

STATE OF MINNESOTA
OFFICE OF ADMINISTRATIVE HEARINGS

In the Matter of the Proposed Amendment
to Rules Governing Plumber Licensing,
Minnesota Rules, Chapter 4716

**REPORT OF THE
ADMINISTRATIVE LAW JUDGE**

This matter came before Administrative Law Judge Eric L. Lipman for a rulemaking hearing on January 11, 2019. The public hearing was held at the Minnesota Room, Minnesota Department of Labor and Industry (Department), 443 Lafayette Road North, St. Paul, Minnesota.

The Minnesota Plumbing Board (Board) proposes to amend its rules regulating registration of unlicensed individuals who perform water conditioning installation and unlicensed individuals who perform plumbing, examination, and licensing of plumbers and water conditioners. The Board also proposes to amend its requirements for continuing education for licensed individuals and registered unlicensed individuals.¹ The hearing and this report are part of a larger rulemaking process under the Minnesota Administrative Procedure Act, Minn. Stat. §§ 14.001-.69 (2018).² The Minnesota Legislature has designed this process to ensure that state agencies have met all the requirements that the state has specified for adopting rules.

The hearing was conducted to permit agency representatives and the Administrative Law Judge to hear public comments regarding the impact of the proposed rules and what changes might be appropriate. Further, the hearing process provides the general public an opportunity to review, discuss, and critique the proposed rules.

The Board must establish that the proposed rules are within the agency's statutory authority and necessary and reasonable, and follow from compliance with the required procedures. Further, any modifications that the Board makes after the proposed rules are published in the *State Register* must be within the scope of the matter that was originally announced.³

The Board panel at the public hearing included Susan Todnem, counsel to the Board; James Peterson, Plumbing Inspector; Bradley Jensen, Chief Plumbing Inspector; Charles Durenberger, Assistant Director of the Department's Construction Codes and Licensing Division; and Richard Jacobs, Chair of the Board.⁴

¹ See Exhibit (Ex.) D at 48 (Statement of Need and Reasonableness [SONAR], Nov. 13, 2018).

² See Minn. Stat. §§ 14.131-.20.

³ Minn. Stat. §§ 14.05, .23, .25, .50.

⁴ Hearing Transcript (Tr.) at 2 (Jan. 11, 2019).

About 19 people attended the hearing and signed the hearing register. The proceedings continued until all interested persons, groups, or associations had an opportunity to be heard concerning the proposed rules. Seven members of the public made statements or asked questions during the hearing.⁵

After the hearing closed, the Administrative Law Judge kept the rulemaking record open for another 20 calendar days until January 31, 2019, to permit interested persons and the Board to submit written comments. After the initial comment period closed, the hearing record was open an additional five business days to permit interested parties and the Board an opportunity to reply to earlier-submitted comments.⁶ The hearing record closed on February 7, 2019.

SUMMARY OF CONCLUSIONS

The Board has established that it has the statutory authority to adopt the proposed rules and that the proposed rules are needed and reasonable.

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

FINDINGS OF FACT

I. Regulatory Background to the Proposed Rules

1. An individual who is not licensed as a plumber may perform plumbing work in Minnesota if the individual registers as an unlicensed plumber and is properly supervised. Following registration, a registered unlicensed plumber may perform plumbing work under the direct supervision of a licensed master plumber or journeyworker plumber and, in some circumstances, under the supervision of a restricted master plumber or restricted journeyworker plumber.⁷

2. In 2017, the Minnesota Legislature granted the Board rulemaking authority over registered unlicensed individuals who perform water conditioning installation.⁸

3. In the same session law, the Minnesota Legislature granted the Board the authority to adopt continuing education requirements for all registered unlicensed individuals.⁹

4. As noted on page 1, the Board's proposed amendments would add new requirements to the registration process for unlicensed water conditioners. The Board

⁵ Hearing Roster at 1-11; see *also* Tr. at 3.

⁶ See Minn. Stat. § 14.15, subd. 1.

⁷ Minn. Stat. §§ 326B.42, subd. 2, .47, subd. 3 (2018); Minn. R. 4716.0050, subp. 2 (2017).

⁸ See 2017 Minn. Laws ch. 94, art 2, §§ 10, 14.

⁹ *Id.* at § 8 (“The board shall have the power to . . . adopt rules that regulate continuing education for . . . registered unlicensed individuals The board shall adopt these rules pursuant to chapter 14 and as provided in subdivision 6, paragraphs (e) and (f)”); see *also id.* at § 14 (“The plumbing board may prescribe rules, not inconsistent with this section, for the registration of unlicensed individuals.”).

asserts that the proposed rules facilitate the Department's tracking of individuals' work experience and aids it in confirming that individuals have obtained sufficient experience to qualify for licensing examinations in particular fields.¹⁰

5. Additionally, the proposed rules that would require certain minimum hours of continuing education to maintain a valid registration to perform those plumbing tasks that do not separately require licensure.¹¹

II. Rulemaking Authority

6. The Board cites Minn. Stat. §§ 326B.435, subd. 2(a)(5), (6), .47, subd. 3, .555 (2018), as its source of statutory authority for the proposed rules. These statutes grant the Board authority to adopt rules (1) related to licensure, certification, or registration; (2) regulating continuing education for registered unlicensed individuals; (3) for registering unlicensed individuals; and (4) regulating registered unlicensed individuals who perform water conditioning installation.¹²

7. The Administrative Law Judge concludes that the Board has the statutory authority to adopt rules governing the licensing, registration, and credentialing of those who are working in Minnesota's plumbing trades.

III. Procedural Requirements of Chapter 14

A. Publications

8. On October 30, 2017, the Board published in the *State Register* a Request for Comments seeking comments on its possible amendments to rules governing plumber licensing.¹³

9. In response, the Board received one comment relating to backflow prevention assembly rebuilders and 61 comments relating to the proposed continuing education requirements for registered unlicensed plumbers.¹⁴

10. On October 5, 2018, the Board asked the Chief Administrative Law Judge for permission to omit the text of the proposed rule changes in the *State Register*.¹⁵

11. By way of a letter dated October 28, 2018, Chief Administrative Law Judge Tammy L. Pust approved the Board's request to omit the text of the proposed rule changes in the *State Register*.¹⁶

¹⁰ Ex. D at 48, 58, 60.

¹¹ *Id.* at 63.

¹² Minn. Stat. §§ 326B.435, subd. 2(a)(5), (6), .47, subd. 3, .555.

¹³ 42 *State Register* 507 (Oct. 30, 2017).

¹⁴ Ex. D at 48.

¹⁵ Ex. J.

¹⁶ *Id.*

12. On October 25, 2018, the Board requested approval of its Notice of Intent to Adopt Rules With or Without a Hearing (Dual Notice) and Additional Notice Plan.¹⁷

13. By way of an Order dated November 1, 2018, Administrative Law Judge Eric L. Lipman approved the Agency's Dual Notice and Additional Notice Plan.¹⁸

14. The Dual Notice of Intent to Adopt Rules, published on November 26, 2018, in the *State Register*, set December 28, 2018, as the deadline for comments, including for requesting a hearing.¹⁹

15. On November 21, 2018, the Board sent a copy of the Dual Notice of Hearing to all persons and associations who had registered their names with the Board to receive such notice and to all persons and associations identified in the Additional Notice Plan.²⁰

16. On November 21, 2018, the Board sent a copy of the Dual Notice and the SONAR to the chairs and ranking minority members of the legislative policy and budget committees with jurisdiction over regulating the plumbing trade.²¹

17. On November 21, 2018, the Board sent a copy of the SONAR to the Legislative Reference Library to meet the requirement under Minn. Stat. §§ 14.131, .23.²²

18. The Notice of Hearing identified the date and location of the hearing.²³

19. At the hearing on January 11, 2019, the Board filed copies of the following documents as required by Minn. R. 1400.2220 (2017):

- (a) the Board's Request for Comments as published in the *State Register* on October 5, 2018;²⁴
- (b) the proposed rules dated August 29, 2018, including the Revisor's approval;²⁵
- (c) the Board's SONAR;²⁶

¹⁷ Ex. K-7.

¹⁸ Ex. K-8.

¹⁹ Ex. F at 232, 240.

²⁰ Exs. G, H.

²¹ Ex. K at 361.

²² Ex. E at 213.

²³ Ex. F at 232, 240.

²⁴ Ex. A.

²⁵ Ex. C.

²⁶ Ex. D.

- (d) the Certificate of Mailing of the SONAR to the Legislative Reference Library on November 21, 2018.²⁷
- (e) the Dual Notice as mailed and published in the *State Register* on November 26, 2018;²⁸
- (f) the Certificate of Mailing of the Dual Notice to the rulemaking mailing list on November 21, 2018, and the Certificate of Accuracy of the Mailing List;²⁹
- (g) the Certificate of Giving Additional Notice Pursuant to the Additional Notice Plan on November 21, 2018;³⁰
- (h) the written comments on the proposed rules that the Board received during the comment period that followed the Dual Notice;³¹
- (i) the Certificate of Sending the Dual Notice and the SONAR to Legislators on November 21, 2018;³² and
- (j) an October 31, 2018, memorandum from Minnesota Management and Budget (MMB).³³

B. Additional Notice Requirements

20. Minn. Stat. §§ 14.131, .23 require that an agency include in its SONAR a description of its efforts to provide additional notification to persons or classes of persons who may be affected by the proposed rule, or alternatively, the Board must detail why these notification efforts were not made.

21. On November 21, 2018, the Board provided the Dual Notice of Intent to Adopt in the following manner, according to the Additional Notice Plan approved by the Office of Administrative Hearings:

- (a) The Dual Notice of Intent to Adopt Rules was posted November 26, 2018, and the Board has maintained these materials continuously since they were posted.³⁴

²⁷ Ex. E.

²⁸ Ex. F.

²⁹ Exs. G, G-2.

³⁰ Exs. H, H-2, K-4, K-5.

³¹ Ex. I.

³² Ex. K.

³³ Ex. K-6 at 437.

³⁴ Exs. K-2, K-3.

- (b) Notice of the rulemaking was sent by electronic mail to the rulemaking list maintained by the Department under Minn. Stat. § 14.14, subd. 1a.³⁵
- (c) A copy of the Dual Notice of Intent to Adopt was sent by Electronic Mail to individuals and entities for whom the Board had valid electronic mail addresses and subscribers to the Board’s distribution list.³⁶

C. Notice Practice

i. Notice to Stakeholders

22. On November 21 and 26, 2018, the Board provided a copy of the Dual Notice of Intent to Adopt to its official rulemaking list (maintained under Minn. Stat. § 14.14), and to stakeholders identified in its Additional Notice Plan.³⁷

23. The comment period on the proposed rules expired at 4:30 p.m. on December 28, 2018.³⁸

24. There are 37 days between November 21, 2018, and December 28, 2018.

25. The Administrative Law Judge concludes that the Board fulfilled its responsibilities, under Minn. R. 1400.2080, subp. 6 (2017), to mail the Dual Notice “at least 33 days before the end of the comment period”

ii. Notice to Legislators

26. On November 21, 2018, the Board sent a copy of the Notice of Hearing and the SONAR to Legislators as required by Minn. Stat. § 14.116.³⁹

27. Minn. Stat. § 14.116 requires the Board to send a copy of the Notice of Intent to Adopt and the SONAR to certain legislators on the same date that it mails its Notice of Intent to Adopt to persons on its rulemaking list and pursuant to its Additional Notice Plan.⁴⁰

28. The Administrative Law Judge concludes that the Board fulfilled its responsibilities to mail the Dual Notice “at least 33 days before the end of the comment period”⁴¹

³⁵ Ex. H-2.

³⁶ Ex. G-2.

³⁷ Exs. F, G, H, H-2.

³⁸ Ex. D at 48.

³⁹ Ex. K.

⁴⁰ Minn. Stat. § 14.116.

⁴¹ *Id.*

iii. Notice to the Legislative Reference Library

29. On November 21, 2018, the Board mailed a copy of the SONAR to the Legislative Reference Library.⁴²

30. Minn. Stat. § 14.23 requires the Board to send a copy of the SONAR to the Legislative Reference Library when the Notice of Intent to Adopt is mailed.

31. The Administrative Law Judge concludes that the Board fulfilled its responsibilities to mail the Dual Notice “at least 33 days before the end of the comment period”

D. Impact on Farming Operations

32. Minn. Stat. § 14.111 imposes additional notice requirements when the proposed rules affect farming operations. The statute requires that an agency provide a copy of any such changes to the commissioner of agriculture at least 30 days before publishing the proposed rules in the *State Register*.

33. The proposed rules do not impose restrictions or have an impact on farming operations. The Administrative Law Judge finds that the Board was not required to notify the commissioner of agriculture.

E. Statutory Requirements for the SONAR

34. The Administrative Procedure Act obliges an agency adopting rules to address eight factors in its SONAR.⁴³ Those factors are:

- (1) a description of the classes of persons who probably will be affected by the proposed rule, including classes that will bear the costs of the proposed rule and classes that will benefit from the proposed rule;
- (2) the probable costs to the Board and to any other agency of the implementation and enforcement of the proposed rule and any anticipated effect on state revenues;
- (3) a determination of whether there are less costly methods or less intrusive methods for achieving the purpose of the proposed rule;
- (4) a description of any alternative methods for achieving the purpose of the proposed rule that were seriously considered by the Board and the reasons why they were rejected in favor of the proposed rule;

⁴² Ex. E.

⁴³ Minn. Stat. § 14.131.

- (5) the probable costs of complying with the proposed rule, including the portion of the total costs that will be borne by identifiable categories of affected parties, such as separate classes of governmental units, businesses, or individuals;
- (6) the probable costs or consequences of not adopting the proposed rule, including those costs or consequences borne by identifiable categories of affected parties, such as separate classes of government units, businesses, or individuals;
- (7) an assessment of any differences between the proposed rule and existing federal regulations and a specific analysis of the need for and reasonableness of each difference; and
- (8) an assessment of the cumulative effect of the rule with other federal and state regulations related to the specific purpose of the rule and reasonableness of each difference.

i. The Agency's Regulatory Analysis

- (a) A description of the classes of persons who probably will be affected by the proposed rule, including classes that will bear the costs of the proposed rule and classes that will benefit from the proposed rule.**

35. The Board asserts that its proposed rules are likely to affect individuals and contractors that are licensed, certified, or registered in Minnesota under Minn. R. 4716.0010-.0210 (2017); those who would like to be licensed, certified, or registered under Minn. R. 4716.0010-.0210; individuals who perform water conditioning installation but are not now licensed, certified or registered; providers of continuing education coursework relating to the plumbing trades; and the general public.⁴⁴

- (b) The probable costs to the Board and to any other agency of the implementation and enforcement of the proposed rule and any anticipated effect on state revenues.**

36. The Board does not project that implementing and enforcing the proposed rules will result in additional costs to the Department, the Board, or any other state agency. It forecasts that any additional costs to implement and enforce the proposed rules will be offset by additional registration fees collected from registered unlicensed individuals.⁴⁵

⁴⁴ Ex. D at 50.

⁴⁵ *Id.*

- (c) The determination of whether there are less costly methods or less intrusive methods for achieving the purpose of the proposed rule.**

37. The Board asserts that the proposed rules represent significant regulatory relief, and fewer compliance costs, for those working in the Minnesota plumbing trades. The Board argues that rule reforms that permit licensed plumbers to meet all the continuing education requirements by accessing coursework over electronic media, and revising Plumbing Code-related studies to permit completion of this work in a single day, are less costly and intrusive to licensees.⁴⁶

- (d) A description of any alternative methods for achieving the purpose of the proposed rule that were seriously considered by the Board and the reasons why they were rejected in favor of the proposed rule.**

38. The Board could not identify methods other than rulemaking to accomplish the proposed regulatory reforms. Because some of the changes involved revisions to existing rules, and this method has yielded results in other similar contexts, the Board selected rulemaking as its preferred approach.⁴⁷

- (e) The probable costs of complying with the proposed rule, including the portion of the total costs that will be borne by identifiable categories of affected parties, such as separate classes of governmental units, businesses, or individuals.**

39. The Board estimates that the probable costs of complying with the proposed rules will be modest. It maintains that registered unlicensed individuals who perform water conditioning work will be subject to the same initial registration and renewal fees (\$14 and \$19, respectively) that registered unlicensed plumbers and electricians currently pay. It asserts further that by easing coursework-related costs other regulated parties will have lower compliance costs.⁴⁸

- (f) The probable costs or consequences of not adopting the proposed rule, including those costs borne by individual categories of affected parties, such as separate classes of governmental units, businesses, or individuals.**

40. The Board argues that the probable costs or consequences of not adopting the proposed rule would be a reduction in the opportunities for unlicensed individuals to qualify for journeyworker licensing exams and fewer work options for individuals seeking employment in the water conditioning industry. The Board further

⁴⁶ *Id.* at 50-51.

⁴⁷ *Id.* at 51.

⁴⁸ *Id.*

maintains that the proposed rules reduce the regulatory uncertainties around the qualifications for registered unlicensed water conditioners.⁴⁹

(g) An assessment of any differences between the proposed rules and existing federal regulation and a specific analysis of the need for and reasonableness of each difference.

41. The Board asserts that there are no federal regulations on credentialing, registration, or licensure of those working as plumbers and water conditioners. As a result, the proposed rules are not different, or potentially inconsistent, regulations under federal law.⁵⁰

(h) An assessment of the cumulative effect of the rule with other federal and state regulations related to the specific purpose of the rule.

42. Because, as noted in paragraph 41, there are no federal regulations on credentialing, registration, or licensure of those working as plumbers and water conditioners, the Board maintains that the proposed rules do not add to the regulatory burdens of meeting the requirements of federal law.⁵¹

43. The Administrative Law Judge finds that the Board has met its obligation to complete the eight assessments under Minn. Stat. § 14.131 in the text of its SONAR.

ii. Consultation with the Commissioner of MMB

44. As required by Minn. Stat. § 14.131, by letter dated October 31, 2018, the commissioner of MMB responded to a request by the Board to evaluate the fiscal impact and benefit of the proposed rules on local units of government. MMB reviewed the Agency's proposed rules and concluded that "[t]here appears to be no direct fiscal impact or fiscal benefit from this rule amendment to local units of government."⁵²

iii. Performance-Based Regulation

45. The Administrative Procedure Act also requires an agency to describe how it has considered and implemented the legislative policy supporting performance-based regulatory systems. A performance-based rule is one that emphasizes superior achievement in meeting the agency's regulatory objectives and maximum flexibility for the regulated party and the Board in meeting those goals.⁵³

⁴⁹ *Id.*

⁵⁰ *Id.*

⁵¹ *Id.* at 52.

⁵² *Id.* at 53.

⁵³ Minn. Stat. §§ 14.002, .131.

46. The proposed rules introduce a wider range of opportunities for regulated parties to meet continuing education requirements and narrow the code-related coursework requirements to permit completion within a single day.⁵⁴

iv. Summary

47. The Administrative Law Judge finds that the Board has met the requirements under Minn. Stat. § 14.131 for assessing the impact of the proposed rules, including considering and implementing the legislative policy supporting performance-based regulatory systems, and the fiscal impact on units of local government.

E. Cost to Small Businesses and Cities under Minn. Stat. § 14.127

48. Minn. Stat. § 14.127 requires the Board to “determine if the cost of complying with a proposed rule in the first year after the rule takes effect will exceed \$25,000 for: (1) any one business that has less than 50 full-time employees; or (2) any one statutory or home rule charter city that has less than ten full-time employees.” The Board must make this determination before the close of the hearing record, and the Administrative Law Judge must review the determination and approve or disapprove it.⁵⁵

49. The Board determined that the cost of complying with the proposed rule changes will not exceed \$25,000 for any business or any statutory or home rule charter city.⁵⁶

50. While the proposed rules do not require any employer to defray the costs of registration or continuing education coursework, the Board contends that even if these costs are included in the calculation, the total compliance costs are “well below the \$25,000 threshold.”⁵⁷

51. The Administrative Law Judge finds that the Board has made the determinations required by Minn. Stat. § 14.127 and approves the determinations.

F. Adoption or Amendment of Local Ordinances

52. Under Minn. Stat. § 14.128, the Board must determine if a local government will be required to adopt or amend an ordinance or other regulation to comply with a proposed agency rule. The Board must make this determination before the close of the hearing record, and the Administrative Law Judge must review the determination and approve or disapprove it.⁵⁸

⁵⁴ See, e.g., Ex. D at 61-63.

⁵⁵ Minn. Stat. § 14.127, subs. 1, 2.

⁵⁶ Ex. D at 54-55.

⁵⁷ *Id.*

⁵⁸ Minn. Stat. § 14.128, subd. 1. Moreover, a determination that the proposed rules require adopting or amending an ordinance may modify the effective date of the rule, subject to some exceptions. Minn. Stat. § 14.128, subs. 2, 3.

53. The Board concluded that no local government will need to adopt or amend an ordinance or other regulation to comply with the proposed rules. The Agency's proposed rule should not require local governments to adopt or amend those more-general ordinances and regulations.⁵⁹

54. The Administrative Law Judge finds that the Board has made the determination required by Minn. Stat. § 14.128 and approves that determination.

IV. Rulemaking Legal Standards

55. The Administrative Law Judge must make the following inquiries: Whether the Board has statutory authority to adopt the rule, whether the rule is unconstitutional or otherwise illegal, whether the Board has complied with the rule-adoption procedures, whether the proposed rule grants undue discretion to government officials, whether the rule constitutes an undue delegation of authority to another entity, and whether the proposed language meets the definition of a rule.⁶⁰

56. Under Minn. Stat. § 14.14, subd. 2; Minn. R. 1400.2100, the Board must establish the need for and reasonableness of a proposed rule by an affirmative presentation of facts. In support of a rule, the Board may rely upon materials developed for the hearing record,⁶¹ "legislative facts" (namely, general and well-established principles that are not related to the specifics of a particular case but that guide the development of law and policy),⁶² and the agency's interpretation of related statutes.⁶³

57. A proposed rule is reasonable if the Board can "explain on what evidence it is relying and how the evidence connects rationally with the agency's choice of action to be taken."⁶⁴ By contrast, a proposed rule will be deemed arbitrary and capricious where the agency's choice is based upon whim, devoid of articulated reasons, or "represents its will and not its judgment."⁶⁵

58. An important corollary to these standards is that when proposing new rules an agency is entitled to make choices between different possible regulatory approaches, so long as the alternative that is selected by the Board is a rational one.⁶⁶ Thus, while reasonable minds might differ as to whether one or another particular

⁵⁹ Ex. D at 53.

⁶⁰ See Minn. R. 1400.2100 (2017).

⁶¹ See *Manufactured Housing Institute v. Pettersen*, 347 N.W.2d 238, 240 (Minn. 1984); *Minnesota Chamber of Commerce v. Minnesota Pollution Control Agency*, 469 N.W.2d 100, 103 (Minn. Ct. App. 1991).

⁶² Compare generally *United States v. Gould*, 536 F.2d 216, 220 (8th Cir. 1976).

⁶³ See *Mammenga v. Agency of Human Services*, 442 N.W.2d 786, 789-92 (Minn. 1989); *Manufactured Hous. Inst.*, 347 N.W.2d at 244.

⁶⁴ *Manufactured Hous. Inst.*, 347 N.W.2d at 244.

⁶⁵ See *Mammenga*, 442 N.W.2d at 789; *St. Paul Area Chamber of Commerce v. Minn. Pub. Serv. Comm'n*, 251 N.W.2d 350, 357-58 (Minn. 1977).

⁶⁶ *Peterson v. Minn. Dep't of Labor & Indus.*, 591 N.W.2d 76, 78 (Minn. Ct. App. 1999).

approach represents “the best alternative,” the agency’s selection will be approved if it is one that a rational person could have made.⁶⁷

V. Rule-by-Rule Analysis

59. Several sections of the proposed rules were not opposed by any member of the public and were adequately supported by the SONAR. Accordingly, this report will not necessarily address each comment or rule part. Rather, the discussion that follows below focuses on those portions of the proposed rules as to which commentators prompted a genuine dispute as to the reasonableness of the Agency’s regulatory choice or otherwise requires closer examination.

60. The Administrative Law Judge finds that the Board has demonstrated by an affirmative presentation of facts the need for and reasonableness of all rule provisions that are not specifically addressed in this Report.

61. Further, the Administrative Law Judge finds that all provisions that are not specifically addressed in this report are authorized by statute and that there are no other defects that would bar the adoption of those rules.

62. The key focus of the testimony at the rulemaking hearing, and the later written comments, was the propriety and reasonableness of continuing education requirements for unlicensed registrants who work in the plumbing trades.⁶⁸

A. Minn. R. 4716.0205, subp. 1(C) – Continuing Education

63. Tim Power, a member of the Minnesota Nursery and Landscape Association, maintains that the Board was acting outside its statutory authority when proposing continuing education requirements for registered unlicensed plumbers and registered unlicensed water conditioners.⁶⁹

64. The Administrative Law Judge disagrees. As noted in Finding 3, when the Minnesota Legislature enacted 2017 Minn. Laws ch. 94, it granted a delegation of rulemaking authority to the board for regulating continuing education for “registered unlicensed individuals,” including registered unlicensed plumbers and registered unlicensed water conditioners.⁷⁰

65. Mr. Power is entitled to his view that “responsibility for training unlicensed individuals should remain with the licensed (or certified) individuals and their employing contractor;”⁷¹ but the legislature is similarly entitled to reach a different policy judgment on that question and to enact laws reflecting its view.

⁶⁷ *Minnesota Chamber of Commerce*, 469 N.W.2d at 103.

⁶⁸ See *generally* Tr. at 29-63; eComment of Tim Power (Jan. 25, 2019); eComment of Associated Builders and Contractors (Feb. 7, 2019).

⁶⁹ eComment of T. Power, *supra*; see also Tr. at 60.

⁷⁰ See 2017 Minn. Laws ch. 94, art 2, § 8.

⁷¹ eComment of T. Power, *supra*.

66. The role of the Administrative Law Judge during a legal review of rules is not to fashion requirements that the judge regards as best suited for the regulatory purpose but rather to determine whether the Board has made a reasonable selection among the regulatory options it had. The delegation of rulemaking authority runs from the Minnesota Legislature to the agency, and not to the Judge.⁷² In this instance, the Board's decision to adopt continuing education requirements for registered unlicensed individuals is a reasonable exercise of its delegated authority.

67. The conclusion is not altered by the facts that individuals who are enrolled in qualified apprenticeship programs⁷³ would be exempt from the requirements to complete continuing education coursework⁷⁴ or that more-qualified apprenticeship programs in Minnesota are sponsored by trade unions than other entities.⁷⁵

68. The distinction in regulatory treatment follows from a deliberate policy choice made by the legislature to distinguish the training of plumber's apprentices from that of other unlicensed individuals in the plumbing trades.⁷⁶ The legislature is entitled to draw such distinctions.

69. Moreover, it was reasonable for the Board to conclude that workers who are enrolled in a qualified apprenticeship program will receive more than two hours of coursework relating to proper plumbing installation practice each year.⁷⁷

70. Entities that are not affiliated with trade unions can, and do, receive accreditation for apprenticeship programs⁷⁸ and would enjoy the same the exemption from continuing education that is granted to union-affiliated programs.⁷⁹

71. Additionally, the proposed rules are not unnecessary or unreasonable because there was (and still is) a significant training-related infrastructure in Minnesota

⁷² See generally *Citizens Advocating Responsible Dev. v. Kandiyohi Cty. Bd. of Comm'rs*, 713 N.W.2d 817, 832 (Minn. 2006) ("Our role when reviewing agency action is to determine whether the agency has taken a 'hard look' at the problems involved, and whether it has 'genuinely engaged in reasoned decision-making'") (quoting *Reserve Mining Co. v. Herbst*, 256 N.W.2d 808, 825 (Minn. 1977)); *Manufactured Hous. Inst.*, 347 N.W.2d at 244 ("Agencies must at times make judgments and draw conclusions from suspected, but not completely substantiated, relationships between facts, from trends among facts, from theoretical projections from imperfect data, from probative preliminary data not yet certifiable as fact, and the like") (quoting *Ethyl Corp. v. EPA*, 541 F.2d 1, 28 (D.C. Cir.), cert. denied, 426 U.S. 941 (1976)).

⁷³ See generally Minn. Stat. § 178.036 (2018); Board's Initial Comments at 4 (Jan. 31, 2019).

⁷⁴ See Ex. C at 43 (Proposed part 4716.0010, subp. 6, reads: "'Registered unlicensed plumber' means an individual who performs plumbing work for a contractor or employer, does not hold any class of plumber license, is not a plumber's apprentice as described in Minnesota Statutes, section 326B.42, subdivision 6, and is registered with the commissioner under part 4716.0050.").

⁷⁵ See eComment of Associated Builders and Contractors, *supra*, at 2.

⁷⁶ Compare Minn. Stat. § 178.036 (2018), with Minn. Stat. § 326B.47, subds. 1, 3 (2018).

⁷⁷ See Minn. Stat. § 178.036, subds. 2, 3 (2018) (the apprenticeship program standards "must also contain . . . [a] minimum of 144 hours of related instruction is required in each training cycle. At least 50 hours of related safety instruction is required during the term of apprenticeship"); Board's Initial Comments, at 6; eComment of James Peterson at 3 (Jan. 31, 2019).

⁷⁸ Tr. 37 (Curley); Tr. 41, 43 (Gander); eComment of Associated Builders and Contractors at 3.

⁷⁹ See Board's Initial Comments at 6.

that predated the enactment of chapter 94. The training offered by these private firms and cooperatives is useful and commendable – but enrollment is entirely voluntary.⁸⁰

72. The Board did not act unreasonably when it made the dual conclusions that (a) some construction and installation mishaps could be avoided through training unlicensed registrants on the practices that are required by the Plumbing Code,⁸¹ and (b) a wholly voluntary system of training on plumbing practices is not comprehensive enough to reach those who need training the most.⁸²

73. Such judgments are squarely within the rulemaking delegation given to the Board by chapter 94, and a sufficient basis for those judgments is grounded in the underlying record.⁸³

Based upon the findings of fact and the contents of the rulemaking record, the Administrative Law Judge makes the following:

CONCLUSIONS

1. The Board gave notice to interested persons in this matter.
2. The Board has fulfilled the procedural requirements of Minn. Stat. § 14.14 and all other procedural requirements of law or rule.
3. The Administrative Law Judge concludes that the Board has fulfilled its additional notice requirements.
4. 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, .15, subd. 3; .50(3)(i), (ii).
5. The Notice of Hearing, the proposed rules, and SONAR complied with Minn. R. 1400.2080, subp. 5 (2017).
6. 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, .50.
7. As part of the public comment process, a number of stakeholders urged the Board to adopt other revisions to chapter 4716. In each instance, the Agency's

⁸⁰ Ex. M; Tr. at 36-38 (Curley); Board's Initial Comments at 4; *see generally* Ex. D, Attachment A; Ex. D-5; Ex. K-9 at 494-502.

⁸¹ *See* eComment of J. Peterson at 2; Board's Initial Comments at 3.

⁸² Board's Initial Comments at 4 (“[T]he Board is responsible for ensuring safe plumbing work throughout the state of Minnesota, not only the safety of work performed by those who recognize the importance of ongoing training. The rule is needed because not all businesses provide the ongoing training described by the commenters.”).

⁸³ *See generally* Board's Initial Comments; eComment of J. Peterson.

rationale in declining to make the requested revisions to its rules was well grounded in this record and reasonable.

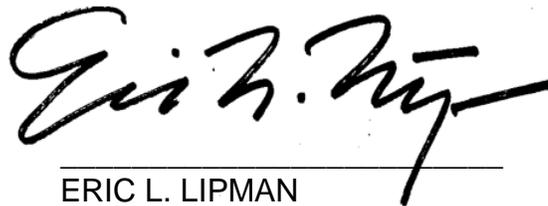
8. A finding or conclusion of need and reasonableness regarding any particular rule subsection does not preclude, and should not discourage, the Board from further modification of the proposed rules – provided that the rule finally adopted is based upon facts appearing in this rule hearing record.

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

RECOMMENDATION

The proposed rules should be **ADOPTED**.

Dated: March 11, 2019



ERIC L. LIPMAN
Administrative Law Judge

NOTICE

This report must be available for review to all affected individuals upon request for at least five working days before the Board takes any further action on the rules. The Board may then adopt the final rules or modify or withdraw its proposed rule. If the Board makes any changes in the rule, it must submit the rule to the Chief Administrative Law Judge for a review of the changes prior to final adoption. Upon adoption of a final rule, the Board must submit a copy of the Order Adopting Rules to the Chief Administrative Law Judge. After the rule's adoption, the OAH will file certified copies of the rules with the Secretary of State. At that time, the Board must give notice to all persons who requested to be informed when the rule is adopted and filed with the Secretary of State.