

January 30, 2023

VIA EMAIL ONLY

Representative Ginny Klevorn
Chair
State and Local Government Finance and
Policy
581 State Office Building
St. Paul, MN 55155
rep.ginny.klevorn@house.mn.gov

VIA EMAIL ONLY

Senator Erin P. Murphy
Chair
State and Local Government and Veterans
Committee
3211 Minnesota Senate Bldg.
St. Paul, MN 55155
sen.erin.murphy@senate.mn

**Re: *In the Matter of the Amending Rules Governing Certain Teacher
Licensure Standards, including the Standards of Effective Practice
OAH 5-9021-36362; Revisor R-4615***

Dear Representative Klevorn and Senator Murphy:

Pursuant to Minn. Stat. § 14.15, the Office of Administrative Hearings is required to send to the legislative policy committees with primary jurisdiction over state governmental operations a copy of the statement of reasons for disapproval of agency rules. Enclosed please find the Chief Administrative Law Judge's Order on Review of Resubmitted Rules for the above-referenced rules.

Under Minnesota law, the Minnesota Professional Educator Licensing and Standards Board may resubmit the rule to the Chief Administrative Law Judge for review after changing it, or may request that the Chief Administrative Law Judge reconsider the disapproval. If the Board does not wish to follow the suggested actions of the Chief Administrative Law Judge to correct the defects found, the Board may follow the process outlined in Minn. Stat. § 14.15, subd. 4.

Sincerely,



DENISE S. COLLINS
Legal Assistant

Enclosure

cc: Alex Liuzzi, Executive Director
Michelle Hersh Vaught, Rule Requestor

STATE OF MINNESOTA
OFFICE OF ADMINISTRATIVE HEARINGS

In the Matter of the Proposed Amendments to Rules Governing Teacher Licensure and Permissions; the Standards of Effective Practice; and Teachers of Health, Physical Education, Developmental Adapted Physical Education, Parent and Family Education, Adult Basic Education, and American Indian Language, History, and Culture; Minn. R. 8710; Proposed Repeal of Minn. R. 8710.0400 and .0550

**ORDER ON REVIEW OF
RESUBMITTED RULES UNDER
MINN. STAT. § 14.16, SUBDS. 1, 2
AND MINN. R. 1400.2240, SUBPS. 4, 5**

This matter came on for review by the Chief Administrative Law Judge pursuant to Minn. Stat. § 14.16, subds. 1, 2 (2022) and Minn. R. 1400.2240, subps. 4, 5 (2021).

This rulemaking concerns the proposed rules of the Professional Educator Licensing and Standards Board (Board) governing teacher licensure and required pedagogical standards under Minn. R. 8710.0100 – .9010 (2021). The proposed rules came on for a public rulemaking hearing on August 24, 2022.

Administrative Law Judge Jim Mortenson disapproved portions of the rules in a Report dated November 22, 2022. The Chief Administrative Law Judge concurred with most of the determinations of the Administrative Law Judge and identified an additional defect by Order dated December 2, 2022.

On January 18, 2023, the Board requested that the Chief Administrative Law Judge review and approve modifications to the proposed rules pursuant to Minn. R. 1400.2240, subps. 4, 5.¹ The newly submitted rules include modifications incorporating changes recommended by the Chief Judge and Judge Mortenson, as well as other changes made to clarify and improve processes based on public comments submitted to the Board.²

The Chief Administrative Law Judge finds that all defects identified in her prior Order dated December 2, 2022, have been corrected.

¹ See Board's Request for Review (Jan. 18, 2023).

² *Id.*, Exhibit (Ex.) 1 (AR draft dated Dec. 20, 2022).

With respect to the additional rule revisions submitted by the Board after the hearing, the Chief Judge finds that, except for proposed Minn. R. 8710.0330, subps. 2E and 2G, the modified proposed rules should be approved. In general, these additional modifications do not render the final proposed rules substantially different from those published in the *State Register* on May 2, 2022, and proposed at the public hearing.³ Yet, for reasons explained in the attached Memorandum, the revisions to Minn. R. 8710.0330, subps. 2E and 2G include legal defects.

Therefore, based upon a review of the modifications made by the Board as presented in its January 18, 2023, submissions, and the rulemaking record,

IT IS HEREBY ORDERED THAT:

1. Proposed Minnesota Rule 8710.0330, subparts 2E and 2G are defective and **DISAPPROVED**.
2. The remaining proposed rules, as modified, are **APPROVED** as to legality.

Dated: January 30, 2023



JENNY STARR
Chief Administrative Law Judge

³ Minn. Stat. § 14.05, subd. 2(b)(2) (2022) (“A modification does not make a proposed rule substantially different if . . . the differences are a logical outgrowth of the contents of the notice of intent to adopt or notice of hearing and the comments submitted in response to the notice.”).

MEMORANDUM

I. Legal Standard

When undertaking a review of proposed rules, an administrative law judge must assess whether the proposed rules comport with applicable legal standards.⁴ Those standards include prohibitions on grants of undue discretion to government officials, and on proposed rules that are unduly vague and cannot take effect upon their own terms.⁵ “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.”⁶

II. Analysis

As modified in the Revisor’s draft of the proposed rules dated December 20, 2022, proposed Minn. R. 8710.0330, subps. 2E and 2G state as follows:

E. If the panel of educators under item D does not recommend an applicant for licensure via the pedagogy portfolio, the panel must provide specific information to the applicant on how to successfully demonstrate meeting any standard the panel determined was not met. If the applicant submits the revised pedagogy portfolio within ~~one year~~ two years from the date the portfolio is not approved, one member of the panel of educators must review the revised portfolio and recommend it for approval or disapproval within 60 days of receiving the revised submission. If the applicant resubmits a revised portfolio after ~~one year~~ two years from the date the portfolio is not approved, the portfolio ~~will be considered a new submission~~ may be reviewed in full under new pedagogical standards.

G. If the content reviewers under item F do not recommend the applicant for licensure via the content portfolio, the reviewers must provide specific information to the applicant on how to successfully demonstrate meeting any standard the reviewers determined was not met. If the applicant submits the revised content portfolio within ~~one year~~ two years from the date the portfolio is not approved, ~~one of the content reviewers a content reviewer~~ must review the revised portfolio and recommend it for approval or disapproval within 60 days of receiving the revised submission. If the applicant resubmits a revised portfolio after ~~one year~~ two years from the date the portfolio is not approved, the portfolio ~~will be considered a new submission~~ may be reviewed in full under new content standards.

Both proposed subparts 2E and 2G are unduly vague and defective. The proposed revisions do not make clear what evaluation standards will apply to resubmissions that

⁴ See Minn. R. 1400.2100 (2021).

⁵ Minn. R. 1400.2100; see also Minn. R. 1400.2300, subp. 3 (2021).

⁶ *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).

occur more than two years after “non-approval.” Use of the word “may” in the phrase “may be reviewed in full under new . . . standards” sets out an authorized possibility but is not definite enough to make a “statement of general applicability and future effect.”⁷

Based on the Board’s explanation of the proposed modifications, it inserted the word “may” to account for the possibility that newly revised standards may be in effect at the time of a later resubmission and review of a revised portfolio.⁸ While sympathetic to the Board’s uncertainty and concern, the proposed formulation is too vague to avoid finding a defect.

To cure the vagueness defect, the Chief Administrative Law Judge recommends that Board revise the subparts as follows:

E. If the panel of educators under item D does not recommend an applicant for licensure via the pedagogy portfolio, the panel must provide specific information to the applicant on how to successfully demonstrate meeting any standard the panel determined was not met. If the applicant submits the revised pedagogy portfolio within ~~one year~~ two years from the date the portfolio is not approved, one member of the panel of educators must review the revised portfolio and recommend it for approval or disapproval, applying the standards in effect on the date of the original submission. The approval or disapproval must occur within 60 days of receiving the revised submission.

If the applicant resubmits a revised portfolio after ~~one year~~ two years from the date the portfolio is not approved, the portfolio ~~will be considered a new submission~~ may must be reviewed in full applying the pedagogical standards in effect on the date of the resubmission. under new pedagogical standards.

G. If the content reviewers under item F do not recommend the applicant for licensure via the content portfolio, the reviewers must provide specific information to the applicant on how to successfully demonstrate meeting any standard the reviewers determined was not met. If the applicant submits the revised content portfolio within ~~one year~~ two years from the date the portfolio is not approved, ~~one of the content reviewers a content reviewer~~ must review the revised portfolio and recommend it for approval or disapproval, applying the standards in effect on the date of the original submission. The approval or disapproval must occur within 60 days of receiving the revised submission.

If the applicant resubmits a revised portfolio after ~~one year~~ two years from the date the portfolio is not approved, the portfolio ~~will be considered a new~~

⁷ Minn. Stat. § 14.02, subd. 4 (2022).

⁸ See Board’s Request for Review, Ex. 2.

submission may must be reviewed in full applying the content standards in effect on the date of the resubmission under new content standards.

In the event the Board elects not to correct the defects associated with proposed Minn. R. 8710.0330, subps. 2E and 2G, it 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 (2022).

III. Conclusion

Except as to proposed Minn. R. 8710.0330, subps. 2E and 2G, the rules as proposed and modified are approved.

J. S.