9-3101-4216-1

STATE OF MINNESOTA
OFFICE OF ADMINISTRATIVE HEARINGS

FOR THE MINNESOTA DEPARTMENT OF VETERANS AFFAIRS

In the Matter of the
Proposed Permanent Rules
Relating to Veterans Homes
Admissions, Discharges,
Cost of Care Calculations,
and Maintenance Charges.

REPORT OF THE
ADMINISTRATIVE LAW JUDGE

The above-entitled matter came on for hearing before Administrative Law Judge Phyllis A. Reha on Tuesday, December 5, 1989, at 9:30 a.m. in the Fifth Floor Conference Room, Veterans Affairs Building, in the City of St. Paul, Minnesota.

This report is a part of a rulemaking proceeding held pursuant to Minn. Stat. §§ 14.131 to 14.20, to hear public comment, to determine whether the Minnesota Department of Veterans Affairs (Department) and the Veterans Home Board (Board) have fulfilled all relevant substantive and procedural requirements of law or rule, to determine whether the proposed rules are needed and reasonable, and to determine whether or not the rules, if modified, are substantially different from those originally proposed.

Merwin Peterson, Assistant Attorney General, 1100 Bremer Tower, Seventh Place and Minnesota Street, St. Paul, Minnesota 55101, appeared on behalf of the Minnesota Veterans Homes Board (hereinafter also referred to as "Board"). The agency panel appearing in support of the rules consisted of Steven O'Connor, member Veterans Home Board of Directors; Jeff Smith, Administrator, Veterans Home, Minneapolis; Susan Kiley, Administrator, Veterans Home, Hastings; Daniel Bolhouse, Pres. and CEO, Presbyterian Homes of Minnesota; Jay Inwood, Social Services Director, Veterans Home, Minneapolis; Kathleen Davis, Director of Nursing, Veterans Home, Minneapolis; Karen Jennings, Assistant Administrator for Direct Care Services; Carleen Hoeschen, Quality Assurance Coordinator; David Carroll, Psych. Services Director; Rebecca Leschner, Business Manager, Veterans Home, Minneapolis; John Fearon, Cost of Care Program Officer.

Approximately 50 persons attended the hearing. 27 persons signed the hearing register. The Administrative Law Judge received 16 exhibits as evidence during the hearing. The Department offered Exhibits 1-15, and one public exhibit was offered. The hearing continued until all interested persons, groups or associations had an opportunity to be heard concerning the adoption of the rules.

The record remained opened for the submission of written comments for

seventeen (17) calendar days following the date of the hearing or December 22, 1989. Pursuant to Minn. Stat. § 14.15, subd. 1 (1988), three business days were allowed for the filing of responsive comments. On December 28, 1989, the rulemaking record closed for all purposes.

In addition to the oral comments at the hearing, the Administrative Law Judge received 4 letters from interested persons and a memorandum from the Board's counsel regarding the proposed rules before the record closed.

The Board must wait at least five working days before taking any final action on the rules; during that period, this Report must be made available to all interested persons upon request.

Pursuant to the provisions of Minn. Stat. § 14.15, subds. 3 and 4, this Report has been submitted to the Chief Administrative Law Judge for his approval. If the Chief Administrative Law Judge approves the adverse findings of this Report, he will advise the Board of actions which will correct the defects and the Board may not adopt the rule until the Chief Administrative Law Judge determines that the defects have been corrected. However, in those instances where the Chief Administrative Law Judge identifies defects which relate to the issues of need or reasonableness, the Board may either adopt the Chief Administrative Law Judge's suggested actions to cure the defects or, in the alternative, if the Board does not elect to adopt the suggested actions, it must submit the proposed rule to the Legislative Commission to Review Administrative Rules for the Commission's advice and comment.

If the Board elects to adopt the suggested actions of the Chief Administrative Law Judge and makes no other changes and the Chief Administrative Law Judge determines that the defects have been corrected, then the Board may proceed to adopt the rule and submit it to the Revisor of Statutes for a review of the form. If the Board makes changes in the rule other than those suggested by the Administrative Law Judge and the Chief Administrative Law Judge, then it shall submit the rule, with the complete record, to the Chief Administrative Law Judge for a review of the changes before adopting it and submitting it to the Revisor of Statutes.

When the Board files the rule with the Secretary of State, it shall give notice on the day of filing to all persons who requested that they be informed of the filing.

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

FINDINGS OF FACT

Procedural Requirements.

1. On October 27, 1989, the Veterans Homes Board (hereinafter "the Board") 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) The Statement of Need and Reasonableness.
(e) A statement of the estimated length of the Agency's presentation.

(f) A notice informing interested persons that the hearing would be cancelled if fewer than 25 persons requested a hearing.

2. On October 6, 1989, the Board 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.

3. On October 30, 1989, a Notice of Hearing and a copy of the proposed rules were published at 14 State Register 1096.

4. On October 31, 1989, the Board filed a Statement of Additional Notice with the Administrative Law Judge.

5. On November 9, 1989, the Department filed the following documents with the undersigned Administrative Law Judge (ALJ):

(a) The Notice of Hearing as mailed.
(b) The Department's Certification that its mailing list was accurate and complete.
(c) The Affidavit of Mailing the Notice of Hearing to all persons on the Department's list.
(d) A photocopy of the pages of the State Register on which the proposed rules were published.
(e) The names of Department personnel who will represent the Department at the hearing together with the names of other witnesses solicited by the Department to appear on its behalf.

6. All documents were available for inspection and copying at the Office of Administrative Hearings from the date of filing to December 28, 1989, the date the rulemaking record closed.

7. The Notice of Hearing prepared by the Board omitted the paragraph required by Minn. Rule 1400.0300, subp. 1a (C)(9). This paragraph advises interested persons that a copy of the Statement of Need and Reasonableness (SONAR) is on file with the Office of Administrative Hearings and that copies of the SONAR may be obtained for the cost of reproduction. In this case, the omission was harmless, since the Board made the SONAR available to individuals who requested a copy of the rules and the Board supplied copies of the SONAR to individuals who attended the hearing. The Administrative Law Judge finds no prejudice has been suffered by any interested person through the Board's omission. In this instance, the technical defect in the Notice of Hearing is an insufficient basis for invalidating this proceeding. See, Minnesota Association of Homes for the Aging v. Department of Human Services, 385 N.W.2d 65, 68 (Minn. App. 1986). The Administrative Law Judge finds that this rulemaking proceeding is procedurally valid.

Nature of the Proposed Rules

8. The proposed rules establish standards for the admission and discharge of residents, calculation of the cost of care and maintenance charges, and billing procedures for the Minnesota Veterans Homes. The Veterans Homes (hereinafter, "the Homes") have been established by the Legislature to care for veterans and their spouses who meet specified criteria. Minn. Stat. § 198.01. Responsibility for the Homes is vested in the Board. Minn. Stat. § 198.003. This rulemaking proceeding arises from the

Board's need to comply with the general requirement that agency rules be promulgated in accordance with the Administrative Procedure Act. Minn. Stat. §§ 14.01-14.69.

Background and Need for the Proposed Rules

9. On September 11, 1989, the Board adopted emergency rules of a similar nature to the proposed rules. 14 S.R. 618. By statute, the emergency rules expired on December 31, 1989. Minn. Stat. § 198.003 (1989). Prior to the adoption of emergency rules, the Homes were operated through written guidelines. These guidelines were not promulgated under the Administrative Procedure Act, Minn. Stat. §§ 14.01-14.69 (hereinafter "the APA"). The Minnesota Court of Appeals, in L.K. v. Gregg, 380 N.W.2d 145, 150 (Minn.App. 1986), petition for rev. denied (March 14, 1986), held that any discharge or transfer of residents must be accomplished through APA promulgated rules. Since the Homes will continue to discharge or transfer residents in its facilities, rules relating to the process of such actions are clearly needed.

10. The need for promulgated rules goes beyond the holding in Gregg, however. All resident policies of the Homes are "agency statements of general applicability and future effect * * * adopted to implement or make specific the law enforced or administered by it * * *." Gregg, 380 N.W.2d at 150 (quoting Minn. Stat. § 14.02, subd. 4). Such resident policies are required to be promulgated under the APA. Properly promulgated rules are needed in areas beyond the discharge and transfer of residents. The Board has responded to this need by proposing rules to calculate the cost of care, setting maintenance charges, and billing residents of the Homes. The need for such rules is clear, insofar as the Homes cannot operate without these policies. This rulemaking proceeding serves to bring those policies into compliance with the law governing rulemaking.

Statutory Authority

11. In the SONAR, the Board states that Minn. Stat. §§ 198.003, (a)(1) (1988) authorizes it to adopt the proposed rules. That statute, as amended in 1989, also expressly authorizes the adoption of emergency rules. The Board has the general authority to promulgate rules.

Small Business Considerations in Rulemaking

12. Minn. Stat. § 14.115, subd. 2 (1988) requires state agencies proposing rules affecting small businesses to consider methods for reducing adverse impact on those businesses. The proposed rules relate only to the functioning of the State-owned and operated Veterans Homes. The proposed rules will not affect small businesses. Therefore, the Board need not consider alternatives to lessen the impact of the rules on small businesses.

Fiscal Note

13. Minn. Stat. § 14.11, subd. 1 requires proposers of rules requiring the expenditure of public funds in excess of $100,000 by local public bodies to publish an estimate of the total cost for a two year period. The rules do not require any expenditure of public funds by local public bodies. Since no expenditures by local public bodies are required under the rules, the statute does not apply.

Impact on Agricultural Land

14. Minn. Stat. § 14.11, subd. 2 requires proposers of rules that have a "direct and substantial adverse impact on agricultural land in this state" to comply with additional statutory requirements. These rules have no impact on agricultural land and, therefore, the additional statutory provisions are inapplicable.

Analysis of Substantive Provisions

Scope of Analysis.

15. The proposed rules consist of 67 pages of new material. Some of the parts contained in the proposed rule did not incite any comment. Absent some other need to discuss these parts, they will not be specifically referred to in this report. Any rule not mentioned is found to be needed and reasonable. Further, any rule not mentioned is found to be specifically authorized by statute. This rule report will focus on those proposed rules which were altered by the Board, generated written comment, were the subject of testimony, or are of questionable statutory authority.

Proposed Rule 9050.0030: Compliance with Statutes, Rules, and Codes.

16. This part, proposed Rule 9050.0030, sets out a non-inclusive list of state statutes and rules which must be complied with to maintain the Homes' licensure. This part is needed and reasonable to index the sources of law which have an immediate impact on the operation of the Homes. In particular, the rules which govern many specific functions of the Homes are not compiled in any other location for the Homes' use. The Board has added a Subpart M which adds the United States Veteran's Administration Code M-1, Part I, Chapter 3 to the list of statutes and rules which must be complied with. This addition is needed and reasonable to ensure that financial assistance from the U.S. Veterans Administration continues uninterrupted. The change is not a substantial change.

Proposed Rule 9050.0040: Definitions.

17. Much of this part, which sets forth definitions used in the substantive sections of the proposed rules, was not discussed in the comments or in testimony at the hearing of this matter. Those definitions clarify the proposed rule and are needed and reasonable as written. The remaining definitions will be discussed in the following paragraphs.

18. Subpart 5 defines "Admissions Agreement" as the contract between the Homes and the resident or the resident's legal representative. The Subpart sets certain criteria for the contents of the contract. The only comment relating to this definition suggested that the subpart explicitly require compliance with the Minnesota Plain Language Act, Minn. Stat. § 325G.31 and the Minnesota Attorney General's Standards for Certification of Consumer contracts as authorized under Minn. Stat. § 325G.35. The Board declined to adopt this suggestion. When implementing agency rules, the agency must comply with all applicable statutes or rules. Unless the citation of an applicable statute materially assists the understanding of the rule, citations to other sources of law should be omitted. The Subpart provides standards for the

content of admissions agreements which will ensure that rights and responsibilities are clearly assigned to the Homes and residents. The Subpart is needed and reasonable as written.

19. "Discharge" is defined in Subpart 36 as a termination of residence in the Homes. Testimony from the agency panel at the hearing indicated that the Board considers discharge to include the movement of a resident from one Board-operated campus to another. Francesca Chervenak, Esq., Legal Aid Society of Minneapolis (Legal Aid), suggested new language that would make that change explicit. The Board adopted that suggestion and has included the new languge in proposed Subpart 36 as follows:

> Subp. 36. Discharge. "Discharge" means a termination of residence in a nursing home or boarding care home that is documented in the discharge summary signed by the attending physician. A discharge includes the movement of a resident from the campus of one board-operated facility to another, whether to the same or to a different level of care. For purposes of this definition, a discharge does not include: . . . .

The Subpart, as modified, is reasonable and necessary to advise residents of the precise nature of discharges from the Homes. The new language clarifies the rule and is not a substantial change.

Proposed Rule 9050.0050: Persons Eligible for Admission.

20. Proposed rule 9050.0050 sets forth the eligibility requirements for veterans who seek to be admitted to the Homes. Subpart 1 enumerates the statutes an applicant must be in compliance with to gain admission. Further, the subpart specifies that an applicant must provide "current medical evidence of the need for admission and financial information . . . ." The criteria for Minnesota resident status is established and the standards for adequate financial support are set in this subpart.

21. Subpart 1 did not generate critical comment. However, many commentators objected to the application of the specific admission requirements in proposed rule 9050.0070. Since the discussion of the two parts is identical, proposed rule 9050.0050 will be analyzed together with proposed rule 9050.0070, below. (See, Findings 28-45).

Proposed Rule 9050.0055: Admissions Process, Waiting List, Priority.

22. Proposed rule 9050.0055, Subpart 1 sets forth the documentary requirements for completing an application. Legal Aid objected to the requirements of a discharge summary from all hospitals from which the applicant received treatment over the previous 5 years and information from the applicant's current nursing home. The commenter felt that this was an unwarranted intrusion into the applicant's background. This provision directly relates to the statutory requirement that the Board use the case mix system in admitting residents. Since the facility must know what level of care will be required by the applicant and whether any particular health problems persist, the subpart is needed and reasonable.

23. Subparts 3, 4, and 5 establish a waiting list system to prioritize

applications. The Board suggests that some system is necessary to ensure fairness to all applicants. The system consists of two waiting lists, one active and one inactive. An applicant on the active waiting list is directly in line to be offered a bed at one of the Homes. If offered a bed, the applicant must choose within seven days whether to accept the offer. Failure to accept (or request transfer to the inactive waiting list) places the applicant at the bottom of the active waiting list upon the first refusal, and on the inactive waiting list upon the second refusal. The Board states that this is necessary to promote realistic assessment on the part of the applicant of the need for admission into the facility. Applicants on the inactive waiting list are eligible to receive information on the length of the active waiting list and the likelihood of openings at the facility. Subpart 5(A) has an exception for an applicant who has twice refused an offer and thereby been moved to the inactive waiting list. Although the rule renders such an applicant ineligible for placement on the active list for one year, the applicant may be placed on the active waiting list sooner, if the attending physician verifies that "a significant change in health status" ocurred since the last refusal. The proposed rules do not define "substantial change." Although the rule as written is needed and reasonable, the Administrative Law Judge suggests that the following be added after the last line of Subpart 5(A):

> A "Substantial change" is the worsening of an applicant's medical condition due to an unexpected health condition such as a sudden stroke, heart attack or condition not previously diagnosed.

This language is extrapolated from the Board's SONAR and clarifies the Board's intent. With the suggested change, proposed rule 9050.0055 is needed and reasonable. The change does not constitute a substantial change.

Proposed Rule 9050.0060: Admissions Committee; Creation, Composition, and Duties.

24. Subpart 1 of proposed rule 9050.0060 provides for the appointment of an admissions committee by the facility administrator. This committee will review and decide upon applications for admission to the Homes. Subpart 2 requires three or more staff members be appointed, and provides a list of candidates. Optional candidates are also listed in Subpart 2. The specific duties of the committee are detailed in Subpart 3. Essentially, the committee must screen each applicant for admission and keep minutes of the screening process. Subpart 4 mandates a preadmission screening similar to that conducted pursuant to Minn. Stat. § 256B.091. The screening consists of an interview with the applicant or legal representative, and consideration of previous records including military, medical, psychiatric, placement history, criminal and financial.

25. Establishing a screening team is expressly required by Minn. Stat. § 198.007 (1989). The statute, in pertinant part, states that "The Board shall adopt a preadmission screening program, such as the one established under section 256B.091 . . . ." Id. The section 256B.091 screening committee is expressly required to have a public health nurse and a social worker. Further, that statute states:

> Each screening team shall have a physician available for consultation and shall utilize individuals' attending

> physicians' physical assessment forms, if any, in assessing needs. The individual's physician shall be included on the screening team if the physician chooses to participate. (Emphasis added).

Minn. Stat. § 256B.091, Subd. 2. The Board acknowledges that the proposed rule calls for a similar preadmission screening committee. SONAR, at 19. However, the Board's proposed rule does not require that a physician be a committee member, nor does it require that a physician be "available for consulation." Furthermore, no provision is made for having an applicant's attending physician choose to participate on the Board's committee. The Legislature's emphasis upon this right of the attending physician to participate in the screening process is clear. The Board has not made any showing that the lack of a physician available to consult with the preadmission screening committee is reasonable. Nor has the Board shown that denying the right of an individual's attending physician to join the committee is reasonable.

26. The language of Minn. Stat. § 198.007 does not require the Board to adopt the preadmission screening process in section 256B.091 verbatim. However, the Board's flexibility to vary from the model does not extend to omitting fundamental aspects of that model. Having a physician available for consulation is mandated (in the Department of Health's system) by section 256B.091. Similarly, the right of the individual's attending physician to join the committee is mandated. In Subpart 4, the Board requires that the screening committee review the records of the attending physician, but the proposed rule does not provide the screening committee with a physician to conduct that review. This omission is not reasonable to accomplish the goals of the proposed rules and must be changed.

27. To correct this defect, the Board must alter proposed rule 9050.0060, Subpart 2 to make provision for having either a physician on the screening committee or having a physician available for consultation during the screening process. The Board must further alter Subpart 2 to provide for the right of the individual's attending physician to join the preadmission screening committee. The Administrative Law Judge suggests the following language be added after the last sentence in Subpart 2:

> The applicant's attending physician shall be included on the admissions committee if the physician chooses to participate.

This language is consistent with the rights afforded in the screening team provision of Minn. Stat. § 256B.091, ensures that all appropriate opinions are available and does not constitute a substantial change.

Proposed Rule 9050.0070: Types of Admissions.

28. This rule part sets the particular criteria used to determine whether a particular applicant qualifies for admission into one of the Homes' facilities. Subpart 1 specifies that the Department of Health rules regarding disqualification of applicants, capacity of the facility and nondiscrimination in acceptance of applicants are to be followed in the admissions process for the Homes. Subpart 2 makes the admissions committee of the facility responsible for further evaluation of applicants who qualify under Subpart 1. Subpart 2 specifies that the admissions committee will use the criteria found in Subparts 3 or 4.

29. Proposed rule 9050.0070, Subpart 3 establishes the specific criteria used by the admissions committee for both the initial admission and continued stay in the facility. If the care needs of the applicant (or resident) can be met by the facility, that person must be admitted, retained as a resident or placed on the facility waiting list. If the care needs of the person cannot be met by the facility, the applicant must be denied admission or the resident refused continued stay. The determination of care needs is made through the person meeting the criteria labeled A through N.

30. Subpart 3(A) requires each person to be assigned a case mix classification of A or B as a prerequisite to living at the Homes. These classifications contain persons who have a low supervisory need score in activities for daily living (ADL) and who are not defined as "special nursing." The use of the case mix system is specifically required by Minn. Stat. § 198.007 (1989) and, therefore, its inclusion is needed and reasonable. Limiting admission and continued residency to persons who are classified A or B is appropriate since the Homes, board and care facilities, are not equipped to provide special nursing care and not capable of providing the intensive personal care required by Medium or High ADL persons. Subpart 3(A) is needed and reasonable.

31. Subparts 3(B) and (C) were objected to by Legal Aid on the basis that not every applicant has an "attending physician" and, therefore, such persons might be denied their right to reside in the Homes on a technicality. The Board responded that, when an applicant does not have an attending physician, the Board appoints one of the facility physicians to that status. That physician performs the required examinations. The Board may wish to amend proposed Rule 9050.0040, Subpart 11, by adding the following sentence to clarify the Board's intent: "When an applicant or resident has not specified an attending physician, the attending physician will be a Minnesota veteran's home facility staff physician." Although this rule is needed and reasonable as written, the suggested change will clarify the Board's intent to appoint a staff physician when an applicant does not have an attending physician. The change is not a substantial change.

32. Many commentators raised an additional objection to Subparts 3(B) and (C), asserting that requiring an applicant to document "medical necessity" for residing in the Homes exceeded the Board's statutory authority and interfered with a statutory right vested in veterans by Minn Stat. § 198.01-.03. Minn. Stat. § 198.022, (1), sets forth the most specific statement of eligibility. It states: "All applicants for admission to the Minnesota veterans home must be without adequate means of support and unable by reason of wounds, disease, old age, or infirmity to properly maintain themselves." Minn. Stat. § 198.022, (1) (emphasis added). The Board requirement for documenting medical need for the Homes' care is merely a restatement of the statutory entitlement. The condition of being unable to maintain oneself is the medical need referred to in the proposed rule. Subparts 3(B) and (C) are needed and reasonable to carry out the statutory mandate.

33. The proposed rule requires, in Subpart 3(D), that the person be alert, oriented and able to function within the monitoring structure of the Homes. This rule is supported by the Board's assertion that the Homes are board and care facilities, and thereby incapable of providing more comprehensive nursing care. Gail Kaba of Legal Aid suggested that a "trial

period" be included in this item to assess whether the effects of medications will ease, permitting the person to occupy the facility without restriction. The Board declined to adopt this suggestion on the basis that: 1) a board and care facility cannot provide the care such a person would need even during this "trial period"; and 2) the time period cannot be set with any precision to provide adequate time to determine whether the person's condition improves. Additionally, the preadmission screening should resolve this sort of problem. The applicant is able to choose the time of the screening and, if the use of medication is temporary, opt for a period of nonusage in which to be assessed. If the use of such medication is long-term, the applicant would not qualify for residency at the Homes, in any event. Subpart 3(D) is needed and reasonable as proposed.

34. The analysis for Subpart 3(D) applies with equal force to Subpart 3(E). A person with a diagnosis of mental illness must be capable of orienting and responding to the environment of the Homes. Any person unable to do so must be refused admission. Subpart 3(E) is needed and reasonable as proposed.

35. Proposed rule 9050.0070, Subpart 3(F) requires resident participation in establishing and complying with the individual's care plan. An individual care plan is defined in part 9050.0040 - Definitions, Subpart 58. The Board asserts that the Subpart is needed since an individual who resists implementation of the care plan requires more staff intervention than the Homes can provide. SONAR, at 23. The proposed rule is not limited to compliance, however. The requirement that the individual "must participate in establishing . . .the person's individual care plan" is both vague in application and unsupported in the Board's presentation of fact. Whether a resident actually "participates in establishing" a plan is different than the question of whether the resident "will comply" with the established plan. Minn. Stat. § 144.651, Subd. 10 provides an affirmative right for a resident to participate in planning the resident's health care. There is no affirmative duty placed upon the resident to do so, either in the rules regulating such facilities or in Minn. Stat. § 198. The imposition of such a duty would place a restriction upon the statutory entitlement of veterans to reside in the Homes. This restriction is narrower than the authorizing statute and, therefore, is without statutory authority. See, Wallace v. Commissioner of Taxation, 184 N.W.2d 588 (1971). The Board must correct this defect by deleting the vague language "must participate in establishing" from the first sentence of Subpart 3(F). The Administrative Law Judge suggests the following language:

> F. The person has the right to participate in establishing the person's individual care plan. . . .

36. In addition to the preceding discussion, Subpart 3(F) requires compliance with the person's medical treatment plan as a condition of admission and continued stay at the facility. A medical treatment plan is defined in Part 9050.0040, Subpart 74. This rule is in conflict with Minn. Stat. §144.651, the Patient's Bill of Rights. This statute affords patients the right to refuse medical treatment. Minn. Stat. § 144.651, Subd. 12. From the language of the statute, the only consequence of such refusal is for the care provider to inform the resident of the "likely medical or major psychological results of the refusal, with documentation in the individual medical record." Id. Making compliance with a medical treatment plan a condition of continued residence, however, seriously infringes upon the statutory right of a resident to refuse medical treatment. The Board justifies requiring compliance by

asserting that the Department of Health has fined Board-operated facilities for failure of the resident to follow their care plans. Board Responsive Comment, at 10 (December 28, 1989). Additionally, the Board cites inadequate facility capabilities to intervene in cases of resident refusal to follow medical treatment plans. SONAR at 23. These arguments do not justify a rule which conflicts with the Patient's Bill of Rights. Furthermore, the Board does not cite, nor can the Administrative Law Judge find, any Department of Health rule which permits assessments or fines against a facility as a result of a resident refusing medical treatment. Absent such a showing, the Board also has not met its affirmative burden of establishing the need and reasonableness of the proposed rule, with respect to refusal of medical treatment. To correct these defects, the Board must delete language requiring compliance with the medical treatment plan and compliance with the individual care plan to the extent that medical treatment is a component of the individual care plan. Refusal by a resident to accept medical treatment cannot form the basis for discharge from the Homes.

37. Subparts 3(G), (H) and (I) are all more specific restatements of Subpart 3(D) and, as such, these subparts are needed and reasonable. Subpart 3(I) permits making additional nursing services available for a period of not more than 5 days, with approval of the assistant director of nursing. This period of more intensive care is appropriate to provide for a resident with a minor illness, without needing to transfer the resident. Subpart 3(I) is needed and reasonable.

38. Many commentators objected to the language contained in Subpart 3(J) as being too vague and lacking objective criteria for determining whether a person with a history of violent behavior is a danger to self or others. In response, the Board altered the language of the subpart to require that a staff psychologist or psychiatrist assess each person for significant risk factors suggesting that the person poses a risk of harm to self or others. The Board is prohibited from accepting disturbed mentally ill persons by rules of the Department of Health. Minn. Rules 4655.0400 and .6600. The Department of Health rules clearly indicate that conduct which merely creates "difficulty of management" is adequate to disqualify the person from continued residency in a board and care facility. Minn. Rule 4655.6600. The rule proposed by the Board in this subpart is less restrictive than the Department of Health rules require and is sufficiently clear to provide reasonable, nondiscriminatory application. Subpart 3(J) is needed and reasonable as amended and the change in the rule is not a substantial change.

39. Just as the Department of Health rules control the analysis of Subpart 3(J), so too is Subpart 3(K) in accordance with the restrictions on residency in board and care facilities by mentally ill persons. Subpart 3(K) is needed and reasonable.

40. Subpart 3(L) was altered by the Board in response to numerous comments made during the course of this rulemaking proceeding. The subpart, as amended, requires persons with a diagnosis of chemical dependency to either complete a treatment program or be chemically free. The treatment program must be an "in-patient" program, according to proposed rules 9050.0040, subp. 25 and 99 and Minn. Rules 9530.6620 to 9530.6650. Francesca Chervenak, of Legal Aid, objected to the requirement of residential in-patient treatment being required under this proposed rule. The Board has not addressed whether out-patient treatment is sufficient to meet the needs of chemically dependent applicants or

residents. The Administrative Law Judge suggests that the Board also permit nonresidential out-patient treatment programs for appropriate cases. To accomplish this end, the definitions in proposed rule 9050.0040, subp. 25 and 99 would have to be changed to add the language "or out-patient treatment program as defined in Minnesota Rule 9530.6605, Subpart 19, when such out-patient program is appropriate under Minnesota Rules 9530.6620 to .6650." This language will incorporate the use of out-patient treatment programs in appropriate cases and ensure that appropriate treatment is received for the level of dependency. Additionally, the Board may wish to alter proposed rule 9050.0040, subp. 99 to change the statutory citation to Minn. Stat. § 245A.02, Subd. 14, since the statute cited in the rule as presently proposed has been repealed. Despite the foregoing, however, it is found that the Board's proposed rule, as amended, has been demonstrated to be needed and reasonable.

41. Other commenters suggested that Subpart 3(L) is discriminatory toward individuals with a disability (chemical dependency). No court case or statute has been cited to the Administrative Law Judge which classifies chemical dependency as a disability within the meaning of the Human Rights Act, Minn. Stat. § 363.03. The Board has asserted a legitimate, non-discriminatory purpose in restricting chemically dependent residents. The Homes maintain an alchohol-free environment to assist those residents whose chemical dependency is "in remission." The Homes' policy protects potentially vulnerable residents and cannot be accomplished without restricting admission or continued stay of chemically dependent individuals.

42. Francesca Chervenak also objected to defining "chemically free" as a six month period without useage or symptoms of dependency, asserting that the Board lacked the authority to restrict the admission of veterans who suffer from a disease (chemical dependency). The purpose of rulemaking proceedings is to establish standards for the Board to follow in its actions. The Board has chosen 6 months as a benchmark for nonusage or lack of symptoms. This time period has the advantage of being relatively short, but long enough for symptoms of chemical dependency to reassert themselves, if present in an individual. As will be discussed below, regarding proposed rule 9050.0070, subp. 3(N), the Board has the authority to restrict admission or residency on the basis of disease. Subpart 3(L), as proposed, is needed and reasonable. The new language proposed by the Board (and the suggested language in Finding 40), does not constitute a substantial change. Subpart 3(L) is found to be needed and reasonable.

43. Subpart 3(M) provides that a person must be able to comply with the rules. It further provides that ability to comply "is demonstrated by a documented history of compliance in a prior placement, if any." One commentator suggested that it is unfair to base a prospective ability to comply with the rules on a past history of compliance in some prior placement that may or may not have similar rules. Requiring an applicant for admission to have the ability to comply with rules is reasonable. However, ability to comply with rules should not be based exclusively on past history of compliance. Other evidence of ability to comply should also be permitted in appropriate circumstances, and, under the rule as proposed is apparently permitted when an applicant has no history of compliance in a prior placement. Accordingly, the language of the rule should clarify the Board's intent to permit a person to produce other appropriate evidence to demonstrate ability to comply. Changing the language to read as follows would clarify the rule:

Ability to comply may be demonstrated by a documented history of compliance in a prior placement, if any, or other relevant evidence which demonstrates ability to comply.

The new language does not constitute a substantial change. Subpart 3(M) is found to be needed and reasonable.

44. Subpart 3(N) requires that the person be free from any disease that poses a threat to the health and safety of others. Many commentators objected to the subpart because it incorporated the Department of Health list of reportable diseases. Minn. Rule 4605.7040. Many of the diseases on that list do not fall within the definition of posing a threat to the health and safety of others. The potential for confusion by retaining the list was made manifest at the hearing and through an inquiry made by the Minnesota Department of Human Rights. To clarify the intent of the Board and eliminate the potential for confusion, the Board adopted new language which parallels the Department of Health rule for persons who must be excluded from residency at a board and care facility due to disease. Minn. Rule 4655.0400, Subpart 1. The new language includes the potential for a waiver from the Department of Health to permit residency and incorporates the statutory prohibition against discrimination of carriers of the human immunodeficiency virus (HIV) or the hepatitus B virus. Laws of Minnesota for 1989, Chapter 282, Article 3, Section 4. The subpart is needed and reasonable as amended. The change in Subpart 3(N) was fully discussed in the comments and at the hearing, and does not constitute a substantial change.

45. When admission is sought to the board and care facility, the criteria in Subpart 3(A)-(N) are used. When admission is sought to the nursing care licensed facility, the criteria in Subpart 4(A)-(F) are used. Subpart 4(A) requires a case mix classification ranging from A to K. The justification for using this system is discussed above at Finding 30. The wider range is appropriate in a nursing care setting since more intensive care is available to the resident. Subparts 4(B) and (C) are nearly identical to Subparts 3(B) and (C), discussed at Finding 31. Subpart 4(D) requires a person to demostrate a history of compliance with an individual treatment plan. This criterion is discussed at Finding 43, above. Subpart 4(E) is identical to Subpart 3(N) and the Board proposes to change the language to conform with the new language in Subpart 3(N). That subpart is dicussed and no substantial change found at Finding 44, above. Similarly, Subpart 4(F) is identical to Subpart 3(J) and the Board proposes to change the language to conform with the new language in Subpart 3(J). That subpart is dicussed and no substantial change found at Finding 39, above. Each of the items in Subpart 4 are found to be needed and reasonable and none of the changes proposed constitute a substantial change.

Proposed Rule 9050.0100: Transfer.

46. The need for rules governing the transfer of residents was not contested by any commentator. The reasonableness of the rule as proposed by the Board was vigorously contested at the hearing and in the written comments. James Lee of Southern Minnesota Regional Legal Services, Inc. (SMRLS) and Francesca Cervenak of Legal Aid objected to the lack of a specific prior notice requirement in the event of a transfer resulting from an event outside the Homes' control. Under Subpart 1, a transfer may occur: A) by attending physician order; B) by resident request; or C) in an emergency. The resident

must consent to the transfer or be subject to discharge. The exception to the consent requirement for transfers is when an "emergency" exists. "Emergency" is defined in proposed rule 9050.0040, Subpart 39, as "a life-threatening medical condition that if not immediately diagnosed and treated could cause a person serious physical or mental disability, continuation of severe pain, or death." As discussed in Finding 36, a resident has the right to refuse medical treatment under Minn. Stat. § 144.651. Despite the resident's right to refuse, however, the facility has the obligation to be able to provide treatment. Under Department of Health rules, a facility cannot retain a resident "for whom care cannot be provided." Minn. Rules 4655.1500, subp. 2. Thus, a person may refuse medical treatment at a boarding care facility without adverse action against that person's residency status, so long as the resident does not need treatment not available at the facility. Once such treatment is needed, the resident must be transferred to a facility capable of meeting the person's medical need, whether the needed treatment is refused or accepted. Thus, a transfer to a facility capable of meeting a resident's treatment needs is a reasonable requirement.

47. Subpart 2 provides for 30 day notice prior to transfers outside the Homes, 7 day notice for transfers within the particular Home and notice in accordance with Minn. Stat. § 144.651, subd. 29 for transfers caused by circumstances outside the facility's control. This last notice requirement is a change from the rule as originally proposed. The 30 day and 7 day notice requirements are mandated by the Patient's Bill of Rights. Minn. Stat. § 144.651, subd. 29. In situations outside the facility's control, the Board attempts to incorporate the abbreviated notice provisions of that statute by specific reference to the Patient's Bill of Rights in Subpart 2(C). The Patient's Bill of Rights states, in pertinent part: "the notice period may be shortened in situations outside the facility's control . . . ." Minn. Stat. § 144.651, subd. 29. Subpart 2(C) does not reference the specific language quoted above, however. Additionally, the statute permits shortening of the notice period, it does not mandate the period. Thus, if the Board wishes to use shortened notice periods in some situations, the Board must expressly establish the means to shorten the period. Failure to do so constitutes a defect. The Administrative Law Judge suggests the following language to cure this defect:

> C. A reasonable time before the anticipated transfer in situations outside the board-operated facility's control, and such reasonable time must be determined by the facility administrator or designee, based upon the particular facts of the situation prompting the transfer.

The suggested language expressly provides for shortening the notice period, names the individual who determines the notice period and establishes the standard by which the notice period is to be set. Proposed rule 9050.0100, as altered is needed and reasonable to protect the due process rights of residents in the Homes, while permitting the facilities to respond to extraordinary situations without undue procedural interference. Any transfer, except one based upon an emergency, may be appealed through the process established in proposed rule 9050.0220. The Administrative Law Judge notes that, as the rule is worded, an emergency is not identical to all situations outside the facility's control. Thus, nonpayment of stay remains appealable under the rule as proposed. The language suggested in this report clarifies the rule, comports with the Board's expressed intent and does not constitute a substantial change.

Proposed Rule 9050.0150: Bed Hold.

48. Bed hold is the retention of an open bed in anticipation of an absent resident's return to a Board-operated facility. The absence could be for treatment or personal reasons. Under Subpart 3, satisfactory progress must be made in treatment or discharge proceedings would be initiated. In Subpart 4, the Board has proposed new language changing the personal absence rule from an absolute limit of 96 hours to a limit for personal absences of 96 hours, "unless arrangement has been made with the administrator for a longer absence." The new language also makes explicit the requirement that the maintenance charge remains in effect, despite the resident's absence. The Board asserts that the bed hold rule is needed to efficently and economically allocate the beds available in the Homes. The Board recognizes that the bed hold rule is a compromise between the rights of admitted (but absent) residents and applicants for admission on the waiting list. The Board justifies continuing the existing maintenance charge on several grounds. First, the standard practice among boarding care homes is to maintain the charge so long as the bed is "reserved" for a resident. Second, maintaining the charge provides a disincentive to prolonging discretionary absences. Additionally, the resident is encouraged to choose against retaining the bed when the likelihood of return to the facility is remote. Such choices will maximize the use of unoccupied beds at the facility and shorten the wait of applicants seeking admission to the Homes.

49. Several commentators objected to the 96 hour limitation on personal absences. The Board has responded to these comments by altering the proposed language as outlined in the preceding paragraph. The 96 hour standard was adopted from the United States Veteran's Administration Code M-1, Part I, Chapter 3.31, which permits per diem payment for residents whose absence does not exceed 96 hours. Under the VA Code, should an absence last more than 96 hours, the per diem is disallowed to the beginning of the absence. This negative fiscal impact renders the Board's proposed rule requiring notification needed and reasonable. The administrator must be aware of periods when VA aid will not be available. Further, in extended absences, the notification requirement permits the administrator to determine whether an absence will be too long to avoid discharge proceedings. In the event of discretionary absences, such knowlege will aid both the resident and administrator in opting for mutually acceptable solutions, rather than discharge proceedings. The bed hold rule is needed and reasonable. The change to the rule was made to permit needed flexibility to the 96 hour rule and does not constitute a substantial change.

Proposed Rule 9050.0200: Discharge.

50. The Board proposes two types of discharge of residents. The first type of discharge is a voluntary agreement between the administrator, the resident's attending physician, and the resident (or resident's legal representative) that the resident permanently leave the home. The other type of discharge is involuntary. Once discharged, either voluntarily or involuntarily, the former resident would be eligible to reapply. James Lee of SMRLS objected to the two types of discharges and suggested that only the process established for involuntary discharges would protect the rights of residents. There has been no suggestion by any witness that a resident, once

admitted, cannot leave the facility on the resident's own volition. The Board need not require "sham" hearings where all sides agree on the outcome. Further, the resident has an interest in maintaining a history of residency free of stigma. Eliminating voluntary discharge raises the potential of stigma attaching to the resident's history for having been "discharged" with a hearing. The Board's system of voluntary and involuntary discharges is needed and reasonable.

51. Subpart 3 sets forth the grounds for involuntary discharge. They are: 1) failure to comply with the admissions agreement; 2) the resident (or legal representative) makes a written request for discharge; 3) the facility cannot meet the resident's needs, as determined by the utilization review committee; 4) the resident is absent from the facility for 96 consecutive hours or more; or 5) false information is supplied or information withheld in various circumstances. The first three grounds are needed and reasonable as written. Regarding resident absence, the language proposed by this subpart uses the expression "96 hours or more without notice." The Bed Hold rule, proposed rule 9050.0150, Subp. 4 uses the expression "not longer than 96 hours, unless the resident has made a definitive arrangement . . . ." Although it is clear from the record that the Board's intent is to have the same standard in Subpart 3(D) as the standard in 9050.0150, Subpart 4, the language of these two proposed rules are different and could cause confusion. The language of both subparts should be consistent. Furthermore, the administrator may wish to discharge a resident for failing to comply with the "definitive arrangement" made between the resident and the administrator, even though notice of absence was provided. The Administrative Law Judge suggests the following language to eliminate potential confusion and make the language of the two subparts consistent:

> D. The resident is absent for more than 96 consecutive hours, or where a definitive arrangement has been made for an absence longer than 96 hours, and the resident fails to comply with that arrangement.

Although the rule as written is not unreasonable, the change is strongly recommended to better set forth the Board's intent. The suggested language would not constitute a substantial change.

52. In Subpart 3(E), the Board has specified three types of false or withheld information. The only suggestion to this section of the rules was made by Gail Kaba of Legal Aid, who recommended that the word "critical" be added to Subpart 3(E)(2), so that the rule would read: "refuses to provide critical information or releases." The addition of this word would distinguish between trivial and important matters; however, the addition is not vital to the rule. The Administrative Law Judge must presume that the Board will proceed on application in good faith and will not emphasize trivialities in discharging residents. The Subpart is needed and reasonable with or without the word "critical." Adding that word would not constitute a substantial change.

53. The notice provision for discharges, set forth in Subpart 4, has been changed to conform to the new notice language for transfers at proposed rule 9050.0100. The transfer rule was discussed at Finding 47, and the same discussion applies to Subpart 4. As with the transfer rule, the notice for situations outside the board-operated facilities control must be changed. The

Administrative Law Judge recommends that the Board change the last sentence of Subpart 4 to read as follows:

> In situations outside the board-operated facility's control, notice of discharge must be given a reasonable time before the discharge and such reasonable time must be determined by the facility administrator or designee, based upon the particular facts of the situation prompting the discharge.

Subpart 4, with the suggested language, is needed and reasonable and does not constitute a substantial change.

54. Subpart 6 makes an exception to the notice provisions of Subpart 4 when a resident has been absent for 96 hours, subjecting the resident to immediate discharge with the right to a hearing requesting reinstatement. The Board argues it needs to deny a resident's right to a pre-termination proceeding when the resident is willfully absent from the facility. The Board asserts that it would otherwise be responsible for residents not at the facility and not receiving care. The concept of offering a pre-termination "hearing" to an individual who is not present to participate in that hearing supports the Board's argument. The threshold for this exception needs to be changed to conform to proposed rule 9050.0150, Subpart 4. The Administrative Law Judge suggests the Board replace "for 96 consecutive hours" with "for more than 96 consecutive hours". This change will conform the rule with other parts, reduce confusion and is needed and reasonable. The change is not a substantial change.

Proposed Rule 9050.0220: Involuntary Discharge Procedures.

55. This part sets out the procedure for carrying out involuntary discharges. Subparts 1 through 5 are needed and reasonable and prompted little comment. Subpart 6, setting out the process for appeal of involuntary discharges, requires adherence to the contested case rules of Minn. Stat. §§ 14.48 to 14.56 until rules are adopted under Minn. Stat. § 144A.135 by the Commissioner of Health. The proposed rule does not say what is to occur when that Department of Health rule is adopted, however. At the hearing, members of the agency panel stated that the Board's intention is to have the Department of Health rules apply once they are adopted. Should such a change occur, the administrator should expressly inform the applicant or resident of which rules govern the appeal. Further, this rule gives the administrator discretion to waive the effect of the discharge pending appeal. No standards are given to limit this discretion. Such unbridled discretion is improper. To cure the defects in this subpart, the Board must add language to expressly apply the new rules of the Department of Health and establish some standards for waiving the effect of a discharge order pending appeal. The Administrative Law Judge suggests the following language to cure the defects noted:

> An applicant or resident, or legal representative, may appeal a discharge or transfer order. Appeals must be in accordance with contested case procedures of the Administrative Procedures Act, Minnesota Statutes, sections 14.48 to 14.56, until rules are adopted under Minnesota Statutes, section 144A.135, by the commissioner of health. Once the rules adopted under Minnesota

Statutes, section 144A.135 have taken effect, all appeals must be in accordance with the rules promulgated under that statute. The administrator shall inform the resident or applicant of which rules govern the appeal in the notice provided under parts 9050.0100, subpart 2 or 9050.0200, subp. 4. A final discharge order issued by the administrator following the Office of Administrative Hearings' review remains in effect pending any further appeal. Notwithstanding this provision, the administrator may, for good cause shown, waive imposition of the discharge order until all appeals have been concluded.

Nothing in this part may be construed to limit, change, or restrict other appeal or review procedures available to a resident under law.

(new language underlined). The suggested changes remove ambiguity from the Subpart, provide a flexible standard for the administrator's discretion, and permit the use of the Commissioner of Health appeal procedure, once it is promulgated. The Administrative Law Judge recognizes that a "good cause" standard is broad. However, in this procedural setting, the reasons which could justify the administrator's waiver are so varied that the standard cannot be made more specific. See, Can Manufacturer's Institute v. State, 289 N.W.2d 416 (Minn. 1979). Since the good cause standard is meant to lessen the negative regulatory impact of an involuntary discharge procedure, the broad standard is acceptable in this situation. Subpart 6, as altered, is needed and reasonable to describe the appeal procedure and the changes suggested do not constitute substantial changes.

Proposed Rule 9050.0400: Utilization Review Committee.

56. The use of utilization review committees is expressly required by Minn. Stat. § 198.007. The statute does not specify who shall comprise the committee. Subpart 2 of the proposed rule requires the committee to have, at a minimum, two physicians, a registered nurse, the administrator (or a designee), a social worker, and a medical records technician. The Subpart also lists other potential members of the utilization committee, depending upon the needs of the resident. Commentators at the hearing objected to the presence of the medical records technician on the committee. The Board staff responded that this member was necessary to ensure that the committee had access to the proper resident records. A compromise was suggested, that the records technician remain on the committee, but not be involved in making substantive decisions. This compromise is consistent with the Board's intent in placing the technician on the committee and reasonable to accomplish the Board's purpose. The compromise is not required by law, however. Should the Board wish to change Subpart 2, it may add, "who shall not participate in a decision making capacity" after "medical records technician." No other parts of this rule received significant comment. The subpart is needed and reasonable and, should the change be made, does not constitute a substantial change.

Proposed Rule 9050.0500: Cost of Care; Basis for Maintenance Charge; Billing.

57. Many of the residents of the Homes who testified at the hearing or

submitted written comments objected to this portion of the proposed rules. The substance of the objections focus on: 1) the amounts required of residents as a maintenance charge; 2) the accumulation of arrearages; and, 3) the billing of residents for services not received. The legislation authorizing these rules sets out methods to be followed in setting the cost of care for the residents of the Homes. The cost of care is to be the average cost per resident, including administrative, service, food and lodging costs. Minn. Stat. § 198.03, Subd. 2. The issue of being billed for services not received is not debatable, since the legislative scheme mandates an average cost of care for all residents. The average costs for boarding care facilities and nursing homes must be calculated separately. Minn. Stat. § 198.03, Subd. 2. Similarly, the Legislature has decided that residents' arrearages at the Homes are not forgiven. Minn. Stat. § 198.03, Subd. 3. The proposed rules establishing a method of calculating the average daily cost per resident are statutority authorized, needed and reasonable.

Proposed Rule 9050.0510: Maintenance Charge; Additional Services; Veteran Exclusive Services.

58. This part requires residents to pay for any services obtained by the resident beyond the services provided by the Homes, in addition to maintenance charge. These additional services arise from outside sources, are incurred at the sole option of the resident, and cannot exceed the level of care for which the facility is licensed. Minn. Rule 4655.1600 requires a written agreement between the resident and the facility detailing "the base rate, extra charges made for care and services . . .". The agreement contemplated in that rule covers additional services provided by the facility and not covered by the base rate. The proposed rule merely states that no additional services are available from the facility and that any such services brought in from outside will not reduce the obligation of the resident to pay the full maintenance charge. The proposed rule is needed and reasonable as written.

Proposed Rule 9050.0560: Maintenance Charge Determination; Time and Calculation Method.

59. This rule part establishes the timing and method of calculating the appropriate maintenance charge for each resident. Subpart 1(B) provides for calculating a new maintenance charge when "there is a substantial change in . . . financial status." "Substantial change" is later defined as "a change that increases the person's net worth above the $3,000 limit." In Subpart 2(A), the resident's net worth, once it exceeds $3,000, must be reduced to $2,500. Until the $2,500 level is reached, the resident must pay a maintenance charge of the full cost of care less the VA per diem reimbursement. The Board provides conflicting information in support of this provision. The initial net worth limit of $3000 is set in proposed rule 9050.0550, subp. 3. The Board states "This rule limits unexcluded property to $3,000 and further provides that excess 'property' must be spent down to the $3,000 limit by full payment of the cost of care." SONAR, at 55 (emphasis added). Later, referring to proposed rule 9050.0560, subpart 2(A) the Board states: "As in medical assistance, those with resources over the "assets" limit of $3,000 must reduce that amount to the appropriate level to acheive or maintain eligibility for benefits. SONAR, at 58 (emphasis added). The Board appears to support a spend down requirement to $3,000. However, the Board continues: "The resources must be reduced to $2,500, according to rule." SONAR, at 58. The Board asserts that ease of administration and efficient use of staff justify the lower spend down level.

This justification is difficult to accept in light of: A) the resident's incentive to spend any sums available over the $3,000 level upon receipt, rather than pay a higher charge; B) the existing involvement of facility staff in the financial affairs of the residents; and C) the margin ($500) being one-sixth of the resident's net worth. Furthermore, the Board is authorized to set the level at which persons are considered to be "without adequate means of support." Minn. Stat. § 198.022, Subd. 1. It is concluded that the Board has failed to demonstrate the reasonableness of setting two levels for the same determination. To correct this defect, the Administrative Law Judge suggests that the reference to $2,500 in Subpart 2(A) be altered to $3,000. As amended, the proposed rule is needed and reasonable. The change promotes consistency, is authorized by statute and does not constitute a substantial change.

Remaining Provisions.

60. The remaining provisions relate to the calculation of income, determination of net worth, sources of income, application for additional benefits and execution of verifications. Only one comment was made concerning these provisions. Roland Johnson, a resident of the Minneapolis facility proposed that the Homes establish a trust fund, exempt from the $3,000 limitation in proposed rule 9050.0560, to permit a mentally ill resident, upon recovery, to re-enter the mainstream of society. Under the present system, the resident cannot accumulate enough money to leave the facility without fear of financial distress. As discussed in the previous paragraph, the Board does not have authority to establish two levels of support for residents. However, the Board staff stated their intention to explore possible methods of establishing Mr. Johnson's proposal. The Administrative Law Judge encourages the Board staff to seek methods to enact this proposal, insofar as it would encourage recovery and re-entry of residents, eliminate a serious dilemma for residents and make a scarce resource (space in the Homes) available to other deserving individuals. The remaining provisions of the proposed rules are needed and reasonable.

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

CONCLUSIONS

1. That the Veterans Home Board (hereinafter "Board") gave proper notice of the hearing in this matter.

2. That the Board has fulfilled the procedural requirements of Minn. Stat. §§ 14.14, subds. 1, 1a and 14.14, subd. 2, and all other procedural requirements of law or rule. The technical defect found in Finding 7 was not prejudicial to any interested person and does not form a basis for invalidating the proceeding.

3. That 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, 14.15, subd. 3 and 14.50 (i)(ii), except as noted at Findings 35, 36, 47, and 55.

4. That the Board has documented the need for and reasonableness of its proposed rules with an affirmative presentation of facts in the record within the meaning of Minn. Stat. §§ 14.14, subd. 2 and 14.50 (iii), except as noted

at Findings 24 through 27, and 59.

5. That the amendments and additions to the proposed rules which were suggested by the Board 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, and Minn. Rule 1400.1000, Subp. 1 and 1400.1100.

6. That the Administrative Law Judge has suggested action to correct the defects cited in Conclusions 3 and 4, as noted at Findings 24 through 27, 35, 36, 47, 55, and 59.

7. That due to Conclusions 3 and 4, this Report has been submitted to the Chief Administrative Law Judge for his approval pursuant to Minn. Stat. § 14.15, subd. 3.

8. That any Findings which might properly be termed Conclusions and any Conclusions which might properly be termed Findings are hereby adopted as such.

9. That a finding or conclusion of need and reasonableness in regard to any particular rule subsection does not preclude and should not discourage the Board from further modification of the proposed 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 except where specifically otherwise noted above.

Dated this 29th day of January, 1990.

Phyllis A. Reha

PHYLLIS A. REHA
Administrative Law Judge