeds, conflicts with, does not comply with, or grants the agency discretion beyond what is allowed by its enabling statute or other applicable law;

(5) The rule is unconstitutional or illegal;

(6) The rule improperly delegates the agency's powers to another agency, person, or group;

(7) The rule is not a "rule" as defined in Minn. Stat. § 14.02, subd. 4, or by its own terms cannot have the force and effect of law; or

(8) The rule is subject to Minn. Stat. § 14.25, subd. 2, and the notice that hearing requests have been withdrawn and written responses to the notice show that the withdrawal is not consistent with Minn. Stat. § 14.001, clauses (2), (4), and (5).[1]

Three of the rule parts presented for review contain substantive defects, as addressed below.

**B. Minn. R. 6500.0100, subp. 2**

Minn. R. 6500.0100, subp. 2 defines "Act." Relying upon Minn. Stat. § 145.711 (2016) for its statutory authority to propose the amendment to this rule part, the Board proposed to amend this subpart as follows:

"Act" means the Minnesota Optometric Practice Act, Minnesota Statutes, sections 148.42 to 148.62, and the Minnesota Contact Lens Prescription Act, Minnesota Statutes, sections 145.711 to 145.714.

This proposed amendment is disapproved because it violates Minn. R. 1400.2100 (4). The statute upon which the Board relies for its statutory authority, Minn. Stat. § 145.711, does not provide authority for rulemaking. Minnesota statutes, section 145.711 states, in its entirety, "Failure to comply with sections 145.711 to 145.713 shall be grounds for disciplinary action by the Board of Optometry or the Board of Medical Practice."

The Board's primary rulemaking authority is based upon Minn. Stat. § 148.53 (2016), which provides broad authority for the Board to "make any rules . . . which it may deem necessary . . . for the effective enforcement of sections 148.52 to 148.62 or for the full and efficient performance of its duties thereunder." This authority does not include the Board's responsibilities under Minn. Stat. §§ 145.711 to 145.714. The other statutory cited by the Board in this rulemaking, Minn. Stat. § 214.06 (2016), deals with the Board's authority to charge fees and does not mention §§ 145.711 to 145.714 either.

The problem with presuming rulemaking authority on the part of the Board is highlighted because Minn. Stat. § 145.714 grants disciplinary authority to the Board of Medical Practice as well as the Board of Optometry. To the extent that the Board of Optometry purports to apply its rules to Minn. Stat. §§ 145.711 to 145.714 for disciplinary purposes, it appears to be asserting disciplinary jurisdiction over medical doctors who engage in conduct governed by those sections. It is not clear that the Board of Medical Practice has agreed to such an arrangement.

[1] Minn. R. 1400.2100.

To cure the defect, the Board must eliminate the proposed language from Minn. R. 6500.0100, subp.2 in order for the rule to be approved. The Administrative Law Judge notes, however, that in the technical changes section, below, the Board is encouraged to repeal the subdivision in its entirety.

This change is needed and reasonable, and would not be a substantial change from the rules as proposed.

**C. Minn. R. 6500.2000, subp. 4a**

The Board proposes to combine rule 6500.2000 and 6500.2800 into one new rule that addresses the deadline for application renewal, information required for renewal, and the procedure and penalty the Board will employ when licensees fail to timely renew their licenses. The process set forth in subpart 4a requires the Board to change the status of a licensee to "nonrenewed" or "lapsed" if the renewal application is not timely submitted (subparagraph A), while simultaneously notifying the licensee of the lapse and providing a 30-day notice for the licensee to comply with the renewal requirements (subparagraph B). Subparagraph C introduces the penalty, which is termination of the license if the renewal materials are not received within the 30 days specified in the deadline. Subparagraph D allows for reinstatement pursuant to Minn. R. 6500.2900 (as proposed).

The Administrative Law Judge disapproves 6500.2000, subp. 4a because the rule, as proposed, is unconstitutional and thus not permitted under Minn. R. 1400.2100(5). Minnesota courts, as well as the United States Supreme Court, have held that a person has a constitutionally protected property interest in retaining a license needed to earn a livelihood.[2] Therefore, any proceeding that interferes with the ability to maintain that license must be consistent with constitutional principles of procedural due process.[3] Here, the Board has provided no process at all to licensees before terminating their licenses and requiring them to proceed with a burdensome and costly reinstatement process, during which time they are prohibited from practicing their profession. The Administrative Law Judge concludes that, in order for Minn. R. 6500.2000, subp. 4a to pass constitutional muster, it must include a process for licensees to appeal the termination of their licenses for failure to renew.

The process that is due is based on consideration of specific factors first described by the United States Supreme Court in *Mathews v. Eldridge*:

> First, the private interest that will be affected by the official action; second the risk of an erroneous deprivation of such interest, through the procedures used, and the probable value, if any, of additional or substitute procedural safeguards; and finally, the Government's interest, including

[2] *Fosselman v. Comm'r. of Human Services,* 612 N.W. 2d 456,461 (Minn. Ct. App. 2000). *See Green v. McElroy*, 360 U.S. 474, 492, 79 S. Ct. 1400, 1411 (1959).
[3] *Humenansky v. Minnesota Bd. Of Med. Exam'rs,* 525 N.W. 2d 559, 566 (Minn. Ct. App.1994), *rev. den.* (Minn. Feb. 14. 1995).

the function involved and the fiscal and administrative burdens that the additional or substitute procedural requirement would entail. [4]

The Board is proposing to terminate licenses, thereby blocking the ability of licensed optometrists to earn a living practicing their profession. However, this is not a disciplinary termination. It is a termination that is amenable to reinstatement by following the reinstatement process, with no additional disciplinary actions taken against the licensees. Thus, the private interest that is affected, while it does rise to the level of a protected property interest, is not as great as the situation in cases where licensees are subject to actions that would prevent them from practicing their licensed professions for years, or even permanently.

Furthermore, the termination at issue in the proposed rule will be based on a licensee's failure to file certain required paperwork or to make a required payment. Whether the Board erred in determining that a particular licensee is properly subject to termination under the rule should be capable of resolution by a paper review.

Finally, it is in the interest of both the Board and the licensee to have any due process proceeding associated with this termination occur as quickly and efficiently as possible. If an error is made in subjecting the licensee to termination, it should be fixed. It is not in the public interest, nor in the Board's interest, to have licenses tied up over a period of even a couple of months while a challenge to a termination for failure to renew a license proceeds through an evidentiary hearing.

To remedy the defect caused by the lack of due process, the Board must add to Minn. R. 6500.2000, subp. 4a an opportunity for licensees to request a paper review of the Board's decision to terminate a license for failure to submit a complete renewal application. In addition, the licensee's license must remain in "nonrenewed" or "lapsed" status while the paper review is pending. The Administrative Law Judge recommends adding the following underlined language to the proposed rule:

> **Subp. 4a. Failure to submit renewal application, required fees, or evidence of continuing education compliance.** If a licensee fails to submit the renewal application, the required fee, or evidence of continuing education compliance, the board shall follow the following procedures.
>
> A. After January 1 of the renewal year, the board shall change the status of the active licensee to designate the nonrenewed or lapsed license. A licensee may not provide services as a licensed optometrist with a lapsed or nonrenewed license.
>
> B. After January 1 of the renewal year, the board shall send to the licensee, at the last address on file, notice that the licensee has failed to satisfy the license renewal requirements and shall specify which requirement remains unsatisfied. The board shall set out the steps the licensee must take to renew a license and any late fees required, notify

[4] 424 U.S. 319, 335, 96 S. Ct. 893,903 (1976).

the licensee of the option of voluntarily terminating the license, and notify the licensee that failure to respond within 30 days after the notice is sent by the board will result in termination of the license.

C. If the application for renewal, including the required information about continuing education compliance, the application fee, and any late fees, are not received by the board within the 30-day deadline specified in the notice, the license shall be terminated and the licensee will no longer be authorized to practice optometry in Minnesota. The termination will be administrative and will not constitute disciplinary action on the license.

D. The notice sent after January 1 shall also include notice of the licensee's right to request review of the board's determination that the licensee has failed to satisfy the renewal requirements. The licensee's request for review must state all of the reasons the licensee believes the board's determination is incorrect and include copies of any and all relevant documents that were previously timely submitted, in addition to any documents demonstrating proof of their submission. The licensee may submit the request for review within the 30 days after the board sends the notice required by Minn. R. 6500.2000, subp.4a B., or within 15 days after a licensee receives a notice of termination pursuant to Minn. R. 6500.2000, subp. 4a D. The board shall issue a decision on its review of the licensee's request within [Board fill in number of days] days after it receives the request. The licensee's license shall remain in "nonrenewed" or "lapsed" status pending the board's review of the licensee's request for review under this paragraph. The board's decision on a request for review under this paragraph is a final decision, not subject to review.

E. A license that has been administratively terminated under this part may be reinstated pursuant to part 6500.2900.

This change is needed and reasonable, and would not be a substantial change from the rules as proposed.

**D. Minn. R. 6500.3000, subp. 2 F**

The Board's proposed Minn. R. 6500.3000, subp. 2 sets out the requirements for continuing education reporting. Subparagraphs A through E list the specific items that licensees must maintain in either paper or electronic form to demonstrate proof of required continuing education compliance, such as the name of the sponsoring organization, the licensee's name, and the course title and instructor's name, among other items. Item F in the list requires licensees to maintain "any other evidence the board requires."

The Administrative Law Judge disapproves proposed Minn. R. 6500.3000, subp. 2 F pursuant to Minn. R. 1400.2100 E because it is unconstitutionally vague. "A rule, like a statute, is void for vagueness, if it fails to give a person of ordinary

intelligence a reasonable opportunity to know what is prohibited or fails to provide sufficient standards for enforcement."[5] The requirement that licensees keep a record of "any other evidence the board requires" fails to provide a person of ordinary intelligence sufficient information to know what is being required. This requirement is made more onerous by the language proposed at Minn. R. 6500.3000, subp. 3, which permits the Board to "conduct random audits for the purpose of verifying continuing education each reporting year." Under the proposed language of subpart 3, "Failure to submit the required documentation shall be grounds for disciplinary action."

The cure for the defect identified at subpart 2 F is to strike Item F in its entirety. The Board may replace Item F with an additional specific item or items. It may not require licensees to maintain records which it does not identify.

This change is needed and reasonable, and would not be a substantial change from the rules as proposed.

## II. Technical Suggestions

The following are suggestions for changes to the rules which are not required, but which the Administrative Law Judge suggests for improved clarity and readability. The changes below are recommendations only and may be adopted or not, as the Board sees fit. All of the changes recommended below are needed and reasonable, and would not be substantial changes from the rules as proposed.

### A. Minn. R. 6500.0100, subp. 2

As discussed above, this subpart defines the word "act" for purposes of the rule. Because the word "act" does not appear anywhere else in the rule as proposed (it is currently only at Minn. R. 6500.1900, which is to be repealed), the Administrative Law Judge recommends that the Board repeal the now-obsolete definition of "Act" at Minn. R. 6500.0100. It is unnecessary to define a term which is not used in the rule.

### B. Minn. R. 6500.2000, subp. 2

This subpart specifies information required on a renewal application. The last sentence in the subpart requires:

> The renewal application shall include the applicant's signature, any application fees required by statute, the address or addresses where the applicant practices optometry, any changes in the applicant's optometry practice locations in the previous 12-month period, the applicant's license number, and any other information requested by the board.

[5] *In re N.P.*, 361 N.W. 2d 386, 394 (Minn. 1985), *citing Grayned v. City of Rockford*, 408 U.S. 104, 108-09, 92 S. Ct. 2294, 2298-99 (1972).

The Administrative Law Judge recommends the following change to the final phrase in this sentence, for the sake of clarity and to ensure that the information requested is reasonably related to the application renewal process:

> . . . and any other information reasonably related to the application process as requested by the board.

**C. Minn. R. 6500.2900, subp.1.B**

This rule part outlines the process for applying for reinstatement of a license. Subpart 1 B specifically names the items that must be submitted with the application. The rule, as proposed, instructs:

> B. submit with the application the fee of three prior renewal periods and late fees, if the person has not held an active license in any state during the three calendar years preceding the date of application.

The reinstatement process will apply in many instances where a licensee has only missed one renewal payment. It is unclear from this rule language whether the Board intends that such licensees will have to pay a penalty of three years of renewal periods, even if they have only missed one payment, or if they have missed no payments, but failed to complete their continuing education requirements. The Administrative Law Judge recommends that this language be clarified, as follows:

> B. submit with the application the fee of up to three prior renewal periods and the applicable late fees, if the person has not held an active license in any state during the three calendar years preceding the date of application.

**D. Minn. R. 6500.3000, subp. 5**

This subpart requires the board to notify a continuing education program sponsor if the board changes its approved number of continuing education hours. The proposed rule states:

> The board shall notify the program sponsor via mail of the change in approval.

The Administrative Law Judge recommends that the Board specify what kind of mail is being required. The Board could require United States mail, or electronic mail, or it could allow other delivery services, as it wishes. Specifying what form of mailing is required will minimize misunderstandings in the future.

**L.S.**