

RP 2362

8-0900-8842-1

STATE OF MINNESOTA  
OFFICE OF ADMINISTRATIVE HEARINGS  
FOR THE MINNESOTA DEPARTMENT OF HEALTH

In the Matter of Proposed Permanent  
Rules Relating to Dietary and Food  
Services in Licensed Nursing Homes,  
Minn. Rules, Chapters 4655 and 4658.

REPORT OF THE  
ADMINISTRATIVE LAW JUDGE

The above-entitled matter came on for hearing before Administrative Law Judge Jon L. Lunde on August 2, 1994, at 9:00 a.m. at the Capitol View Conference Center, 70 West County Road B2, in Little Canada, Minnesota.

This Report is part of a rulemaking proceeding held pursuant to Minn. Stat. §§ 14.131 to 14.20, to hear public comment, to determine if the Minnesota Department of Health ("Department") has fulfilled all relevant substantive and procedural requirements of law applicable to the adoption of the rules, if the proposed rules are needed and reasonable, and if any modifications to the rules proposed by the Department after initial publication are impermissible, substantial changes.

Approximately 31 persons attended the hearing. Mary Stanislav, Assistant Attorney General, Suite 200, 520 Lafayette Road, St. Paul, Minnesota 55155, appeared on behalf of the Department. The Department's hearing panel consisted of H. Michael Tripple, Assistant Director of the Department's Health Resources Division; Maggie Friend, Rule Drafter in the Health Resources Division; and Dena Dunkel, Rule Coordinator for the Department. 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 for twenty calendar days following the hearing, to August 22, 1994. Pursuant to Minn. Stat. § 14.15, subd. 1, five working days were allowed for the filing of responsive comments. At the close of business on August 29, 1994, the rulemaking record closed for all purposes. Written comments were filed by interested persons during the comment period. The Department also submitted written comments responding to matters discussed at the hearings and proposing further amendments to the rules.

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 Minnesota Department of Health makes changes in the rule other than those recommended in this report, it 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 20, 1994, the Department filed the following documents with the Chief Administrative Law Judge:

- (a) an uncertified copy of the proposed rules;
- (b) the Order for Hearing;
- (c) the Notice of Hearing proposed to be issued;
- (d) the Statement of Need and Reasonableness (SONAR), including the names of agency personnel and witnesses called by the Department to testify at the hearing;
- (e) a list of additional persons to receive the Notice of Hearing; and,
- (f) an estimate of the number of persons who would attend the hearing and how long the hearing is expected to last.

2. On May 31, 1994, the Department filed a copy of the proposed rules certified by the Revisor of Statutes.

3. On June 6, 1994, 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 and all licensed nursing homes in Minnesota.

4. On June 20, 1994, the Notice of Hearing and the proposed rules were published at 18 State Register 2638 (June 20, 1994).

5. On July 5, 1994, 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 its proposed rules;
- (c) a copy of the Notice of Solicitation of Outside Materials published at 16 State Register 1230 on November 18, 1991;
- (d) the Department's certification that its mailing list was accurate and complete as of June 1, 1994; and,
- (e) the Affidavit of Mailing the Notice to all persons on the Department's mailing list and the additional mailing.

6. A copy of all materials received pursuant to the Notice of Solicitation of Outside Materials was filed on July 6, 1994.

7. Minn. Rule 1400.0600 requires that the documents listed in Findings 5 and 6 be filed with the Office of Administrative Hearings at least 25 days prior to the hearing on the rule. The documents were filed only six days before the hearing. This failure to meet the filing requirement is a procedural defect in these rules. In addition, the certification of the mailing list was done on June 1 and the mailing was done on June 6. The purpose behind the certification of the mailing list is that the list be accurate and complete on the day the notice was mailed.

Under Minn. Stat. § 14.15, subd. 5, harmless errors arising out of a failure to comply with the procedures for rulemaking must be disregarded if:

- (1) the failure did not deprive any person of the opportunity to participate meaningfully in the rulemaking process, or
- (2) the agency has taken corrective action to cure the defect.

There is no evidence that either error deprived any person of the opportunity to participate in the hearing. No person inquired after the documents untimely filed. The failure to meet the filing requirement is a harmless error. There is no evidence that anyone was not notified due to the gap between the mailing and the Department's certification. Both errors should be disregarded by operation of Minn. Stat. § 14.15, subd. 5.

#### Nature of the Proposed Rules and Statutory Authority.

8. The rules proposed in this proceeding relate to the dietary and food services provided by nursing homes. The rules were developed as a result of the Commissioner's study of long-term care facilities. The study was made pursuant to a legislative mandate commonly known as the Nursing Home Regulatory Reform Project.<sup>1</sup> The rules are designed to reflect changes in the nursing home reform provisions of the Omnibus Budget Reconciliation Act of 1987, P.L. 100-203, which is commonly referred to as "OBRA 87", and changes which have occurred in the provision of long-term care services in the State of Minnesota.

9. Nursing homes must comply with "minimum health, sanitation, safety and comfort standards" prescribed by departmental rules. Minn. Stat. § 144A.04, subd. 3. Under Minn. Stat. § 144A.08, subd. 1, the Department must "establish minimum standards for the construction, maintenance, equipping and operation of nursing homes." To the extent possible, departmental rules must "assure the health, treatment, comfort, safety and well being of nursing home residents." The proposed rules set standards for dietary and food services in nursing homes, and establish a schedule of fines for noncompliance. The Commissioner of Health has authority to assess fines for noncompliance with the

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1. The Nursing Home Regulatory Reform Project was mandated by Minnesota Laws 1991, c. 292, art. 4, § 75. The Department's Statment of Need and Reasonableness erroneously cited § 55 of that Act.

Commissioner of Health has authority to assess fines for noncompliance with the rules under Minn. Stat. § 144A.10 (1992). Based on these statutory provisions, it is concluded that the Department has authority to adopt the rules proposed in this proceeding.

#### Small Business Considerations in Rulemaking.

10. Minn. Stat. § 14.115, subd. 2, provides that state agencies proposing rules affecting small businesses must consider methods for reducing adverse impact on those businesses. In its Notice of Hearing and its SONAR, the Department stated that the proposed rules are exempt from the small business considerations under Minn. Stat. § 14.115, subd. 7. That exemption applies where the rules affect service businesses "regulated by government bodies for standards and costs, such as nursing homes ...." Id. The proposed rules apply to nursing homes. Hence, they are exempt from the small business considerations in Minn. Stat. § 14.115 (1992).

#### Fiscal Note.

11. Minn. Stat. § 14.11, subd. 1, requires the preparation of a fiscal note when newly adopted rules will result in the expenditure of public funds in excess of \$100,000 per year by local public bodies. The fiscal note must include an estimate of the total cost to local public bodies for a two-year period. The Department concluded that the proposed rules will not have a total cost to local public bodies of more than \$100,000 in either of the first two years after the rules are adopted.

#### Impact on Agricultural Land.

12. Minn. Stat. § 14.11, subd. 2 (1992), imposes additional statutory notice requirements when rules are proposed that have a "direct and substantial adverse impact on agricultural land in the state." The statutory requirements referred to are found in Minn. Stat. §§ 17.80 to 17.84. The proposed rules will have no substantial adverse impact on agricultural land within the meaning of Minn. Stat. § 14.11, subd. 2 (1992).

#### Reasonableness of the Proposed Rules

13. Agency rules must be reasonable. That is, they must have a rational basis. The Minnesota Court of Appeals has held that a rule is reasonable if it's 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 held that the agency must "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). In drafting rules, however, the Department is not required to adopt the most reasonable rule. The Agency is authorized to select any reasonable alternative.

14. This Report will not discuss each rule part, or each change proposed by the Department after the rules were published in the State Register. The Report generally will focus on those provisions the Administrative Law Judge finds important or members of the public addressed. Persons or groups who do not find their particular comments in this Report should know that the Administrative Law Judge has read and considered each and every suggestion. Any rule not commented on in this Report was shown to be needed and reasonable and within the scope of the Department's rulemaking authority. Also, unless otherwise noted, no substantial rule changes were made to the rules after initial publication in the State Register.

#### Proposed Rule 4655.0090 - Scope.

15. The only rule in chapter 4655 affected by the proposed rules is Minn. Rule 4655.0090, which describes the scope of the rules in chapter 4655 on nursing homes and boarding care homes. This change was not mentioned in the SONAR. Leota Davis, R.D., objected to this provision as attempting to extend federal regulations to boarding care homes. It does not have that effect.

The Department proposes to amend Part 4655.0090. As amended, the rule will read as follows:

The rules in Chapter 4655 apply to both nursing homes and boarding care homes unless otherwise indicated or when superceded by more recently adopted rules for nursing homes. (underlination indicates new language.)

Generally speaking, the Department must demonstrate that any new language is needed and reasonable by "an affirmative presentation of facts." Minn. Stat. § 14.14, subd. 2. Although the Department did not discuss the need and reasonableness for this amendment to the cited rule, its failure to do so does not prevent it from adopting a mere clarification which will assist the public at large. The amendment proposed by the Department is intended to alert people to newly adopted nursing home rules which may supersede the provisions in Chapter 4655. Clearly, no one will be prejudiced if a clarifying amendment to Part 4655.0090 is adopted. Nonetheless, the language proposed by the Department could be clearer. The words "more recently adopted" are confusing and uncertain. The Administrative Law Judge recommends, therefore, that the rule be amended to read as follows:

The rules in Chapter 4655 apply to both nursing homes and boarding care homes unless the context clearly indicates otherwise. Chapter 4655 does not apply to nursing homes in those areas covered by the dietary and food services rules in Part 4658.0600 through 4658.0685.

#### Proposed Rule 4658.0600 - Dietary Service.

##### Subpart 1 - Food Quality

16. Proposed rule 4658.0600 is composed of three subparts. Subpart 1 requires food served by nursing homes "have taste, aroma, and appearance that

encourages resident consumption of food." Marcy L. Harris, of the Minnesota Veterans Home Board, stated that subpart 1 is too subjective. The Board suggested retaining the existing language at part 4655.8500 which requires therapeutic diets for residents who need them.

The Department indicated that the proposed subpart is identical to the language in federal certification rules implementing OBRA 87. (42 CFR § 483.35). Department Reply, at 4. The Department noted that "99% of the nursing homes in Minnesota are already required to comply with this language." Id. The Administrative Law Judge recognizes that tastes differ and such differences can arise in assessing the quality of food. However, the mere fact that the standard is potentially subjective does not disqualify that standard from adoption as a rule. In the Matter of Proposed Permanent Rules Relating to Infectious Waste Management, Parts 7035.9100 to 7035.9150, at 5, OAH Docket No. 3-2200-4603-1 (Report issued July 24, 1990). The rule is needed to comply with federal standards. It would be unreasonable to subject nursing home residents to meals that have "taste, aroma, and appearance" discouraging to their appetites. Subpart 1 is needed and reasonable as proposed.

#### Subpart 2 - Nutritional Status

17. Subpart 2 requires nursing homes to offer residents diets which meet their caloric and nutritional needs, as set forth in each individual's comprehensive resident assessment. Substitutes of equivalent nutritional value must also be offered to residents who refuse the food served. The rule replaces existing language requiring food portions and recommended daily allowances (RDAs).

Darrell R. Shreve, Ph.D., Director of Research & Regulations for the Minnesota Association of Homes for the Aging (MAHA), supports the new language. Carol Opheim of the Minnesota Dietetic Association and Twin City Consulting Dietitians recommended the rule refer to therapeutic diets. Kathryn Godsill, R.D., suggested using the U.S. Department of Agriculture food pyramid to plan menus.

The Veterans Home Board, and Joan Nielsen, R.D., objected to the subpart as subjective. Nielsen asserted that the verification process could be costly since each resident's assessment must be compared with the nutrient analysis of each menu item. Nielsen suggested replacing the rule language with federal language requiring use of the RDAs. 42 CFR § 483.35(c).

The Department declined to make any changes to the proposed rule. Regarding therapeutic diets, the Department noted, among other things, that physicians can order modified diets for residents. Department Reply, at 5. The Department's position is consistent with federal guidelines. 42 CFR § 483.35(e). The Department has demonstrated that the proposed rule is needed and reasonable. It is patterned after OBRA 87 requirements (42 C.F.R. § 483.35(c)(1)) and will coincide with other state rules which require a care planning process which will identify dietary problems and resident preferences. The rule will help facilities limit the amount of food which is thrown away, accommodate reasonable resident preferences, and give nursing homes more flexibility in responding to the physical condition and health of individual residents.

### Subpart 3 - Availability of Diet Manuals

18. Proposed rule 4658.0600, subpart 3, requires nursing homes to make current diet manuals readily available. The Minnesota Dietetic Association and Twin City Consulting Dietitians recommended requiring nursing homes to make therapeutic diets available pursuant to a physician's order or a resident's request, or if indicated by a resident's condition. The Department declined to make that change. In its view, such diets are required by the mandate in subpart 2 to meet a resident's needs.

The inclusion of therapeutic diets was discussed by the advisory group (workgroup) which worked with the Department in developing these rules. Department Reply, at 6. Due to the lack of a widely accepted definition of a "therapeutic diet," the advisory group and the Department decided against using the term. Rita K. Baer, R.D., suggested clarification of what was meant by "current" and suggested that nursing homes be required to update manuals every five years. In response, the Department revised the subpart to replace the word "current" with "the most recent edition." The new language more accurately describes the Department's intent to require that up-to-date diet manuals be available in the nursing home's dietary department. Subpart 3, as modified, is needed and reasonable. The new language does not constitute a substantial change.

### Proposed Rule 4658.0605 - Dietitian.

19. Subpart 1 of proposed rule 4658.0605 requires that nursing homes employ a qualified dietitian on a full-time or part-time basis, or as a consultant. "Qualified Dietitian" is defined in the subpart as:

a person who is registered by the Commission on Dietetic Registration of the American Dietetic Association, or a person who has a bachelor's degree in dietetics, food and nutrition, or food service management plus experience in long-term care and ongoing continuing education in identification of dietary needs, and planning and implementation of dietary programs.

Jenean Erickson, President and Chief Executive Officer of Yorkshire Manor, questioned how a degreed dietitian could gain the required experience to qualify for employment in a nursing home. Rick E. Carter, President of Care Providers of Minnesota (Care Providers) and Kathryn Godsill, R.D., suggested deleting the long-term care experience requirement in the definition of "qualified dietitian."

The Department explained that the experience requirement only applies to persons with a bachelors degree who are not registered dietitians. Department Reply, at 6. The Department relies upon the registration standards to ensure that such dietitians are qualified to work in nursing homes. For persons with a bachelors degree who are not registered, the Department stated that some experience as a dietitian is needed to ensure that residents receive proper care.

Laurie Arndt, R.D., Consulting Dietitian; Sue Lewis, C.D.M., Dietetic Services Supervisor; and Dan Zeleznikar, Assistant Administrator, all with the

Nopeming Nursing Home, objected to the rule on the grounds that it is inconsistent with new licensing statutes. Under Laws of Minnesota 1994, c. 613, codifying Minn. Stat. § 148.621 et seq., the legislature adopted new statutory provisions regulating dietetics and nutrition practice. Effective July 1, 1994, a new Board of Dietetics and Nutrition Practice was created. Among other things, the new board is required to adopt rules implementing the new statutory provisions. Thirty days after the board adopts rules under the statute, the remaining statutory provisions become effective. The new law defines dietitians, nutritionists, and nutrition practice.

To address the commentators' concerns, the Department has modified subpart 1 to create three categories of persons who meet the definition of a "qualified dietitian." The three categories are:

- a. registered dietitians;
- b. licensed dietitians; and
- c. persons with a bachelor's degree in dietetic, food and nutrition, or food service management plus experience in long-term care and ongoing continuing education in identification of dietary needs, and planning and implementation of dietary programs.

The new statute licensing dietitians prohibits use of the term "dietitian" in an occupational title (e.g. dietitian, licensed dietitian), by anyone but a registered dietitian. Laws of Minnesota 1994, c. 613, § 11. However, the licensing act expressly provides for a one-year transition period after the Board of Dietetics and Nutrition Practice adopts rules. Laws of Minnesota 1994, c. 613, § 8. During the transition period, persons who meet the definition of a "qualified dietitian" as defined in these rules are eligible for licensure. After the transition period, the statutory licensure standards apply. The statutory licensure standards are more stringent than the Department's standards for "qualified dietitian." See Laws of Minnesota 1994, c. 613, § 5.

The transition period contained in Laws of Minnesota 1994, c. 613, § 8, appear to be designed to enable individuals meeting the requirements of qualified dietitians under these rules to practice for one full year after the Board of Dietetics and Nutrition Practice first adopts rules, so that those persons can maintain their employment and still have an opportunity to meet the requirements for licensure as a dietitian after the end of the transition period. When the transition period expires, only persons meeting the statutory requirements for licensure may be licensed. For that reason, the Department may wish to consider adding a sunset provision to Part 4658.0605, subp. 1, under which the Department's rule will conform with the new law at the end of the transition period. Such a rule could read as follows:

The nursing home must employ a qualified dietitian full time or part time or on a consulting basis. A "qualified dietitian" means a person who is licensed as a dietitian under Laws of Minnesota 1994, chapter 613. During the transition period established under Laws of Minnesota 1994, chapter 613, section



8, "qualified dietitian" also includes a person registered with the Commission on Dietetic Registration of the American Dietetic Association and persons with a bachelor's degree in dietetics, food and nutrition, or food service management plus experience in long-term care and ongoing continuing education in identification of dietary needs and planning and implementation of dietary programs.

Under this approach, the statute and rule support each other to establish standards for qualified dietitians during and after the transition period.

The amended language proposed by the Department to define qualified dietitians, and the alternative suggested above, are both necessary and reasonable and neither constitutes a substantial change for purposes of Minn. Rules, pt. 1400.1100 (1993).

#### Subpart 2 - Director of Dietary Service

20. When a nursing home does not employ a qualified dietitian full-time, subpart 2 requires it to employ a director of dietary service. A director of dietary service must be enrolled in or have completed a dietary manager course and receive frequently scheduled consultation with a qualified dietitian. The subpart further requires that:

The number of hours of consultation must be based upon the needs of the nursing home.

The Veterans Home Board urged retention of the existing requirement of four hours of consultation monthly. Yorkshire Manor and Care Providers objected to the requirement of a dietary manager course. Kristi Rieger, R.D., of the Minnesota Dietary Managers Association (MDMA), recommended requiring completion of an MDMA-approved course, certification as a dietary manager, or graduation from a dietetic training program. MAHA opposed requiring credentials for dietary managers. The Minnesota Dietetic Association and Twin City Consulting Dietitians supported the subpart as proposed.

The Department considered the proposed requirement that only certified courses or credentialed dietary managers be allowed to qualify as directors of dietary service. The Department opted for an outcome-based approach, placing the burden on each nursing home to meet the needs of its residents and allowing each nursing home to engage in such additional educational efforts as are needed for that nursing home. Requiring one course for directors of dietary service provides assurance that the director has the basic knowledge to perform the functions of the position. The Department's approach is consistent with the decision to require a director of dietary service only where a qualified dietitian is not employed full-time. If the needs of a nursing home are not significant, a director of dietary service in consultation with a qualified dietitian is adequate to protect the residents. As the needs increase, the nursing home can increase the amount of education and training so that the director of dietary service has the ability to meet those needs. The nursing home retains the ability to determine, subject to Department oversight, if hiring a qualified dietitian full-time is a reasonable expenditure.

The Department intends to "grandfather" existing directors of dietary service; they will not be required to complete a dietary manager course. To this end, the last sentence of subpart 2 reads "a director of dietary service hired after the effective date of parts 4658.0600 to 4658.0685 must meet this requirement." This language is confusing because it doesn't indicate what "this requirement" is. Further, the effect of the sentence is to expressly state that this undefined requirement applies to persons hired after the effective date of the rule. The language does not clearly exempt anyone from anything, except by implication. It is recommended, therefore, that the pertinent language be amended to read as follows:

Directors of dietary service hired before the effective date of parts 4658.0600 to 4658.0685 are not required to complete a dietary manager course.

The suggested language identifies who must complete the dietary manager course by specifically stating that the course requirement is waived only for existing directors of dietary service.

Proposed Rule 4658.0610 - Dietary Staff Requirements.

21. Proposed rule 4658.0610 is composed of eight subparts containing a variety of dietary staff responsibilities.

Subpart 2 - Health

22. Subpart 2 requires the dietary staff of a nursing home to "be free from symptoms of communicable disease and from open, infected wounds." The rule only applies to dietary staff and is consistent with current rules. There are also infection control rules which apply to all nursing home staff. SONAR, at 13. Care Providers suggested deleting this subpart and relying upon the infection control rules required of all staff. It also suggested using language from 54 F.R. 5340 which states:

Employees with a communicable disease or infected skin lesions (sic) are prohibited from direct contact with resident's food, if direct contact will transmit disease.

Care Providers Comment, at 3.

The Department responded that the language in the proposed rule is taken from the "current rule language in both the nursing home licensing rules and the rules for food, beverage and lodging establishments (MN Rules Chapter 4625)." Department Reply, at 10. The language in the Federal Register does not preempt the Department's rules on infection control. Subpart 2 is needed and reasonable, as proposed.

Subpart 3 - Grooming

23. Proposed subpart 3 requires a nursing home's dietary staff to wear clean outer garments and hair restraints to prevent contamination of food and

utensils. The use of hair spray is an inadequate restraint. As originally proposed, the specific provision on hair restraints required use of "hairnets, headbands, caps, or other hair restraints." The Veterans Home Board suggested deleting the reference to headbands and add more specific options. Care Providers suggested deleting "headband, caps" from the rule and relying on "hairnets or other hair restraints" to describe the protection required. The Department accepted Care Provider's suggestion and modified subpart 3 accordingly. As modified, subpart 3 is needed and reasonable. The change to the rule does not constitute a substantial change.

#### Subpart 4 - Hygiene

24. This rule contains requirements for handwashing and fingernail trimming by dietary staff. The staff must wash their hands and exposed portions of their arms with soap and warm water at specific times. Yorkshire Manor, MAHA, and Care Providers objected to washing the exposed portions of the arms, particularly above the elbow. Care Providers and Yorkshire Manor suggested using the Center for Disease Control (CDC) guidelines for handwashing. The CDC guidelines require handwashing for 10 seconds, under running water, with soap.

The Department criticized the CDC guidelines for not requiring warm water. According to the Department, citations have been written for handwashing violations for water temperature below 110 degrees Fahrenheit. The Department does not consider the method of handwashing to be important. Rather, it believes it necessary that the dietary staff wash with soap and warm water at identified times. Department Reply, at 11. Care Providers indicated that subpart 4 should include a requirement that staff wash after handling soiled equipment. The Department agreed with this comment and added "after handling soiled equipment or utensils" as a time when staff are required to wash. The Department has shown the subpart to be needed and reasonable. The modification requires employees to wash after contact with soiled equipment which is a source of disease. The modification is not a substantial change.

#### Subpart 6 - Eating

25. Subpart 6 requires employees to consume food only in a designated employee dining area. A designated dining area cannot be in a location that could cause contamination of food, equipment, or utensils. The only exception in the subpart is for cooks testing food for flavor and palatability.

The Veterans Home Board objected to the Department's intrusion into nursing home operations. The Department denied intruding into the legitimate operation of nursing homes. The rule does not require a break area or employee lunchroom be in any particular area. Rather, the rule excludes locations where consuming food (and, where allowed, smoking) could contaminate food or equipment. Such an exclusion is reasonable because it is directly related to the protection of residents.

Yorkshire Manor and Care Providers suggested that staff other than cooks be allowed to test foods. The Department acknowledged that the proposed rule is too narrow and expanded the language. The new language allows "cooks or others designated by the cook" to test the food. The modification meets suggestions from commentators and does not constitute a substantial change.

### Subpart 7 - Soiled Equipment

26. As originally proposed, subpart 7 required dietary staff to handle soiled equipment "in a manner that minimizes contamination of their hands." Care Providers and MAHA suggested deleting this subpart as unnecessary and impractical. The Department acknowledged that requiring handwashing after handling soiled equipment was a better way to prevent contamination than restricting how employees handle that equipment. The Department replaced the existing language with:

Subp. 7. Sanitary conditions. Sanitary procedures and conditions must be maintained in the operation of the dietary department at all times.

The reason for the replacement is not to substitute the suggested language for the soiled equipment standard. Rather, the new language imposes a general standard for sanitary conditions in the dietary department. The Department indicated that the lack of a general standard was an omission.

Because the amended standard was proposed at the end of the reply period, it must be decided if a substantial change is involved. In making that decision, the Judge must consider, among other things, the extent to which the change affects classes of persons who could not have reasonably been expected to comment on the proposed rules, addresses a subject matter different from that in the rulemaking notice, or has a fundamental difference in effect from the rules as proposed. Minn. Rule 1400.1100, subp. 2. While no commentators had any opportunity to comment on this standard, the new language doesn't address a new subject matter, does not have a different effect, and does not affect new classes of people. More importantly, it is identical to a current rule--Part 4655.8520 E (1993). Hence, adding it to these rules is solely "editorial." Subpart 7 is needed and reasonable and isn't a substantial change.

### Subpart 8 - Food Handling Guide

27. A current copy of the Department's food handling guide must be available to all dietary staff under proposed subpart 8. The Veterans Home Board criticized this requirement on the ground that the food handling guide contains different standards than those in the Department of Health's Nursing and Boarding Care Rules (Minn. Rule Chapter 4655). The Department heard from dietary staff that the food handling guide is a useful resource that should be updated. The proposed rule does not require that the Department's food handling guide be followed, merely that it be available. The Department acknowledged that the guide was not a rule and could not be enforced as such. Subpart 8 is needed and reasonable, as proposed.

### Proposed Rule 4658.0615 - Food Handling

28. As originally proposed, part 4658.0615 required food to be maintained at 140 degrees Fahrenheit or higher for hot foods and 45 degrees Fahrenheit or colder for cold foods. It does not set temperatures at which

food is consumed. Nopeming Nursing Home indicated that food at 140° F is too hot to eat and staff will use water or milk in pureed foods to cool them to a temperature suitable for serving to residents. The result can be unappetizing food. Yorkshire Manor urged use of temperature guidelines rather than rules to enable nursing homes to conform to changing dietary standards. Yorkshire Manor cited announcements by the U.S. Food and Drug Administration and the Culinary Institute of America suggesting temperatures colder than 45° F for some foods.

The Department indicated that part 4658.0615 was proposed to set outer limits for foods not to replace the independent judgment of the nursing home's dietitian. The Department expects dietary staff to exercise judgment in serving food to avoid serving food that is too hot and to avoid serving unappetizing food. The Department agreed with Care Providers that the title of this part should be "Food Temperatures" and changed the required temperatures to 150° F for hot food and 40° F for cold food. The modified temperatures are those in the current rule. Minn. Rule 4625.3401. The rule, as amended, is necessary and reasonable and the amendment made does not constitute a substantial change under Minn. Rules, pt. 1400.1100 (1993). It is recommended, however, that a sentence be added expressly requiring dietary staff to ensure that food is served at proper temperature for consumption, consistent with individual resident preference.

#### Proposed Rule 4658.0620 - Frequency of Meals

29. Proposed rule 4658.0620 is composed of four subparts that regulate the time of meals, maximum periods between meals, snacks, and dining areas.

##### Subpart 1 - Time of Meals

##### Subpart 3 - Time Between Meals

30. The Veterans Home Board and MAHA objected to subpart 1, which requires "at least three meals daily, at regular times comparable to the normal mealtimes in the community." The language is based on federal regulations, but both commentators argued that the rule is too subjective. To bring some objective standards into the rule, the Department amended subpart 1 by borrowing language from subpart three on maximum times between meals. Subpart 1, as amended, reads:

The nursing home must provide at least three meals daily at regular times. There must be no more than 14 hours between a substantial evening meal and breakfast the following day. A "substantial evening meal" means an offering of three or more menu items at one time, one of which includes a high-quality protein such as meat, fish, eggs, or cheese.

The proposed modification provides objective standards that must be followed unless subpart 3 applies. Subpart 3, as modified, reads:

Up to 16 hours may elapse between a substantial evening meal and breakfast the following day if a resident group, such as the Resident Council, agrees to this meal span and a nourishing snack is provided.

Care Providers suggested that the snack required in subpart 3 be "offered", not "provided." The Minnesota Dietetic Association and Twin City Consulting Dietitians suggested that that snack be "served." The Department chose to retain the term "provided" to ensure that the snack is brought to each resident and not left in some location unavailable to the residents. However, the Department changed subpart 3 to leave the choice of snacks with the nursing home, not a resident council. This change was suggested by MAHA, Minnesota Dietetic Association, and Twin City Consulting Dietitians. These commentators suggested that individual residents, families, and others should be allowed input into the choice of a snack. The Department's choice of language regarding the snack is needed and reasonable, and the language changes made to subpart 1 and 3 do not constitute substantial changes.

#### Subpart 2 - Snacks

31. Subpart 2 requires nursing homes to offer evening snacks on a daily basis. The Veterans Home Board suggested retaining the original rule language which does not require snacks. See Minn. Rule 4655.8620. The Department declined to change the subpart on the grounds that the new language is very similar to existing rules and more closely matches the federal regulatory language. The Veterans Home Board did not indicate what aspect of the new language is troublesome. The Department has shown that subpart 2 is needed and reasonable as proposed.

#### Subpart 4 - Dining Room

32. Subpart 4 requires that meals be served in a "specified dining area." Joan Johnson, R.N., Director of Nursing at Henning Nursing Home (Henning Nursing Home); Care Providers; John Falconer, Director of Health Care for Reinhart Institutional Foods, Inc.; Mariann Wiebusch, President and CEO of Edgewood Management; Minnesota Alliance for Health Care Consumers; Minnesota Dietetic Association; and Twin City Consulting Dietitians, suggested that the language be broadened to incorporate both a resident's choice of dining area and each resident's plan of care. The Department agreed with the commentators' suggestions and modified the subpart accordingly. Subpart 4, as modified, is needed and reasonable. The change allows appropriate areas, including a resident's own room, to be designated as a dining area. The modification is not a substantial change.

### Proposed Rule 4658.0625 - Menu Planning

#### Subpart 1 - Menu Planning

33. Many commentators suggested changes to proposed rule 4658.0625, subpart 1. As originally proposed, the subpart stated:

All menus must be planned, dated, posted for a minimum of one week in advance, and followed. Residents must be involved in menu planning. Notations must be made of any substitutions in the meals actually served and those substitutions must be of equal nutritional value. The current week's menus, and any changes to those menus, must be posted at a location readily accessible to residents. All menus and any changes for the current week's and following week's menus must be posted in the

dietary area. Records of menus and of foods purchased must be filed for six months. A variety of foods must be provided. A file of tested recipes adjusted to a yield appropriate for the size of the home must be maintained.

Advance posting of menus was objected to by Care Providers and Sue Zins, C.D.M. The burden of changing menus when substitutions are made was criticized by Nopeming Nursing Home. Deanna Dunbar, Director of Nutrition Services for Grandview Christian Home; Henning Nursing Home; Minnesota Dietetic Associon; Twin City Consulting Dietitians; Reinhart Institutional Foods; Edgewood Managment; Yorkshire Manor; and Care Providers suggested modifications to require some menus be posted in advance, require substitutions be noted on such menus, and reduce the paperwork that must be retained by the nursing home. The Department responded that only the regular menu with substitutions need be posted in an area accessible to residents. Other, specialized resident menus must be posted only in the dietary staff areas. The need for posting the regular menu was established by Minnesota Alliance of Health Care Consumers, who described how residents have expressed their desire to see the menu in advance.

The Department supported the retention of records for six months on the ground that surveys for nutritional value of foods served to residents must have data which enables it to determine what was served to residents and whether sufficient food is being prepared. However, the Department acknowledged that the rule is unwieldy and could be misinterpreted. To eliminate any potential problems, the subpart was modified by the Department to read as follows:

All menus must be planned in advance, dated, and followed. Any changes in the meals actually served must be of equal nutritional value. The general menu for a seven-day period must be posted prior to the start of that seven-day period at a location readily accessible to residents. All menus and any changes for the current and following seven-day periods must be posted in the dietary area. Records of menus and of foods purchased must be filed for six months. A variety of foods must be provided. A file of tested recipes adjusted to a yield appropriate for the size of the home must be maintained.

The new language leaves latitude to a nursing home as to when its menu cycle begins. Only the general menu is required to be posted for the information of residents. The changes to the subpart address many of the commentators' concerns. The Department has demonstrated that the subpart, as modified, is needed and reasonable. The modifications do not result in a substantial change.

#### Subpart 2 - Food Habits and Customs

34. Subpart 2 requires "adjustment to the food habits, customs, likes, and appetites of individual residents." MAHA objected to the term "adjustment" as suggesting an absolute right for a resident to demand certain food. The Department declined to make that change because it intends to require nursing homes do more than merely consider a resident's "habits,

customs, likes, and appetites." Department Reply, at 22. The Department did add an express requirement that residents be included in menu planning. This addition is consistent with federal guidelines on dietary programs.

Care Providers suggested adding language to expressly include condiments, seasoning, and salad dressings in the adjustments which nursing homes must make to each resident's taste. Minnesota Alliance for Health Care Consumers suggested changes to include substitutions when a resident rejects the prepared menu items. The Department agreed with Care Provider's suggestion and incorporated that language into subpart 2. The Department declined to include the suggestion extending the application of the subpart to substitutions because the suggestion came too late in the rulemaking process to allow for a full discussion of the impact such a change would have on nursing home dietary programs.

The Department has demonstrated that subpart 2, as modified, is needed and reasonable. Declining to expressly extend the adjustment requirement to menu substitutes is not a defect in the proposed rule. The new language clarifies one way that resident adjustments to dietary programs are to be carried out. The new language is not a substantial change.

#### Proposed Rule 4658.0630 - Returned Food

35. The Minnesota Dietetic Association, Twin City Consulting Dietitians, and Care Providers suggested revisions to proposed rule 4658.0630 to make the rule language more positive. The rule as originally proposed prohibited reusing returned food unless the food was served in an unopened, sealed container. The suggested language prohibits potentially unsafe foods from being returned, such as dairy products that require refrigeration. The suggested language was incorporated in the proposed rule. The rule part, as modified, is needed and reasonable. The modification does not constitute a substantial change.

#### Proposed Rule 4658.0635 - Condiments

36. No commentator opposed providing condiments to residents. However, several commentators criticized proposed rule 4658.0635 insofar as it requires nursing homes to provide condiments either in individual packages or bulk containers. Yorkshire Manor suggested requiring these condiments only when appropriate. The Veterans Home Board wanted clarification as to whether salt and pepper shakers are bulk dispensers. The Department indicated that the rule allows bulk dispensers for residents, including salt and pepper shakers. The rule unambiguously requires nursing homes to provide condiments in multi-serving containers (e.g. shakers, bottles, jars) or in single-serving packages (e.g. packets). The Department does not believe the proposed rule changes existing nursing homes practices. Department Reply, at 24. The rule part is needed and reasonable.

#### Proposed Rule 4658.0640 - Milk

37. Proposed rule part 4658.0640, which pertains to milk, is composed of the existing language in Minn. Rule 4655.8650. The proposed rule sets



standards for milk quality, dispensing, and dry milk. Care Providers supported the use of dry milk to increase nutrient density. The Veterans Home Board requested additional language expressly allowing the use of milk in special diets. The Department responded that special diets or other modifications take place in a resident's individual assessment or plan of care. The rule part does not affect such situations. Proposed rule 4658.0640 is needed and reasonable.

#### Proposed Rule 4658.0645 - Ice

38. Care Providers objected to the regulation of ice under proposed rule 4658.0645. The commentator urged its deletion due to its lack of support in the SONAR and the impropriety of including the provision in the dietary service rules rather than the infection control rules. In the SONAR, the Department discussed the infection risk of ice and noted that many nursing homes use coolers that require daily cleaning. SONAR, at 17-18. Ice is currently included in the existing rules for dietary services. See Minn. Rule 4655.8660. The Department argues that ice is a food item suitable for inclusion in these rules. Department Reply, at 26. The rule part is needed and reasonable.

#### Proposed Rule 4658.0650 - Food Supplies

##### Subpart 1 - Food

##### Subpart 2 - Food Brought Into Nursing Home

39. Proposed rule 4658.0650 is comprised of seven subparts that regulate the food, food containers, food storage, and vending machines in nursing homes. Subpart 1 requires all food to be wholesome and safe for human consumption and prohibits hermetically sealed, nonacid, or low-acid foods processed outside of commercial establishments. However, subpart 2 allows food items from noncommercial sources to be brought into a nursing home for special occasions under a policy adopted by the nursing home.

Minnesota Alliance for Care Consumers objected to limiting noncommercial sources of food to special occasions on the grounds that it's vague and patronizing. The Department agreed with the comment and deleted the special occasion language from subpart 2. Care Providers asserted that the noncommercial food prohibition in subpart 1 conflicts with the language in subpart 2 allowing noncommercial food. The Department maintains that no conflict exists because subpart 1 prohibits unsanitary food and subpart 2 allows food from noncommercial sources. Department Reply, at 26.

The language of subpart 1 does not neatly mesh with the language of subpart 2. It is unclear if noncommercial, hermetically sealed, nonacid, or low-acid foods may be brought in to the nursing home if that food meets the subpart 2 requirements for safe and sanitary maintenance and the food is consistent with the nursing home's policy. This should be clarified. It is recommended, therefore, that the last sentence of subpart 1 be modified to read:

Hermetically sealed, nonacid, or low-acid food which has been processed in a place other than a commercial food-processing establishment is prohibited from nursing homes.

Also, subpart 2 should be modified to reflect that prohibition, as follows:

Nonprohibited food items from noncommercial sources such as fresh produce, game, and fish may be brought into the nursing home in accordance with nursing home policy.

Subparts 1 and 2, if amended as suggested, are needed and reasonable, and the modifications do not constitute substantial changes.

#### Subpart 4 - Storage of Nonperishable Food

40. Subpart 4 requires that nonperishable food be stored at least six inches above the floor to prevent contamination from mopping. The six-inch standard was criticized by Care Providers, the Veterans Home Board, and MAHA as being inconsistent with other guidelines. Steven R. Roy of the City of St. Paul Environmental Protection Division supported the six-inch standard as a nationally recognized standard which allows cleaning under the shelving. The Department chose to retain the proposed six-inch standard.

MAHA suggested that the list of equipment upon which nonperishable food can be stored is incomplete. The Department agreed and modified the subpart to reflect that other equipment similar to the listed equipment can be used for storage. MAHA also suggested that an outcome-based standard be adopted rather than a performance standard. The Department declined to make that change. The subpart is needed and reasonable, as modified. The new language does not constitute a substantial change.

#### Subpart 5 - Storage of Perishable Food

41. Joyce M. Gossman, R.D., suggested that leftovers be required to be stored in covered containers, labelled, dated, and used within three days. The Department did not respond to this comment. The commentator gave no specific reason why three days is the appropriate length of time for properly stored leftovers. Further, her proposal makes no distinction between refrigeration and frozen storage. The Department's rules establish standards for serving any food--newly prepared or leftovers--to residents. The rules are not defective for failing to set a standard for leftovers.

#### Subpart 6 - Prohibited Storage

42. MAHA suggested that the language of subpart 6, which prohibits storage of nonfood items in the food storage area, would have the unintended effect of excluding paper products used in the dietary service. The Department agreed that such nonfood items should be allowed to be stored with food items. To accomplish this goal, the Department limited the "other nonfood items" excluded to those not related to dietary service. The Department also explicitly authorized nursing homes to store dry goods and paper products that are related to the dietary service in the food storage area. The rule as modified is needed and reasonable. The changes conform the rule to the Department's intent and do not constitute a substantial change.

#### Proposed Rule 4658.0655 - Transport of Food

43. Proposed rule 4658.0655 governs the delivery of resident food by dietary staff. The Veterans Home Board suggested that the rule require that food be covered during transport. The Department's workgroup considered and rejected such a requirement. The reason for covering food, according to the workgroup members, is to maintain food temperature. Department Reply, at 28. The Department pointed out that each nursing home has the option to cover food in transport. Id. at 28-29. Not requiring that food be covered in transport is not a defect in the proposed rule.

Allen Potvin, Administrator of Midway Care Center, indicated that the proposed rule would cause an additional \$30,000 in annual operating costs by limiting Midway Care Center's use of its dumbwaiter. As originally proposed, rule part 4658.0655 would prohibit use of a dumbwaiter for the transportation of food if the same device is used for transporting soiled linens or dishes. Care Providers and MAHA suggested that the prohibition of food transportation is unnecessary when soiled dishes are transported since food carts are used to bus dishes after meals. The commentators suggested that the rule should only require dumbwaiter sanitization after transporting soiled dishes. Transporting soiled linens in the same cab or carrier as used for food transportation would remain prohibited. The Department agreed with these suggestions and modified the rule accordingly. The modified rule is needed and reasonable to prevent contamination of food while not imposing additional costs on some nursing homes. The modifications were made in response to commentators' suggestions and do not constitute a substantial change.

#### Proposed Rule 4658.0660 - Floor Cleaning and Trash

44. Proposed rule 4685.0660 prohibits some cleaning activities in the kitchen during food preparation and prohibits transporting nondietary trash through the food preparation and storage areas. Twin City Consulting Dietitians suggested that the rule allow cleaning in areas outside the food preparation area during the food preparation period. The Department agreed that allowing such cleaning would pose no risk of contamination to the food being prepared and altered subpart 1 accordingly. The modified subpart is needed and reasonable. The change is not a substantial change.

#### Proposed Rule 4658.0665 - Dishes and Utensils Requirements

45. The use of dishes and utensils are governed by proposed rule 4658.0665. Item A requires that dishes and utensils be stored in enclosed storage compartments. Reinhart Institutional Foods, Edgewood Management, and Care Providers criticized this requirement as an unnecessary interference with existing practices for air-drying. The Department responded that air-drying practices are not covered by this rule.

Requiring storage of dishes and utensils in enclosed compartments is an important aspect of sanitation. MAHA suggested that storage compartments be "closed " rather than "enclosed." The Department agreed that the suggested word is more appropriate for the item. Item A is needed and reasonable, as modified. The change is not a substantial change.

## Proposed Rule 4658.0670 - Dishwashing

46. Proposed rule 4658.0670 sets standards for dishwashing in nursing home dietary services. Subpart 1 requires "proper separation" between soiled and clean dishes and utensils. MAHA suggested that "proper" be deleted as superfluous and the Department agreed. Subpart 1 is needed and reasonable, as modified.

47. Subpart 2 sets standards for sanitation and storage of dishes and utensils. Care Providers suggested that the last sentence in the subpart, which requires that clean dishes be handled to protect them from contamination, be deleted as redundant. The Department objected to deleting that sentence, because handling is different from cleaning and storage. Subpart 2 is needed and reasonable as proposed.

## Proposed Rule 4658.0675 - Mechanical Cleaning and Sanitizing

### Subpart 2 - Cleaning and Sanitizing

48. Subpart 2 of proposed rule 4658.0675 adopts by reference the NSF International Standard No. 3, dated June, 1982. This standard sets requirements for spray-type dishwashing machines. Care Providers objected to the reference to dated materials, since compliance with updates would not constitute compliance with the rule. The Department has followed the statutory requirements for adopting the standard by reference. Minn. Stat. § 14.07, subd. 4. The date must be retained to comply with the statute. Grandview Christian Home questioned whether the requirement to follow the manufacturer's instructions for use of machines and devices applies to the dishwasher or the chemicals used in the dishwasher. It does; the language in the subpart requires compliance with the instructions of the machine's manufacturer. Subpart 2 is needed and reasonable.

### Subpart 3 - Drainboards

49. Under subpart 3, drainboards must be available for use in preparing soiled dishes for cleaning and handling clean dishes after sanitizing. Portable dish tables are expressly allowed. Care Providers suggested that this subpart be merged with subpart 3 of 4658.0680. The Department declined because one subpart relates to mechanical cleaning and the other subpart relates to manual cleaning. The significant difference between the subparts is that mechanical cleaning must have two drainboards available and manual cleaning must have a drainboard present at either side of the sink used for that cleaning. Since dishes and utensils are usually racked to send them through the machine for cleaning, the drainboard can be anywhere nearby for the operator to place the sanitized dishes. A dishwasher manually cleaning dishes must have two drainboards in reach to prevent placing clean dishes on the same drainboard as soiled dishes. Retaining two different standards for drainboards in mechanical and manual dishwashing is needed and reasonable.

### Subpart 4 - Preparing to Clean

50. Subpart 4 sets standards for preparing soiled dishes for machine washing. Those standards include: soaking, scraping, or rinsing dishes

(unless the machine has a prewash cycle); placing soiled items in a manner which brings the food contact surfaces in line with the wash and rinse water; and position those items in a way that allows the water to drain. Care Providers suggested deleting this subpart as unnecessary. The commentator suggested that the instructions for operating the dishwashing machine covers this area and the rule is redundant. The Department wants an express statement of practices that result in the cleanest dishes and utensils. The subpart is needed and reasonable.

#### Subpart 5 - Chemical Sanitation

51. Certain dishwashing machines that use sanitizing chemicals are permitted under subpart 5. If such chemicals are used, two standards (incorporated by reference) must be met, a test kit must be used to determine the level of sanitizing chemicals, the results of such tests must be logged, containers for those chemicals must be installed, and warning devices must be installed to prevent depletion of those chemicals. The Department properly adopted the two standards by reference. MAHA suggested the rule be modified to allow off-site testing. Steven Roy of the City of St. Paul Environmental Health Department testified that the testing required by the rule is done with sensitized paper, on-site, and every time the machine is used. There is a potential for harm to residents from too much or too little sanitizer. The standards set in subpart 5 protect against such harm. Subpart 5 is needed and reasonable.

#### Subpart 7 - Air Drying

52. As originally proposed, subpart 7 merely required air drying. Edgewood Management and Care Providers suggested expanding the language of the subpart to expressly allow drying before storage or storing dishes and utensils in a self-draining position. It was also suggested that the rule allow racking dishes and utensils to complete air drying in proper storage places. The Department agreed with these suggestions and altered the subpart accordingly. As modified, subpart 7 is needed and reasonable. The modification does not constitute a substantial change.

#### Subpart 8 - Cleaning of Dishwashing Machines

53. This subpart sets alternative, minimum standards for cleaning dishwashing machines. Each machine must be cleaned daily or more frequently if required. Care Providers suggested deletion of this subpart as unnecessary, since dietary staff must follow the manufacturer's instructions which include cleaning frequency. The Department refused to delete the subpart because it determined that some clear minimum standard should exist and because a manufacturer's instructions may not set an adequate standard. Department Reply, at 35. The subpart is needed and reasonable.

#### Proposed Rule 4658.0680 - Manual Cleaning and Sanitizing

54. The requirements for proposed rule 4658.0680 apply to any manual cleaning and sanitizing. Care Providers objected to requiring that equipment too large to fit in a sink be cleaned manually or with pressure spray methods. The commentator asserted that adopting such basic cleaning requirements in rules is demeaning. The Department does not insult dietary

staff by requiring the obvious. The rules must address issues of sanitation and protect the health of residents. Subpart 2 is needed and reasonable to accomplish these ends.

#### Subpart 6 - Sanitation Methods

55. Five methods are listed in subpart 6 for sanitizing food contact surfaces of equipment and utensils. Care Providers objected to the wording of the subpart as possibly requiring the use of more than one of the five methods. The Department adopted the language suggested by Care Providers to make it clear that only one of the five methods is required. The subpart, as modified, is needed and reasonable. The modification is not a substantial change.

#### Subpart 9 - Air Drying

56. Subpart 9 requires air drying of manually cleaned dishes and utensils. Edgewood Management and Yorkshire Manor suggested that racked dishes and utensils should be allowed to dry in storage. The Department agreed with this suggestion and conformed the subpart's language to that of proposed rule 4658.0775, subp. 7. See Finding 52, *supra*. The modification is needed and reasonable and not a substantial change.

Yorkshire Manor suggested that manual drying be expressly prohibited. The Department declined to add any reference to this practice. The Department asserted that the rule's language is clear and that dietary staff are aware of proper infection control techniques. Subpart 9 is needed and reasonable, as modified.

#### Proposed rule 4685.0685 - Penalties for Dietary and Food Services and Sanitation

57. Proposed rule 4685.0685 sets penalties for violations of specific rules levied through assessments. The penalties range from \$50 to \$350. In its SONAR, the Department cited Minn. Stat. § 144A.10, subd. 6 (1993), as its statutory authority for assessing penalties. The maximum penalty under the statute is \$500. The schedule of penalty assessments already adopted by the Department has eight tiers proceeding in \$50 increments from \$50 to \$350 and the highest tier which is \$500. Each penalty is individually assessed by the impact a violation of that rule would have on resident health and safety. The rule is needed and reasonable as proposed. The Department may wish to consider adding "rule violations" to the end of the title to clarify what is being penalized. Such a change would only affect the title and would not be a substantial change.

#### Food Service Inspections

58. Kent A. Rees, M.P.H., R.S., suggested that persons performing food service inspections in nursing homes meet qualifications for registered sanitarians or environmental health specialists. He said this addition is important because elderly persons are far more vulnerable to food-borne illnesses. There is no evidence in the record to suggest that the persons presently performing inspections are not capable of recognizing rule

violations and acting accordingly. The rule is not defective for failing to establish qualifications for inspectors.

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

3. That the Department of Health 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 of Health 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 of Health 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 of Health 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 27th day of September, 1994.

*Jon L. Lunde*

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SON L. LUNDE  
Administrative Law Judge

Reported: Taped