

STATE OF MINNESOTA  
OFFICE OF ADMINISTRATIVE HEARINGS  
FOR THE MINNESOTA DEPARTMENT OF HEALTH

In the Matter of the Proposed  
Adoption of Department of  
Health Rules Governing the  
Minnesota Special Supplemental  
Food Program for Women,  
Infants, and Children (WIC).

REPORT OF THE  
ADMINISTRATIVE LAW JUDGE

The above-entitled matter came for hearing before Administrative Law Judge Peter C. Erickson at 9:00 a.m. on Thursday, May 25, 1989 in the Chesley Room, Minnesota Department of Health Building, Minneapolis, Minnesota. This Report is part of a rule hearing proceeding, held pursuant to Minn. Stat. §§ 14.131 - 14.20 to determine whether the Agency has fulfilled all relevant substantive and procedural requirements of law, whether the proposed rules are needed and reasonable, and whether or not the rules, if modified, are substantially different from those originally proposed.

Robert T. Holley, Special Assistant Attorney General, Suite 136, 2829 University Avenue Southeast, Minneapolis, Minnesota 55414, appeared on behalf of the Minnesota Department of Health. Pati Maier, Director of the WIC Program, appeared and testified in support of the proposed rules on behalf of the Department. The hearing continued until all interested groups and persons had had an opportunity to testify concerning the adoption of the proposed rules.

This Report must be available for review to all affected individuals upon request for at least five working days before the agency takes any further action on the rule(s). The agency may then adopt a final rule or modify or withdraw its proposed rule. If the Commissioner of Health makes changes in the rule other than those recommended in this report, she must submit the rule with the complete hearing record to the Chief Administrative Law Judge for a review of the changes prior to final adoption. Upon adoption of a final rule, the agency must submit it to the Revisor of Statutes for a review of the form of the rule. The agency must also give notice to all persons who requested to be informed when the rule is adopted and filed with the Secretary of State.

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

FINDINGS OF FACT

Procedural Requirements

1. On April 14, 1989, the Department filed the following documents with the Chief Administrative Law Judge:

- (a) A copy of the proposed rules certified by the Revisor of Statutes.
- (b) The Order for Hearing.
- (c) The Notice of Hearing proposed to be issued.
- (d) A Statement of the number of persons expected to attend the hearing and estimated length of the Agency's presentation.
- (e) The Statement of Need and Reasonableness.

2. On Monday, April 24, 1989, a Notice of Hearing and a copy of the proposed rules were published at 13 State Register, pp. 2583-2603.

3. On April 13, 1989, the Department mailed the Notice of Hearing to all persons and associations who had registered their names with the Department for the purpose of receiving such notice.

4. On May 5, 1989, the Department filed the following documents with the Administrative Law Judge:

- (a) The Notice of Hearing as mailed.
- (b) The Agency's certification that its mailing list was accurate and complete.
- (c) The Affidavit of Mailing the Notice to all persons on the Agency's list.
- (d) An Affidavit of Additional Notice.
- (e) The names of Department personnel who will represent the Agency at the hearing together with the names of any other witnesses solicited by the Agency to appear on its behalf.
- (f) A copy of the State Register containing the proposed rules.
- (g) All materials received following a Notice of Intent to Solicit Outside Opinion published at 11 State Register, pp. 1794 - 1795 (March 30, 1987) and a copy of the Notice.

The documents were available for inspection at the Office of Administrative Hearings from the date of filing to the date of the hearing.

5. The period for submission of written comment and statements remained open through June 2, 1989. The record closed on June 7, 1989, at the end of the third business day following the close of the comment period.

#### Statutory Authority

6. Statutory authority to promulgate the proposed rules is found at Minn. Stat. §§ 144.05(f), and 145.893 to 145.897 (1988).

#### Nature of the Proposed Rules

7. The Special Supplemental Food Program for Women, Infants and Children (WIC Program) is a program of comprehensive nutrition care for pregnant, post-partum and breast-feeding women; infants under one year of age; and children under five years of age who have a low income and nutritional deficiency. The WIC Program informs potentially eligible persons of the availability of program

benefits; determines the nutritional deficiencies of applicants; educates participants regarding nutrition; provides the kinds and amounts of foods that will restore proper nutrition for participants; and provides health services directly or through referrals to health care providers. Local WIC agencies make eligibility determinations. If an individual is determined to be eligible, the local agency prescribes supplemental food for the participant and provides vouchers for the food. The participant must exchange the voucher for the prescribed food at a designated vendor (grocery or pharmacy approved by the WIC Program to accept vouchers).

The WIC Program is a federal program governed primarily by federal regulations (7 C.F.R. Part 246). The United States Department of Agriculture (USDA) administers the program at the federal level. USDA provides the Minnesota Department of Health (MDH) with most of the funds required to operate the program at the state level. These funds are distributed by MDH to local agencies that operate the program in their communities.

WIC Program rules are currently set forth in Chapter 4617 of Minnesota Rules. The scope of this proceeding is proposed amendments to the current rules which apply to WIC Program food vendors and additional rules governing local agencies and approved foods.

8. Many of the proposed rule provisions received no negative public comment and were adequately supported by the Statement of Need and Reasonableness. The Judge will not specifically address those rules in the discussion below and finds that the need for and reasonableness of those provisions has been demonstrated.<sup>1</sup> Only specific issues concerning the need for, reasonableness of, or statutory authority for the proposed rules will be discussed.

9. After a review of the testimony given at the hearing and all written comments submitted, the Department has proposed the following modifications to the proposed rules:

4617.0002, Subp. 25.

. . . or registered nurse. (Delete remaining language.) ✓

4617.0002, Subp. 37.

"Proxy" means ~~a~~ the person . . . ✓

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<sup>1</sup>In order for an agency to meet the burden of reasonableness, it must demonstrate by a presentation of facts that the rule is rationally related to the end sought to be achieved. Broen Memorial Home v. Minnesota Department of Human Services, 364 N.W.2d 436, 440 (Minn. App. 1985). Those facts may either be adjudicative facts or legislative facts. Manufactured Housing Institute v. Pettersen, 347 N.W.2d 238, 244 (Minn. 1984). The agency must show that a reasoned determination has been made. Manufactured Housing Institute at 246.

4617.0035, Subp. 2.

The commissioner shall review . . . dietetic technician, ~~or~~ licensed practical nurse or physician's assistant to ensure . . .

4617.0035, Subp. 7.

The substantive language of this subpart is replaced with the language in subpart 4 except that the term "physician's assistant" will be substituted for "dietetic technician".

4617.0056, Subp. 2.

E. the value of using breastmilk or infant formula . . .

The above-modifications are based on oral and written comments from the public. The Judge finds that the need for and reasonableness of those modifications has been demonstrated by the Department. None constitute a substantial change from the rules as initially proposed.

#### Discussion of the Proposed Rules

10. Jane Strauss and Linda Klatt commented that the proposed rules do not sufficiently emphasize the value of breastfeeding infants or encourage mothers to breastfeed rather than feed formula to infants. They suggest that the proposed rules do not comply with the directive contained in 7 C.F.R. § 246.11(e)(1) which states that, "all pregnant participants shall be encouraged to breastfeed unless contraindicated for health reasons." Both Ms. Strauss and Ms. Klatt contend that it is imperative that the proposed rules do more to promote breastfeeding.

The Department modified proposed Rule 4617.0056, subp. 2E. as set forth above in response to the concerns raised by Ms. Strauss and Ms. Klatt. Additionally, the Department states that proposed Rule 4617.0056, subp. 1A. complies with the federal regulation by stating that nutrition education sessions must "encourage pregnant participants to breastfeed unless the participant's health does not allow breastfeeding . . . ." The Department argues that the proposed rules do adequately deal with the issue of breastfeeding in compliance with federal program requirements.

The Administrative Law Judge finds that the Department has demonstrated the need for and reasonableness of the proposed rules with respect to the issue of breastfeeding. Although, as both Ms. Strauss and Ms. Klatt point out, more could be done regarding that issue, the federal mandate has been complied with and the rule has been shown to be reasonable.

11. Several local agencies and individuals submitted written comments which contained suggestions for modifications to the proposed rules. The modifications made by the Department set forth above reflect some of those

suggestions. However, the record in this matter adequately supports the need for and reasonableness of the proposed rules as modified above.

Based upon the foregoing Findings of Fact, the Administrative Law Judge makes the following:

#### CONCLUSIONS

1. That the Department of Health gave proper notice of the hearing in this matter.
2. That the Commissioner has fulfilled the procedural requirements of Minn. Stat. §§ 14.14, and all other procedural requirements of law or rule.
3. That the Department has documented 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, 14.15, subd. 3 and 14.50 (i) and (ii).
4. That the Department 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, subd. 2 and 14.50 (iii).
5. That the additions and amendments to the proposed rules which were suggested by the Department after publication of the proposed rules in the State Register do not result in rules which are substantially different from the proposed rules as published in the State Register within the meaning of Minn. Stat. § 14.15, subd. 3, Minn. Rule 1400.1000, Subp. 1 and 1400.1100.
6. That any Findings which might properly be termed Conclusions and any Conclusions which might properly be termed Findings are hereby adopted as such.
7. That a finding or conclusion of need and reasonableness in regard to any particular rule subsection does not preclude and should not discourage the Department from further modification of the rules based upon an examination of the public comments, provided that no substantial change is made from the proposed rules as originally published, and 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

IT IS HEREBY RECOMMENDED that the proposed rules be adopted consistent with the Findings and Conclusions made above.

Dated this 20 day of June, 1989.



PETER C. ERICKSON  
Administrative Law Judge