11-0900-6052-1

STATE OF MINNESOTA
OFFICE OF ADMINISTRATIVE HEARINGS

FOR THE MINNESOTA DEPARTMENT OF HEALTH

In the Matter of the Proposed Amendment of Rules of the Department of Health Concerning Fines for Violations of the Supervised Living Facilities Rules and Minnesota Statutes Sections 144.411 to 144.417, Minnesota Clean Indoor Air Act; Section 144.651, Patients and Residents of Health Care Facilities Bill of Rights; and Section 626.557, Reporting of Maltreatment of Vulnerable Adults, Minnesota Rules, part 4665.9000

REPORT OF THE ADMINISTRATIVE LAW JUDGE

The above-entitled matter came on for hearing before Administrative Law Judge Barbara L. Neilson on February 14, 1991, at 9:00 a.m. in the Chesley Room of the Minnesota Department of Health Building in Minneapolis, Minnesota.

This Report is part of a rulemaking proceeding held pursuant to Minn. Stat. §§ 14.131 to 14.20 (1990) to hear public comment, determine whether the Minnesota Department of Health ("the Department") has fulfilled all relevant substantive and procedural requirements of law or rule applicable to the adoption of the rules, determine whether the proposed rules are needed and reasonable, and determine whether or not modifications to the rules proposed by the Department after initial publication are substantially different from those originally proposed.

Maria Christu, Special Assistant Attorney General, Suite 500, 525 Park Street, St. Paul, Minnesota 55103, appeared on behalf of the Department at the hearing. The Department's hearing panel consisted of Linda Sutherland, Director of the Department's Division of Health Resources, and Sandra Abrams, Management Analyst and Rules Coordinator with the Department's Division of Health Resources. Seventeen persons attended the hearing. Fifteen persons signed the hearing register. The Administrative Law Judge received ten agency exhibits and six public exhibits as evidence during the hearing. The hearing continued until all interested persons, groups or associations had an opportunity to be heard concerning the adoption of these rules.

The record remained open for the submission of written comments until March 5, 1992, twenty calendar days following the date of the hearing. Pursuant to Minn. Stat. § 14.15, subd. 1 (1990), three business days were allowed for the filing of responsive comments. At the close of business on March 10, 1992, the rulemaking record closed for all purposes. The Administrative Law Judge received seven post-hearing written comments from interested persons. The Department submitted two written comments responding

to matters discussed at the hearing and comments filed during the twenty-day period. In its written comments, the Department proposed further amendments to the rules.

The Department 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.

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

FINDINGS OF FACT

Procedural Requirements

1. On December 18, 1991, the Board filed the following documents with the Chief Administrative Law Judge:

(a) a copy of the proposed rules as certified by the Revisor of Statutes;

(b) the proposed Notice of and Order for Hearing;

(c) the Statement of Need and Reasonableness (SONAR);

(d) an estimate of the number of persons who were expected to attend the hearing;

(e) an estimate of the length of the Department's presentation at the hearing; and

(f) a statement that the Department intended to provide discretionary additional public notice of the hearing.

2. On December 27, 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. Department Ex. 2.

3. On January 6, 1992, the proposed rules and the Notice of Hearing were published in 16 State Register 1629. Department Ex. 8.

4. On January 8, 1992, the Department filed the following documents with the Administrative Law Judge:

(a) the Notice of Hearing as mailed;

(b) a copy of the State Register pages containing the Notice of Hearing and the proposed rules;

(c) an affidavit stating that the Notice of Hearing was mailed on December 27, 1991, to all persons on the Department's mailing list and certifying that the Department's mailing list was accurate and complete as of that date;

(d) an affidavit stating that additional discretionary notice of the hearing was mailed on December 27, 1991, to associations of supervised living facilities and Rule 35 facility administrators;

(e) copies of the Notices of Solicitation of Outside Information or Opinions published in 15 State Register 2311 (April 22, 1991) and 16 State Register 103 (July 15, 1991), together with the materials received by the Department in response to the soliciations; and

(f) the names of agency personnel who would represent the Department at the hearing, and a statement that no other witnesses had been solicited by the Department to appear on its behalf.

5. All documents were available for inspection and copying at the Office of Administrative Hearings from the date of filing to March 10, 1992, the date the rulemaking record closed.

Nature of the Proposed Rules

6. Supervised Living Facilities ("SLFs") are facilities in which supervision, lodging, meals, counseling and rehabilitative services are provided to five or more persons who are mentally retarded, chemically dependent, adult mentally ill, or physically handicapped. Minn. Rules pt. 4665.0100, subp. 10 (1991). Facilities seeking medical assistance certification as intermediate care facilities for four or more persons with mental retardation or related conditions may also be licensed as an SLF by the Commissioner of Health. Minn. Stat. § 144.50, subd. 6 (1991 Supp.).

The proposed rules establish a schedule of fines which the Department may impose on SLFs for uncorrected violations of the Department's Supervised Living Facilities rules, the Minnesota Clean Indoor Air Act, the Patients and Residents of Health Care Facilities Bill of Rights, and the Vulnerable Adults Act. The rules would authorize the imposition of fines ranging in amount from $50 to $500 if Departmental inspectors conducting reinspections following the issuance of correction orders determine that SLFs have not taken action to correct violations of the relevant rules and statutes. If the violation remains uncorrected after a fine has already been imposed, another fine will be assessed which will be double the amount of the previous fine.

Statutory Authority

7. In its Notice of Hearing and SONAR, the Department cites Minn. Stat. §§ 144.653, subds. 5 and 6 (1990 and 1991 Supp.), as its statutory authority for issuance of the proposed rules. Subdivision 5 provides as follows:

> Whenever a duly authorized representative of the state commissioner of health finds upon inspection of a facility required to be licensed under the provisions of sections 144.50 to 144.58 that the licensee of such facility is not in compliance with sections 144.411 to 144.417 [the Minnesota Clean Indoor Air Act], 144.50 to

144.58 [encompassing licensure requirements for SLFs and other facilities], 144.651 [the Patients and Residents of Health Care Facilities Bill of Rights], or 626.557 [the Reporting of Maltreatment of Vulnerable Adults Act], or the applicable rules promulgated under those sections, a correction order shall be issued to the licensee. The correction order shall state the deficiency, cite the specific rule violated, and specify the time allowed for correction.

Subdivision 6 specifies:

> If upon reinspection it is found that the licensee of a facility required to be licensed under the provisions of sections 144.50 to 144.58 has not corrected deficiencies specified in the correction order, a notice of noncompliance with a correction order shall be issued stating all deficiencies not corrected. Unless a hearing is requested under subdivision 8, the licensee shall forfeit to the state within 15 days after receipt by the licensee of such notice of noncompliance with a correction order up to $1,000 for each deficiency not corrected. For each subsequent reinspection, the licensee may be fined an additional amount for each deficiency which has not been corrected. All forfeitures shall be paid into the general fund. The commissioner of health shall promulgate by rule a schedule of fines applicable for each type of uncorrected deficiency.

The proposed rules establish a schedule of fines for uncorrected violations by SLFs of the statutory and regulatory provisions specified in Minn. Stat. § 144.653, subd. 5 (1991 Supp.). The statutory provisions quoted above direct the Commissioner to promulgate rules establishing a fine schedule for uncorrected deficiencies under these rules and statutes. The Administrative Law Judge concludes that the Department has statutory authority to promulgate these rules.

Small Business Considerations in Rulemaking

8. Minn. Stat. § 14.115, subd. 2 (1990), requires that state agencies proposing rules which may affect small businesses must consider methods for reducing adverse impact on those businesses. In its Notice of Hearing, SONAR, and post-hearing comments, the Department asserted that the proposed rules are exempt from the requirements of that statute. Mary Rodenberg-Roberts, Director of Advocacy Services for Resident Advocacy Services, David Kieley of the Association of Residential Resources in Minnesota, and Kathryn Lester of Norhaven questioned whether the proposed rules were properly exempt from the statute and urged the Department to take into consideration the impact of the proposed rules on small SLFs.

The small business statute 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." Minn. Stat. § 14.115, subd. 7(3) (1990). SLFs clearly constitute "long-term care facilities," "group homes," and "residential care facilities" within the meaning of the statute, and are regulated for standards and costs by the

Department of Human Services and the Department of Health. The Administrative Law Judge thus finds that the Department is not required to consider the impact of the proposed rules on small businesses and that the requirements of Minn. Stat. § 14.115, subd. 2 (1990), have been met in this rulemaking proceeding. Of course, the Department may nevertheless choose to consider methods to reduce the impact of the proposed rules on small businesses.

Fiscal Note

9. Minn. Stat. § 14.11, subd. 1 (1990), requires agencies proposing rules that will require the expenditure of public funds in excess of $100,000 per year by local public bodies to publish an estimate of the total cost to local public bodies for the two years immediately following adoption of the rule. In its Notice of Hearing and SONAR, the Department stated that the proposed rules would not require the expenditure of public money by local public bodies in excess of $100,000 per year during the next two years. At the hearing, Resident Advocacy Services contested the Department's determination that it need not comply with the fiscal note requirement, contending that the imposition of fines under the proposed rules with respect to Regional Treatment Centers ("RTCs") and State Operated Community Services ("SOCS") would exceeed $100,000 per year during the next two years.

In its post-hearing comments, the Department reiterated its view that the proposed rules will not require expenditures in excess of the $100,000 limit. The Department stated that there are thirty-one publicly-operated SLFs in Minnnesota (including facilities in receivership). Twenty-six are run by the state, four are run by counties, and one is run by a hospital district. The Department of Human Services operates eight RTCs for developmentally disabled individuals in Minnesota, and state employees staff five smaller residential SOCS. The Department acknowledged that the $100,000 limit would be exceeded if fines in excess of $3,225 were imposed against all publicly-operated SLFs. Based upon its experience with nursing homes and the way fines are structured, however, the Department does not project that fines will occur at this rate.

The fiscal notice requirement is applicable only if the proposed rules will require "local public bodies" to expend the requisite public funds. The term "local public bodies" is defined in Minn. Stat. § 14.11, subd. 1 (1990), as "officers and governing bodies of the political subdivisions of the state and other officers and bodies of less than statewide jurisdiction which have the authority to levy taxes." "Political subdivision" is defined in the Minnesota Statutes as "any agency or unit of this state which is now, or hereafter shall be, authorized to levy taxes or empowered to cause taxes to be levied." Minn. Stat. § 471.49, subd. 3 (1990). The preparation of a fiscal note thus is not required when proposed rules require expenditures by private individuals, entities which have statewide jurisdiction (such as the state Department of Human Services), or state agencies which do not have taxing authority. Neither RTCs nor SOCS are operated by political subdivisions or bodies of less than statewide jurisdiction. Although counties apparently operate four SLFs and provide some funds to private SLFs, the comments and hearing testimony focused upon potential expenditures involving RTCs and SOCS and there was no assertion that these counties would have to spend public funds in excess of the statutory limits as a consequence of promulgation of the proposed rules. The Department thus was not required to prepare a fiscal

notice with respect to the proposed rules.

Impact on Agricultural Land

10. Minn. Stat. § 14.11, subd. 2 (1990), requires that agencies proposing rules that have a "direct and substantial adverse impact on agricultural land in the state" comply with the requirements set forth in Minn. Stat. §§ 17.80 to 17.84 (1990). Under those statutory provisions, adverse impact is deemed to include acquisition of farmland for a nonagricultural purpose, granting a permit for the nonagricultural use of farmland, the lease of state-owned land for nonagricultural purposes, or granting or loaning state funds for uses incompatible with agriculture. Minn. Stat. § 17.81, subd. 2 (1990). Because the proposed rules will not have a direct and substantial adverse impact on agricultural land, Minn. Stat. § 14.11, subd. 2 (1990), does not apply.

Outside Information Solicited

11. In formulating these proposed rules, the Department published notices soliciting outside information and opinions in the State Register in April and July, 1991. The Department also sent letters in June and July of 1991 to licensed SLFs for chemical dependency treatment, organizations of mental health providers, and consumer organizations soliciting information or opinions on the fine schedule.

Substantive Provisions

12. The Administrative Law Judge must determine, inter alia, whether the need for and reasonableness of the proposed rules has been established by the Department by an affirmative presentation of fact. The Department prepared a Statement of Need and Reasonableness (SONAR) in support of the adoption of the proposed rules. At the hearing, the Department primarily relied upon its SONAR as its affirmative presentation of need and reasonableness. The SONAR was supplemented by the comments made by the Department at the public hearing and its written post-hearing comments.

The question of whether a rule is reasonable focuses on whether it has a rational basis. The Minnesota Court of Appeals has held a rule to be reasonable if it is rationally related to the end sought to be achieved by the statute. Broen Memorial Home v. Minnesota Department of Human Services, 364 N.W.2d 436, 440 (Minn.App. 1985); Blocker Outdoor Advertising Company v. Minnesota Department of Transportation, 347 N.W.2d 88, 91 (Minn. App. 1984). The Supreme Court of Minnesota has further defined the burden by requiring that the agency "explain on what evidence it is relying and how the evidence connects rationally with the agency's choice of action to be taken." Manufactured Housing Institute v. Pettersen, 347 N.W.2d 238, 244 (Minn. 1984).

This Report is generally limited to the discussion of the portions of the proposed rules that received significant critical comment or otherwise need to be examined. Because some sections of the proposed rules were not opposed and were adequately supported by the SONAR, a detailed discussion of each section of the proposed rules is unnecessary. The Administrative Law Judge specifically finds that the need for and reasonableness of the

provisions that are not discussed in this Report have been demonstrated by an affirmative presentation of facts, and that such provisions are specifically authorized by statute. Any change proposed by the Department from the rules as published in the State Register which is not discussed in this Report is found not to constitute a substantial change.

Very few of those commenting on the proposed rules focused upon particular rule provisions or fine amounts. The majority of the comments that were made at the hearing and in post-hearing submissions disputed the need for or reasonableness of the proposed fining system in general. The comments that focused on particular provisions of the proposed rules will be discussed below, followed by a discussion of the comments which challenged the need for or reasonableness of the proposed rules in general.

Proposed Rule 4665.9010 - General Requirements

Item G - Residents

13. Item G of part 4665.9010 of the proposed rules specifies that the Department may impose a fine of $350 for violations of part 4665.0900 of the exising rules. Part 4665.0900 requires, inter alia, that SLFs may not accept as residents "persons who have or are suspected of having a communicable disease or a disease endangering the health of other residents [or] persons who require nursing care . . . except for brief episodic periods." Lynn Megan, an administrator for REM, Inc., pointed out that the county in which the SLF is located is responsible for admission authorization under current law. Ms. Megan and Care Providers of Minnesota also stated that the penalty provision should not be applied in a fashion that conflicts with Minn. Stat. § 144.50, subd. 7 (1990), which requires that SLFs licensed by the Commissioner of Health accept as residents individuals who are infected with the human immunodeficiency virus or the hepatitis B virus unless the facility cannot meet the needs of the individual under specified rule provisions or the individual is otherwise not eligible for admission. Care Providers of Minnesota also asserted that it is difficult or impossible to obtain the assurance of a resident's physician that the resident does not have a communicable disease and requested that penalties only be imposed for deficiencies that are within the control of the SLF provider.

In its post-hearing comments, the Department acknowledged that it could not write a correction order on portions of its rules that are superseded by statute. The Department's response indicates that it is sensitive to this issue and will consider the explanations of providers with respect to resident admissions. Moreover, as explained below, providers will be able to appeal any fines that may be levied under the provisions of the Minnesota Administrative Procedure Act. The Department has established that item G of proposed rule 4665.9010 is needed and reasonable.

Item I - Staff Health

14. Item I of part 4665.9010 of the proposed rules provides that a penalty of $100 may be imposed for violations of part 4665.1200, items A to C, of the existing SLF rules. These rule provisions require SLF providers to assure that all staff members (prior to employment and on an annual basis thereafter) show that they do not have tuberculosis and that staff members

suffering from communicable diseases are not permitted to work in the facility until a physician certifies that they may return to work without endangering the health of other staff and residents. They also authorize the facility administrator to require that a staff member undergo a medical examination when a reasonable suspicion of communicable disease exists. Care Providers of Minnesota asserted that the imposition of a penalty for violation of this rule provision may conflict with various state and federal employment discrimination laws. As discussed above, the Department has recognized that it will not have authority to issue correction orders or impose fines where laws have been enacted which supersede rule provisions, and contested case review is available in the event that a fine is imposed. Item I of proposed rule 4665.9010 has been shown to be needed and reasonable.

Fines as a Compliance Tool

15. Glenn Anderson, Executive Director of People, Inc., Mary Rodenberg-Roberts of Resident Advocacy Services, Patricia Moore of Catholic Charities, and David Petersen of REM, Inc., asserted that the Department has not shown the requisite nexus between the fine schedule and its conclusion that enhanced compliance with the SLF rules would be achieved by the assessment of fines. These and other commentators stressed the reimbursement-related problems experienced by privately-owned SLFs and their resulting financial instability, contended that there was insufficient evidence that there are currently problems with compliance or that the proposed system of fines would improve compliance, and suggested that the proposed rules merely will be utilized by the Department as a means to raise revenues for the state. Janet Martins and David Petersen of REM, Inc., suggested that punishment was not effective in changing behavior and that the Department should consider the use of positive reinforcement to reward compliance, such as working with the Department of Human Services to obtain rate increases for providers.

By virtue of Minn. Stat. § 144.653, subds. 5 and 6 (1990 and 1991 Supp.), the Minnesota Legislature has mandated that the Department promulgate rules setting forth a fine schedule for uncorrected violations of specified statutory and rule provisions. This legislation reflects the judgment of the Legislature that fines are necessary to enforce these standards. The Department indicated in its SONAR that it seeks to promulgate the proposed rules in order to implement this statutory requirement and also "to ensure that there is an efficient mechanism to promote compliance with statutes and rules, and that the licensee operates in accordance with these statutes and rules." SONAR at 1. In its post-hearing comments, the Department emphasized that it sees fines as a means of obtaining compliance and not as a method of producing revenue. Moreover, the Department established through evidence provided at the hearing that numerous SLF providers have failed to correct violations of the licensing standards following the issuance of correction orders by the Department. Information presented at the hearing demonstrated that, during the period 1988-1991, at least 63 SLFs had failed to correct deficiencies noted by the Department by the time of reinspection. Other information supplied by the Department at the hearing suggested that an analogous fine schedule already in place with respect to nursing homes is achieving its goal of enhanced compliance. The Department has made the requisite showing of need for the proposed rules.

16. Several individuals, including Ms. Rodenberg-Roberts, Ms. Megan, Ms. Martins, Mr. Petersen, Kathryn Lester of Norhaven, and Jean Searles, Director of RESA, Inc., urged the Department to punish repeated violations of SLF regulations by taking adverse action against the provider's license or suspending the provider's Medicaid certification rather than imposing fines. These commentators maintain that an immediate suspension of services is preferable to the slow downhill spiral which will be caused by the imposition of fines. Gerry McInerney, Director of Member Services for the Association of Residential Resources in Minnesota ("ARRM"), disagreed with the use of decertification, but urged that technical assistance be provided by the Department in order to aid SLFs in achieving compliance. Anne Henry of the Minnesota Disability Law Center supported the use of fines rather than decertification because decertification deprives residents of a place to live and is an extreme penalty which is rarely used. Ms. Henry stated that a fine structure will lead to the correction of violations of the SLF rule rather than a situation in which the problem is ignored until it becomes so egregious that decertification is sought.

In its post-hearing comments, the Department reiterated its position that fines are an appropriate sanction for uncorrected deficiencies and that the Legislature has mandated such an approach. The Department indicated that the deficiencies sought to be addressed in the proposed rules would not warrant such severe sanctions:

> Imposition of these sanctions [suspension, revocation, or decertification] can involve a complicated and costly legal procedure for both the state and the facility and can only be initiated when violations are extremely serious. Because of the potential for disruption to clients, these should not be the first sanctions imposed by the state. Fines seem to be a deterrent with nursing homes and we believe that will be the case for the SLF's as well.

Department's March 5, 1992, Post-Hearing Comment at 7. The Department has demonstrated that it is needed and reasonable to seek to ensure compliance with the relevant laws and rules by employing the less drastic approach of assessing a fine if a reinspection reveals that an SLF has not complied with a correction order. This approach is also consistent with that authorized by the Legislature in Minn. Stat. § 144.653, subd. 6 (1990).

17. Mary Rodenberg-Roberts asserted that the proposed rules conflict with Minn. Stat. § 245A.09, subd. 1 (1990), and thus have not been shown to be necessary. That statute authorizes the Commissioner of Human Services to adopt rules governing the operation, maintenance, and licensure of programs subject to Human Services licensure and prohibits the Commissioner of Human Services from adopting any rules that are inconsistent with or duplicative of existing state or federal regulations. The statute clearly applies only to the Commissioner of Human Services. Moreover, in the current rulemaking proceeding, the Department of Health is operating in accordance with authority expressly granted to it pursuant to Minn. Stat. § 144.653, subd. 6 (1991 Supp.). The proposed rules thus are not in conflict with Minn. Stat. § 245A.09, subd. 1 (1990).

18. Ms. Martins, Ms. Searles, and Mr. McInerney indicated that, while private intermediate care facilities for the mentally retarded ("ICFs/MR") do not receive reimbursement for fines imposed by licensing authorities, state-operated facilities do receive reimbursement through the Medicaid program for fines incurred due to licensing violations. They suggested that state-operated facilities thus would have no incentive to correct deficiencies and that fines would not be effective in preventing problems that occur in RTCs and SOCS. In its post-hearing comments, the Department emphasized that Minn. Stat. § 144.653, subds. 5 and 6 (1990 and 1991 Supp.), require the Department to impose fines on SLFs with uncorrected deficiencies regardless of the size or ownership of the SLF. The Department stated that it has found that most state-operated programs quickly take corrective action and that, if fines do not bring about compliance, more serious sanctions such as suspension and revocation may be imposed. The Department has demonstrated that the imposition of fines is needed and reasonable.

Need for Revision of the Underlying Substantive Rules and Duplication within the Underlying Rules

19. Ms. Rodenberg-Roberts, Ms. Megan, Ms. Martins, Ms. Searles, Ms. Moore, Mr. Sagevic, and Sandy Henry of REM, Inc., expressed a belief that the proposed rules are premature because the existing SLF rules are "input-oriented" rather than "outcome-oriented," contain many out-of-date provisions, and require significant revision. They urged that the Department review and amend the underlying SLF rules before promulgating a schedule of fines. These and other commentators also argued that the proposed rules are unnecessary because the Department of Human Services already has been granted authority to assess fines for deficiencies found in programs for persons with mental retardation and existing SLF licensing standards are in large part duplicative of federal ICF/MR regulations and other state and federal regulations.

In response, the Department denied that its existing SLF rules are "archaic," but acknowledged that the rules are slated for revision beginning in 1993 or 1994. The Department stressed that the rules have built-in flexibility to accommodate changes over time by virtue of a rule provision which provides for waiver of the rule if a facility has an equivalent means of meeting the rule requirement that protects the health and safety of residents and staff. See Minn. Rules pt. 4665.0600 (1991). With respect to the providers' duplication arguments, the Department pointed out that not all SLFs are ICFs/MR who are subject to the federal regulations governing those who participate in the Medicaid program. The Department emphasized that the State Legislature chose to enact a statute requiring the Department to impose the fines despite the fact that SLF providers that are also certified as ICFs/MR are subject to state and federal sanctions. The Department further stressed that, from their inception, SLFs were intended to be regulated by both the Department of Human Services and the Department of Health. In its post-hearing comments, the Department indicated that it has been working with the Commissioner of Health in accordance with Minn. Stat. § 245A.09, subd.7(c) (1990), in attempting to consolidate duplicative licensing and certification rules and standards and that, in accordance with such efforts, the Department of Human Services no longer routinely inspects ICF/MR facilities that are inspected by the Department of Health. As a result, the Department of Human Services and the Department of Health will not assess duplicative fines in

such instances.

The proposed rules are not rendered unnecessary or unreasonable by the Department's failure to first take action to amend the underlying SLF rules or by the mere fact that certain other state and federal regulations may overlap with the underlying SLF rules. The waiver provision contained in the underlying rules accords the Department and SLF providers the necessary flexibility in meeting any rule requirements that may be out of date. The Department is statutorily required to adopt rules setting forth a fine schedule for its SLF rules, and is not precluded from doing so prior to amending the underlying rules.

Delineation of Fine Schedule

20. The proposed rules set forth an eight-tiered fine schedule ranging from $50 to $500 for violations of specified provisions of SLF licensure requirements, the Minnesota Clean Indoor Air Act, the Patients and Residents of Health Care Facilities Bill of Rights, and the Vulnerable Adults Act. Part 4665.9100 of the proposed rules provides that a fine double the amount of the previous fine shall be assessed if the deficiency has still not been corrected upon reinspection.

In its SONAR, the Department indicated that, in designing the fine schedule, it considered the rationale behind the fine schedule already in place for nursing homes which fail to comply with correction orders. See Minn. Rules pt. 4655.9320 through 4655.9341 (1991). The amount of the fine levied under the nursing home rules is related to the impact of noncompliance on the health, treatment, safety, comfort, or well-being of residents. SONAR at 1-2. Following the same rationale in the present rulemaking proceeding, the Department has proposed fines of $50 for violations of rules which are deemed not to jeopardize the health, safety, or well-being of residents; $100 for violations of rules related to the administration and management of the facility; $150 and $200 for violations of rules that are related to the physical environment and physical plant of the facility; $250 for violations of rules that relate to the protection of the individual rights of residents; $300 for violations of rules that are necessary to ensure that services are properly provided; $350 for violations of rules related to the direct provision of services to residents; and $500 for violations of rules and statutes that present an imminent risk of harm to the health, treatment, comfort, safety or well-being of residents. SONAR at 2. The Department determined that it was "reasonable to adopt the fine levels and categories established for nursing home violations because the nursing home rules and the rules and statutes governing [SLFs] are all designed to protect and promote the health, safety, and well-being of consumers by regulating the provision of services to persons in health care facilities." The Department further indicated that "[t]he fines themselves are reasonable because they take into consideration the potential for harm to clients while at the same time establishing sufficient sanctions to ensure compliance with applicable statutes and rules." SONAR at 2.

Ms. Rodenberg-Roberts, Ms. Searles, Ms. Moore, Mr. Anderson and Mark Wiger, an Administrator for MBW Company, asserted that the fine schedule set forth in the proposed rules is arbitrary and punitive in nature. Ms. Rodenberg-Roberts, Mr. McInerney, Ms. Lester, and Peter Sagevic of Snelling

Park Place also questioned the fairness and propriety of imposing the nursing home fine schedule on SLFs given that nursing homes generally are much larger in size, command much larger budgets, and serve a population with different needs. For example, by comparing a 100-bed skilled nursing facility with a 6-bed ICF/MR, Ms. Rodenberg-Roberts concluded that an identical $500 fine would constitute approximately 7 percent of the nursing home's daily revenue but 120 percent of the ICF/MR's daily revenue.

At the hearing and in post-hearing comments, the Department responded that the fines imposed on nursing homes are fundamentally different from those to be imposed on SLFs under the proposed rules since the nursing home fines accrue on a daily basis, while the SLF fines would only be imposed upon reinspection following issuance of a correction order or a prior fine. It is reasonable for the Department to conform the SLF fines to the system already in place for nursing homes and thereby benefit from the experience it has had in developing and enforcing similar rules with respect to nursing homes.

21. Ms. Rodenberg-Roberts contended that the proposed rules are unreasonably vague in that it is left to the discretion of the Department to determine at what point a deficiency will be deemed to be uncorrected. In its post-hearing comments, the Department stated that the time period for correction will be determined by the Departmental surveyors and supervisors using their professional judgment and experience. The Department is granted ample authority by Minn. Stat. § 144.653, subd. 2 (1990), to conduct inspections and reinspections and is authorized by Minn. Stat. § 144.653, subd. 5 (1990), to specify the time allowed for correction of a deficiency in a correction order. The length of time required for correction necessarily depends upon the nature of the violation, the speed with which it can be remedied, and the seriousness of the impact on the resident. The process requires flexibility. The proposed rules are not rendered unreasonably vague by virtue of their failure to specify time lines for correction and reinspection.

22. A number of commentators raised questions concerning the manner in which the proposed rules would be applied. For example, Juanita Hayes of REM, Inc., Ms. Searles, Mr. Sagevic, and others complained of vague terminology in the underlying rules and inconsistency in Departmental surveyors' interpretations of various rule provisions. Ms. Hayes and Mr. Anderson asserted that it is unclear whether a new set of circumstances that violates the same rule provision as was involved in a prior violation will trigger a fine upon reinspection by the Department. Ms. Searles and Mr. Anderson contended that, given the interrelationship of various rule provisions, a single type of violation could result in the imposition of fines under several rule provisions. Mr. Wiger asserted that the proposed rules might conceivably result in the imposition of a $250 fine for failure to provide a resident with writing implements, a $300 fine for failure to provide a "reasonable" variety of food, and a $350 fine for failure to keep a resident's hair combed.

In its post-hearing comments, the Department indicated that the surveyors themselves will not have authority to assess fines under the proposed rules. Before any fine is assessed, the section chief of the Survey and Compliance section will review correction orders from the inspection and reinspection in order to ensure that a correction order in fact remained uncorrected and, if necessary, engage in consultations with Departmental

attorneys and the director of the division. As discussed in more detail below, SLFs obviously will also be able to appeal a fine if they disagree with its issuance.

The concerns of SLF providers relating to the training of Departmental surveyors, the interpretation of various provisions of the underlying rules, and the enforcement policies that may be developed by the Department are genuine and should receive consideration by the Department. - A joint effort by the Department and SLF providers to establish protocols or guidelines relating to the implementation of the proposed rules could reduce providers' fears regarding the potential for unfair enforcement of the rules. Such concerns are, however, distinct from the issues of need and reasonableness of the proposed rules and may not properly be addressed in the context of this rulemaking proceeding.

Appeal of Fines

23. Mr. Anderson, Ms. Searles, Ms. Lester, and other commentators raised questions concerning the procedures that must be followed in order to challenge the imposition of a fine under the proposed rules. Mr. Anderson urged that the Department consider including a provision within the proposed rules allowing for the waiver of fines or decreases in fine amounts if justified by extenuating circumstances or impossibility.

The appeals procedure with respect to fines imposed by the Department is established by statute. Minn. Stat. § 144.653, subd. 8 (1990), provides in relevant part that "a licensee of a facility . . . is entitled to a hearing on any notice of noncompliance with a correction order issued to the licensee as a result of a reinspection . . . ." The hearing and review are governed by the applicable provisions of the Minnesota Administrative Procedure Act, Minn. Stat. §§ 14.48 through 14.69 (1990). Id. The Administrative Procedure Act affords the petitioner an opportunity to have a contested case hearing before an Administrative Law Judge, a final decision rendered by the Commissioner of Health, and judicial review of the final decision by the Minnesota Court of Appeals. Minn. Stat. § 144.653, subd. 8 (1990) further provides that a request for a hearing shall operate as a stay of the payment of any fine during the hearing and review process. The fine thus cannot be collected by the Department unless the Department establishes its propriety in the contested case proceeding.

The Department does not have authority to deviate from the appeals process required by statute, and thus properly declined to follow the suggestions of the commentators who urged that a different appeals system be implemented. Because fines may be appealed to administrative and judicial tribunals, the proposed rules are not rendered unreasonable by their failure to include a provision authorizing waiver of or reduction in fines due to impossibility or the existence of extenuating circumstances.

Duplication within the Provisions of the Proposed Rules

24. Rule part 4665.1320 of the exising rules of the Department authorizes the imposition of fines in the amount of $50 and $250 for violations of two specified rule provisions relating to the keeping of pets at facilities. Gerry McInerney of ARRM suggested that the proposed rules might

be construed also to permit the imposition of fines for violation of the pet animal provisions. In its post-hearing comments, the Department emphasized that the proposed rules do not contain any fines relating to the rule provisions governing the keeping of pets. In order to avoid any confusion regarding this matter, however, and to consolidate all of the rules relating to fines in one location, the Department proposed in its post-hearing comments that the existing pet animal rule provision (rule part 4665.1320) be moved to part 4665.9010, items N and O of the proposed rules. Unnecessary language would also be removed from the existing rule provision. New items N and O would read as follows:

> N. A $50 penalty assessment will be issued for noncompliance with correction orders relating to part 4638.0200, subpart 2.
>
> O. A $250 penalty assessment will be issued for noncompliance with correction orders relating to part 4638.0200, subpart 3.

The modification suggested by the Department responds to comments at the hearing and clarifies the provisions of the proposed rules. The new language has been shown to be needed and reasonable. The modification does not alter any substantive provision of the Department's rules and does not constitute a substantial change from the rules as originally proposed.

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

CONCLUSIONS

1. The Minnesota Department of Health ("the Department") gave proper notice of this rulemaking hearing.

2. The Department has fulfilled the procedural requirements of Minn. Stat. § 14.14, subds. 1, 1a, and 2 (1991), and all other procedural requirements of law or rule so as to allow it to adopt the proposed rules.

3. 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) and (ii) (1990).

4. 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) (1990).

5. 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 (1990), and Minn. Rules pts. 1400.1000, subp. 1 and 1400.1100 (1991).

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

7. 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 in accordance with the Findings and Conclusions in this Report.

Dated this 9th day of April, 1992.

Barbara L. Neilson

BARBARA L. NEILSON
Administrative Law Judge

Reported: Tape Recorded. Transcript prepared by Jeffrey J. Watczak (one volume).