

July 9, 2021

VIA EFILING ONLY

Suzanne Todnem
General Counsel
Department of Labor and Industry
443 Lafayette Rd N
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Re: *Proposed Exempt Rule Amendments to the Minnesota Plumbing Board's Rules Governing the Minnesota Plumbing Code in Minnesota Rules, chapter 4714*
OAH 60-9045-37601; Revisor R-04704

Dear Ms. Todnem:

Enclosed herewith and served upon you please find the **ORDER OF REVIEW ON RULES UNDER MINN. STAT. § 14.388 AND MINN. R. 1400.2400** in the above-entitled matter.

Pursuant to Minn. R. 1400.2400, subp. 4a (2019), the Department may resubmit the rule and accompanying materials to the Administrative Law Judge for review. The Department may also request, pursuant to Minn. R. 1400.2400, subp. 5, that the Chief Administrative Law Judge reconsider the disapproval of the rules **within five working days of receiving the Judge's decision.**

If you have any questions regarding this matter, please contact Denise Collins at (651) 361-7875, denise.collins@state.mn.us or via facsimile at (651) 539-0310.

Sincerely,


MICHELLE SEVERSON
Legal Assistant

Enclosures

cc: Ryan Inman
Legislative Coordinating Commission
Representative Michael Nelson
Senator Mary Kiffmeyer

STATE OF MINNESOTA
OFFICE OF ADMINISTRATIVE HEARINGS

Proposed Exempt Rule Amendments to
the Minnesota Plumbing Board's Rules
Governing the Minnesota Plumbing Code
in Minnesota Rules, chapter 4714

**ORDER ON REVIEW
OF RULES UNDER
MINN. STAT. § 14.388
AND MINN. R. 1400.2400**


This matter came before Administrative Law Judge James E. LaFave upon the application of the Minnesota Plumbing Board (Board) for a legal review under Minn. Stat. § 14.388 (2020).

On June 25, 2021, the Board filed documents with the Office of Administrative Hearings seeking review and approval of these rules. No comments were filed regarding the proposed rules.

Based upon a review of the documents submitted by the Board and for the reasons set out in the Memorandum which follows below,

IT IS HEREBY ORDERED that the Proposed Exempt Permanent Rules Amending Minnesota Rules, chapter 4714 are **NOT APPROVED**.

Dated: July 9, 2021


JAMES E. LAFAVE
Administrative Law Judge

NOTICE

Minn. R. 1400.2400, subp. 4a (2019), provides that when a rule is disapproved, the agency must resubmit the rule to the Administrative Law Judge for review if the agency modifies the proposed rules. The Administrative Law Judge has five working days to review and approve or disapprove the rule. Minn. R. 1400.2400, subp. 5 (2019), provides that an agency may ask the Chief Administrative Law Judge to review a rule that has been disapproved by an administrative law judge. The request must be made within five working days of receiving the judge's decision. The Chief Administrative Law Judge must then review the agency's filing and approve or disapprove the rule within 14 days of receiving it.

MEMORANDUM

In 2015 the Board incorporated the 2012 Uniform Plumbing Code (UPC) as part of the Minnesota Plumbing Code.¹ It was the first time the Board incorporated a model code for Minnesota.²

On March 22, 2021, the Board published a Notice of Adoption of rule amendments, R-04633, that updated the Minnesota Plumbing Code to include the incorporation of the 2018 UPC.³ The adoption of the R-04633 amendments will become effective on December 17, 2021.⁴ The Board asserts that as a result of some renumbering in the model code, some paragraphs regarding topics addressed in the Minnesota amendments to the model code were passively and inadvertently retained in the R-04633 amendments.⁵ As a result certain sections of the model code and the Minnesota amendments are in conflict.

For example, the model code prohibits air testing on plastic pipes.⁶ The Minnesota amendment, however, allows air testing on plastic pipes because it is unsafe to perform water tests during the winter in Minnesota.⁷ In addition, the Board proposes to delete section 1601.2 and 1601.3 of the model code.⁸ Section 1601.2 because it addresses the qualification requirements of design professionals who design rainwater catchment systems, which are outside the Plumbing Code,⁹ and 1601.3 because it addresses permitting requirements that are under the jurisdiction of the Minnesota Department of Labor and Industry and are covered in Minnesota Rules, chapter 1300.¹⁰ The proposed rules also renumber of certain sections and tables in the code to reflect the deletions described above.¹¹

To remedy this situation and to avoid confusion for users of the code, the Board seeks to use the good cause exempt rulemaking process to adopt permanent rules amending the Minnesota Plumbing Code. It argues the proposed amendments are “consistent with the vetted Minnesota amendments and have no substantive effect on the Plumbing Code.”¹² The Administrative Law Judge disagrees.

Minn. Stat. § 14.388 provides for an abbreviated and streamlined set of procedures for promulgating new rules that may be used when “good cause” is present.

¹ Proposed Findings and Order Adopting Exempt Rule Amendments Under Minnesota Statutes Section 14.388 at ¶ 5. (Proposed Findings); Statement of Support for Adoption of Exempt Permanent Rules Amending Minnesota Rules chapter 4714 at 1 (Statement of Support).

² Proposed Findings at ¶ 5.

³ *Id.*

⁴ *Id.*

⁵ *Id.*

⁶ Statement of Support for Adoption of Exempt Permanent Rules Amending Minnesota Rules chapter 4714 at 2 (Statement of Support).

⁷ *Id.*

⁸ *Id.*

⁹ *Id.*

¹⁰ *Id.*

¹¹ *Id.* at 3.

¹² Statement of Support for Adoption of Exempt Permanent Rules Amending Minnesota Rules chapter 4714 at 1 (Statement of Support).

That is when the agency finds the normal rulemaking procedures “are unnecessary, impracticable, or contrary to the public interest.”¹³ Under the good cause exemption both the agency’s rulemaking powers and the breath of review by the Office of Administrative Hearings are sharply reduced. This is because the good cause exemption contemplates that administrative rules will only be promulgated with this method in order to meet truly exigent circumstances,¹⁴ or when the specific policy choices underlying the new rules were made through an earlier, publicly-accessible process (such as a prior rulemaking or through Legislative enactment of a statutes which set forth the specific requirements).¹⁵

Here, The Board seeks to use the later approach, citing Minn. Stat. § 14.388, subd. 1(4), for the proposition that the proposed rules “make changes that do not alter the sense, meaning, or effect of a rule.”¹⁶ This statutory provision, however, is very narrow in scope and is more appropriately used for correcting statutory citations, making editorial revisions, or to correct typographical errors.¹⁷ There are very few instances where a modification does not later the effect or sense of the rule.¹⁸ In this instance, the Board seeks to resolve differences between the model code and the Minnesota amendments by deleting sections of the model code. While understandable, deleting sections, by definition, changes the meaning and effect of the rules. It is not the type of change contemplated by the good cause exemption found in Minn. Stat. § 14.388, subd. 1(4).

The Administrative Law Judges understands and is sympathetic with the Board’s desire to have these inconsistencies remedied as soon as possible. The use of the good cause exemption found in Minn. Stat. § 14.388, subd. 1(4), however, is not the appropriate vehicle to achieve that end. Assuming that the nature of the changes proposed are non-controversial (as evidenced by the fact that no comments were submitted in response to the proposed rules) the Board could achieve its goals by proposing to adopt the rules without a hearing.¹⁹

Because the Board is relying on Minn. Stat. § 14.388, subd. 1(4), for proceeding under the good cause exemption, it has the burden to show in its submissions that the proposed amendment incorporates specific changes set forth in applicable statutes that make changes that do not alter the sense, meaning, or effect of a rule and that it would be unnecessary, impracticable or contrary to the public interest to proceed with the standard rulemaking process. It failed to meet that burden.

The appropriate result, therefore, is to not approve the proposed rules.

J. E. L.

¹³ Minn. Stat. § 14.388, subd. 1.

¹⁴ *Id.* at (1) and (2).

¹⁵ *Id.* at (3) and (4).

¹⁶ *Id.* at (4); Statement of Support at 1.

¹⁷ See Minnesota Administrative Procedure at Chapter 21, p. 2 by George A. Beck and Mehmet Konar-Steenberg (3rd Ed., Revised 2014) ([Minnesota Administrative Procedure \(mitchellhamline.edu\)](http://mitchellhamline.edu)) (last visited July 8, 2021).

¹⁸ *Id.*

¹⁹ See Minn. Stat. §§ 14.22-.28 (2020); Minn. R. 1400.2050-.2510(2019).