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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 the Rules, Parts
4625.5000 and 4625.2300, of the
Minnesota Department of Health
Governing Fees for Food, Beverage
and Lodging Establishments.

REPORT OF THE
ADMINISTRATIVE LAW JUDGE

The above-entitled matter came on for hearing before Administrative Law Judge Peter C. Erickson at 9:00 a.m. on Wednesday, June 30, 1993 in Room 5 of the State Office Building, St. Paul, Minnesota. This Report is part of a rule hearing proceeding held pursuant to Minn. Stat. §§ 14.131 - 14.20 to determine whether the Agency has fulfilled all relevant substantive and procedural requirements of law, and whether the proposed rules, if modified, are substantially different from those originally proposed.

Paul Zerby, Assistant Attorney General, Suite 500, 525 Park Street, St. Paul, Minnesota 55103, appeared on behalf of the Minnesota Department of Health. Appearing and testifying in support of the proposed rules for the Department were: Charles Schneider, Section Chief; Judith Ball, Policy Analyst; and Jane Nelson, Rules Coordinator.

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

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

FINDINGS OF FACT

Procedural Requirements

1. On May 5, 1993, the Department filed the following documents with the Chief Administrative Law Judge:

- (a) A copy of the proposed rules certified by the Revisor of Statutes.
- (b) The Order for Hearing.
- (c) The Notice of Hearing proposed to be issued.

- (d) A Statement of the number of persons expected to attend the hearing and estimated length of the Agency's presentation.
- (e) The Statement of Need and Reasonableness.

2. On May 24, 1993, a Notice of Hearing and a copy of the proposed rules were published at 17 State Register pp. 2890-2891.

3. On May 20, 1993, the Department mailed the Notice of Hearing to all persons and associations who had registered their names with the Agency for the purpose of receiving such notice.

4. On June 4, 1993, 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 17 State Register pp. 1761 - 1762 (January 11, 1993) and a copy of the Notice.

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

5. The period for submission of written comment and statements remained open through July 8, 1993, the period having been extended by order of the Administrative Law Judge to eight calendar days following the hearing. The record closed on July 15, 1993, the fifth business day following the close of the comment period.

Statutory Authority

6. Statutory authority to promulgate rules to set the types of fees herein is contained in Minn. Stat. §§ 144.05(b) and (c); 144.122(a); 157.03; and 157.045.

Fiscal Impact, Impact on Small Business, and Impact on Agricultural Lands; and Fee Requirements

7. The Department estimates that the proposed rules will not impose a cost on local governmental bodies in excess of \$100,000 in either of the two years immediately following adoption of the rules.

8. The Department has considered the impact of the proposed rules on small businesses as set forth on pages 2 and 3 of the Statement of Need and Reasonableness (SONAR). The Department has determined that many lodging

establishments and over 80% of the businesses serving food or beverages and licensed by the State fall under the definition of small business. The factors set forth in Minn. Stat. § 14.115, subd. 2 have been addressed by the Department in the SONAR. Because the factors contained in the statute are not fee-based factors, several of the criteria are not applicable to the type of rules herein.

9. The Department has determined that the proposed rules will not have any direct or substantial adverse impact on agricultural land.

10. Pursuant to Minn. Stat. § 16A.128, the Director of Budget Operations and Support in the Minnesota Department of Finance approved the proposed fees on April 29, 1993. Additionally, the Chairman of the Minnesota House of Representatives Ways and Means Committee and the Chairman of the Minnesota Senate and Finance Committee were notified by letter with attachments on May 10, 1993 of the Department's proposal to set increased fees for food, beverage and lodging establishments.

Nature of the Proposed Rules

11. License fees for lodging establishments, and food and beverage establishment were last adjusted in 1988 effective for the 1989 calendar year. The Department of Health has found that the actual cost of licensing and inspecting the types of establishments covered by the licenses has been insufficient to cover past and anticipated future costs for those activities. The Department's calculations show an accumulated deficit in 1991 of \$391,000 which includes a \$147,000 deficit from fiscal year 1990. The Department estimates that at the end of the 1993 fiscal year, the total deficit will be \$970,000. Consequently, the Department is proposing to increase initial and renewal license fees to recover past deficits and reduce the future deficit until a surplus of \$16,000 is estimated for 1998. Additionally, the licensure cost, which is based on the average number of employees, has been changed to reflect more "natural" breaks between the number of employees in small and big establishments. The proposed rules also require a \$150 fee for the review of "construction or remodeling plans" and any time an establishment is "extensively remodeled". Industry representatives and the Department could not agree on language to define "extensively remodeled" at the time of the hearing. Subsequent to the hearing, an agreement was reached which reads as follows:

Subp. 1a. Construction; remodeling. An initial license application for food and beverage establishments as defined in part 4625.2401 must be accompanied by a fee of \$150 for review of the construction or remodeling plans as required under part 4625.2701. When an establishment is extensively remodeled, a fee of \$150 must accompany the remodeling plans required under part 4625.2701. Neither an initial license plan review fee nor a remodeling plan review fee shall be required for a limited food service establishment as defined in Minnesota Rules, part 4625.2401, subpart 22 that is not a mobile food service as defined in part 4625.2401, subpart 23. Extensive remodeling means an addition or change to the physical facility, or making a major equipment addition.

Extensive remodeling does not include redecorating, cosmetic refurbishing, or altering seating design or capacity.

The Judge finds that the above-modification is not a substantial change and that need and reasonableness has been demonstrated.¹

Discussion of the Proposed Rules

12. Representatives of the affected industry (Judy Hewes-General Manager of Upper Midwest Hospitality, Inc.; Al Brodie, Executive Vice-President of the Minnesota Motel Association; and Tom Newcome representing the Minnesota Restaurant, Hotel and Resort Associations) object to the increased fees and re-categorization of fee amounts based on number of employees because the fees are unreasonable, illegally retroactive, and impose a greater burden on establishments whose categorization was changed resulting in an increased fee that is disproportionate with respect to other establishments whose categorization did not change. Additionally, those representatives argue that the costs experienced by the Department of Health for licensing and inspection are inflated due to departmental inefficiency which should not be borne by lodging, beverage and food establishments whose profit margin is very small.

13. Minn. Stat. § 144.122(a) specifically requires that fees established for the licensure and inspection of lodging, beverage and food establishments "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." It would be impractical if that language were read to only include cost and revenue projections for future years. The rules proposed are not retroactive; they do not require that licensed establishments now pay higher fees for licenses which were issued in the past. Rather, the proposed rules will only set prospective license fees after the rules are adopted and take effect. No authority has been cited by the industry which would prohibit the Department from adopting a prospective fee rule for the purpose of paying off deficits which arose in the past. See, In the Matter of the Proposed Adoption of Rules of the Department of Health Governing Health Maintenance Organization Fees, Report issued April 17, 1991 by Administrative Law Judge Allan W. Klein, at Finding 25.

Although the proposed fees have been increased significantly for the purpose of paying future costs and repaying past deficits, the Commissioner has specific authority to set fees at a level which will pay the costs of administering the licensing and inspection program. There is nothing in the

¹In order for an agency to meet the burden of reasonableness, it must demonstrate by a presentation of facts that the rule is rationally related to the end sought to be achieved. Blocher Outdoor Advertising Co. v. Minnesota Dep't of Transp., 347 N.W.2d 88, 91 (Minn. Ct. App. 1984). Those facts may either be adjudicative facts or legislative facts. Manufactured Housing Institute v. Pettersen, 347 N.W.2d 238, 244 (Minn. 1984). The agency must show that a reasoned determination has been made. Manufactured Housing Institute at 246.

record to suggest that Minnesota businesses will not be able to pay these new fees or that the new fees will have a seriously detrimental effect on the profitability of those businesses. Obviously, none of the affected establishments wants to pay higher licensure fees. However, based on the record herein, the Department has demonstrated that the fees are necessary to pay the costs of administering the licensure and inspection program. Consequently, the Judge finds that the need for and reasonableness of the fees have been demonstrated by the Department.

Lastly, industry representatives contend that the higher costs are due, in large part, to departmental inefficiency in the inspection program. This issue was not fully discussed or documented during this proceeding, however. The Judge points out that 1993 Laws, Chapter 114 specifically directs the Commissioner of Health to study and report to the Legislature by February 1, 1994 on the issue of efficiency of its inspection programs. The Legislature is probably the most appropriate forum for this issue to be addressed and changes made, if appropriate.

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

CONCLUSIONS

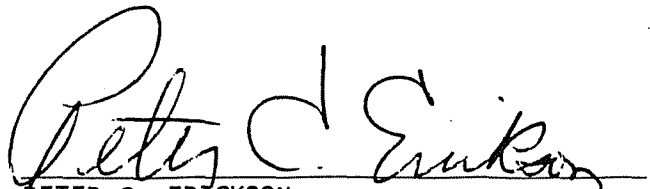
1. That the Department of Health gave proper notice of the hearing in this matter.
2. That the Department has fulfilled the procedural requirements of Minn. Stat. §§ 14.14, and all other procedural requirements of law or rule.
3. That the Department has documented its statutory authority to adopt the 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 10 day of August, 1993.

A handwritten signature in cursive script, reading "Peter C. Erickson". The signature is written in dark ink and is positioned above a horizontal line.

PETER C. ERICKSON
Administrative Law Judge