

STATE OF MINNESOTA  
OFFICE OF ADMINISTRATIVE HEARINGS

In the Matter of the Proposed Rules  
Governing Elevators and Related  
Devices, Minnesota Rules Chapter 1307

**ORDER ON REVIEW  
OF RULES UNDER  
MINN. STAT. § 14.26  
AND MINN. R. 1400.2300**

This matter came before Administrative Law Judge Eric L. Lipman upon the request of the Minnesota Department of Labor and Industry (Department) for legal review and approval of the above-entitled rules under Minn. Stat. § 14.26 (2020).

On July 20, 2020, the Department filed all documents required under Minn. Stat. § 14.26 and Minn. R. 1400.2310 (2019) with the Office of Administrative Hearings

Based upon a review of the written submissions by the Department, and all of the documents in the rulemaking record,

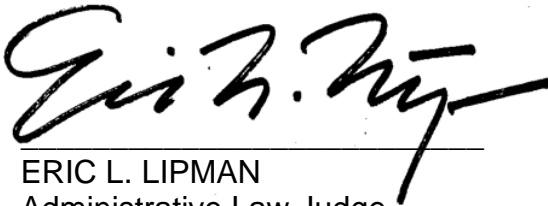
**IT IS HEREBY DETERMINED THAT:**

1. The Department has the statutory authority to adopt the rules.
2. The rules were adopted in compliance with the procedural requirements of Minn. Stat. §§ 14.01-.69 (2020); Minn. R. 1400.2000-.8612 (2019).
3. The proposed rules are needed and reasonable.

**IT IS HEREBY ORDERED THAT:**

1. With the exception of the third sentence of proposed rule Minn. R. 1307.0090, subp. 7(B), the adopted rules are **APPROVED**.
2. The third sentence of proposed rule Minn. R. 1307.0090, subp. 7(B), is **DISAPPROVED**.

Dated: August 6, 2020

  
ERIC L. LIPMAN  
Administrative Law Judge

## MEMORANDUM

Pursuant to Minn. Stat. § 14.26, the agency has submitted these rules to the Administrative Law Judge for a review as to legality. The rules of the Office of Administrative Hearings identify several types of circumstances under which a rule must be disapproved by the Administrative Law Judge or the Chief Administrative Law Judge.<sup>1</sup> These include circumstances in which the proposed rule is illegal, is not self-executing, or otherwise does not meet the definitional requirements of a “rule” under Minn. Stat. § 14.02, subd. 4.

### **Substantive Defects under Minn. R. 1400.2100**

In proposed rule Minn. R. 1307.0090, subp. 7(B), the Department addresses the remediation of elevators which do not meet current performance standards and the process for taking these elevators out of service.<sup>2</sup> The proposed rule reads in part:

Any compliance schedule submitted for an existing elevator shall result in compliance with the code requirements within five years of submission of the compliance schedule. Elevators not in compliance with the code requirements within five years of submission of the compliance schedule may be taken out of service as provided in Minnesota Statutes, section 326B.175.<sup>3</sup>

The statute cited in this regulation, Minn. Stat. § 326B.175 (2020), provides that:

Except as provided in section 326B.188, it shall be the duty of the department and the licensing authority of any municipality which adopts any such ordinance whenever it finds any such elevator under its jurisdiction in use in violation of any provision of sections 326B.163 to 326B.178 to seal the entrances of such elevator and attach a notice forbidding the use of such elevator until the provisions thereof are complied with.<sup>4</sup>

A rule must be sufficiently specific to provide fair warning of the type of conduct to which the rule applies.<sup>5</sup> “If the law furnishes a reasonably clear policy or standard of action which controls and guides the administrative officers in ascertaining the operative facts to which the law applies,” the law must take effect “upon these facts by virtue of its own terms, and not according to the whim or caprice of the administrative officers.”<sup>6</sup>

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<sup>1</sup> Minn. R. 1400.2100 (emphasis added).

<sup>2</sup> Revisor RD-4517, at 14 (January 2, 2020).

<sup>3</sup> *Id.*

<sup>4</sup> Minn. Stat. § 326B.175.

<sup>5</sup> *Cullen v. Kentucky*, 407 U.S. 104, 110 (1972); *Thompson v. City of Minneapolis*, 300 N.W.2d 763, 768 (Minn. 1980).

<sup>6</sup> *Lee v. Delmont*, 228 Minn. 101, 113, 36 N.W.2d 530, 538 (1949); *accord. Anderson v. Commissioner of Highways*, 126 N.W.2d 778, 780 (Minn. 1964).

In this circumstance, however, the meaning of the proposed rule is ambiguous. It is unclear from the text whether the proposed rule text merely describes one possibility that could occur – a properly authorized local inspector could seal the elevator and take it out of service – or, the regulation authorizes such inspectors to undertake that action.

While the better reading of the regulation is that such actions are authorized, the Department cannot promulgate a rule that is impermissibly vague or has terms that are so conditional that it does not qualify as a rule at all.<sup>7</sup> Either of these shortcomings renders the proposed rule defective.

Yet, there are a number of alternatives that the Department could select to cure this defect. One alternative is to delete the third sentence of the proposed rule. In such a circumstance, Minn. Stat. § 326B.175 would still be in place and impose the duty upon the appropriate officials to “seal the entrances” of noncompliant elevators. Another alternative would be to replace the word “may” in this subpart with the word “shall” – an outcome that presumably is consistent with the duty imposed by Minn. Stat. § 326B.175. A third possibility would be to rephrase the proposed regulation to clarify that certain local officials are authorized to undertake the sealing procedures. For example, such a revision of the subpart might read:

Any compliance schedule submitted for an existing elevator shall result in compliance with the code requirements within five years of submission of the compliance schedule. Local licensing authorities, acting under Minnesota Statutes section 326B.175, are authorized to take an elevator that is not in compliance with the code requirements within five years of submission of the compliance schedule, out of service.

Such revisions would not make the rule substantially different than the original proposal of the Department and is needed and reasonable.

**E. L. L.**

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<sup>7</sup> Minn. Stat. § 14.02, subd. 4 (“‘Rule’ means every agency statement of general applicability and future effect, including amendments, suspensions, and repeals of rules, *adopted to implement or make specific* the law enforced or administered by that agency or to govern its organization or procedure.”) (emphasis added).