5-0900-4796-1

STATE OF MINNESOTA
OFFICE OF ADMINISTRATIVE HEARINGS

FOR THE MINNESOTA DEPARTMENT OF HEALTH

In the Matter of the Proposed Adoption of Minnesota Department of Health Rules Governing Fees for Manufactured Home Parks and Recreational Camping Areas, Minn. Rules, Pts. 4630.1900, 4630.2000, and 4630.2010.

REPORT OF THE ADMINISTRATIVE LAW JUDGE

The above-entitled matter came on for hearing before Howard L. Kaibel, Jr., Administrative Law Judge, at 9:00 a.m. on August 15, 1990, in the State Office Building in St. Paul, Minnesota.

This is a rulemaking proceeding under Minn. Stat. §§ 14.131-14.20 held to determine whether the Department of Health has fulfilled all relevant substantive and procedural requirements of law applicable to the adoption of rules, whether the proposed provisions are needed and reasonable, and whether any suggested modifications would constitute impermissible substantial changes.

The Department staff panel consisted of the following representatives of the Environmental Health Division: Charles Schneider, Chief of the Environmental Field Services Section; Denton Peterson, Information Systems Coordinator; and Jane Nelson, Rules Coordinator. Assistant Commissioner Michael Finn and Special Assistant Attorney General Paul Zerby also attended.

The Commissioner 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, subd. 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 Commissioner of actions which will correct the defects and the Commissioner 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 Commissioner may either adopt the Chief Administrative Law Judge's suggested actions to cure the defects or, in the alternative, if the Commissioner does not elect to adopt the suggested actions, she must submit the proposed rule to the Legislative Commission to Review Administrative Rules for the Commission's advice and comment.

If the Commissioner 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 Commissioner may proceed to adopt the rule and submit it to the Revisor of Statutes for a review of the form. If the Commissioner makes changes in the rule other than those suggested by the Administrative Law Judge and the Chief Administrative Law Judge, then she 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 Commissioner files the rule with the Secretary of State, she 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 June 15, 1990, 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.
(f) A Statement of Additional Notice.

2. On July 2, 1990, a Notice of Hearing and a copy of the proposed rules were published at 15 State Register page 1.

3. On June 29, 1990, 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 July 20, 1990, 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 14 State Register 1879, on January 22,

1990, 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 comments and statements remained open through September 4, 1990, the period having been extended by Order of the Administrative Law Judge to 20 calendar days following the close of the hearing. Pursuant to Minn. Stat. 14.15, subd. 1, an additional 3 business days were allowed for filing of responsive comments. The record consequently closed on September 7, 1990.

Statutory Authority

6. General statutory authority to establish and modify license fees by rule is found in Minn. Stat. §§ 16A.128, 144.122 and 157.045. The Department has adequately documented its statutory authority to adopt the proposed rules.

Fiscal Note

7. The rules as proposed will not require license fees of local units of government and should not have any significant cost impact on them. They certainly will not increase local government costs more than $100,000 in either of the two years following adoption. A fiscal note was consequently not required pursuant to Minn. Stat. § 14.11, subd. 1.

Nature of the Proposed Rules

8. The Department really has no choice here but to make some upwards adjustment of fees, as soon as possible. The above-cited statutes clearly and unequivocally require that fees cover costs of the inspection program - at least as long as the amounts charged are reasonable and practical.

Although it was not specifically explained in the Department's Statement of Need and Reasonableness (SONAR) or at the hearing, licensees have been seriously undercharged since at least 1981, because of underestimated program costs, discovered in 1988. In 1987 and previous years, the Department bookkeepers assumed that 4.36% of staff salaries and benefits and other costs across the board were attributable to the inspection program. In 1988 the Department began requiring detailed daily time records of each employee and discovered that 20 staff members were spending an average of 12.4% of their time on these inspections plus one member spending 100% of the time on the program, which is comparable to an across-the-board figure of 16.54%. As a result, staff costs attributable on the Department books to inspection nearly quadrupled from $32,000 to $117,000. Supply, expense and indirect costs attributable to inspection also accordingly tripled.

The Department books showed it collecting nearly twice as much ($82,000) in 1987 as its erroneously-estimated private inspection costs of $42,000 leaving a "surplus" of $40,000 going into 1988. However, in 1988, its revised private costs based on the new time records jumps to $146,000, minus revenue collections of only $82,000, for a deficit of $64,000 (or $24,000 after deduction of the 1987 $40,000 "surplus"). The Department did not cut back its

activities in this area at that time or make an immediate effort to adjust the fees to reflect these revised costs.

The situation got worse, beginning in 1989, as the number of parks and camps declined. Resulting revenues were reduced to $78,000 in 1989 and $70,000 in 1990.

The accumulated deficit on Department books increased accordingly to $74,000 in 1989 and $155,000 in 1990. The Department proposes to erase this "deficit" over the next five years by tripling revenues collected from fees, from the current $70,000 per year to $206,000 a year, beginning in 1991. Regardless of the way this proposed 200% increase in fees is distributed among the campgrounds and mobile home parks, the impact will be difficult for operators to absorb, because they cannot increase the fees they charge consumers at this kind of inflationary rate.

Small Business Considerations

9. Minn. Stat. § 14.115, subds. 2 and 3 require in part that:

> When an agency proposes . . . an amendment to an existing rule, which may affect small businesses as defined by this section, the agency shall consider each of the following methods for reducing the impact of the rule on small businesses:
>
> (a) The establishment of less stringent compliance . . . requirements for small business;
>
> (b) The establishment of less stringent schedules . . . for compliance . . . for small businesses; . . .
>
> The agency shall incorporate into the proposed . . . amendment any of the methods specified . . . that it finds to be feasible, unless doing so would be contrary to the statutory objectives that are the basis of the proposed rulemaking.

Arguably, the only way licensed businesses can comply with this proposed rule is by paying the prescribed fees and a less stringent schedule for compliance for small businesses, particularly seasonal campgrounds would be feasible and would not be contrary to the program's statutory objectives. Indeed, the existing fee rule has such a less stringent schedule for compliance, which has proven to be feasible and the proposed rule does contain a somewhat less stringent schedule for smaller seasonal and year-round businesses by charging operators with less than 50 sites a dollar less per site.

The decision on whether the Department has adequately complied with Minn. Stat. § 14.115 is never reached lightly. The statute provides that in cases of inadequate compliance, the rule cannot be adopted. Unlike other Chapter 14 findings, this small business compliance ruling is not subject to approval by the Chief Administrative Law Judge. Unlike findings on need and reasonableness, state agencies do not have the option of ignoring the judgment

and adopting the rule after obtaining advice from the Legislative Commission to Review Administrative Rules (LCRAR). The authority to make such judgments is accordingly exercised hesitantly after particularly careful deliberation.

It is specifically not concluded herein that the Department has failed to comply with Minn. Stat. § 14.115, because such a conclusion would mean the Department could not adopt the rule and it would have to start over with another lengthy, expensive rulemaking proceeding. It is important to move forward with some substantial adjustment of the fees, hopefully by the first of the year, so the legislative intent of fees covering costs can begin to be obtained.

The Department has already started over once. Increased revenue which could have and should have been deposited in the State's General Fund from increased fees in 1990 was not collected. It is important that some reasonable increase in revenues from this program occur in 1991.

Technically, Department Staff complied with the statutory requirement that it "consider" the impact on small businesses and recommended a less stringent schedule for them in the per-site portion of the proposed fees. The Commissioner could consider the matter further before final adoption (as is discussed in a subsequent finding) and adopt an even less stringent schedule.

This finding should not be cited in the future as a precedent for approval of technical implementation of Minn. Stat. § 14.115. It is explicitly limited to the peculiar situation and circumstances examined herein.

10. The basic thrust of the proposed rule is to shift inspection program costs away from large businesses and onto the smallest seasonal businesses that are least able to pay. The new proposed $75 base fee does this dramatically. The Department Staff has not adequately documented either the need for or the reasonableness of the magnitude of this shift.

At the hearing and in final written comments, Department staff wrongly characterizes its proposal as being similar to the industry dues structure which has a per-site fee with a (quite significantly in this case, voluntary) minimum (which may exclude many of the potentially affected operators that complained herein from being members). A minimum of, say $35.00 as a cap on a per-site fee for facilities of 10 sites or less is a "horse of a different color" from a "base fee" of $75.00 plus a per-site fee of $3.00. The $35.00 minimum would triple fees for the smallest seasonal campgrounds, while the proposed schedule ($75.00 plus $30.00) would increase them 9-fold (or 18-fold per inspection, as subsequently discussed).

Even if fees were simply tripled across the board, the impact would be most severe on operators of small seasonal campgrounds, who face stiff competition from public campgrounds, have occupancy rates as low as 27% - averaging only 35% to 40% and operate on slim net revenues. The Department proposes to exacerbate that impact further by abandoning its present policy of charging reduced fees to such seasonal operators.

The result would be a very significant shift in the burden of paying for the inspection program and the accumulated "deficit" to small seasonal operators. According to the Department's own computations in its SONAR, for

example, fees for seasonal campgrounds with 10 sites or less would increase 833%, while fees for year-round mobile home parks with 300 to 400 sites would increase only 183%.

The potentially affected small businesses, many of whom are marginal operations, complained bitterly and vigorously over this proposed impact. The 30 citizens who requested the hearing on the proposed rule raised this objection primarily in their letters. A campground owner in Alexandria wrote, for example:

> Times are such that campgrounds are being forced to close all the time due to rising expenses. I own one that is also nearing going out of business. A increase like the one proposed might be the final push.

Another from Richmond pled:

> We're just getting started in our new venture and right now everything is taking our profits. We cannot afford to keep on paying higher cost to stay in business. We tried raising our prices and found we lost a lot of customers. Please do not raise the license fee.

Another from Koochiching County inquired:

> Why can't the admission fees to the state-owned parks be raised instead of picking on the privately-owned businesses that are struggling to survive?

Another owner complained:

> It is shocking as to how many businesses of this sort have chosen to go out of business in the past few years. We have owned the Big K Campground for four seasons and have not yet made a profit on our business. This necessitates my spouse to work away from home during the summer months when he is needed here with me at the campground. Our insurance has tripled along with other expenses gas, electric etc. constantly rising.

Owners of a campground near Brainerd warned:

> My husband and I are new campground owners. We are very concerned regarding the proposed <u>substantial</u> increase of fees for recreational seasonal campgrounds/parks. <u>Ours would raise 400%</u>. At that rate - we'll be closed before we have an opportunity to really get going! (Emphasis original).

Without belaboring, these are representative of many letters indicating that the impact of the proposed rules on Minnesota small businesses would be real and severe.

The Minnesota Association of Campground Operators (MACO) compiled and

presented survey data establishing that the proposed more-stringent compliance schedule would have the most severe impact on small businesses with the lowest gross revenues. Analysis of the cost-per-site data for facilities, indicates that there is a direct and consistent inverse correlation between size of business and adverse impact of compliance with the proposed amended fee schedule. The worst increases would be born by the smallest facilities of 10 sites or less (more than $9 per site) and the least impact would be felt by the largest facilities of 300 to 400 sites (less than $3 per site).

It is doubtless true, as the Department points out in final written comments, that the present fee "has not come close to meeting the actual program costs for inspecting small campgrounds." Some modest adjustment of the fee schedule to assess a larger share of the actual costs of inspections to these small businesses would certainly be reasonable and practical. However, increasing the fees for facilities with 10 sites from $11.25 to $105 and for those with 20 sites from $22.50 to $135 in a single year, cannot fairly be found to be reasonable without a further affirmative presentation of facts. Doubling or perhaps even tripling fees in a single year would be defensible and perhaps palatable, if the need were adequately documented. They have not documented the need for or reasonableness of the 5 to 9-fold increase for small operations.

This is particularly true for the seasonal campgrounds, if competing public operations continue to receive free inspection services from the Department. There is no such significant competition for mobile home park operations who consequently have a greater ability to pass costs on to consumers. The revenues available to pay the inspection costs for campgrounds operating 120 days or less a year at 40% occupancy are orders of magnitude less than the revenues of mobile home parks operating year round at close to 100% occupancy.

As discussed on the record, the Department has previously recognized the importance of accommodating licensees' ability to pay in other rules. In the Home Caregiver rules it proposed nominal $15.00 fees for independent individuals and non-profit hospices versus $900.00 fees for larger public and profit making institutional caregivers. The SONAR in that proceeding specifically recognized that this was a regulatory necessity because of the differences in ability to pay that were involved.

55% of all private licensed parks and camps in Minnesota have less than 30 sites. 247 of Minnesota's 347 licensed seasonal campgrounds have 50 sites or less and 188 of them have 30 sites or less, according to Ex. MDH 16. Continuing to have a single fee rule for both seasonal campgrounds and mobile home parks ("lumping them together" which was objected to by MACO) is not necessarily unreasonable, however the need for and reasonableness of amending the rule to eliminate the separate schedule for seasonal operations and shifting the cost burden so dramatically has not been documented.

The defect can be corrected by limiting increases for facilities of fewer than 50 sites to a maximum of 200%. Whether to cap small facilities at triple versus double current rates is appropriately left to the Commissioner's considerable discretion in matters of policy.

Using the figures supplied by the Department on Spread Sheet 2 of its final written comments (which are doubtless inflated considerably, as discussed in a subsequent finding) the cost per site of inspecting private facilities is projected to be $4.22. Thus, tripling the annual fee for seasonal facilities with 10 sites to $33.75 would come close to the $42.20 actual projected cost of inspecting 10 sites. Tripling the current fee for year-round facilities with 10 sites, from $15 to $45, would more than cover the actual fair share of the cost for those sites. This same relationship, tripling fees approximating projected actual annual costs, exists generally for facilities with 50 sites or less, using the figures provided in the comparative table in the SONAR.

It is emphasized that tripling annual fees for small operators should be considered a maximum and that doubling them would be more equitable and more in accord with the evidence on the actual costs of inspections. The 644 facilities (or 707 facilities, depending on which Department data is accurate, as discussed in a subsequent finding) which have fewer than 51 sites will be "Category B" operations, except for a few that have public swimming pools or draw drinking water from a surface source. Under the "Inspection Frequency" section of the proposed rule, these facilities, which have been inspected annually, will now be inspected, at most, once every two years. Consequently, these operators will henceforth be paying for each inspection with two annual renewal fee installments.

In other words, the 5 to 9-fold annual increase in the proposed amendments for these small businesses would actually be a 10 to 18-fold increase in what they would be paying for each inspection. Similarly, tripling annual fees for these facilities would cause a 6-fold increase in what they pay per inspection. Thus the per-site cost analysis above must be doubled to obtain what each of these small businesses will be paying for each inspection service if fees are tripled.

If the fee increase for these facilities is held to 100%, the amount paid per inspection will be four times what they are currently paying. Thus, if the current $11.50 fee for a ten site seasonal campground is doubled to $23.00 per year, they will be paying $46.00 per inspection. This would be 10% more than their estimated per-site share of the costs of the inspection program.

It is understood that per-site costs are not (arguably because the actual facts weren't presented) the same as per-facility costs of inspection. There may be some economies-of-scale. Some basic travel and paperwork costs may be relatively equal for 10 site and 400 site operations. For that reason, it is not necessarily unreasonable to triple fees for facilities with less than 50 sites even though they would be paying basically double their ratable per-site-per-inspection share of the inspection program costs.

Another way of correcting the defect would be to reject staff's proposal to shift costs altogether. Fees could simply be more or less ratably increased across the board and each facility could continue to shoulder the same share of program costs it has assumed for the last 4 years.

Perhaps it goes without saying that the defect could also be corrected by increasing the current break given to small and/or seasonal operations, shifting a larger share of the costs to the larger and/or year-round

operations that are more capable of absorbing them. The evidence herein would certainly support such final action by the Commissioner.

While the judgment on whether it would be a substantial change to correct the defect by revising the compliance schedule is ultimately made by the Chief Administrative Law Judge, this should not be a serious concern. The public was on notice that the schedule could be revised as a result of the hearing, the change would not go to a new subject matter and the issue was raised and discussed exhaustively at the hearing.

Facts-Need and Reasonableness

11. It is the legal responsibility of an administrative law judge in a rulemaking report such as this one to specifically render a finding that a State agency has adequately documented the need for and reasonableness of its proposed rules by an affirmative presentation of facts. It is impossible to responsibly enter such a finding in this report, because there is serious doubt as to the accuracy and veracity of the often-conflicting data presented.

This was particularly distressing to the members of the affected public commenting on the proposed rules. The MACO spokesman testified without contradiction that 1990 cost estimates for private inspections have increased 50% from $101,000 last fall when the Department proposed an earlier draft of the rules to increase fees, to $151,000 in this proceeding. 1991 cost estimates were also increased from $106,500 to $157,644.

> It does cast some doubt as to the accuracy of their projections and without additional information I do not know how I or you can determine the accuracy of these costs. I would ask that the Department be required to supply additional information to back up their numbers.

The Department did not offer any explanation of any kind for this very significant discrepancy.

Nothing herein should be misconstrued as suggesting or implying that staff is engaging in any intentional sleight of hand or concealment. They have been very cooperative in supplying information, but the data simply doesn't jibe.

For example, prior to the hearing they supplied a detailed requested breakdown of mobile home parks and campgrounds by number of sites (Ex. MDH 16). It was apparently carefully compiled from Department records and contains a handwritten notation on the first page "Done 6/90". The facility total in this document is 1,016, which is 83 more licensed facilities (nearly 10% more) than the 933 reported on Spread Sheet 2, the "fee calculation work sheet" submitted with the Department's final written comments. The difference in potential revenues is considerable. The work sheet computations are based on 644 facilities with 50 sites or less (with a total of 7,528 sites), but MDH 16 counted 707 facilities in this category. The work sheet says there are 293 facilities with 51 or more sites totaling 28,306 while MDH 16 says there are 309 such facilities without totaling the sites. Work sheet computations are based on a stated 1990 site total of 35,834 licensed private sites while page 2 of the Department's final comments says there are 36,045 private

manufactured home sites and 17,607 private-operated camp sites for a total of 53,652 sites. This 17,818 site discrepancy alone at $4 a site could yield $71,272 in revenue under the proposed rule, which is more than the total revenue collected in 1990, 35% of the 1991 total revenues projected in the work sheet under the proposed rule and nearly 1/2 of the latest projected actual 1991 cost of inspecting private facilities.

The difference in the total number of sites may be due to delegation of inspection authority for some facilities to local governments, but that is not clear on this record. It cannot be presumed in this report, given all the other inconsistencies.

Lack of factual data on the impact of delegation and the need for increased fees was particularly vexing to the public. MACO final written comments emphasized this lack of factual data:

> What are their costs? We really don't know. . . . We need far more information as to details of how they arrived at their cost estimate. That cost estimate has increased 50% over a eight-month period. In a twelve-year period the Department has reduced from 34 to 23 the number of employees in this section. That's about a 33% reduction. What we don't know is how many less facilities are now being inspected because of delegating this authority to local government. I believe the number of inspections has dropped far more than 33%.

The Department did provide some additional breakdown of its calculations in Spread Sheets 1 and 2 of their final written comments. However, the actual data from past years does not support the statements in the SONAR and the projections for future years are clearly erroneous and inflated.

For example, the SONAR says, "It is estimated that the new staff positions devote 10% of their time inspecting manufactured home parks and recreational camping areas, . . .". Actually, 5 of the 6 added positions according to their 1989 time sheets (as reported on Spread Sheet 1) in the last few months of that year spent an average of exactly 10.424% of their time on this activity, but the sixth new position spends half time in this area - making the average 17%. According to that data, starting in late 1989, the Department began devoting 42.8 more hours per week (.17 x 40 hours x 6 positions) to this activity. In 1988, the 20 old employees (other than the full time position) collectively spent 99 hours per week on parks and camps, or a total of 139 hours if you include the full-time position. Beginning in 1989, these 21 old employees continued to spend 14% of their time on camps and parks or 120 hours per week and the 42.8 hours of the new employees was added. Thus the time devoted to inspecting parks was increased 15% while the number of facilities inspected (according to Spread Sheet 2) declined 12%.

However, this stated increase in activity probably has not actually occurred in 1990 as projected on that spread sheet and certainly will not continue in 1991 as projected under the new rule which would significantly decrease the number of inspections. The Department is doubtless not spending 15% more time doing 12% less work. The erroneous projections are the result of using the same 1989 allocation data in 1990 and future years, when the

scenarios have changed. The salary data indicates that the new employees were only employed during the last few months of 1989. Most of the inspection activity during the first three quarters of 1989 must have been performed by the 20 old employees. Consequently, the percentage of time these old employees (and the new employees) devoted to this activity probably decreased markedly, beginning in 1990. Also, under the proposed rule, inspection frequency will be cut in half for Category B facilities which may be as much as 2/3 of the facilities inspected. However, the projected rates on Spread Sheet 1 for all employees in 1990 and 1991 reads simply "Same as 1989". This significantly inflates the projected cost, which simply cannot be fairly estimated based on this record.

Minn. Stat. § 14.14, subd. 2 requires in part, "At the public hearing, the agency shall make an affirmative presentation of facts establishing the need for and reasonableness of the proposed rule . . .". The Department's evidence presented in this proceeding cannot be fairly characterized as compliance with what the Legislature intended in enacting that statute.

One way to correct the defect would be to reduce the increased fees to a maximum of $140,000, doubling the current revenues. The data presented does support the need for and reasonableness of an increase of this magnitude to correct the Department's erroneous past estimates of cost. Unless 20 state employees (for some inconceivable reason) deliberately falsified their 5 minute-by-5 minute time sheets during 1988 and 1989, this is the most accurate data in the record of actual State costs of inspections. Given its internal consistency, the tabulation of those real, minute-by-minute conscientious entries is evidence worthy of great weight. Its consistency (and inconsistency) with the SONAR lands credence to its veracity. Bookkeepers relied on it religiously in generating the SONAR. Other Department Staff unquestionably relied on it sincerely in fashioning the proposals herein and will be genuinely surprised in re-examining the erroneous projections. Inspections of all facilities (public and private) did cost roughly $137,000 in 1989. An examination of the 1990 time records will probably show that the redistributed inspection time spent by the 25 division employees servicing fewer facilities in the private sector that year was actually something considerably less than the documented actual 1989 costs of $137,000. The savings from reducing inspection frequency under the new rule at $140,000 will doubtless be more than adequate to offset inflationary increases over the next five years.

The defect can also be corrected by reopening the hearing after a new notice pursuant to Minn. Stat. Ch. 14, to present the facts and/or clarify them. In the alternative, the Department can also, of course, submit the proposed rules to the LCRAR for their advice and comment as is provided in Minn. Stat. § 14.15, subd. 4.

Statutory Authority - This Proposal

12. One of the toughest questions to be resolved in this proceeding is whether the Department has the statutory authority to adopt these rules - as proposed. The difficulty is two provisions of Minn. Stat. § 144.122, pointed out by the public at the hearing. The first is the mandate that "all fees proposed to be prescribed in rules shall be reasonable." The second is the

qualification of the requirement that amounts collected should equal administrative costs only "where practical".

Here, specifically placing the reasonableness requirement on proposals, in the statute delegating rulemaking authority, arguably potentially prevents the Department from proceeding to adopt the rules at this stage of the process. The courts have always applied a reasonableness standard when adopted rules are subsequently challenged in court. Lee v. Delmont, 228 Minn. 101, 110, 36 N.W.2d 530, 539 (1949). But the public must bring a court appeal to remedy the unreasonableness after the rule has been adopted. The Administrative Procedure Act also requires all agencies in adopting any rules to document their reasonableness in advance, but a negative ruling on this issue can be ignored, as long as agencies seek LCRAR advice (which can also be ignored) before proceeding with adoption. However, a finding that an agency has failed to document its statutory authority, if it is approved by the Chief Administrative Law Judge, requires the agency to either cure the defect or not adopt the rule. The option of adopting the rule without curing the defect after consulting with the LCRAR is eliminated.

After some careful deliberation it is concluded that the Legislature probably did not intend to vest Administrative Law Judges with such a veto at this stage of the process. The "reasonableness" requirement is merely a reaffirmation of the well established principle that a democratic government can never proceed in any other fashion. If the Legislature intended the OAH to render a final judgment at this stage of the proceedings which would stop rules from being adopted, it would have stated that with more specificity - as it did in Minn. Stat. § 14.115, subd. 5, for small business considerations. The proper OAH role in this proceeding is accordingly advisory to the Commissioner, on adequacy of documentation in the record of reasonableness. The reviewing courts are the proper recourse for citizens aggrieved by perceived unreasonableness of exercise of the Department's fee-setting authority.

Facts - Deficit Recovery

13. Staff has not documented the need for or the reasonableness and practicality of recovering the alleged $155,000 "deficit" and the manner of that recovery proposed. The question has been considered very cautiously and thoroughly, starting with the presumption that the rules are reasonable and that the proposed cost recovery is practical. The ambit of reasonableness is very broad. A proposed rule is not unreasonable just because another approach appears more reasonable. Federal Securities Administrator v. Quaker Oats Company, 318 U.S. 218, 233 (1943). The approach chosen, for example, for assessing the costs (base fee plus site fee) is not unreasonable (as long as it is modified for small business considerations). A flat per-site fee or a gross revenue approach (or any one of at least a dozen other formulae) may be arguably more reasonable, but that does not render the proposed approach unreasonable.

To begin with, it is important to understand that the "deficit" is a fictional bookkeeping debit on the Department's internal accounts. More accurate time-keeping records, beginning in 1988, disclosed that the Department was actually spending four times as much on this inspection

activity as it thought it was spending. Although the Department books were changed in 1988 to reflect this fact, the amounts involved are not akin to the federal deficit. Bonds have not been issued to pay these inspection costs and future generations have not been saddled with paying interest on the obligations.

Similarly, contrary to the allegation in the Department's final written comments, there was no "surplus" in 1987 to offset any real increased costs of providing any increased services in 1988. This "surplus" is the difference between what the Department collected in 1987 and what the Department books record them spending on this activity in 1987.

The actual cost of providing services in 1987 was doubtless approximately the same as they discovered they were actually spending on this activity in 1988, roughly $156,000. Deducting the 1987 fee revenue of $82,000, there was also a "deficit" in 1987 of $74,000. Similar "deficits" doubtless occurred in previous years. The actual "deficit" since the fees were last adjusted in January of 1986 is consequently more on the order of $374,000 for the years 1986 - 1990. If the statutes require collection of the full administrative costs of the program through fees, that is the real revenue "deficit" that must be recovered.

The difference between what the Department collected in fees in those years and what they now know they spent for this activity had to come from monies the Legislature appropriated from the General Fund in each of those years to spend on other programs (which also probably cost more or less than the Department told the legislature it needed for those programs). The books for each of the previous fiscal years have been closed and any surplus the Department had in its overall budget in each of those years has been returned to the General Fund.

The difference between what the Department was actually spending and what it was collecting should have been discovered in 1988. The Department could have cut services and/or adjusted fees to cover this difference at that time, but did not do so. The option of cutting back services is recognized in a new section in the proposed rule relating to inspection frequency. The SONAR relating to this section states in part:

> Industry representatives have suggested, and the Department concurs, that not every park requires a yearly inspection. In addition, a slightly reduced inspection frequency will help lower program costs.

The consequences of failure to recover these "deficits" for previous years have not been documented on this record. MACO final written comments imply that Department officials believe there may be some kind of consequences, which were discussed at a post-hearing meeting with industry representatives: "We also discussed what would happen if their purported deficiency, $154,944, was not made up." However, there is no further discussion in the record which would permit a fair assessment of why such "cost recovery" would or would not be reasonable.

Neither the Department nor industry representatives were apparently aware of the magnitude of this alleged deficiency until the commencement of this

proceeding. As late as last fall, 1990 costs were projected to be $101,000, this was only $31,000 more than the $70,000 projected revenues under the existing rule. This was not a particular cause for alarm because it amounted to an increase of less than $1 per site for the 36,000 affected sites. The documentation of the reasonableness and practicality of the current proposal to increase annual revenues to $205,000, must be viewed in that context.

Deciding the question of whether the facts presented are adequate to establish that the proposed fees are reasonable and practical, also requires an examination of the proposed mode of collecting the bookkeeping "deficits". The Department proposes to collect the entire accumulated $155,000 amount over the next five years with the largest amount ($50,000) "up front" in the first year of the fee increase. Thirty-seven percent of the proposed $135,000 revenue increase in 1991 would be dedicated to retiring the disputed "deficit" with a declining percentage devoted to that purpose over the next four years. This would come on top of more than doubling the fees to remedy the Department's failure the last time it adjusted fees to properly estimate and project actual program costs. The result is a tripling of overall fees charged to operators in a single year.

The affected industries also objected very strongly to the unreasonableness of receiving no increased or improved service whatsoever in return for the proposed tripling of (and in the case of small facilities, a five to nine-fold increase in) fees. Indeed, the industries would be paying three times as much for reduced and less efficient inspection service.

The increasing inefficiency results from partial delegation of other inspection responsibilities in many counties. It is described in a prehearing staff letter to the Minnesota Manufactured Housing Association (Exhibit MDH 15):

> Some of our delegation agreements to local community service agencies have resulted in increased inspection costs because of the lesser density of establishments to be inspected. For example; in counties such as Anoka, Hennepin, Ramsey and Washington we have delegated food, beverage and lodging inspections to the local agency. The local agency has elected not to accept delegation of the inspection and licensing of manufactured home parks. This results in sanitarians traveling more miles per inspection than in areas where we have responsibility for all inspections.

The Department staff steadfastly defends their policy of local community service delivery and candidly concedes that it results in inefficiency, in their final written comments: "Value, not cost efficiency, is the driving force of this policy." Unfortunately, the value of local administration is received by the other industries and paid for by the camping and mobile home park industries. While delegation is unquestionably reasonable and laudable, partial delegation is not. This anomaly will continue and worsen until the Department or the Legislature forces local delegatees to shoulder all the inspection responsibilities. The situation is most egregious in northeastern Minnesota, where many of these facilities are located and where travel distances and times are most severe.

In short, given all the circumstances discussed above, this construct cannot be found to be in compliance with Legislature's "reasonable" and "practical" limitation given the facts presented. The staff has not documented by an affirmative presentation of facts either the need for or the reasonableness and practicality of tripling fees in a single year to pay for reduced, less efficient service delivery and Department inaction on erroneous cost estimates and projections, collecting the "deficits" in the manner proposed. This is not a case where reasonable minds might well be divided on the wisdom of an administrative action. Rible v. Hughes, 24 Cal.2d 437, 445, 150 P.2d 455, 459 (1944). It is better characterized as "willful and unreasoning action, without consideration and in disregard of the facts and circumstances of the case." Greenhill v. Bailey, 519 F.2d 5, 10 (8th Cir. 1975). The Department staff has consequently not adequately documented the need for or reasonableness of its proposal.

There are several potential ways of correcting this defect. The following specific suggestions should not be construed as limitations, preventing the Department from proposing other reasonable and practical proposals.

The Department could adjust its fees only prospectively, beginning with 1991, ignoring the bookkeeping "deficits" from prior fiscal years. This would be in accord with Minn. Stat. § 645.21 which states that, "No law shall be construed to be retroactive unless clearly and manifestly so intended by the Legislature." There is nothing in the statutes cited as authority for adjusting the fees herein that specifically "clearly and manifestly" allows for retrospective application. As is suggested in an earlier finding, an overall doubling of fees for the next five years should be more than adequate for such a prospective rule.

The Department could also cure the defect by limiting its proposed "deficit" recovery to the shortfall during the 1990 year of promulgation of these rules and collect 10 percent of it each year for the next ten years. The $8,100 per year increase in overall revenues would probably be on the order of six percent over actual annual costs of administration, which would not be unduly onerous, unreasonable or impractical. The Department is already recognizing the unreasonableness and impracticality of attempting to recover the actual "deficits" for 1986, 1987 and $40,000 of 1988. This correction of the defect would only extend the same treatment to the remaining 1988 and 1989 "deficits".

If the staff insists that it legally (or as a matter of policy) must recover every penny of bookkeeping deficiency since mid-1988 only (ignoring the previous real shortfalls) it would be palatable, reasonable and practical to collect five percent of the two and one-half year bookkeeping "deficit" each year for the next twenty years. This $7,750 increase in overall revenues would again be on the order of a six percent addition to actual annual costs which would be a reasonable and practical mode of recovery.

Another alternative cure would be to simply limit the increases in the taxes on these industries to a doubling of them for the next five years and continue to do what the Department has been doing for the last three years -- keep track of the accumulating "deficit" and redouble fees again in five years, if the Legislature hasn't bailed out the program in the interim. A doubling of

fees would be a fair, albeit extraordinarily stiff increase which could reasonably be absorbed by the industries. It would ensure that the industries pay the full actual annual administrative costs of the program. Correcting the defect in this fashion would permit the Department to continue to insist that the deficiencies be collected while putting the reasonableness and practicality of their proposal to the legislative test. The Department could immediately begin collecting very significant additional revenues, giving the regulated industries an opportunity to make their case to the Legislature. Legislative inaction would permit the presumption that a redoubling of fees in five years meets the statutory test of reasonableness and practicality, while sparing operators the jolt of an immediate tripling of taxes.

Public Facilities

14. Excluding 4,304 DNR state park sites and other forest campground sites (which are explicitly exempted from inspections in the statute) according to Department figures, one out of five recreational campsites (3,187) which the law directs the Department to inspect in Minnesota is publicly owned and operated. Although the statute does not explicitly exempt these public operators from paying fees, the Department has been providing them free inspection and "permitting" services since 1951.

One of the inconsistencies in the factual data submitted is the cost of inspecting and permitting these public campgrounds. Spread sheet 2 allocates $151,172 of the $163,000 total estimated 1990 program costs to private inspections without explaining how the allocation was made. The resulting cost per site of inspecting the stated 35,834 private sites is consequently $4.22. The remaining $11,828 is the public cost of inspecting the 3,186 public sites, which results in a cost per site for those facilities of $3.71. There is no logical reason in this record for such a discrepancy.

The Department cites Minn. Stat. § 327.23, subd. 3 as exempting public facilities. It provides:

> Any manufactured home park or recreational camping area owned or operated by any municipality or political subdivision of this state shall meet all sanitary and safety provisions of sections 327.10, 327.11 and 327.14 to 327.28, shall be inspected as herein provided, and make all reports, as herein required of a licensee.

There is nothing in that section exempting political subdivisions from paying inspection fees. Minn. Stat. § 144.122 authorizes prescription of fees for both licenses and permits and provides that:

> The fees shall be in an amount so that the total fees collected by the commissioner will, where practical, approximate the cost to the commissioner in administering the program.

Minnesota Statutes § 157.045 provides:

> For licenses issued in 1989 and succeeding years, the commissioner of health shall increase license fees for

> facilities licensed under this chapter and chapter 327 to a level sufficient to recover all expenses relating to the licensing, inspection and enforcement activities prescribed in those chapters.

The inspection of public campgrounds is one of the inspection and enforcement activities specifically prescribed in chapter 327 in the section quoted above which the Department construes to be an exemption. It is respectfully submitted that the statute authorizes and indeed requires permit fees to fund the costs of inspecting public campgrounds as urged by the private campground operators. If the Commissioner decides to renotice the proposed rule, she should consider revising it to include such fees.

Inspection Frequency

15. The Department Staff has not adequately documented either the need for or the reasonableness of the proposed minimum inspection schedules for Category B facilities of once every two years, by an affirmative presentation of facts. On the contrary, their own expert opinion expressed at the hearing was that triennial inspections of many facilities may be adequate and might be undertaken in the future to contain costs.

The defect can be cured by changing the sentence to read "at least once every three years" or by eliminating any reference to a set schedule for Category B facilities.

Other Concerns

16. All of the other concerns raised by the public in testimony and written submissions have been carefully considered. They have generally been dealt with adequately in the SONAR and in Staff final written comments. Except as otherwise noted in the foregoing Findings, the proposed provisions are specifically found to be needed, reasonable and statutorily authorized. There are no substantial change problems.

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

CONCLUSIONS

1. That the Department gave proper notice of the hearing in this matter.

2. That the Department 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.

3. That the Department 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).

4. That the Department 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 No. 10, 11, 13 and 15.

5. That the amendments and additions 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, 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 Conclusion 4 as noted at Findings No. 10, 11, 13 and 15.

7. That due to Conclusion 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 Department 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 22ND day of October, 1990.

HOWARD L. KAIBEL, JR.
Administrative Law Judge