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STATE OF MINNESOTA
OFFICE OF ADMINISTRATIVE HEARINGS

FOR THE MINNESOTA DEPARTMENT OF HEALTH

In the Matter of the Proposed Adoption of Rules of the Department of Health Governing Health Maintenance Organization Fees, Minn. Rules Part 4685.2800.

REPORT OF THE ADMINISTRATIVE LAW JUDGE

The above-entitled matter came on for hearing before Administrative Law Judge Allan W. Klein on March 19, 1991 at 9:00 a.m. in the Administration Building, St. Paul, Minnesota.

This Report is a part of a rule hearing proceeding held pursuant to Minn. Stat. §§ 14.131 - 14.20 to determine whether the Department of Health has fulfilled all relevant substantive and procedural requirements of law, to determine whether the proposed rules are needed and reasonable, and to determine whether the Board has statutory authority to adopt the rules.

Members of the agency panel appearing at the hearing included Kent E. Peterson, Marsha J. Schoenkin, and Sharon K. Mitchell. Paul Zerby, Special Assistant Attorney General, also appeared representing the Department.

Approximately six members of the public attended the hearing. Five of them signed the hearing register. Seven written comments were submitted by members of the public. The Department submitted 16 written exhibits.

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

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

## FINDINGS OF FACT

### Procedural Requirements

1. On January 10, 1991, the Department filed the following documents with the Chief Administrative Law Judge pursuant to Minn. Rules pt. 1400.0300, subp. 1:

(a) The proposed rule with a certification of approval as to form by the Revisor of Statutes attached. (Ex. 1).
(b) A proposed Order for Hearing. (Ex. 14).
(c) A proposed Notice of Hearing. (Ex. 13).
(d) A Statement of Need and Reasonableness with attachments. (Ex. 5).
(e) A Statement of the estimated attendance and the time necessary to present the Department's evidence. (Ex. 12).
(f) A Statement concerning discretionary additional public notice. (Ex. 12).

2. On February 11, 1991, the Notice of Hearing and the proposed rule were published at 15 State Register 1778. (Ex. 9-1).

3. On February 8, 1991, 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. (Ex. 7).

4. On February 21, 1991, the Department filed the following documents with the Administrative Law Judge:

(a) The executed Notice of Hearing. (Ex. 3).
(b) The Department's certification and Affidavit that the mailing list was accurate and complete and that the Notice was mailed to all persons on the list. (Ex. 7).
(c) Affidavits of delivery of the proposed rule and notice to the Chairs of the Senate Finance and House Appropriations Committees, as well as an Affidavit of Mailing of the proposed rule and the Statement of Need and Reasonableness to the Legislative Commission to Review Administrative Rules. (Ex. 8).
(d) A copy of the Notice of Hearing and proposed rule as mailed. (Ex. 6).
(e) A copy of the State Register containing the Notice of Intent to Solicit Outside Opinion together with materials received following that notice. (Ex. 9).
(f) The names of agency personnel who were to represent the Department at the hearing. (Ex. 10).
(g) An executed Order for Hearing. (Ex. 2).
(h) A copy of the Notice and proposed rule as published in the State Register. (Ex. 9-1).

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

5. The period for submission of written comment and statements remained open through Wednesday, April 3, 1991 at 4:30 p.m., fifteen (15) calendar days after the hearing. The record remained open for an additional three (3) working days through April 8, 1991, for responses to earlier submissions.

Nature of the Proposed Rule

6. The proposed rule amendments would raise certain fees paid by Health Maintenance Organizations (HMOs). The fee for filing a quarterly report is raised from $50 to $100, and the fee for filing an amendment to a certificate of authority for each HMO is raised from $50 to $90. Most importantly, the

annual renewal fee for a certificate of authority for each HMO is increased from $10,000 to $16,000 and the per enrollee annual renewal fee is increased from .35 per person to .46 per person. An applicable statute provides that the total fees collected by the Department must approximate the cost of administering the HMO regulatory program, where practical. The Department asserts that the fee increases are needed and reasonable under that statutory directive.

Statutory Authority

7. Minn. Stat. § 62D.21 provides that the Commissioner of Health shall prescribe fees for HMO filings which are not specifically described in the statute. Minn. Stat. § 62D.211 allows the Commissioner to adjust a renewal fee by rule. The Commissioner also has general rulemaking authority for HMOs as set out at Minn. Stat. § 62D.20. Additionally, Minn. Stat. § 144.122, which relates to license and permit fees, states in part, as follows:

> The state commissioner of health, by rule and regulation, may prescribe reasonable procedures and fees for filing with the commissioner as prescribed by statute and for the issuance of original and renewal permits, licenses, registrations and certifications issuing under its authority. . . . Fees proposed to be prescribed in the rules and regulations shall be approved by the department of finance. All fees proposed to be prescribed in rules and regulations shall be reasonable. 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.

The Department has demonstrated its general statutory authority to adopt the proposed rule amendment.

8. By a letter dated February 22, 1991, the Minnesota Department of Finance advised the Department of Health that it had reviewed this proposed fee increase and approved it as reasonable under Minn. Stat. § 16A.128. The Department of Finance also stated that it has consistently interpreted Minn. Stat. § 16A.128 to mean that all deficits incurred in both the current biennium and prior fiscal periods must be recouped by proposed fee increases. (Ex. 11).

Small Business Considerations in Rulemaking

9. Minn. Stat. § 14.115, subd. 7(c) provides that the Small Business Considerations in Rulemaking Act does not apply to "service businesses regulated by government bodies, for standards and costs, such as nursing homes, long-term care facilities, hospitals, providers of medical care, day care centers, group homes, and residential care facilities;". Since HMOs are providers of medical care regulated by the Department for standards and costs, these proposed rule amendments are exempt from the small business considerations in rulemaking statute. See the Report of the Administrative Law Judge in OAH Docket Nos. 8-0900-247-1 and 8-0900-3156-1. However, as MedCenters points out (Ex. F), there is an indirect effect on small businesses since many of them do utilize HMOs as their health plan, and premium increases are a substantial concern for a small business.

Need and Reasonableness

10. In its Statement of Need and Reasonableness the Department asserts that the fees in question need to be raised because current revenues do not cover the costs of regulation. The filing fees are based upon the amount of staff time devoted to the review and analysis of filed documents. The renewal fees, which consist of a per-HMO fee and a separate per-enrollee fee, pay for the cost associated with complaint investigations, public inquiries, policy analysis, rule writing, legislative bill drafting, enforcement, administration, staff training, and other general operating costs. The HMO section's projected costs for fiscal 1991 are $702,459 while anticipated revenues without a change in fees would be $613,700. The result would be a deficit of $88,759. Additionally, the HMO section has accumulated a deficit of $264,745, most of which was accumulated in 1989 due to a delay in completion of the rulemaking which established fees for that year. The deficit is also due to a decline in HMO enrollment during 1989.

11. The Department states that it has reduced administrative costs for fiscal 1991 by reducing the budget for supplies and operating expenses approximately 35% or a total of $35,900. Additionally, two full-time HMO section staff positions are paid for with federal funding and another staff position is partially funded by a combination of state HMO funds and funding for the the Medical Technology Assistance Review Panel program. The Department argues that further cuts in the budget of the HMO section cannot be made if it is to perform all tasks delegated by the Legislature. (Ex. 5, pp. 4-6).

Distribution of Fee Increases

12. The proposed annual renewal fee consists of two parts: (1) a $16,000 flat fee for each HMO, and (2) a $.46 fee for each member of the HMO. Allocating amounts between these two parts generated significant controversy. Some commentors, including the Mayo Health Plan (Ex. A), First Plan HMO (Ex. B), Central Minnesota Group Health Plan (Ex. C), and Blue Plus (Ex. D), expressed concern about the disproportionate impact upon smaller HMOs which results from the weight placed upon the flat fee. First Plan calculates its annual fees under the proposal as $2.29 per member as against less than $.60 per member for the five largest HMOs. Mayo, the smallest HMO, calculates its per member fee at approximately $3.60 under the proposed amendment, as against $2.25 per member under the current rule. Central Minnesota Group Health Plan argued that in a small HMO the high level of operating costs per member necessitates aggressive cost control and that the fee increase would be a negative factor in keeping it competitive. Mayo suggested that the flat fee fee be graduated to remedy this problem. Central Minnesota Group Health Plan and First Plan argued that the annual fee should be based solely on the number of members, to be equitable. The Department acknowledged the impact of the proposed structure on the smaller plans, but believes that the per-enrollee portion of the fees imposed recognizes this problem and accommodates it.

13. In its post-hearing comments the Department points out that the two-part structure originated with the legislature. Minn. Stat. § 62D.211 (1988) set an initial renewal fee of $10,000 for each HMO plus $.20 per person enrolled. The statute provided also that the fee could be adjusted by rule. The Department interprets the statute as requiring HMOs to pay an annual renewal fee that is a combination of a flat fee and a per-member fee. The

Department believes it is prohibited from deleting the flat fee in light of the legislative directive. The Department did consider at least three options, namely, leaving the flat fee at $10,000 and placing the entire increase in the per-member fee, increasing both fees using the same proportion of total expected revenue as the original statutory fees, and increasing both fees using a revised proportion. The Department decided that leaving the flat fee at $10,000 would require a significantly higher per-member increase. If it kept the same proportions as the original statute, it would create an even greater burden on the small HMOs than the current fee structure. The proportion which it chose to use is the same as the current fee structure and raises 24.5% of expected revenue from the annual renewal fee and 67.3% from per-member fees. (The remaining 8.2% is generated through fees for required filings and direct billing for examinations). The Department asserts that the total impact of the fee increase on members of the smallest HMO, Mayo Health Plan, will be an additional $.11 per month, or $1.21 per year, which it believes is not an unreasonable increase. The Department has demonstrated the reasonableness of the fees it has set. Its analysis of the various options and its arguments supporting the option selected demonstrate a reasoned determination in support of its policy choice. Manufactured Housing Institute v. Pettersen, 347 N.W.2d 238, 246 (Minn. 1984). Nonetheless, it should examine this rule hearing record to determine whether a flat fee somewhere closer to $10,000 might be fairer to the smaller HMOs, and therefore more reasonable. The graphic prepared by First Plan HMO (Ex. B) is helpful in this regard.

Size of the Budget

14. Some commentors argued that the increase in the review time for the filing of quarterly reports from 3 hours to 4-1/2 hours was unjustified. It was suggested that this was not a complicated report and that the additional review time proposed from 1989 to 1991 evidenced the Department's intent to adjust the staff hours to reach whatever budget it felt was needed. Blue Plus argued that the amount of time spent on review should decrease over time. (Ex. D, p. 2). MEDICA felt two hours was sufficient for review. (Ex. G, pp. 6-7). The Department stated that the 3 hour figure used in 1989 was based upon the review of only one report since the filing requirement had just been instituted by the Legislature at that time. It stated that with two years experience reviewing the filings, it is now clear that the initial figure was optimistic, and that 4-1/2 hours is more accurate.

15. In its reply to comments the Department states that the analysis of quarterly reports includes the development of reports which compare information from previous quarterly reports and among HMOs. It suggests that the costs for these analyses are important for enforcement of critical elements of the HMO Act, including monitoring the financial solvency of HMOs. The fee for filing amendments to certificates of authority has not increased since 1986. Since that time staff and overhead costs have increased and amendments to the law and the complexity of the industry have necessitated more detailed review of filings. Accordingly, more amendments to certificates of authority have been denied and sent back for revision.

16. It was also suggested that any staff time for rule writing or bill drafting could appropriately be left to the Revisor of Statutes. The Department stated that it does use the services of the Revisor but that there is still staff time necessary for policy statements and technical advice in regard to bills which are drafted.

17. MEDICA commented that staff time which was devoted to the financial audit function was already billed separately apart from the HMO section budget and should not be used to justify fees. It pointed out that the Department has authority to bill HMOs directly for the cost of audits, including staff salaries, and has used that authority. MEDICA contends that the Department has not reduced its costs by the estimated amount it will collect for audit fees. (Ex. 6, pp. 5-6). The Department indicated that the budget does reflect income from auditor fees and that this income is recognized in the budget calculations leading to the proposed fee increase. (Ex. 5, Appendix F). Appendix F shows the total operating costs for the current fiscal year of $709,707 including deficit repayment. Total costs to be recovered by the proposed annual renewal fees as shown on the bottom of Appendix G of the Statement of Need are $725,869. The difference of $64,838 is made up by other sources including the $44,000 examination fees. (Ex. 16).

18. Some commentors felt that increased fees to cover a 4.5% salary increase in fiscal years 1992 and 1993 was inappropriate since the Governor has proposed no increase. (Ex. A, p. 2; Ex. D, p. 2). The Department responded that if the increases are not forthcoming, then fees will be adjusted accordingly in future rulemaking proceedings. (Testimony of Kent Peterson).

19. MedCenters questioned the projected HMO enrollment figures used by the Department in setting the fee increases, namely 1,100,000 enrollees. (Ex. 5, App. G). It states that the Minnesota Council of HMOs has estimated enrollment at closer to 1,400,000 and suggests that revenues should be based on the April 1, 1991 annual financial reports submitted by the HMOs. (Ex. F, p. 2). In its post-hearing comments the Department indicated that the annual reports submitted on April 1, 1991 show the number of HMO enrollees to be 1,168,446. (Ex. 16, Att. D). It disagrees with using the HMO Council projection because the Council included enrollees of HMOs who are covered through self-funded employer agreements, and are exempt from state regulation by federal law. (Ex. 16). The Department has justified use of its estimate as reasonable.

20. There was also comment concerning the Department's reliance on a determination of the Administrative Law Judge in the 1989 fee setting hearing. The Administrative Law Judge in that rulemaking proceeding stated that:

> The Department is not required to demonstrate the need and reasonableness of its budget or the need and reasonableness of any legislative appropriation that has been made. Agency budgeting is not subject to the rulemaking requirements of the Administrative Procedure Act and those budgets, when approved, must be presumed to be necessary and reasonable. Consequently, when the agency's projected costs are known, sections 16A.128, subdivision 1a. and 144.122(a) establish the need for and reasonableness of their recovery.

OAH Docket No. 8-0900-3156-1. Report of the Administrative Law Judge dated March 31, 1989. Blue Plus saw this reasoning as circular. (Ex. D, pp. 1-2). The Mayo Health Plan suggested that that issue needed to be reexamined and suggested that detailed budgets need to be submitted for review if the

regulated entities are to be able to determine the justification for the fees. It suggested that if a legislative change is necessary to create such a duty, then it ought to be recommended. (Ex. A, p. 2; Ex. G, p. 7).

21. In reply the Department noted that it is accountable to the Governor and the Minnesota Legislature for operational costs through the biennial appropriations process which results in the setting of its budget. The Commissioner establishes a proposed budget with the assistance of the Department of Finance. The budget is reviewed by the Governor's office and the recommendations of the Governor are sent to the subcommittees of House Appropriations and Senate Finance for analysis. The final budget is approved by the full Legislature. The Department argues that the appropriations process provides the oversight which HMOs feel is necessary. The appropriations process is open to anyone who wishes to become involved. Additionally, the Department of Finance reviews and approves all fee increases.

22. The Department has offered justification for the reasonableness of its budget and costs in this proceeding. It has demonstrated them to be needed and reasonable. Additionally, the Department is entitled to rely upon the 1989 ruling in regard to need and reasonableness. As one HMO suggested, a legislative change would be necessary at this point to change that holding. Moreover, the rulemaking proceeding is not rendered unnecessary even if the budget is presumed to be necessary and reasonable. The issue of the appropriate distribution of the fees is controversial, must be considered and was a matter of debate in this rule hearing proceeding. That issue alone justifies a proceeding.

Retroactivity

23. Several commentors, including Blue Plus (Ex. D), Group Health (Ex. E), MedCenters (Ex. F), and MEDICA (Ex. G), questioned whether the statute permitted a fee increase which included amounts needed to recoup the deficit incurred in prior fiscal years. They argued that the "where practical" language precluded retroactive increases. Group Health stated that it is unreasonable to have HMOs pay for the expenses of past regulatory activities not covered by fees previously set by the Department. It reasoned that allowing past imbalances to be made up leaves the Department no incentive to properly budget and has rendered the rulemaking proceeding illusory. MEDICA asserted that recouping a past deficit was contrary to Minn. Stat. § 16A.128, subd. 1a. which states that "fees must be set . . . so the total fees nearly equal the sum of the appropriation for the accounts . . . ." MEDICA contends that this language ties the size of the fee to the agency's appropriation during the year the fee is paid. It was also argued by MEDICA that recovering 1989 costs constitutes a retroactive fee increase contrary to Minn. Stat. § 645.21. That statute, which also applies to rules, provides that "No law shall be construed to be retroactive unless clearly and manifestly so intended by the legislature."

24. The Department, in its post-hearing comments, argued that Minn. Stat. § 16A.128, subd. 1a. does not prohibit recouping a past deficit but in fact makes it clear that the total fees are to nearly equal the sum of the appropriation, support costs, indirect costs, and attorney general costs "attributable to the fee function." The Department points out that the Department of Finance specifically stated that the deficit should be recovered

and that it has consistently interpreted § 16A.128 not only to permit, but also to require, that prior deficits be recouped. (Ex. 11). The Department also argues that recouping a deficit does not constitute a retroactive rule since the rule will be in effect before the fees are collected. Finally, it asserts that applying Minn. Stat. § 645.21 to this matter should result in the conclusion that even if the rule is considered retroactive, it is clearly intended to be. The Department intends recoupment of past deficits and that the Legislature intended for the Department to recover all the costs applicable to its fee function by its fees charged to HMOs. (Ex. 16).

25. The proposed amendments are not retroactive in the sense of changing the law applicable to events that happened prior to its effective date. The fee increases will not be effective until this rule is adopted and no fee increase takes effect unless subjected to the rulemaking process. Retroactive rules are not prohibited. They may be retroactive where it is clearly stated and the retroactivity is reasonable in the circumstances. Mason v. Farmers Insurance Company, 281 N.W.2d 344, 348 (Minn. 1979), 2 Davis, Administrative Law Treatise (2nd Ed.) § 7.23, p. 109. The recovery of the deficit is reasonable in light of the clear legislative directive to recover the costs of regulation through fees. The Department asserts that in large measure the deficit arose because of the industry's success in delaying the implementation of a prior fee increase. The adoption of the rule is not prohibited by Minn. Stat. § 16A.128 nor the case law governing retroactive rules. Nonetheless, it is clearly preferable to avoid recouping past deficits and to set fees for costs only on a perspective basis. Hopefully cooperation between the Department and the industry will permit that to be accomplished in the future.

26. It was also argued that the Department's proposed three-year period for recoupment of the prior deficit should be extended to a longer time period, such as 8 to 10 years. (Ex. D, p. 3). The Department stated that it picked a three-year period since less than three years seemed unfair to the smaller plans but a five-year period would take too long to recoup the full amount. The recoupment period has been demonstrated to be a reasoned choice.

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

## CONCLUSIONS

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

2. That the Department has fulfilled the procedural requirements of Minn. Stat. §§ 14.14, and all other procedural requirements of law or rule.

3. That the Department has documented its statutory authority to adopt the proposed rules, and has fulfilled all other substantive requirements of law or rule within the meaning of Minn. Stat. §§ 14.05, subd. 1, 14.15, subd. 3 and 14.50 (i) and (ii).

4. That the Department has demonstrated the need for and reasonableness of the proposed rules by an affirmative presentation of facts in the record within the meaning of Minn. Stat. §§ 14.14, subd. 2 and 14.50 (iii).

5. That the additions and amendments to the proposed rules which were suggested by the Department after publication of the proposed rules in the State Register do not result in rules which are substantially different from the proposed rules as published in the State Register within the meaning of Minn. Stat. § 14.15, subd. 3, Minn. Rule 1400.1000, Subp. 1 and 1400.1100.

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

7. That a finding or conclusion of need and reasonableness in regard to any particular rule subsection does not preclude and should not discourage the Department from further modification of the rules based upon an examination of the public comments, provided that no substantial change is made from the proposed rules as originally published, and provided that the rule finally adopted is based upon facts appearing in this rule hearing record.

Based upon the foregoing Conclusions, the Administrative Law Judge makes the following:

## RECOMMENDATION

It is hereby recommended that the proposed rules be adopted consistent with the Findings and Conclusions made above.

Dated this 17th day of April, 1991.

Allan W. Klein

ALLAN W. KLEIN
Administrative Law Judge