STATE OF MINNESOTA

COUNTY OF HENNEPIN

BEFORE THE MINNESOTA

COMMISSIONER OF HEALTH

In the Matter of a Proposed Rule Relating to the Keeping of Pet Animals in Health Care Facilities; a Proposed Rule Implementing the Provisions of the Vulnerable Adult Abuse Reporting Act in Facilities Licensed or Certified by the Department of Health; Proposed Amendments to the Rules Relating to the Operation and Licensing of Nursing Homes and Boarding Care Homes; a Proposed Rule Relating to the Dual Option Provisions of the Health Maintenance Organization Rules; and a Proposed Rule Providing for the Issuance of Fines to Supervised Living Facilities.

AMENDMENT TO RULES AS PUBLISHED AND A SUPPLEMENTARY STATEMENT OF NEED AND REASONABLENESS

Amendments to Rules

The Department of Health proposes to amend the rules captioned above as printed in the State Register on Monday, September 27, 1982 (7 S.R. 407) as follows:

7 MCAR §1.057 Schedule of fines for uncorrected deficiencies

Delete the following sections:

C.1.g.	7 MCAR §1.043 D.3.
D.1.g.	7 MCAR §1.043 D.3.

Reletter the remaining subsections of those rules as follows:

C.1.h.-q.	as C.1.g.-p.
D.1.h.-t.*	as D.1.g.-t.

7 MCAR §1.058 Allowable time periods for correction

Delete the following section:

A.10.n.	D.3.	14 days

Reletter the remaining subsections of the rule as follows:

A.10.o.-t.	as A.10.n.-s.

*An error was found in the Revisor's copy of the rules: Two sections were both identified as D.1.n. This error is also found in the rules as published in the State Register on page 416.

7 MCAR §1.392 O. Schedule of fines for uncorrected deficiencies

Delete the following section:

1.g. 7 MCAR §1.043 D.3.

Supplementary Statement of Need and Reasonableness

The proposed rule, 7 MCAR §1.043 D.3. reads as follows:

> The development, review and revision of the individual abuse plans may be part of a patient's or resident's care plan.
>
> (Emphasis supplied)

This rule does not impose a mandatory requirement on a health care facility. Rather, the rule merely notes that the individual abuse prevention plans can be incorporated into the existing care plans utilized by a specific facility. As noted in the Department's Statement of Need and Reasonableness at page 39, this rule was included "to assure that facility providers are aware that these abuse prevention plans can be incorporated into existing care plans ... and that a new independent record need not be developed."

Since this rule does not impose a mandatory requirement on a facility, noncompliance with the provision would not result in the issuance of a correction order or penalty assessment. Thus, the inclusion of the reference to this rule in the schedules of fines and in the schedule of allowable time periods for correction is misleading. Those references could be construed as subjecting a facility to a correction order or fine for the failure to include the individual abuse prevention plans in the general care plans for residents. Therefore, to eliminate any confusion in this regard, the Department wishes to amend the rules as printed by deleting the references to this section from the schedules of fines and the schedule of times.

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In the Matter of a Proposed Rule Relating to the Keeping of Pet Animals in Health Care Facilities; a Proposed Rule Implementing the Provisions of the Vulnerable Adult Abuse Reporting Act in Facilities Licensed or Certified by the Department of Health; Proposed Amendments to the Rules Relating to the Operation and Licensing of Nursing Homes and Boarding Care Homes; a Proposed Rule Relating to the Dual Option Provisions of the Health Maintenance Organization Rules; and a Proposed Rule Providing for the Issuance of Fines to Supervised Living Facilities.

Agency Exh. No. 11
File No. HLTH-83-005-JL
Date 10-28-82

STATEMENT OF NEED AND REASONABLENESS

The Minnesota Commissioner of Health (hereinafter "Commissioner") pursuant to Minn. Stat. §15.0412, subd. 4c and Office of Administrative Hearings rule 9 MCAR §2.104, hereby affirmatively presents facts establishing the need for and the reasonableness of the above-captioned rules adoption and amendment.

In order to adopt the proposed rules, the Commissioner must demonstrate that he has complied with all the procedural and substantive requirements of rulemaking. Those requirements are that (1) there is statutory authority to adopt the rule; (2) all necessary procedural requirements have been taken; (3) the rules are needed; (4) the rules are reasonable; and (5) any additional requirements imposed by law have been satisfied. This statement demonstrates that the Commissioner has met these requirements.

This Statement is organized in the following manner:

A. Statutory Authority

The statutory authority of the Commissioner to adopt these rules is briefly noted below. The specific statutory authority for each rule or rule amendment is discussed in detail as part of the rule-by-rule justification.

- Minn. Stat. §§144.573 and 144A.30 requires the Commissioner to develop rules relating to the care, type and maintenance of pets in health care facilities.

- Minn. Stat. §626.557 requires the Commissioner to adopt rules implementing the provisions of the Vulnerable Adult Abuse Reporting Act, Minn. Stat. §626.557

- Minn. Stat. §144.56 and §§144A.02 - .07 provide the Commissioner the authority to develop rules relating to the licensing of boarding care homes and nursing homes.

- Minn. Stat. §§144.56 and 144A.08 provides the Commissioner the authority to promulgate rules relating to the construction, maintenance, equipment, and operation and licensing of boarding care homes and nursing homes.

- Minn. Stat. §§144.653 and 144A.10 require the Commissioner to adopt a schedule of fines for noncompliance with correction orders and also requires the development of a schedule of allowable times for correction.

- Minn. Stat. §62E.17 grants rulemaking authority to the Commissioner to adopt rules as necessary to implement the provisions of Minn. Stat. §62E.17.

B. Statement of Need

The Department of Health's request to initiate a public hearing on the complete revision of the nursing home licensure rules was denied by the Governor and the Legislative Advisory Commission (LAC) in March of this year. The Governor's approval, after LAC consultation, was mandated by the provisions of Minn. Laws 1981, Chapter 3260, section 14. The Department then decided to proceed with the rulemaking process for only those rules specifically required by statute and which would not increase state expenditures by more than $50,000. A copy of a memorandum from Commissioner Pettersen, dated April 29, 1982 explaining this decision is attached as Appendix A. As noted in Section A., above, the majority of the rules being proposed at this time are expressly mandated by statute - the pet rule, the rule relating to the Vulnerable Adult Abuse Reporting Act and the licensure requirements for nursing homes. The promulgation of those substantive rules requires that a schedule of fines and

a schedule of allowable times for correction corresponding to those provisions also be developed. In order to conform with the statutory requirements, the Commissioner is compelled to promulgate these rules. The remaining rules, the personal fund amendment, the provision relating to medication administration by unlicensed personnel and the amendment to the dual option provision of the HMO rule are required to clarify the regulatory activities of the Commissioner. The need for those provisions is specifically addressed in the rule-by-rule justification. It is the Department's position that the need for all of the rules proposed at this time is well established.

C. Compliance with Procedural Rulemaking Requirements

Minn. Stat. §15.0412, rules of the Office of Administrative Hearings, and the rules of the Attorney General, all specify certain procedures which must be followed when an agency adopts rules. All prehearing requirements have been complied with by the Commissioner. The most significant ones are addressed below.

1. Procedural Rulemaking Requirements of the Administrative Procedure Act.

Minn. Stat. §15.0412, subd. 6, requires agencies which seek information or opinions in preparation for adoption of rules from sources outside the agency to publish a notice of its action in the State Register and to afford all interested persons an opportunity to submit data or views on the subject. Any written material, as well as the Notice itself, must be made part of the hearing record. In the State Register issue of Monday, November 8, 1976, the Commissioner published a "Notice of Intent to Solicit Outside Opinion Concerning Amendments to Rule Regulating Health Facilities". 1. S.R. 741. A copy of that Notice as well as any written material submitted in response to the Notice of Intent will be made a part of the record at the

hearing. In the State Register issue of Monday, April 13, 1981, the Commissioner published a "Notice of Intent to Solicit Outside Opinion Relating to the Vulnerable Adult Abuse Act". 5. S.R. 1621. A copy of that Notice as well as any written material submitted in response to the Notice will be made a part of the record at the hearing.

Minn. Stat. §15.0412, subd. 1 prohibits an agency from adopting a rule which repeats language from Minnesota Statutes unless the hearing examiner determines that "duplication of the language is crucial to the ability of a person affected by a rule to comprehend its meaning and effect." The proposed rules, specifically the licensure procedures for nursing homes and the VAA rule do repeat language from the licensure law, Minn. Stat. §144A.01 - .17, and Minn. Stat. §626.557, the VAA law. An attempt has been made to identify each place and comment upon it in the rule-by-rule justification. However, there is in reality one justification which applies in each instance and will be noted here for convenience of interested parties as well as to cover any instance of duplication not specifically addressed.

The rules should have a hand-in-glove fit with the laws. This is in part because the rules implement those laws. But in this instance the connection is even closer because the laws also contain a fair amount of detail with respect to process, procedures, and substantive material. The rules have to pick up on what is already in the laws and either clarify it or, as authorized, provide further detail. With such a close connection between the laws and the rules, repetition of statutory language is virtually mandated. The repetition makes the rules more readable and more easily understood. The connection between the laws and the rules is clearer.

Duplication of language from the Act has been held to a minimum and only done where necessary to aid those reading the rules to understand

them. Even convenience to the reader should be sufficient ground to justify the repetition. In this case, however, because of the close interplay between the laws and the rules, repetition of language from the laws becomes "crucial to the ability of a person affected by...[the proposed rules] to comprehend... [their] meaning and effect." Minn. Stat. §15.0412, subd. 1.

A final prehearing procedural requirement of the Administrative Procedure Act is that at least 30 days before the hearing a Notice of Hearing and the full text of the proposed rules must be published in the State Register and the Notice must be mailed to all persons who have registered their names with the Commissioner for the purpose of receiving notice of rules hearings. Minn. Stat. §15.0412, subd. 4. Both of these requirements have been met. The Notice and rules were published in the State Register on September 27, 1981, 31 days before the hearing. (7 S.R. 407.) The Notice was mailed to people who had requested the Department to so notify them on September 16, 1982, 41 days before the hearing.

2. Non-Mandatory Actions by the Commissioner

While no other statute establishes requirements with which the Commissioner must comply as a condition of promulgating these rules, there are two additional actions by the Commissioner which should be addressed.

First, Minn. Stat. §15.0412, Subd. 4, states that an agency may, but only if it decides to do so, inform persons who had not registered with the agency for the purpose of receiving notice of rulemaking hearings of the scheduled hearing on a specific set of rules. The Commissioner has done so in this instance. On September 17, 1982, Department staff sent copies of the Notice of Hearing as well as the proposed rules to all health care facilities licensed and certified by the Department of Health. Each senator and representative also received a copy of the Notice of Hearing on September 17, 1982. Individuals that had requested information concerning the activities

of the Nursing Home Advisory Council and the development of the proposed rules were also mailed a copy of the Notice of Hearing on September 16, 1982. A copy of the Notice of Hearing and the proposed rules were also mailed on September 27, 1982 to parties expressing an interest in the HMO/ Dual option regulations. The Department mailed a news release to over 800 newspapers, radio and television stations and other interested parties around the state. Second, initial drafts of the rules relating to pets and the licensure procedures for nursing homes were reviewed by the Nursing Home Advisory Council. The Council's formal review of the entire set of nursing home rule revisions ended in September, 1979. This council is appointed by the Commissioner pursuant to Minn. Stat. §144A.17. It is available to the Commissioner to assist him with proposed rules and other matters relating to nursing homes. A draft of the rule relating to the Vulnerable Adult Abuse Reporting Act was mailed to Council members for written comments on March 24, 1981. The remaining rules affecting nursing homes, the amendment to the personal fund rule, rule relating to medication and administration by unlicensed personnel, and the revisions of the schedules of fines and the schedule of allowable time periods for correction were not submitted to the Advisory Council. These amendments were technical in nature and the Department did not feel that Council review was needed. It should be noted that the council's actions have no binding force. Its recommendations are advisory only.

D. General Statement of Reasonableness

In order to adopt rules, an administrative agency must demonstrate that the rules are reasonable. To be reasonable does not necessarily mean to be right. Rulemaking is a quasi-legislative process which primarily involves policy decisions. Thus, there is no inherently right or wrong approach. In

addition, the rules do not have to be the best possible rules. Because policy decisions are involved, determining what is best would be practically impossible. What is the best approach to one person is the worse approach to another because of their differing policy perspectives and biases. Thus, in examining a rule, the standard is not whether the rule is right or best but only whether it is reasonable——and in most cases there are many reasonable ways to address a subject covered by a rule. As long as the approach taken by the agency falls within the wide range of reasonableness, the agency has the right to adopt it.

What is reasonable? A rule is reasonable if there is a rational basis for it, or, to express it negatively, if the rule is not arbitrary or capricious. The Office of Administrative Hearings has provided a detailed explanation of reasonableness and the basis for establishing it in the Report of the Hearing Examiner in the proceeding, "In the Matter of the Proposed Adoption of Rules Governing the Identification, Labeling, Classification, Storage, Collection, Transportation and Disposal of Hazardous Wastes and Amendments to Minnesota Regulations SW 1, 2, 3, 4, 6 and 7, No. PCA-78-003-WS," at pp. 6-11, a copy is attached hereto as Exhibit A-1 and made a part hereof. It is, of course, the position of the Commissioner that the proposed rules are reasonable. It must be noted, however, that merely because the Commissioner asserts that the rules as proposed are reasonable does not mean that he will not take into consideration further suggestions and comments made at the hearing. The rulemaking (quasi-legislative) hearing process provides an excellent opportunity to improve the rules so that the final product is as useful, workable, and understandable as possible. However, it is clear that the rules as proposed are reasonable and meet every procedural and substantive requirement for adoption.

7 MCAR §1.042 Pet animals in health care facilities

7 MCAR §1.042 Pet animals in health care facilities.

General comments

This proposed rule establishes the requirements to be followed by a health care facility regarding the keeping of pet animals on the premises of the facility. The specific statutory authority for the promulgation of the rule is contained in Minn. Stat. §144.573 and in Minn. Stat. §144A.30. Minn. Stat. §144.573, which applies to hospitals, supervised living facilities and boarding care homes, provides as follows:

> Facilities for the institutional care of human beings licensed under Minnesota Statutes 1978, Section 144.50, may keep pet animals on the premises subject to reasonable rules as to the care, type and maintenance of the pets.

Minn. Stat. §144A.30, which is applicable to nursing homes, provides as follows:

> Nursing homes may keep pet animals on the premises subject to reasonable rules as to the care, type and maintenance of the pet.

The promulgation of this rule is also within the Department's statutory authority to promulgate rules relating to the licensure of health care facilities contained in Minn. Stat. §144.56 and in Minn. Stat. §144A.08. For that reason, the Department considers the provisions of 7 MCAR §1.042 to be part of the licensure requirements for nursing homes, boarding care homes and supervised living facilities. Specific references to the provisions of this rule have been added to the licensure rules for those facilities. (7 MCAR §1.046 G. and 7 MCAR §1.392 M.)

This rule is also applicable to licensed hospitals. The provisions of the licensing laws as they relate to hospitals were amended in 1981 (Laws 1981, Chapter 95). Minn. Stat. §144.55, subd. 3, as amended, requires the Commissioner to use, as the minimum licensure standards, the federal hospital certification regulations. However, while this provision limits the Department's ability to

promulgate licensure standards for hospitals, the specific requirement relating to the development of rules in this area, contained in Minn. Stat. §144.573, makes it clear that these rules would be applicable to hospitals that opt to retain pets on the premises.

The provisions of Minn. Stat. §144.573 and §144A.30 require that the Department develop "reasonable rules as to the care, type and maintenance of the pet". As will be discussed in greater detail below, the Department believes that the proposed rules fall within the statutory limitations. The Department feels that these rules will not create barriers to the keeping of pets in health care facilities but rather, will assure that reasonable limits will be maintained in facilities keeping pets on the premises. These limits are necessary to fully protect the interests and well-being of residents residing in the facilities. The Department has attempted to develop a rule which provides a balance between the therapeutic and social benefits gained by keeping pets in a health care facility and the problems that could result, e.g. noise, health and sanitary considerations. The rule places heavy responsibility upon the operators of the facility to assure that pets are properly maintained and that the needs of residents of the health care facility, which must be the most important consideration, are not jeopardized. Since the Department is charged with the responsibility of protecting the needs of residents living in a health care facility, the primary focus of the rules must be concerned with the impact that allowing pets in the facility would have upon the health and safety of the residents. The rules are designed to assure that reasonable and appropriate safeguards are implemented without unduly limiting the therapeutic benefits of having pets on the premises.

Specific comments

A. Definition. As used in 7 MCAR S 1.042, "health care facility" means a hospital, nursing home, boarding care home, or supervised living facility licensed by the Minnesota Department of Health under Minnesota Statutes, sections 144.50 to 144.56 or Minnesota Statutes, sections 144A.01 to 144A.17.

Since the provisions of this rule will apply to all health care facilities, it was necessary to provide a definition to assure that the applicability of the rule is clearly understood.

B. Written policy.
1. Every health care facility shall establish a written policy specifying whether or not pet animals can be kept on the facility's premises.
2. If pet animals are allowed to be kept on the premises, the policy must:
a. specify whether or not individual patients or residents will be permitted to keep pets; and
b. specify the restrictions established by the health care facility regarding the keeping of pet animals.
3. This policy must be developed only after consultation with facility staff and with patients or residents, as appropriate.

The provisions of Minn. Stat. §144.573 and §144A.30 do not impose a mandatory requirement on a health care facility to allow pets to be kept on the premises. Therefore, each health care facility will be required to make a decision as to whether or not pets will be allowed on the premises. Section B.1. requires that each health care facility establish a written policy specifying whether or not pet animals can be kept on the premises. The establishment of the written policy will assure that residents and prospective residents are aware of the facility's decision on this matter. In addition, the establishment of the policy will provide an assurance that this issue has been carefully considered by the licensee of the health care facility. Section B.3. requires that the development of the policy be based on consultation with the facility staff and with the facility's residents and patients, as appropriate. The Department believes that the need for obtaining input from staff and residents

is important. Numerous articles have promoted the benefits to be gained by allowing pets to be kept on the premises of a health care facility. However, despite these benefits, it must also be kept in mind that the keeping of pets on the premises will involve work and will require that staff supervise the care of the pets. In addition, the health and sanitary aspects of having pets housed in a health care facility must also be carefully evaluated. Residents may be allergic to certain types of animals and, since the primary goal of a health care facility is to promote and protect the health of its residents, these concerns cannot be ignored. In addition, staff members and residents may have adverse feelings about allowing pets on the premises on a permanent basis. Residents may not like pets and these concerns must be weighed in reaching a decision in this matter. Staff may not wish to be involved in the care of the animals or may feel that animals will not be appropriate or beneficial in the facility. Since the policy finally adopted by the facility will be a standard of conduct to be followed by facility staff and residents, the Department believes that this rule requiring staff and resident input is appropriate and necessary to assure that the feelings and concerns of staff and residents are considered.

If the health care facility allows pets to be kept on the premises, Section B.2. will require the policy to specify whether or not individual residents will be allowed to keep pets and also specify the restrictions established by the facility regarding the keeping of the pets. Residents and prospective residents have the right to be informed if the facility will prohibit or permit them from keeping individual pets in the facility. This position should be known to avoid any misunderstanding as to the nature of the facility's policy and this issue should also be carefully considered by any facility that will allow pets to be kept on the premises. The Department has approved a number of

specific waiver requests which, with the approval of the facility, allowed individual residents to retain pets in the facility. These requests were primarily based on the therapeutic benefit that the retention of the pet would provide to the individual resident. Residents and staff must also be aware of any restrictions established by the facility regarding the keeping of pets. These restrictions would generally relate to the types and numbers of pets, areas where pets will be permitted and the controls established by the facility to assure that pets do not interfere with the residents' health and safety. The development of these restrictions will also assure that the facility has appropriately considered the various issues regarding the keeping of pets on the premises. The development of the policy required by Section B. will provide the mechanism for a careful evaluation of the positive and negative factors of keeping pets in the facility. The policy will provide the means to assure that residents and staff are aware of the facility's decision and, if pets are permitted, the restrictions governing the keeping of pets on the premises.

> C. Conditions. If pet animals are allowed to be kept within the facility, the following requirements must be met;
>
> 1. A written policy must be developed which specifies the types of pet animals that are allowed to be kept within the health care facility.
>
> 2. The policy required by 1. shall be developed in consultation with a veterinarian and a physician to assure that pets which, in their opinion, present a higher risk of transmitting diseases to human beings are not allowed to be kept within the facility.

Section C. of the proposed rule establishes the conditions that must be followed by any facility electing to maintain pets animals on its premises. This section contains subsections relating to the types of pet animals, the health of the pet animals and the facility's responsibility for the care of the pets.

While the Department does not dispute the beneficial and therapeutic effects

that pet animals could provide in a health care facility, the Department must also assure that the health, safety and well-being of the residents is not threatened by allowing pets to be kept on the premises. The conditions contained in this section establish reasonable controls to be followed and, at the same time, do not create barriers which would unreasonably preclude the keeping of pets in the facility.

The first two subsections relate to the types of animals that will be allowed in the health care facility. The rule will require that a specific policy be developed which identifies the types of pets that can be retained and also requires that this policy be developed in consultation with a veterinarian and a physician.

The types of animals that could be retained in a health care facility is virtually unlimited. For that reason, it will be necessary for the facility to carefully consider this issue and then, once a decision is made, to inform the residents. In determining the types of pets which will be allowed to be kept in the facility a number of factors must be considered: the types and needs of the residents, the physical surroundings, the costs of caring for the pets, the willingness and ability of staff to care for or to monitor the care of the pets; and the risks associated with keeping pets on the premises. Any pet selected must also be compatible with the residents and must not pose a health or safety factor. The animals must be emotionally stable and adaptable to the purpose that it will serve in the facility, e.g. will the animal come into close contact with residents, will the animal be handled by many individuals, etc.

Since the types of animals available for pets are numerous and since the

Department cannot predict the purpose that an animal will serve in a particular facility, it would not be feasible for the Department to develop a specific listing of "approved" pets. In fact, while a dog or cat may be appropriate in a particular facility, differences in the size of another facility or the characteristics of the resident population could make the dog or cat completely unsuitable as a pet in another facility. For these reasons, the rule will require that this policy be developed in consultation with a veterinarian and with a physician. The veterinarian has the expertise to advise the facility as to the appropriateness of different types of animals to be considered as well as possibly suggesting various breeds of animals that would be suitable to a specific facility. The physician, along with the veterinarian, would also be able to inform the facility of those pets that pose a higher risk of transmitting diseases to human beings. Veterinary medicine has greatly reduced the risks of disease transmission to human beings by developing various immunizations and providing proper treatment of the animals. However, these risks should not be minimized and expert advice will be important in properly selecting the type of pet to consider. The physician would also identify problems that the keeping of pets on the premises might create. Facility residents, especially those in nursing homes, are at a greater risk of disease than the average population. Residents could have allergies or other respiratory diseases that would be compounded if certain pets were retained. For that reason, the impact that particular types of pets might have on the resident population must be considered. The physician and the veterinarian will be able to provide the necessary advice in these important areas and this will help to assure that an appropriate type of pet animal is selected.

3. All pet animals must be in good health.

4. The health care facility shall ensure that pets are examined and receive any necessary immunizations or treatments in accordance with a veterinarian's recommendations.

5. A copy of the veterinarian's recommendations as well as records of all examinations, treatments, and immunizations shall be retained in the health care facility.

The next three conditions are required to assure that pets are kept in good health. Since residents may have less than optimum physical health, the Department is concerned with the resident's susceptibility to animal transmitted diseases and infections. It is for this reason that any pet animal brought into the facility must be healthy in order to reduce the possibility of any disease transmission to the residents. The rules also require that the health care facility assume the responsibility for assuring that the pet is examined and receives any necessary immunizations in accordance with the veterinarian's recommendation. The veterinarian has the training and expertise to assure that pets are in good health and to establish a schedule of regular examinations and treatments to maintain a pet in a healthy condition. It would only be through these regular examinations that a determination as to the pet's health status could be ascertained. These examinations and treatments will protect residents from the possibility of receiving an infection or disease from the pet animal.

Subsection 5 will require that the facility maintain a record of the examinations, treatments and the veterinarian's recommendations. This documentation will be necessary in order to verify the facility's compliance with the rule as well as to assure that the facility is fully aware of its responsibility in maintaining the pet in good health.

6. Regardless of the ownership of any pet, the health care facility shall assume overall responsibility for any pets kept within or on the premises of the facility.

The sixth condition relates to the facility's responsibility for the care and maintenance of the pet. The Department believes that it is necessary to require the facility to assume this responsibility in order to assure that the interests of the residents are protected as well as to assure that the pet is properly cared for. The facility is responsible for the care of the residents and this responsibility also includes assurances that the rights and interests of all facility residents are protected. Thus, even if residents are permitted to keep their individual pets on the premises, the facility must assume the responsibility for any pets kept on the premises. Even if the resident cares for the pet, the facility must monitor the provision of the care and assure that the resident's pet does not interfere with the rights of other residents or disrupt the activities of the facility. If the facility did not assume this control, it would not be possible to properly monitor the pets in the facility and, if other residents also kept pets, problems in controlling the pets would occur. An individual will, of course, be permitted to care for his or her pet. However, the facility must have the overall responsibility and control over any pet kept in the facility. It will also be important to assure that the welfare of any pet animal is also taken into consideration. Since the facility will be required to assume the responsibility for the pet animal, facility staff will be in a position to monitor the care and feeding of the pet. This would include the furnishing of suitable living quarters, adequate nutrition, and the avoidance of abuse. Since the facility will have the option to allow pets to be kept on the premises, the Department does not believe that this rule is unreasonable. The facility is responsible for the well-being of all residents and since the retention of pets on the premises could jeopardize that well-being, the facility must be in the position of overall responsibility to curtail any

problems that might develop. Even in situations when a pet is owned by a specific resident, the Department does not consider this rule to be a violation of that resident's right. The facility will be required to develop policies relating to the keeping of pet animals and the responsibility of the facility should be clearly stated within that policy. The policy will be available for the resident's review and, if a resident wishes to bring a pet into the facility (assuming this would be permissible under the facility's policy), the resident would be notified of this restriction. As previously mentioned, the rule is not intended to exclude or limit a resident's involvement with the pet. In fact, the interaction between the resident and a pet is one of the benefits to be gained by allowing pets in the facility. The rule merely states the principle that since the facility staff has responsibility for the residents, this responsibility extends to all aspects of the facility's programs.

> 7. The health care facility shall ensure that no pet creates a nuisance or otherwise jeopardizes the health, safety, comfort, treatment, or well-being of the patients, residents, or staff.

Subsection 7. provides some specific examples of the facility's responsibility if pets are permitted to be kept on the premises. Depending on the type of pet selected, it is not inconceivable that a particular pet could become a nuisance. Noise, odor and unrestricted access to resident areas are examples of problems that could result from keeping pets on the premises. Some residents may react adversely to the keeping of pets or certain types of pets on the premises. The facility must consider the needs of these individuals and assure that the keeping of pets would not upset these individuals. Another factor that is of critical importance is any impact that the keeping of pets would have on the health and safety of the facility's residents. Residents

could be allergic to certain pets or may have respiratory problems that could be complicated if pets are kept on the premises. While restricting pets to specific areas may solve this problem, the health of the residents must be carefully considered. Pets that have freedom to roam around the facility also become an obstacle for residents, especially those residents with visual handicaps or whose ability to walk is limited. Staff reaction must also be considered since pets could create similar problems for staff members. The facility will have to assure that appropriate measures are taken to prevent pets from becoming a nuisance and to assure that the interest of staff and residents are protected.

> 8. A facility employee shall be designated as being responsible for the care of all pet animals and for ensuring the cleanliness and maintenance of cages, tanks, and other areas used to house pets.

In order to assure that the facility's responsibility is effectively carried out, it will be necessary to require that a facility carefully plan its program and provide an organized mechanism to implement the program. For that reason, the Department believes that it is necessary for a specific facility employee to be designated to care for the pet animals. The designation of a specific individual will assure that appropriate accountability is maintained and will also provide a uniform approach for caring for the pets and monitoring the pets in the facility. In no circumstance should pets be permitted in a facility unless provisions for adequate supervision and management are in place. The individual designated by the facility will be assigned the responsibility for the day to day care of the pets. While specific chores for caring for the pet can be delegated, the staff member will be responsible for assuring that these chores are completed. In the event that these chores are not completed, it will be the responsibility of

the staff member to take the necessary steps. It is obvious that the keeping of a pet on the premises could lead to problems with sanitation, particularly with hair, food and body wastes. The rule requires that the facility be maintained in a clean and sanitary condition and since pets could create problems, the designated individual will be required to assure that these problems do not occur. The welfare of the pet animal must also be considered and the selection of one individual to monitor the care of the animal will help to assure that the animal is fed, groomed and appropriately cared for. This individual will also be responsible for following the facility's policy and procedures concerning the keeping of pets and for assuring that the provisions of the policy and procedures are implemented.

> 9. Except for guide dogs accompanying a blind or deaf individual, pets shall not be permitted in areas where food is prepared, served, or stored; in dishwashing areas; dish storage areas; in medication storage areas; in clean sterile supply storage areas; in nurses' stations; or in any other areas where cleanliness and sanitary precautions are necessary to protect the health, comfort, safety, and well-being of patients or residents.

The last part of the rule identifies areas where pets will not be permitted. These restrictions, which do not apply to guide dogs, prohibit pets from going into areas where proper sanitation is especially important. The rule restricts pets from areas where food is prepared, stored or served, from dishwashing areas and dish storage areas. These restrictions are necessary to avoid any potential of contamination of medications and of the clean or sterile supplies used in caring for the facility's residents. The final portion of this rule would restrict pets from other areas in the facility where cleanliness and sanitary precautions are necessary to protect the health, comfort, safety and well-being of the residents. While this provision is somewhat subjective, the Department believes that this particular provision

is necessary. The rule applies to all health care facilities and special circumstances applicable to one facility may not apply to the others. The facility will have to evaluate the types of services provided as well as the needs of the residents and if additional restrictions are necessary, such limitations would be included in the facility's policy. For example, a nursing home might have a specific room for physician or nursing treatments, and it would be necessary to restrict pets from having access to these areas. Some facilities might want to restrict pets from going into resident rooms or from entering rooms used by specific individuals. Such considerations must be left up to the facility since it is not possible to list all such areas within the context of this rule.

7 MCAR §1.043 Preventing abuse and neglect of vulnerable adults in facilities licensed or certified by the Department of Health

7 MCAR §1.043 Preventing abuse and neglect of vulnerable adults in facilities licensed or certified by the Department of Health

General comments

The provisions of Minn. Stat. §626.557 establish the requirements relating to the reporting and investigation of suspected cases of abuse or neglect in health care facilities. The statute identifies categories of individuals mandated to report suspected cases of abuse or neglect, establishes reporting procedures and requires investigation by this Department, other licensing agencies, local welfare agencies and law enforcement agencies. Specific requirements are imposed on health care facilities to develop abuse prevention plans for the facility and for each resident and to establish an internal system for investigating and reporting suspected incidents of abuse or neglect. The provisions of this rule relate to the last three areas.

Specific statutory authority for the development of these rules is contained in Minn. Stat. §626.557, subdivision 16(b). In addition, the Department's general statutory authority to promulgate rules relating to the operation of a health care facility contained in Minn. Stat. §144.56 and in Minn. Stat. §144A.08 also provides a basis to support the promulgation of these rules. The Department has included a reference to this proposed rule in the boarding care home and nursing home licensure rules, 7 MCAR §1.046 M. and in the licensure rules for supervised living facilities, 7 MCAR §1.392 N. The Department considers the provisions of 7 MCAR §1.043 to be part of the licensure requirements for these facilities. In addition, the Department will require that a licensed hospital and other facilities certified by the Department, e.g., a home health agency, comply with the provisions of these rules. The definition of "facility" contained in Minn. Stat. §626.557, subd. (2)(a) states, in pertinent part:

> (a) "Facility" means a hospital or other entity required to be licensed pursuant to sections 144.50 to 144.58; a nursing home required to be licensed pursuant to section 144A.02; ... or any entity required to be certified for participation in Titles XVIII or XIX of the Social Security Act, 42 U.S.C. 1395 et. seq.

The above definition clearly establishes that hospitals and certified agencies are subject to the provision of this law and these rules.

The provisions of the law require that all licensing agencies investigate any reports of suspected abuse or neglect. In addition, licensed facilities are required to develop the abuse prevention plans and the internal reporting mechanism in accordance with the rules promulgated by the licensing agencies. All supervised living facilities and some of the other health care facilities licensed by this Department are also required to obtain a program license from the Department of Public Welfare. In these instances, such facilities will be required to comply with the provisions of this Department's rules and with the Department of Public Welfare's rule. The Department does not believe that the joint licensure of these facilities is an unnecessary duplication nor does the Department believe that compliance with the two sets of rules will create a burden for the jointly licensed facilities. It must be kept in mind that the focus and responsibility of each licensing agency as it relates to the requirements to be followed by a facility is different. For that reason, the investigative activities of each Department will differ. For example, if a report for an alleged instance of abuse in a supervised living facility is received, the investigation will determine if the report is true and identify any violations of the licensure rules. Since the licensure rules of the two agencies are not similar, it would be possible to find a violation of one agency's rules while not finding a deficiency of the other agency's rules. The Department of Health's rules for supervised

living facilities focus on the health services provided to residents and on the provision of a safe and sanitary environment. The rules address areas which include the proper upkeep of the physical plant, environmental considerations, nutrition and food handling practices, provision of health services, and medication handling procedures. The rules of the Department of Public Welfare focus on the type and appropriateness of the programs offered to the residents in these facilities; for example, the programs for the mentally retarded, chemically dependent, mentally ill or physically handicapped.

The rules developed by the two agencies relating to the implementation of the VAA do not create any conflicts for the implementation of these provisions in jointly licensed facilities. The Department of Public Welfare presented its proposed rules to a public hearing on June 15, 1982. Those rules outlined the requirements to be met by the DPW licensed facilities for implementation of the provisions of the law. A comparison of the DPW proposed rule (attached as Appendix B) and this rule indicates that a conflict in the requirements does not exist. The proposed DPW rule, 12 MCAR §2.010 C. relates to the development of the program abuse prevention plan. The rule requires that the programs governing body develop this plan; and that the plan be based on an assessment of the population, the physical plant and the environment. The plan must also include the description of the specific steps to be taken for minimizing the risk of abuse and include a timetable for the implementation of any corrective action. The Department of Health's proposed rule is similar. The rule will require the development of this plan based on the assessment of the population, environment and physical plant. The Department's rule does require that the plan be developed by

an interdisciplinary committee selected by the administrator as opposed to DPW's requirements that the rule developed by the facility's governing body. However, the Department does not believe that this is a conflict. Any policy developed by the health care facility must be approved by this facility's governing body. The Department's requirement that the plan be developed by an interdisciplinary committee could easily be accomplished by the facility. The committee could develop the plan and then present the plan to the governing body for approval and adoption. The Department's rule also requires that the plan be based on an assessment of the population, physical plant and environment. While the assessment factors listed in both rules are not identical, a conflict in these requirements is not created. Both rules require an identification of the specific steps to be taken to correct or alleviate the conditions identified by the assessment that make residents or patient susceptible to abuse and the rules also require that a timetable for correction be included in the plan. The rules also require an annual review of the plan.

The requirements relating to the development of the individual abuse prevention plans contained in the rules are also similar. Both sets of rules require that these plans be developed by an interdisciplinary team consisting of persons involved in the care of the resident and that these plans be based on an assessment of the individual's susceptibility of abuse. Both rules require that this plan be developed as part of the initial plan of care for the patient or resident; however, the Department of Health's rule does not mandate that this plan actually be incorporated as part of the patient's or resident's plan of care. Both rules will require at least an annual review of this plan.

The third major portion of the two rules relates to the development of the internal reporting mechanism to be implemented by a facility. Again, no major conflicts are found in the two rules. Both rules require the development of this mechanism in each facility. The rules require that an individual responsible for reporting cases of suspected abuse or neglect to outside authorities be clearly identified and also require the identification of the individual responsible for the internal investigation. Both rules require that the records be maintained regarding any investigation and the contents of these records are identical. Both rules will also require that the information obtained during the course of an investigation be sent to the agencies. Both rules require that the facility inform residents of the existence of the internal reporting mechanism, and finally, both rules require staff orientation and inservice training to assure that the facility employee's are fully informed of the reporting requirements of the facility's abuse plan, individual abuse plans and the internal reporting mechanism.

The rules were developed in consultation with personnel from the Department of Public Welfare. As noted above, the provisions of the rules are quite similar and neither agency feels that difficulties in implementation will arise in the jointly licensed facilities. The differences that do exist are the result of the differing focus and responsibilities of the agencies and compliance with these provisions will be required. However, such compliance will not result in a facility being forced to comply with one provision at the risk of being in noncompliance with another.

The Department's rule must also be read in conjuction with the provisions of the statute. The Department did not feel that it was necessary to incorporate the provisions of the VAA into this rule since many of the statutory provisions,

e.g. the reporting requirements, are clearly delineated in the law. All facilities have previously been furnished with a copy of the law and informed of the Department's position regarding compliance with law. A copy of this notice is attached as Appendix C.

Specific comments

> A. Definition. As used in 7 MCAR S 1.043, "facility" has the meaning given it in Minnesota Statutes, section 626.557, subdivision 2, clause (a).

As mentioned above, the provisions of this rule will apply to all facilities licensed or certified by the Department of Health. This definition is necessary to assure that the applicability of these provisions is clearly understood. As defined in the statute, of the term "facility" includes the facilities licensed or certified by the Department.

> B. General requirement. A facility shall comply with Minnesota Statutes, section 626.557.

Under the provisions of Minn. Stat. §626.557, each facility will be required to comply with the provisions of that law. The law specifies a number of requirements which are not subject to rule-making, e.g. the definition of mandated reporters, the reporting requirements, the contents of the report, etc. The rule is necessary to assure that a facility is aware of these requirements and is in compliance with this law.

Facility abuse prevention plan

Minn. Stat. §626.557, subd. 14(a) provides as follows:

> Each facility shall establish and enforce an ongoing written abuse prevention plan. The plan shall contain an assessment of the physical plant, its environment, and its population identifying factors which may encourage or permit abuse, and a statement of specific measures to be taken to minimize the risk of abuse. The plan shall comply with any rules governing the plan as are promulgated by the licensing agency.

The proposed rules contained in section C. require the development of this plan and specify the factors to be met during the plan development and its implementation.

> C. Facility abuse prevention plan.
> 1. Every facility which admits vulnerable adults on an inpatient basis shall develop and implement a written plan to prevent abuse in the facility. The plan must be designed to identify and remedy conditions in the population, environment, and physical plant that make patients or residents susceptible to abuse.

This section requires the development of the facility abuse prevention plan. The rule will apply to facilities which admit individuals on an inpatient basis. This would include hospitals, nursing homes, boarding care homes and supervised living facilities. The rule would not apply to home health agencies or other facilities which do not admit individuals on an inpatient basis. The Deparment believes that it would not be reasonable or appropriate to require the development of a facility abuse plan in these facilities since residents or patients are not admitted. The statute and the rule is intended to apply to those facilities which provide services to individuals on an inpatient basis since it requires an assessment of the population, physical plant and environment. Facilities which do not admit individuals would not have a facility population nor would there be a concern over environmental and physical plant factors since an individual's contact with these facilities would be limited.

The rule will require that a facility admitting residents develop a plan which is designed to identify and remedy conditions that would make residents or patients susceptible to abuse. This language parallels the statutory provisions.

> 2. The plan must meet the following requirements:
> a. It must be developed by an interdisciplinary committee selected by the administrator of the facility.

Subsections 2.a. - e. specify the requirements to be followed in the development of the facility abuse prevention plan. Subsection 2.a. will require that the plan be developed by an interdisciplinary committee selected by the facility administrator. In order to assure for a thorough analysis of the various factors to be considered in the development of this plan - the population, physical plant and environment, it is necessary to require that individuals with differing perspectives and areas of expertise work together. Nursing and other direct care staff, such as social workers, rehabilitation services personnel, etc., would be able to provide input into the assessment of the population as well as to comment on how the physical plant characteristics and environment impact on the facility's population. Support service staff, especially housekeeping and maintenance personnel, would be aware of the physical plant and environmental limitations and would be able to specifically identify areas of concern and to suggest methods of alleviating any problems. Administrative staff would be able to comment on the organizational arrangements within the facility as well as to identify concerns relative to the effective and efficient operation of the facility. In addition, this category of individuals would be in a position to implement the changes that may be required or to suggest alternatives to the facility's operation. The above examples demonstrate the need to assure that the final facility abuse prevention plan is based on a broad perspective of input in order to develop a plan that will effectively identify any areas of concern as well as to provide a work plan to eliminate any problems.

> b. It must be based on a written assessment of the population, environment, and physical plant. The assessment must address areas such as the following: the inability of patients or residents to act for themselves because of physical, mental, or emotional impairments; the possibility that patients or residents will injure themselves or others because of their physical, mental,

> or emotional conditions; admission policies and continued stay policies; visitation policies and visitor restrictions; the qualifications and training of staff to meet identified patient and resident needs; the adequacy of programs or services provided in the facility; the orientation and ongoing educational programs offered to employees; patient's and resident's room assignments; the physical conditions of the facility such as lighting levels, furniture placement and decor, and the location and environs of the facility.

Subsection 2.b. requires that the plan be based on a written assessment of the population, environment and physical plant. This provision is directly related to the requirement contained in the statute. The remaining portion of this rule identifies areas to be addressed in the development of this assessment. The factors listed are not intended to be either all inclusive or all exclusive; rather, the areas identified in the rule are representative of the type of specific items to be addressed and considered during the assessment process. The provisions listed deal with factors relating to the population, the physical plant and the environment. Due to the differing types of facilities covered by this rule, it would not be possible to list all possible factors to be considered. However, in order to provide some specific criteria, the proposed rule was developed to furnish facilities with the general content of the facility abuse plan. The fact that each type of facility will have different populations and different physical plant and environmental concerns also emphasizes the need for having the assessment conducted by the interdisciplinary committee. As previously mentioned, the varying perspectives of the individual committee members will help to assure that many factors are addressed.

The type of population in a facility will be one of the major factors to be addressed. If residents are not able to act for themselves, it will be necessary to identify this and to develop a method to protect these individuals

from abuse. Similarly, the tendency to abuse others or for self-abuse must be identified and measures taken to prevent or to alleviate such possibilities. The facility will also want to evaluate its admission policies and continued stay policies to clearly identify the resources of the facility and to determine the limits to be placed on the admission of various categories of individuals. A facility may not be staffed to supervise abusive residents or may not have the physical facilities to isolate abusive residents. Thus, it may be necessary to amend or to develop policies which clearly identify the capacity of the facility to provide care to these types of residents. Another area of conern would be the visitation policies of the home. If visitors are suspected of abusing residents, limits might have to be placed on individuals permitted to visit a resident or in the areas where visits will be permitted. Staff qualifications and training will also have to be evaluated to assure that staff is aware of its responsibilities and properly trained to carry them out. The programs and services provided in the facility might have to be changed in order to more effectively deal with residents who may be abusive or to provide a means to eliminate the potential for abuse. Orientation and inservice training of staff should be evaluated to assure that an awareness of potential problems with residents is provided and to assure that staff is able to effectively deal with an incident of abuse. Physical plant conditions must also be evaluated to eliminate any areas which could create an area where supervision would be restricted or to enhance the surroundings to eliminate the potential for agressive behavior. For the same reasons, the location and surrounding environment must be evaluated to ascertain whether there are factors that could increase the potential for abuse.

The Department will not be in a position to qualitively judge the assessment completed by the facility. However, the Department will want to see evidence of the written assessment and an indication that the factors relating to the population, physical plant and environment has been considered. The factors identified in subsection 2.b., if followed by the facility would constitute an acceptable assessment.

> c. It must include a written plan to correct or alleviate the conditions identified by the assessment that make patients and residents susceptible to abuse.
> d. Its plan to correct the identified conditions must specify the action to be taken and set a schedule for completing the corrections.

Subsection 2.c. and d. are also based on the requirements of the statute. Once the assessment is completed, the statute requires that the plan contain "specific measures to be taken to minimize the risk of abuse". Subsection c. will require that the facility develop a written plan for correction of any conditions identified by the assessment which make patients and residents susceptible to abuse. This written listing will identify the problems and will help the facility to set priorities for making the necessary corrections. Subsection d. will require that specific steps for correcting the problems be clearly identified and will require that a schedule for completion be established. These two requirements will assure that the "specific measures" called for in the statute are contained in the facility's abuse prevention plan.

> e. It must be reviewed at least annually by an interdisciplinary committee and revised if necessary. The date of each review must be recorded on the plan.

Since the population, physical plant and the facility's environment are subject to change, the Department believes that it is necessary to assure that the facility abuse prevention plan is reviewed on at least an annual basis.

This review will determine that the initial assessment is still appropriate and will also provide a means to monitor the facility's compliance with areas identified for change. Revisions in the plan will be required if the committee believes that additional changes are necessary. In order to provide a basis for measuring a facility's compliance with these provisions, the date of the review must be recorded on the plan.

Individual abuse prevention plan.

Minn. Stat. §626.557, subd. 14(b) provides as follows:

> Each facility shall develop an individual abuse prevention plan for each vulnerable adult residing there. Facilities designated in subdivision 2, clause (b)(2) shall develop plans for any vulnerable adults receiving services from them. The plan shall contain an individualized assessment of the person's susceptibility to abuse, and a statement of the specific measures to be taken to minimize the risk of abuse to that person. For the purposes of this clause, the term "abuse" includes self-abuse.

The statute applies only to those facilities which would admit patients or residents on an inpatient basis. Since the statute specifically ties in the requirement that facilities develop plans for each vulnerable adult "residing there", facilities, such as home health agencies which do not provide living arrangements, would be excluded from this provision. It is the Department's position that the term "residing" does not require an individual to take up residence in the facility. The purpose of this requirement is to assure that persons admitted to a facility are assessed to ascertain their susceptibility to abuse and to assure that specific measures are taken to minimize this risk of abuse. The Department believes that this assessment must be completed for any individual admitted to a facility even if the stay would be relatively a short period. Thus, hospitals would be subject to the provisions of Minn. Stat. §626.557, subd. 14(b) and these rules. In order to

avoid any confusion, the rule clearly states that facilities "which admit individuals" are required to comply with these provisions. If the Department's interpretation is not accepted, the provisions of this particular section of the law would become meaningless and difficult to enforce. As previously mentioned, the law is designed to assure that vulnerable adults are protected from the possibility of abuse and neglect. The law clearly is applicable to all facilities licensed by the Department and in order to provide for the greatest amount of protection, the development of the individual abuse prevention plans should be required in facilities which admit individuals on an inpatient basis. If the term "residing" would be construed to imply "residence" in a facility, the enforcement of the law would be difficult. In order to verify the need to develop a plan, it would be necessary to determine if residence will be changed to the facility. In many cases an individual may stay in a facility for an extended period of time without ever intending to take up residence in that facility. The Department's interpretation would conform to the legislative intent as stated in subdivision 1 of the law. That statement of public policy provides as follows:

> The legislature declares that the public policy of this state is to protect adults who, because of physical or mental disability or dependency on institutional services, are particularly vulnerable to abuse or neglect; to provide safe institutional or residential services or living environments for vulnerable adults who have been abused or neglected; and to assist persons charged with the care of vulnerable adults to provide safe environments.

This policy statement implies that the legislature was concerned over the provision of both "institutional" as well as "residential" care. The Department's interpretation of the coverage and applicability of this particular subdivision conforms to that policy statement and assures that the intent

of the legislature is carried out.

> 1. Every facility which admits vulnerable adults on an inpatient basis shall set written policies and procedures governing the development of written individual abuse prevention plans in accordance with Minnesota Statutes, section 626.557, subdivision 14, clause (b).

This provision specifies the types of facilities which will be required to develop the policies and procedures governing the development of the individual abuse prevention plans. The rationale for this provision was discussed above. The rule will also require that these facilities develop the necessary policies and procedures required to implement the provisions of the statute.

> 2. The policies and procedures must meet the following requirements:
>
> a. They must establish the mechanism for developing the individual abuse prevention plans.
>
> b. They must require that an interdisciplinary team conduct for each patient or resident an initial individual assessment that addresses the individual's susceptibility to abuse and the measures to be taken to minimize the risk of abuse to that resident.
>
> c. They must require that the plan is developed as part of the initial plan of care for the patient or resident.
>
> d. They must require at least an annual review of the plan as long as the patient or resident stays in the facility.
>
> e. They must require that the individual's plan be revised whenever necessary.

Section 2 specifies the requirements to be met in developing the policies and procedures relating to the individual abuse prevention plans. These five areas will assure that the mechanism for the development of the plan is in place, that the required assessment is conducted by appropriate individuals and provide for the timely development of the plan and for any subsequent review and revision.

Subsection a. requires that the facility develop the mechanism for developing the prevention plans. The law requires that an individual prevention plan be developed for each vulnerable adult; however, no specific mechanism is established

to govern the actual development of these plans. The Department has generally recommended that the individual abuse prevention plan be developed in conjunction with the plans of care for the patient or resident. This approach would avoid unnecessary duplication of effort and would help to assure that these considerations are raised during the inital phase of the care planning. However, the Department wanted to allow the facility the flexibility to establish its own mechanism for devising these plans. Thus, the rule will require that a mechanism be developed but the specific elements will be left to the facility.

Subsection b. will require that an interdisciplinary team conduct an assessment of the individual's susceptibility to abuse and develop measures to minimize any risk of abuse. The requirement for the assessment and the statement of specific measures is based on the statutory language. The Department believes that it will be necessary for the plan to be developed by an interdisciplinary team. The development of a resident's care plan is based on the expertise and perspective of the various individuals that will be involved in providing care to the resident. This broad perspective will also be required in the development of the abuse prevention plan to assure that a number of view points are considered. For example, the nursing staff will be aware of the resident's health and physical needs as well as the social and emotional needs of the individuals. The great frequency of contact with the individuals will also be important in ascertaining a resident's susceptibility to abuse. However, other direct care staff, especially social workers, rehabilitation personnel and activity directors will also have contact with the resident and will observe the resident's or patient's interaction with staff and other residents. This perspective will enhance the development of the plan and will assure that the fullest possible protection can be afforded to the resident.

Subsection c. will require that the plan be developed as part of the initial plan of care for the vulnerable adult. This requirement is necessary to assure that the plan is developed as quickly as possible by the facility staff. The licensure rules impose limits on the development of these plans and other health records and the development of these records is based on input from facility staff. At the time the initial care plan is developed, it is reasonable to expect the facility to be in a position to discuss the vulnerable adult's susceptibility to abuse and the measures to be taken to minimize abuse.

Subsection d. will require that the facility's policy provide for an annual review of the abuse plan. This requirement will be necessary to assure that the information in the plan is still based on the needs of the individual. The review of the plan could be incorporated into the reviews of the patient's or resident's plan of care.

The last subsection will require that the plan be revised whenever necessary. This provision is required to assure that as the patient's or resident's condition changes, the plan is revised to incorporate those changes.

> 3. The development, review, and revision of the individual abuse plans may be part of a patient's and resident's care plan.

Section 3 was included in the rule to assure that facility providers are aware that these abuse prevention plans can be incorporated into the existing care plans for patients and residents and that a new independent record need not be developed.

Internal reporting system

Minn. Stat. §626.557, subd. 15 provides as follows:

> Each facility shall establish and enforce an ongoing written procedure in compliance with the licensing

agencies' rules for ensuring that all cases of suspected abuse or neglect are reported promptly to a person required by this section to report abuse and neglect and are promptly investigated.

This statute requires that a facility establish an internal mechanism for reporting suspected cases of abuse or neglect as well as assuring that these incidents will be investigated. The proposed rule provides for the implementation of this mechanism.

1. The facility shall set up a mechanism to ensure that all suspected cases of abuse or neglect are reported to an individual mandated to report under Minnesota Statutes, section 626.557 and are promptly investigated by facility staff.

Subsection 1. follows the mandates of statutory provision and is included in order to provide clarity and notice as to the existence of this requirement.

2. The facility shall designate the person responsible for reviewing and investigating all suspected cases of abuse or neglect. However, if the person responsible for the review and investigation is suspected of committing abuse or neglect, the facility shall authorize another to conduct the review and investigation.

This rule will require the designation of an individual who will be responsible for reviewing and investigating all suspected cases of abuse or neglect. The Department believes that this rule is necessary to provide accountability for the conducting of any investigation as well as to assure that an operating mechanism has been established. The designated individual will be required to conduct the necessary reviews and investigations and the identity of this individual will be known to facility staff. The failure to identify a specific individual would result in confusion and reduce the effectiveness of the reporting system. For obvious reasons, the rule will require that another individual be responsible for reviewing any suspected cases of abuse or neglect in which the designated individual has been implicated.

3. The facility shall designate the person responsible for reporting all cases of abuse or neglect to the appropriate authority in accordance with Minnesota Statutes, section 626.557.

For reasons similar to those stated above, subsection 3 will require the facility to designate the person responsible for reporting all cases of abuse or neglect to the appropriate authority. The designation of the specific individual will assure for a more efficient operation of this system since the responsibilities of this individual will be clearly identified. The person designated under this subsection could be the same person designated under subsection 2 above.

> 4. The facility shall keep written records of reviews and investigations of suspected cases of abuse or neglect. These records must include a summary of the findings, persons involved, persons interviewed or notified, conclusions, and actions taken. A copy of the completed record shall be forwarded to the Office of Health Facility Complaints of the Department of Health.

Minn. Stat. §626.557, subd. 4 requires that a mandated reporter complete a written report and submit the report to the appropriate authority. The written report is to include the identity of the vulnerable adult and the caretaker, the nature and extent of the suspected abuse or neglect, any evidence of previous abuse or neglect, the name and address of the reporter and any other information that the reporter believes will be helpful in the agency's investigation. The proposed rule is similar in nature to the statutory provision in that the investigation records will provide the means to develop the report to the licensing agency. In order to assure that incidents of abuse or neglect are appropriately investigated, it will be necessary to maintain records of these investigations. The rules will require that the investigation records include a summary of findings made during the internal investigation, the persons involved, who was interviewed and notified, the conclusion made and the actions taken by the facility. The development of this record will assure that an appropriate investigation has been carried out. The rule will also require that a copy of this record be

furnished to the Department's Office of Health Facility Complaints. This record will be important to the Department's review since it will help to identify the nature of the abuse and neglect and to identify the individuals involved in either the incident or the investigation. The Office of Health Facility Complaints has been delegated the responsibility for reviewing and investigating violations of the Vulnerable Adult Abuse Reporting Act.

> 5. When a patient or resident is admitted, the facility shall explain its internal reporting mechanism to the individual or to the people legally responsible for the patient or resident. It shall also inform these people that anyone may report suspected cases of abuse and neglect directly to outside agencies.

This rule will require that admitted patients and residents be given an explanation of the facility's internal reporting mechanism as well as informed of their right to directly report to outside agencies any suspected case of abuse or neglect. The rule is necessary in order to assure that residents are aware of their rights and aware of the available mechanisms to address their concerns. The internal reporting mechanism is designed to provide for an expeditious review of any allegations of abuse or neglect and it will be important to assure that the availability of this mechanism is known. Hospitals and nursing homes are already required to have an internal grievance mechanism and the Department believes that the requirement of the VAA law and these rules could be incorporated into these grievance mechanisms.

> F. Notification. The facility shall inform its staff of the mandatory reporting requirements and of the responsibilities imposed on the facility staff by Minnesota Statutes, section 626.557. It shall also inform its staff that anyone may report suspected cases of abuse or neglect directly to the appropriate outside agencies. An explanation of the facility's abuse prevention plan, individual abuse prevention plans, and internal reporting mechanism must be part of the facility's orientation and inservice training programs.

The final section of this rule will require that each facility inform its

staff of the reporting requirements and other responsibilities imposed on the staff by the VAA law. Staff must be informed of their right to directly report to outside agencies any suspected cases of abuse or neglect. The rule will also require that the facility abuse prevention plan, individual abuse prevention plans and the facility's internal reporting mechanism be discussed as part of the facility's orientation and inservice training program. The rule is necessary to assure that staff is fully aware of its responsibilities and informed as to the reasons and purpose of the abuse prevention plans and the internal reporting mechanism. Facilities are required to provide orientation and inservice training and this additional information could be included into these ongoing programs.

7 MCAR §§1.044 T. and Y. Licensing procedures

7 MCAR §1.044 T. Licensing procedures for boarding care homes

> T. Procedure for licensing of boarding care homes. ~~Any person acting individually or jointly with other persons who proposes to build; own; establish or operate a nursing home or a boarding care home shall submit a preliminary information questionnaire as furnished by the department at the time of initial contact as specified under MHD 44(s).~~ Application for a license to establish or maintain ~~such a facility~~ a boarding care home shall be made in writing and submitted on forms provided by the department. If the applicant is a corporation, the officers shall furnish the department a copy of the articles of incorporation and bylaws and any amendments thereto as they occur. In addition, out-of-state corporations shall furnish the department with a copy of the certificate of authority to do business in Minnesota. No license shall be issued until all final inspections and clearances pertinent to applicable laws and regulations have been complied with.

The proposed rule, 7 MCAR §1.044 Y., discussed below, establishes procedures for the licensing of nursing homes. Since the rule currently governing the licensure process, MHD(t), applies to both nursing homes and boarding care homes, it was necessary to amend that rule to limit its applicability to boarding care homes only. The changes made in MHD 44(t) provide the necessary clarification to assure that this section will apply only to boarding care homes. These changes were necessary to eliminate any possible confusion as to the applicability of the licensure procedures. In addition, the first sentence of the rule relating to the submission of a Preliminary Information Questionnaire, was deleted since this requirement is no longer followed in the licensure process.

7 MCAR §1.044 Y. Procedure for licensing nursing homes.

General comments

7 MCAR §1.044 Y. governs the issuance of licenses to nursing homes. The rule contains five major subsections: initial licensure, renewed licenses,

transfers of interests, license amendments and conditional or limited licenses. The promulgation of this rule is required as the result of changes in the licensing procedures contained in Minn. Stat. §144A.02 - .06. Those statutes expanded the Department's authority and responsibility as it relates to the review and processing of nursing home license applications. Detailed references to the statutes will be made in conjunction with the discussion of the subsections of this rule.

The proposed rules do duplicate statutory language in certain situations, e.g., the provision in Section 1. requiring the submission of architectural plans and specifications. It is the Department's position that the inclusion of these provisions is crucial to the ability of individuals affected by the rules to fully comprehend the licensure procedures. The primary source of information for both providers and consumers as to the requirements to be followed is the licensure rules and not the statutes. The addition of the statutory requirements with the regulatory requirements will result in a unified set of requirements.

Statutory authority

In addition to the general statutory authorization to promulgate rules contained in Minn. Stat. §144A.08, subd. 1., there are also specific statutory provisions requiring rule making. Minn. Stat. §144A.03, relating to the license application process states, in pertinent part:

> Subdivision 1. The commissioner of health by rule shall establish forms and procedures for the processing of nursing home license applications. ...

Minn. Stat. §144A.05, relating to the license renewal requirements states, in pertinent part:

> ...The commissioner of health by rule shall establish forms and procedures for the processing of license renewals. ...

Minn. Stat. §144A.06, subdivision 2, relating to the processing of transfers of interests in a nursing home requires that:

> The commissioner of health by rule shall prescribe procedures for relicensure under this section. ...

It should be noted that these proposed rules do not incorporate the statutory and regulatory provisions relating to the Certificate of Need program, Minn. Stat. §§145.832 et. seq. It is the Department's position that such a reference is not necessary since the ability of the Department to issue a nursing home license is contingent upon the granting of the Certificate of Need or a determination that the Certificate of Need Act is not applicable.

Specific comments

Initial licensure

> 1. Initial licensure. For the purpose of Y., initial licensure applies to newly constructed facilities designed to operate as nursing homes and to other facilities not already licensed as nursing homes. Applicants for initial licensure shall complete the license application form supplied by the department. Applications for initial licensure must be submitted at least 90 days before the requested date for licensure and must be accompanied by a license fee based upon the formula established in 7 MCAR S 1.701, Exhibit I.
>
> To be issued a license, the applicant must file with the department a copy of the architectural and engineering plans and specifications of the facility as prepared and certified by an architect or engineer registered to practice in Minnesota.
>
> If the applicant for licensure is a corporation, it shall submit with the application a copy of its articles of incorporation and bylaws. A foreign corporation shall also submit a copy of its certificate of authority to do business in Minnesota. Applicants must submit these documents in order to be issued licenses. The department shall issue the initial license as of the date the department determines that the nursing home is in compliance with Minnesota Statutes, sections 144A.02 to 144A.16 and 7 MCAR SS 1.044-1.072, unless the applicant requests a later date.

Definition of "initial licensure"

The first sentence of the rule contains the definition of "initial licensure". While many of the licensure procedures relating to initial licensure are also applicable to processing renewal licenses or transfers of interests, the distinction between the various procedures is required since differing time frames for the submission of the applications are specified. Initial licensure will apply in situations when a facility is to be initially licensed as a nursing home. This would include the completion of a new building or the conversion of an existing facility to a nursing home. A change in the ownership of a nursing home would not be considered as initial licensure since the facility has previously been licensed as a nursing home. Initial licensure would also apply to a situation when a nursing home license is requested for a facility formerly licensed as a nursing home but which was not licensed as such at the time of the application request. Since a facility for which initial licensure is requested is not currently in compliance with the nursing home licensure laws and rules, additional time is required to process the application and to arrange for the proper clearances from the Engineering Services Section, Division of Health Systems, Department of Health and The Fire Marshal's Office, Department of Public Safety. Specific time frames applicable to the processing of initial licensure requests can be established only with the establishment of the category of initial licensure.

Application forms

The second section of the rule requires that the applicant for licensure complete the license application forms provided by the Department. These forms will contain the statutorily required information specified in Minn. Stat. §§144A.02 - .04. The information contained on the license application will include the following:

Minn. Stat. §144A.02:

- The address and legal property description.
- The location and square footage of the floor space constituting the facility.
- The level or levels of nursing care provided in the facility.
- Any conditions or limitations placed on the facility.

Minn. Stat. §144A.03:

- The names and addresses of all controlling persons and managerial employees.
- The designation of an individual responsible for dealing with the Department and upon whom service or orders and notices shall be made.

Minn. Stat. §144A.04

- Relationship of controlling persons to other nursing homes during a two year period prior to the application date.
- Relationship of the administrator and managerial employees to other nursing homes during a two year period prior to the application date.

Since the Department does not intend to request additional information beyond what is specifically required in the statute or in these rules, specific promulgation of this information would be a duplication of statutory language.

Time period for submission

The third sentence of this section requires that the license application be submitted at least 90 days before the requested date of licensure and that the applications be accompanied by the licensure fee. The ninety day time period is longer than the time periods provided for renewed licensing (60 days) or for relicensure after a transfer of interest (45 days). The Department believes

that the ninety day time period, which is necessary to provide sufficient time to complete the processing, would not present an undue hardship on the applicant. Since the facility is not currently licensed as a nursing home, it will be necessary to conduct a survey of the physical plant to assure that the building is in conformance with the rules of the Department. The survey could result in the issuance of orders which would need to be corrected prior to licensure. In addition, the facility would have to obtain a clearance from the Fire Marshal's Office. A survey would also be conducted by members of the Survey and Compliance Section, Division of Health Systems, to verify that the facility will be appropriately staffed, furnished and equipped to provide care and services in accordance with the licensure rules. Again, if orders are issued, the necessary steps to obtain the Department's final clearance will be necessary prior to issuance of the license. Since the survey staffs are also responsible for completing previously scheduled surveys of nursing homes and other health care facilities, sufficient time will be needed to assure that the initial surveys of a new facility can be scheduled without unduly disrupting the other activities of these staffs.

The Department will also be required to verify that the license application is complete. The addition of the provision requiring the disclosure of controlling persons and managerial employees has increased the complexity of this process. If the license is incomplete or if it is determined that the facility has included controlling persons or managerial employees who are prohibited from serving in a nursing home in accordance with the provisions of Minn. Stat. §144A.04, subdivision 4 and 6, the applicant will need time to rectify that situation. The ninety day period will provide time for the completion of these activities.

The ninety day time period should not create any problems for the applicants for licensure since these individuals would be in the best position to determien when the facility will be scheduled to open. The rule will help to eliminate situations that have occurred in the past when very short notice is provided to the Department. In some instances, facilities which have previously made arrangement to admit residents, have been forced to delay the admission until final clearances could be made by the Department.

It should be noted that approval of the facility for licensure could be obtained in less than 90 days if the necessary clearances are obtained. As will be noted below, the earliest effective date for licensure will be the date that the Department determines that the nursing home is in compliance with the licensure laws and rules. It should also be noted that the specification of the 90 day period in the rule would not compel the Department to issue a license within that period. Approval is contingent upon the Department's determination of compliance, and if such a determination cannot be made during this period, licensure would not be possible.

Licensure fees

The last part of the third sentence requires that the application be accompanied by the license fee prescribed in 7 MCAR §1.701, Exhibit I. The requirement for the licensure fee is found in the provisions of Minn. Stat. §144A.07.

Filing of plans and specifications

The second paragraph of section 1. requires the filing of architectural and engineering plans and specifications prior to the approval of the license. This provision is expressly required by Minn. Stat. §144A.03, subdivision 1., which states, in pertinent part:

> ...An application for a nursing home license shall include the following information:...
>
> (c) A copy of the architectural and engineering plans and specifications of the facility as prepared and certified by an architect or engineer registered to practice in this state;...

While the language of the proposed rule does duplicate the statutory language, the Department believes that the rule is necessary in order to provide notice to affected persons as to the requirements to be met to obtain licensure. As discussed earlier, the licensure rules are the primary method used by the Department, providers and consumers to fully elaborate the provisions required of an applicant for licensure. The rule clearly specifies that the failure to have the necessary plans and specifications on file will result in a delay in issuing the initial license to operate the nursing home.

Articles of incorporation and bylaws

The first two sentences of the third paragraph require that a corporate applicant for licensure submit a copy of its articles of incorporation and corporate bylaws. Foreign corporations must also submit a copy of its certificate of authority to do business in Minnesota. This requirement is also based on the provisions of Minn. Stat. §144A.03, subdivision 1., which states:

> ...A controlling person which is a corporation shall submit copies of its articles of incorporation and bylaws and any amendments thereto as they occur, together with the names and addresses of its officers and directors. A controlling person which is a foreign corporation shall furnish the commissioner of health with a copy of its certificate of authority to do business in this state. ...

The inclusion of this provision will assure that the necessary requirements for licensure, both statutory and regulatory, are contained in one source.

Issuance of initial license

The last sentence in this section states that the earliest effective date of the initial license will be the date that the Department determines that the facility has completed the application process and has received all the necessary clearances required by statute and rule. This rule is necessary in order to inform the applicant that the application process must be completed before a license can be issued. This rule will eliminate situations where an applicant sets the date of opening of the nursing home without assuring that all necessary clearances have been obtained. The Department feels that this rule will eliminate any inconvenience to prospective residents who anticipated being admitted to the home on a specified date only to be informed that the license had not yet been granted. Since the rules require at least a 90 day period be provided to the Department, it is not anticipated that delays in approving the license will routinely occur. The rule is based on the provision of Minn. Stat. §144A.04, subdivision 1. which states:

> No nursing home license shall be issued to a facility unless the commissioner of health determines that the facility complies with the requirements of this section.

It should be noted that this proposed rule will not conflict with the provisions of Minn. Stat. §144A.04, subdivision 3. which provides the Commissioner the authority to temporarily waive compliance with a standard if the applicant can establish their good faith efforts to comply with those standards. In such an instance, the granting of the temporary waiver by the Commissioner would, in effect, be a decision that the facility is in compliance with the standards of the statute and the rule.

Renewed licenses

> 2. Renewed licenses. An applicant for license renewal shall complete the license application form supplied by the department. Applications must be submitted at least 60 days

before the expiration of the current license and must be accompanied by a license fee based upon the formula established in 7 MCAR S 1.701, Exhibit I.

If the licensee is a corporation, it shall submit any amendments to its articles of incorporation or bylaws along with the renewal application.

If the application specifies a different licensed capacity from that provided on the current license, the licensee shall follow the procedures relating to license amendments specified in 6. If the changes are not approved before the current license expires, the renewed license will be issued without reflecting the requested changes.

Application forms

The first sentence of this paragraph requires that any applicant for renewed licensure complete the application forms supplied by the Department. This form will be almost identical to the form used for initial licensure which was discussed above. The provisions of Minn. Stat. §144A.02 - .04 apply to the issuance of renewal and initial licenses. However, the applicant for renewal will also have to indicate whether the facility's most recent balance sheet and statement of revenues and expenses has been submitted to the Department of Public Welfare. This requirement is already being met by applicants for renewed licensure. This information is specifically required by the provisions of Minn. Stat. §144A.05.

Time period for submission

The rule requires that an application for a renewed license be submitted at least 60 days prior to the expiration of the license. This time frame is necessary in order to provide sufficient time for the review and processing of the application and to verify the information contained therein. This time period does differ from the Department's previous practice which allowed applications to be submitted up to the expiration date of the license. This practice often resulted in a delay in issuing renewal licenses due to the accumulation

of large numbers of renewal applications. Under existing practices, the Department attempted to furnish applicants with the necessary forms at least 30 days prior to the expiration date. However, since the current renewal application for nursing homes contained only basic and limited information, completion of the form was not difficult. The new application form, on the other hand, is more detailed and will require additional time to complete and to process. The primary reasons for this is the requirement relating to the disclosure of controlling persons and managerial employees. The Department will need additional time to assure that applications are complete and to verify the information contained therein. It will be necessary to assure that the nursing home does not have individuals designated as a controlling person or a managerial employee in violation of the provisions of Minn. Stat. §144A.04, subdivisions 4 and 6. The sixty day time period will also provide time to contact the licensee if questions need to be answered and to cross reference the lists of controlling persons and managerial employees to update the Department's files.

Licensure fees

The rule will also require that each application for a renewed license be accompanied by the fee prescribed in 7 MCAR §1.701, Exhibit I. This requirement is mandated by the provisions of Minn. Stat. §144A.07.

Submission of amendments to articles of incorporation

The second paragraph of this section requires that a corporate applicant for renewed licensure submit any amendments to its articles of incorporation or bylaws. Minn. Stat. §144A.03, in addition to requiring that the applicant for initial licensure submit articles of incorporation and bylaws, also requires that amendments to these documents be submitted as they occur. This rule reminds the corporate licensee of this requirement.

Different license capacity

The last paragraph of this rule relates to situations when the renewal request specifies a different license capacity from the current license. It has been the Department's experience that applicants request additional changes in the level of care or in the number or location of beds at the time of license renewal. However, in many cases, the nature of the requested change necessitates a review unrelated to the renewal process and can also require the scheduling of surveys to ascertain whether the requested changes will be in compliance with the licensure rules. As a result, delays in processing and issuing the renewal license can occur. The proposed rule provides notice that such changes must be made in accordance with the amendment procedures specified in section 6. In addition, the rule provides that if changes cannot be approved prior to the expiration of a license, the renewal license will be issued without reflecting the changes. This rule will provide for a more efficient processing of the renewal applications and will help to eliminate any delays in the actual issuance of the renewal licenses.

Transfers of interests

General comments

Minnesota Statutes §144A.06 requires that a controlling person report to the Department the transfer of any interest held in the nursing home. Under conditions specified in that statute and in the proposed rule, the transfer of an interest could result in the expiration of the current license and require that the nursing home apply for relicensure. The proposed rule establishes the procedures to be followed in reporting transfers of interests and also prescribes the procedures to obtain licensure.

Minn. Stat. §144A.06 provides as follows:

144A.06 Transfer of Interests

Subdivision 1. Notice; expiration of license. Any controlling person who makes any transfer of a beneficial interest in a nursing home shall notify the commissioner of health of the transfer within 14 days of its occurrence. The notification shall identify by name and address the transferor and transferee and shall specify the nature and amount of the transferred interest. If the commissioner of health determines that the transferred beneficial interest exceeds ten percent of the total beneficial interest in the nursing home facility, the structure in which the facility is located, or the land upon which the structure is located, he may, and if he determines that the transferred beneficial interest exceeds 50 percent of the total beneficial interest in the facility, the structure in which the facility is located, or the land upon which the structure is located, he shall, require that the license of the nursing home expire 90 days after the date of transfer. The commissioner of health shall notify the nursing home by certified mail of the expiration of the license at least 60 days prior to the date of the expiration.

Subdivision 2. Relicensure. The commissioner of health by rule shall prescribe procedures for relicensure under this section. The commissioner of health shall relicense a nursing home if the facility satisfies the requirements for license renewal established by section 144A.05. A facility shall not be relicensed by the commissioner if at the time of transfer there are any uncorrected violations. The commissioner of health may temporarily waive correction of one or more violations if he determines that:

(a) Temporary noncorrection of the violation will not create an imminent risk of harm to a nursing home resident; and

(b) A controlling person on behalf of all other controlling persons:

(1) Has entered into a contract to obtain the materials or labor necessary to correct the violation, but the supplier or other contractor has failed to perform the terms of the contract and the inability of the nursing home to correct the violation is due solely to that failure; or

(2) Is otherwise making a diligent good faith effort to correct the violation.

The mandatory relicensure of a nursing home as the result of a transfer of interest has modified the Department's practices governing what is generally termed a "change of ownership". Prior to the enactment of Minn. Stat. Chapter 144A, which introduced the concept of a transfer of interest, the licensing procedures related to the operators as opposed to the owners of the nursing home. Even since the enactment of Minn. Stat. Chapter 144A, the Department does not license the owner of a health care facility, but rather grants the license to the person or entity responsible for the operation and management of the health care facility. The licensee need not own the land, structure or equipment which comprises the nursing home. Thus, prior to the passage of Minn. Stat. §144A.06, the sale of land, or of the building comprising the health care facility, while certainly constituting a change of ownership of those assets did not necessarily require the change in the licensee or reissuance of the license. It was only in situations, when the purchasers of the assets either assumed the responsibility for the management of the health care facility or arranged for another person or entity to assume the operation that a new license would be required. Similarly it would be possible to require a change in the licensee even when a change in the ownership of the land or building did not occur. As an example, if ownership was vested in one person who arranged for a management company to operate the facility or leased the property to a group who operated the facility; the latter entity would be the licensee. If the management contract or lease was terminated and another group assumed the operation of the facility, a new license would be required by the Department even though the actual ownership of the assets was not altered. For those reasons, a more appropriate terminology to describe the Department's responsibility would be a "change in licensee" as opposed to a change of ownership. The following are examples of what types of transactions would result

in a change of licensee:

1. The sale of the land, building and other assets of a health care facility to another entity which also assumes the responsibility for the management and operation of that facility. This would require a change of licensee and would also be considered a change of ownership.

2. The transfer of the responsibility for the operation of a health care facility to another person or entity, without a sale of the facility's assets, through the execution of a management agreement or similar arrangements. Since the party responsible for the operation is changed, a new license would have to be obtained.

3. A change in the nature of the entity operating the facility; e.g. changing a sole proprietorship into a partnership; converting a partnership into a corporation, etc. Even if the individuals comprising the new entity are the same, a new license would be required since the legal status of the entity assuming operation of the facility had changed.

However, as long as the legal entity responsible for the operation of the facility remained unchanged, ownership interests could be transferred without the need for obtaining a new license. Thus, in a situation where a major transaction in the stock of a corporate licensee occurred, a new license would not have to be issued as long as the existence of the corporation remained unchanged. The license would still be held by the corporation despite the fact that new additional shareholders have been added even if a new individual held a controlling share of that corporation's stock.

However, with the enactment of Minn. Stat. §144A.06, the ownership of interests held in a nursing home become more important and under that statute, a change in ownership of those interests could result in the expiration of the license

even if the licensee remains the same. As stated in the statute, the transfer of interests in the land, structure or in the facility could result in the expiration of the current license and necessitate that steps be taken to obtain relicensure. Even if the licensee is unchanged by these transactions, relicensure will be come necessary. The following examples will assist in clarifying this statement:

1. If an individual or other entity owning the land, or structure comprising the nursing home, but not responsible for its operation, sells these assets to another person or entity, relicensure will be required despite the fact that the licensee remains unchanged.

2. If an individual holds the lease to the land or structure but does not operate the facility, the termination of the lease or the subleasing to another entity would also require that the nursing home be relicensed.

3. If stock is transferred in a corporate licensee and if the size of the transaction falls within the requirements specified in the statute or rule, relicensure will again be necessary even though the corporate licensee is unchanged.

It should also be noted that the earlier examples used to distinguish between a change of ownership and a change of licensee would also require relicensure under the provisions of Minn. Stat. §144A.06.

The broadening of the situations which necessitate relicensure of a nursing home as the result of the enactment of Minn. Stat. §144A.06, emphasizes the need to assure that the Department has established rules which will promote the efficient processing of relicensure requests. Since the licensee's ability to maintain operation of a nursing home could be modified by transfers of interests not under the licensee's control, the Department has proposed rules

which will promote the processing of requests for relicensure by assuring that prior notice of a transfer is furnished to the Department and by placing time limits on the submission of licensure applications. It should be noted that Minn. Stat. §144A.06, subdivision 2 provides specific authority to the Commissioner to establish procedures governing the relicensure of nursing homes as the result of a transfer of interest.

Specific comments

> 3. Transfer of interests; notice. A controlling person, as defined in Minnesota Statutes, section 144A.01, subdivision 4, who transfers an interest in the nursing home shall notify the department, in writing, at least 14 days before the date of the transfer. The written notice must contain the name and address of the transferor, the name and address of the transferee, the nature and amount of the transferred interests, and the date of the transfer.

Notice requirement

Section 3. requires that the Department be notified, in writing at least 14 days before the transfer of any interest in a nursing home. This section also specifies the content of the written notice. The proposed rule provides notice, within the context of the licensure rules, of the requirements contained in Minn. Stat. §144A.06. Under these provisions, controlling persons are required to inform the Department of any transfer of interest in the nursing home. The term "controlling person" is defined in Minn. Stat. §144A.01, subdivision 4. While the term can apply to a wide range of individuals, it should also be kept in mind that not every individual who holds an interest in a nursing home, e.g., a shareholder in a corporation whose stock is listed on a major stock exchange, will be subject to the reporting requirements. The definition of controlling persons contains a number of exclusions and if an individual falls within one of those categories, the transfer of interest provisions would not apply. However, if an individual holds an interest in the nursing home and does not fall

within one of the exclusions, it is clear that this individual must provide notice to the Department if that interest is transferred to another entity or individual.

The proposed rule requires that the notice of a transfer of an interest be reported to the Department "at least 14 days before the date of the transfer". This provision, clarifies the language used in the statute which requires the reporting "of the transfer within 14 days of its occurrence". Prior notification is necessary in order to assure for the efficient processing of an application in the event relicensure is necessary. The rule is not inconsistent with the statutory language. It is the Department's position that requiring the reporting of a transfer of interest at least 14 days prior to the occurrence of the transfer is a valid interpretation of the statute. Minn. Stat. §645.08 (1) states:

> Words and phrases are construed according to rules of grammar and according to their common and approved usage;...

Webster's New Collegiate Dictionary (1975) defines "within" as meaning (a) before the end of (b) not beyond the quantity, degree, or limitations of. Using this as a guide to common and approved usage "within" could mean 14 days prior to transfer or 14 days after transfer. Due to the ambiguity of this term, the Department feels that it is necessary to clarify the term "within" by rule in order to make specific the provisions of this requirement. The Department believes that the reporting of a transfer of interest 14 days prior to its occurrence is also necessary in order to provide sufficient time to analyze the nature of the transfer to determine if relicensure will be necessary and, if necessary, to provide a reasonable time for processing the relicensure request. The Department also believes that such an interpretation of the term

"within" is not unreasonable. The identity of those individuals or entities considered to be a "controlling person" of the nursing home will be disclosed as part of the licensure process. In the majortiy of instances, controlling persons will possess significant interests in either the facility, the land or the structure. Thus, it is not unreasonable to require that these individuals provide advance notice of a transfer of any of these interests since the negotiations revolving around the terms and conditions of a transfer would normally take place well in advance of 14 days prior to the transfer date. In addition, the time provided by the advance notice will allow the Department additional time to study the nature of the transaction to determine if relicensure will be necessary and to also identify any impediments that would jeopardize the relicensure of the facility. For example, a transferee may be prohibited from becoming a controlling person in the nursing home as the result of the provisions of Minn. Stat. §144A.04, subdivision 4. In such a situation, relicensure would not be possible and, since the license will expire 90 days after a transfer, the possibility of the nursing home losing its license to operate becomes greater.

The provisions of the statute require that the license expire 90 days after the date of the transfer and the statute also requires that at least 60 day notice of the expiration of the license be provided by the Department. If the reporting of a transfer is allowed to be made 14 days after the occurrence, their would only be a 16 day period in which to evaluate the nature and extent of the transfer and to determine if relicensure will be required. In situations where additional information may be necessary to clarify the nature and extent of the transfer, a sixteen day time period to obtain and evaluate this additional information may not be sufficient. Further problems would occur if a transfer is reported beyond the 14 day time period or goes completely unreported and

not discovered until the time of license renewal. In the latter situation, it would be possible to have a situation where it is determined that a facility's license had expired. In such a case, the facility's certification in the Medicaid program would probably be void and the nursing home could be required to return moneys received through the State's Medicaid program. While the harsh consequences of the above example have been modified by the Department's interpretation of the time frames as directory as opposed to a mandatory requirement, the Department believes that it is still necessary to assure that advance notice of a transfer be provided. The enactment of Minn. Stat. §144A.06 emphasized the Legislature's concern as to the identity of individuals holding an interest in the nursing home. The provisions restricting certain controlling persons and managerial employees from having an interest in a nursing home also reflects the Legislature's concern to assure that prospective controlling persons comply with the provisions of the licensing law. In order to carry out the legislative intent and to provide for an efficient method for analyzing the nature of a transfer of interest and, if necessary, for processing the relicensure of the facility, advance notice will be necessary. The requirement that any transfer of an interest by a controlling person be reported to the Department is a clear indication of the intent of the Legislature to assure that the disclosure of controlling persons required as part of the license application process is maintained on a current basis. In addition, the requirement that the license expire upon the transfer of a significant interest in either the licensee, the land or the structure also is indicative of the Legislature's desire to assure that any individual holding or acquiring an interest in a nursing home be subject to Department analysis as well as identified for public scrutiny. The time frames established for the reporting of the transfers as well as for the processing of the license provide a mechanism to reasonably

implement the provisions of Minn. Stat. §144A.06 in a way which closely conforms to the legislative intent.

The continuity of a nursing home's licensed status is a major concern to the Department. The lapse in licensure would result in the closing of the home and necessitate the initiation of efforts to transfer residents to a licensed facility. Therefore, it is necessary to provide as much time as possible to evaluate the transfer and, if required, to arrange for the relicensure of the nursing home. The proposed rule provides 14 days for the Department to initiate its review of the transaction prior to the actual transfer of the interest. This period will allow time to identify any possible impediments to relicensure and to provide notice to the parties prior to completion of the transaction. The prior notice requirement emphasizes the need to assure that the transferor and the transferee of an interest consider the continuing licensure of the nursing home as part of the negotiation process. It cannot be assumed that relicensure will be the automatic consequence of a transfer. As will be discussed below, until relicensure is approved, the former licensee will be held accountable for the operation of the home up until the time the license is reissued. If the request for relicensure is denied or if any impediments to relicensure are not corrected prior to expiration, the former licensee will be responsible for taking the necessary steps to protect the health and safety of the residents during the transfer process.

Contents of the notice

The second sentence of section 3. specifies the content of the written notice to be provided to the Department. The statute requires that the name and address of the transferor and transferee as well as the nature and amount of the transferred interest be provided to the Department. As discussed previously,

it is the Department's position that the licensure rules should include all of the provisions to be met by an applicant for licensure. Thus, the Department feels that the duplication of the statutory language is necessary to assure compliance with these provisions.

This rule also requires that the date of transfer be provided. This information is necessary to determine if the notice is submitted on a timely basis and will also assist the Department in scheduling any necessary surveys that might be required prior to approving the relicensure of the nursing home. Since the routine licensure and certification surveys are scheduled in advance, adjustments in those survey schedules must be made to complete any additional surveys, such as a relicensure survey. The date of the transfer will provide the date that the license will expire and the advance notice will provide time for the necessary scheduling of surveys without unduly disrupting the day to day survey activity of the Department.

4. Transfer of interest; expiration of license. A transfer of interest will result in the expiration of the nursing home's license under the following conditions:

a. if the transferred interest exceeds ten percent of the total interest in the licensee, in the structure in which the nursing home is located, or in the land upon which the nursing home is located, and if, as the result of the transfer, the transferee then possesses an interest in excess of 50 percent of the total interest in the licensee, in the structure in which the nursing home is located, or in the land upon which the nursing home is located; or

b. if the transferred interest exceeds 50 percent of the total interest in the licensee, the structure in which the nursing home is located, or in the land upon which the nursing home is located.

Under either of these conditions, the nursing home license expires 90 days after the date of the transfer or 90 days after the date when notice of transfer is received, whichever date is later. If the current license expires before the end of the 90-day period, the licensee shall apply for a renewed license in accordance with section 2. The department shall notify the licensee by certified mail at least 60 days before the license expires.

Nature of transfers resulting in the expiration of the license

Minn. Stat. §144A.06 requires that a nursing home be relicensed if a transferred interest in the facility, the structure in which the facility is located, or the land upon which the structure is located exceeds 50% of the total beneficial interest in the facility, structure or land. In order to provide the necessary clarification of the term "facility" the proposed rule has substituted the term "licensee". As defined in the rule, the term "licensee" is the individual or entity to whom the license is issued. The licensee is responsible for the management and operation of the nursing home. As defined in Minn. Stat. §144A.01, subdivision 5, a nursing home means "a facility or that part of a facility which provides nursing care..." The use of the term "facility" in that section implies that the meaning is much broader than the mere physical structure; rather, it is equated to the entity providing or furnishing the nursing care. In order to conform with the statute, the inclusion of the term "licensee" is more appropriate. This interpretation will avoid problems distinguishing between the terms "building" or "facility". The use of the term "licensee" will also confirm the legislative intent underlying Minn. Stat. §144A.06 by assuring that the identity of those individuals actually operating the nursing home i.e. the licensee, is disclosed.

Section 4.b. incorporates the statutory provision calling for the mandatory relicensure of a nursing home if the transferred interest exceeds 50% in the licensee, the land, or the structure.

If a transferred interest exceeds 10% but not more than 50% of the total interest in the licensee, the structure or the land, the provisions of Minn. Stat. §144A.06 give the commissioner the option to require relicensure. In order to provide a more objective basis for determining whether relicensure

would be required, the Department has developed criteria in section 4.a. of the proposed rule. That rule takes into consideration the end result of the transfer of the interest; if the transferee, as a result of the transfer, then possesses an interest in excess of 50% of the total interest in the licensee, in the structure of in the land, relicensure will be required. For example, a corporate licensee has 3 shareholders holding 30%, 30% and 40% of the stock, and if one of the shareholders sells all of the stock to the individual holding 40%, that individual would exceed the 50% threshold established by the rule and relicensure would become necessary.

The rationale for the Department's rule is based on the intent of the statute to assure that persons having interests in either the licensee, the structure or the land are disclosed and to assure that those individuals are not precluded from operating a nursing home in violation of the statutes. It should be noted that transfers of interests other than those in the licensee, the land or the structure would not require relicensure even if the transfer exceeded 50% of that interest. The statute limits the need for relicensure to those interests which have an immediate impact on the resident. The holder of the land or structure could significantly affect the operation of the nursing home by terminating a lease or other arrangement with the licensee. This would result in a change in the operator or, possibly could result in the closure of the facility, if the owner decided to utilize the premises for another purpose. In order to assure that the individuals with the power to make such changes are identified, the proposed rule will require relicensure if an individual who did not initially possess a majority interest, obtains a majority interest as a result of a transfer. The individual holding a majority interest has increased the control that can be exercised over the operation of the nursing home. The

proposed rule only applies to those situations when a person became a majority holder of an interest in the land, structure or licensee. For example, the land and structure is owned by three individuals having a 20%, 20% and 60% interest and the holder of a 20% interest sells the interest to the individual having the 60% holding. In this instance, the ability to control the majority of the interests is unchanged and relicensure will not be necessary.

The Department believes that this rule provides the necessary criteria upon which to base a decision to require relicensure and also believes that limiting relicensure to situations in which an individual or entity becomes the majority holder of the interest is reasonable.

Date of expiration

The last paragraph of section 4. provides for the expiration of the license 90 days after the date of transfer or 90 days after the notice of transfer is received, whichever period of time is greater. This provision does differ from the language in the statute which indicates that the license shall expire 90 days after the date of the transfer. It is the Department's position that the time frame specified in the statute is directory and not mandatory. Thus, the Department has the discretion to implement this provision in such a manner to assure that the provisions and the intent of the statute are met. It is the Department's position that the additional language providing for the expiration of the license after receipt of a notice of transfer fully meets the intent of the statute and provides for an appropriate and reasonable implementation of its provisions.

As previously discussed, the proposed rule requires that advance notice of the transfer be received and assuming general compliance with that provision, the

great majority of licenses would expire 90 days after the date of the transfer. However, it has been the Department's experience that notices of a change in the licensee of a health care facility are not always provided to the Department until after such changes take place or shortly before the transfer is scheduled to be made. Thus, without the added language in the proposed rule, there could be situations when a notice is submitted to the Department after the license has already expired under the provisions of Minn. Stat. §144A.06. If the statute is construed to contained mandatory time frames, the result would impose financial hardship on the facility as well as possibly adversely affecting the residents. If the license had expired, any moneys provided to the facility under the Medical Assistance Program may have to be repayed since the facility's ability to participate in that program is contingent upon it being a licensed nursing home. In addition, the Department would have to initiate steps to transfer residents to a licensed nursing home. However, the proposed rule would alleviate these results by providing time to complete the necessary steps to obtain relicensure.

In a recent Minnesota Supreme Court decision regarding the distinction between mandatory and directory time frames, the Court stated:

> We have observed in several cases that statutory provisions defining the time and mode in which public officers shall discharge their duties, and which are obviously designed merely to secure order, uniformity, system and dispatch in public business, are generally deemed directory.
>
> - Benedictine Sisters Benev. Association vs Pettersen,
>
> 299 N.W. 2d 738, 740 (1980)

The purpose of this statute's time frames are to ensure that an adequate period of time is available to the Department to process the relicensure request and, in those situations where they may be an impediment to such relicensure, to take measures to adequately protect the safety and well being of the resident of that facility. It is the Department's position that the time frames fall within the realm of the agency's orderly, systematic and effective performance of its duties.

Renewal license required

The last paragraph also states that if the license expires prior to the end of the 90 day period, the licensee will also be required to complete the license renewal process.

Minnesota Statutes, §144A.05, relating to license renewals, states:

> Unless the license expires in accordance with section 144A.06 or is suspended or revoked in accordance with section 144A.11, a nursing home license shall remain effective for a period of one year from the date of its issuance....

That statute clearly indicates that a one year period is the longest licensure period available. The failure to obtain a renewal license would result in the termination of that facility's license. Thus, in situations where a license is scheduled to expire prior to the 90 day period provided in Minn. Stat. §144A.06, it will be necessary to provide for the continuity of a license by obtaining its renewal.

The proposed rules governing license renewals require that the application be submitted at least 60 days prior to the date of the license expiration. Situations could occur when the decision to sell the nursing home is made after that submission date or when the scheduled date of the transfer is set after the start of the nursing home's next licensure year. In those cases, failure

to obtain a renewal license would result in the nursing home losing its licensed status.

The Department believes that the rule does not impose an unreasonable burden on the licensee or on a prospective applicant for licensure. It is the Department's responsibility to assure that a nursing home maintains its license to operate in order to fully protect the residents therein. This rule may result in the submission of licensure fees for the obtaining of the renewal as well as for the processing of the license; however, the Department does not view this to be an excessive burden. The licensee and the prospective licensee are aware of the expiration date of the license and can either allocate responsibility for payment of the renewal fees as part of the sales agreement or set the date for the transfer of the license at a time where an overlap with the licensure year end will not occur.

Notification of expiration

The last sentence in this paragraph conforms to the provisions contained in Minn. Stat. §144A.06. The Department believes that this reference is necessary in order to provide notice to the licensee as to the need for relicensure. As explained above, relicensure of the facility could be required even though the licensee remains unchanged. The inclusion of this rule will assure that all of the requirements governing the processing of a transfer of interest is contained in one location.

> 5. Transfer of interest; relicensure. A controlling person may apply for relicensure by submitting the license application form at least 45 days before the license expiration date. Application for relicensure must be accompanied by a license fee based upon the formula established in 7 MCAR S 1.701, Exhibit I. If the applicant for relicensure is a corporation, it shall submit a copy of its current articles of incorporation and bylaws with the license application. A foreign corporation shall also submit a copy of its certificate of authority to do business in Minnesota. The

department shall relicense the nursing home as of the date the commissioner determines that the prospective licensee complies with Minnesota Statutes, sections 144A.02 to 144A.16 and 1.012., unless the applicant requests a later time. The former licensee remains responsible for the operation of the nursing home until the nursing home is relicensed.

Application forms

Section 5 requires that the applicant for relicensure complete the application form supplied by the Department. This form will be identical to the form used for initial and renewal licensure.

Time period for submission

The statute and the rule requires that the Department notify the licensee at least 60 days in advance of the expiration of the license. Thus, there is not an extended period of time to process the application or to obtain any necessary clearances that may be required. For that reason, the Department believes that it is necessary to receive the completed application at least 45 days prior to the expiration of the license. This will provide the licensee or prospective applicant a reasonable period of time to complete and return the application. If the licensee is the same, the majority of information on the license application will remain the same. The only major area of change will be in the disclosure of the controlling persons. However, the Department believes that this information should be readily available to the licensee by contacting the transferor of the interest who would have been identified on the previous application. If the transfer will also result in a change of the licensee, additional changes will have to be made in the application, particularly in the area of the disclosure of managerial employees. However, the Department still believes that the 2 week period of time provided for the application is reasonable. It can be assumed that as part of the negotiations

leading to the transfer and subsequent relicensure, the parties have identified the controlling persons as well as the managerial employers who will assume duties once the license has changed. Thus, completion of the application form and submission to the Department should not place an unreasonable burden upon the applicant.

Licensure fees

The rule will require that each application for a license be accompanied by the fee prescribed in 7 MCAR §1.701, Exhibit I. This requirement is mandated by the provisions of Minn. Stat. §144A.01.

Submission of articles of incorporation

The rule, in accordance with the provisions of Minn. Stat. §144A.03, requires that, if the applicant for relicensure is a corporation, a copy of the articles of incorporation and bylaws be submitted with the application. Foreign corporations will also be required to submit a copy of its certificate of authority to do business in Minnesota.

Issuance of the license

This section clarifies the requirements regarding the effective date of a new license. Minn. Stat. §144A.06 establishes specific requirements that must be met by the applicant prior to the relicensing of the nursing home: the nursing home must comply with the renewal licensure provisions of Minn. Stat. §144A.05 which includes the provision assuring that the facility is in compliance with the statutes and the rules; and any uncorrected violations must be eliminated. The statute does allow the Commissioner to waive correction of violations under the provisions specified in the statute. If a waiver is granted, this would be part of the Commissioner's determination as to compliance with the rules and statutes and would not jeopardize relicensure.

The proposed rule does, however, state that until the facility has been relicensed, the former licensee will be held accountable for operation of the nursing home. This requirement is necessary to fully protect the residents in the nursing home as well as to provide notice to the parties that relicensure cannot be taken for granted. If the Department rejects the application for relicensure, the operation of the nursing home must be provided for until the expiration date occurs. Thus, the former licensee must be held accountable to fully assure that the necessary services are provided to the residents. The Department believes that the parties involved in the negotiations can take this provision into consideration by providing that the agreement is not finalized until such time as relicensure is attained. The statute, by providing that licensure expire 90 days after the transfer, contemplates the requirement contained in the rule. The 90 day period provides time to evaluate the parties that will be controlling persons to assure that the individuals are acceptable. Since the license was not set to expire at the time of the transfer, the legislature must have assumed that the former licensee will continue to operate the facility until the relicensure request is approved. This provision is necessary to assure that the Department has a person or entity to be held responsible for the operation of the nursing home during this 90 day period.

Amendment to the license

> 6. Amendment to the license. If the nursing home requests changes in its licensed capacity or in the level of care provided, it shall submit the request on the application for amendments to the license. This application must be submitted at least 30 days before the requested date of change and if an increase in the number of licensed beds is requested, accompanied by a fee based upon the formula established in 7 MCAR S 1.701, Exhibit I. The amendment to a license is effective for the remainder of the nursing home's licensure year.

Application form

7 MCAR §1.044 R. provides that a nursing home is subject to the Department's evaluation and approval of the physical plant and its operational aspects prior to a change in ownership, classification, capacity or services. The proposed rule will require that an application be submitted to the Department 30 days before a change is made in the licensed capacity or the level of care provided in a nursing home. The application would specify the facility's current licensed capacity and current level of care, e.g., nursing home or boarding care home beds; and indicate the nature of the requested change. Additional information such as the location of the rooms affected, the requested date of change, and the necessary facility identification data would also be included on the form.

Time period for submission

The rule will require that the application be submitted at least thirty days prior to the requested date of change. This time period is necessary in order to verify that the application is complete and to provide time for the scheduling of any necessary surveys. Such surveys could be required if additional beds are requested or if room locations would change as the result of the change in capacity or level of care. In addition, it will also be necessary to assure that any requested change complies with the requirements of the Certificate of Need Law.

Licensure fees

The fee rule, 7 MCAR §1.701 provides for a $12 per bed fee if the licensed capacity of a nursing home is changed during the term of the license. The proposed rule references the provision of the fee rule.

Approval by the Department

The last sentence of section 6 indicates that an amendment would be effective for the remainder of the facility's licensure year. Granting of the request for an amended license would, of course, be contingent upon the Department's approval of the request. 7 MCAR §1.044 R., discussed above, states that Departmental approval is necessary for any change in classification or capacity.

License conditions or limitations

General comments

The nursing home licensure law allows the Commissioner to impose conditions or limitations on the license issued to a nursing home. Minn. Stat. §144A.02 states, in pertinent part:

> . . . The license may also specify the levels of nursing care which the facility is licensed to provide and shall state any conditions or limitations imposed on the facility in accordance with the rules of the commissioner.

The provisions of 7 MCAR §1.044 Y. 7.-12 consist of the rules governing the imposition of a condition or limitation on the license of a nursing home. The proposed rules identify the reasons for these license restrictions, the types of conditions or limitations, and various procedural requirements relating to the issuance of the condition or limitation and the appeal procedure.

> 7. Issuing conditions or limitations on the license. The department may attach to the license any conditions or limitations it considers necessary to assure compliance with the laws and rules governing the operation of the nursing home or to protect the health, treatment, safety, comfort, and well-being of the nursing home's residents. A condition or limitation may be attached when a license is first issued, when it is renewed, or during the course of the licensure year.

General comments

A conditional or limited license would be issued in situations when a licensee is not able to fully comply with the licensure rules, when the nursing home must limit admission to a specific type or number of residents or in other situations when additional control over the licensee is necessary to fully protect the interests of the residents. The Department views the issuance of conditional or limited licenses as an additional control to regulate the performance of a nursing home licensee by clearly stating the conditions or limitations upon which continued licensure will be dependent. Failure to comply with any established condition or limitation could result in the loss of the license. For example, during the surveys to process a transfer of interest, a number of deficiencies may be noted which could not be remedied prior to the requested date for relicensure. While the Department could temporarily waive compliance with those provisions in accordance with the provisions of Minn. Stat. §144A.06, subdivision 2., it might also be appropriate to issue a conditional license requiring completion within a specified time period. Similarly, a conditional license could also be issued to compel the licensee to take necessary corrective action to remedy a deficiency in the facility. For example, if a licensee has received a number of correction orders and/or penalty assessments for a specific item and fails to remedy the problem or is unable to consistently maintain an acceptable state of compliance, the issuance of a conditional license may be an appropriate incentive to compel the licensee to attain compliance. In this instance, a conditional license would notify the licensee of the steps to be taken and provide a time frame for the completion of the required activity. Failure to comply with the conditions would necessitate the initiation of proceedings to suspend or revoke the license.

Limitations could be imposed on the license in situations where it is necessary to modify the type or number of residents admitted to a nursing home. The number of residents that can be legally admitted to a nursing home is controlled by the licensed bed capacity stated on the license. However, situations may arise which would necessitate placing additional restrictions on the type or number of residents to be admitted. For example, a nursing home may be undergoing physical plant repairs and, during the construction, it may be necessary to prohibit admissions to a specific wing or section of the facility. In this instance, a limitation on the license would preclude admission to these areas until such time as the construction is completed.

Another instance for which a limited license could be issued would be in situations where the types of residents to be admitted could be restricted. The provisions of MHD 45(e) state that a nursing home cannot admit an individual for whom care cannot be provided in keeping with their known physical, mental or behavioral condition. This rule imposes on the nursing home the responsibility to assure that admissions are limited to only those individuals capable of being cared for in accordance with the staff and other resources of the facility. If a nursing home is not able to internally impose restrictions, it may be necessary for the license to specify that certain types of residents, e.g., individuals in need of physical therapy, cannot be admitted. Another limitation would occur in areas where certain types of individuals, such as the severely handicapped, might have to be located for the resident's safety.

Authority and criteria

Consistent with the provisions contained in Minn. Stat. §144A.02, Section 7 of the proposed rule clearly states the Department's authority to issue conditional or limited licenses which are necessary to assure compliance with the licensure

laws or rules or to protect the interests of the residents. The underlying criteria for deciding whether or not a conditional or limited license is to be issued is directly tied to the Department's responsibility for monitoring and regulating nursing homes. Once a license to operate a nursing home is issued, the Department is responsible for assuring that compliance with the applicable laws and rules is attained and maintained by the licensee. In addition, the licensure rules of the Commissioner must assure for the health, treatment, comfort, safety and well-being of nursing home residents. Thus, the responsibilities of the Commissioner are directly tied into the protection of nursing home residents, and the ability to issue conditional or limited licenses is a mechanism that can be utilized to meet that responsibility. The Commissioner cannot issue a conditional or limited license unless such issuance is necessary to assure compliance with the laws or rules or for protecting the interests of the residents.

Since the need for the issuance of a conditional or limited license could arise any time during the licensure year of a nursing home, the proposed rule provides for the issuance at the time of the initial licensure or at the time of license renewal or any time during the course of the licensure year. This is necessary to assure that the protections afforded by conditioning or limiting the license can be enacted promptly by the Department.

8. Reasons for conditions or limitations. In deciding to condition or limit a license the department shall consider at least the following:

a. the nature and number of correction orders or penalty assessments issued to the nursing home or to other nursing homes having some or all of the same controlling persons;

b. the commission of illegal acts by any of the controlling persons or employees of the nursing home;

c. the performance of any acts contrary to the welfare of the residents in a nursing home by a controlling person or employee;

d. the condition of the physical plant or physical environment; or

e. the existence of any outstanding variances of waivers.

General comments

Section 7 establishes the criteria governing the decision to issue a conditional or limited license, i.e. the need to assure compliance with laws or rules governing the operation of the nursing home or the need to protect the interests of the nursing home residents. Section 8 enumerates some of the specific reasons which the Department could consider in the decision making process to determine if conditional or limited licensure would be appropriate. It should be noted that the specific reasons contained in subsections a-e are descriptive as opposed to an absolute listing of the reasons that would necessitate the issuance of a conditional or limited license.

Issuance of correction orders or penalty assessments

Subsection a. provides that one of the factors that the Department could consider in determining whether the issuance of a conditional or limited license would be appropriate is the nature and number of correction orders or penalty assessments issued to a nursing home or to other nursing homes having some or all of the same controlling persons. The correction order/penalty assessment system described in Minn. Stat. §144A.10 is the Department's primary enforcement mechanism to assure compliance with the licensure laws and rules. In the majority of instances, the issuance of orders to a nursing home has resulted in prompt corrective actions by the facility since the failure to comply with a correction order would subject the facility to a monetary fine. However, in certain situations it may be necessary to utilize an additional control, e.g. the issuance of a condition or limitation, to assure that steps are being taken to obtain compliance. For example, a nursing home may have been provided an

extended period of time to complete some major remodeling and during that period, an area may not be available for resident use. A limitation on the license would clearly indicate that such an area would not be available for resident occupation until such time as the necessary construction work had been completed and approved by the Department. Another example would be a situation which involves a nursing home with a history of numerous correction orders or repeat violations or assessments. The ultimate sanction against a nursing home for failure to comply with the licensure rules would be the initiation of proceedings to suspend or revoke the facility's license. However, the Department could, as an intermediate step between the issuance of orders and assessments and initiation of revocation proceedings attach a condition to the license. Such a condition would clearly notify the facility's licensee that changes must be made and conditions improved. A violation of the condition would subject the facility to revocation proceedings.

The issuance of orders or assessments to other nursing homes with some or all of the same controlling persons could also result in the issuance of a condition or limitation to a nursing home. The Department feels that this requirement is necessary to assure that appropriate controls can be maintained over nursing homes operated by the same controlling persons. The provisions relating to the disclosure of controlling persons and the prohibition excluding certain individuals from being controlling persons of a nursing home evidences a strong legislative intent to monitor the activities of these individuals. It is not uncommon for a number of nursing homes to be operated under the auspices of a central organization and, if problems with the central organization arise, it might be necessary for the Department to impose conditions or limitations on all facilities operated by that organization. For example, if the organization fails to provide necessary equipment, supplies, or staffing to a particular

nursing home, such actions could be indicative of a pattern of problems that might be found in other facilities. In order to fully protect the residents in all the facilities operated by the same controlling persons, a condition or limitation could be attached to the license. Such action by the Department would place an obligation on the controlling persons to remedy the problems in the specific facility and also protect the interests of residents in all facilities operated by the same controlling persons. The Department does not envision that conditions or limitations would be frequently issued under these conditions. However, the expansion of the number of facilities operated under the same form of common ownership makes it important for the Department to have some enforcement control in the event problems do occur.

Illegal acts by controlling persons

Subsection b. relates to the commission of illegal acts by any of the controlling persons or employees of the nursing home. Minn. Stat. §144A.04, subdivision 4 and 6 as amended by Minn. Laws 1982, Chapter 633, prohibit a nursing home from having a controlling person or managerial employee who was convicted of a felony relating to the operation of the nursing home or directly affecting resident safety or care. In this situation, it may be appropriate for the Department to attach a condition to the nursing home's license specifically excluding such individuals from serving in the facility. The issuance of a condition would clearly place the facility on notice that a violation could subject the facility to license revocation.

Acts contracy to the welfare of residents

Subsection c. relates to the performance of any acts contrary to the welfare of the residents by a controlling person or employee. This provision is again illustrative of the types of problems that could result in the decision to

issue a conditional or limited license. The Department can control, in many instances, the performance of acts contrary to the welfare of residents through the correction order/penalty assessment system. In addition, Minn. Stat. §144A.12 also provides the Commissioner the power to request injunctive relief to curtail illegal activities in violation of the licensure laws. However, the ability to attach a condition or limitation to a license provides the Department with an additional remedy to prevent the continuation of such acts. Continued licensure would become contingent upon compliance with any such conditions or limitations attached to the license. For example, if a nursing home was utilized for other services, such as day care, or providing meals to community members and if these services adversely impacted on the facility's responsibility to meet the needs of the residents, a license condition prohibiting such activities would be appropriate.

Physical plant deficiencies

Subsection d. relates to problems associated with the physical plant or environment. This subsection is also illustrative of the issues that could result in the decision to issue a limited or conditional license. If the issuance of correction orders did not provide a sufficient incentive to alleviate problems, making licensure contingent upon the corrections would be appropriate. Another example would be placing limitations on the number or types of resident that could be admitted to a specific room or area in the facility due to resident's physical handicaps or to the size of the particular room.

Outstanding variances or waivers

Subsection e. relates to the existence of outstanding variances or waivers. While compliance with variance or waivers is controlled by the provisions of 7 MCAR §1.044 X., the Department might also want to place a limitation or condition on the license to guarantee compliance or to specifically notify the

public as to the existence of a variance or waiver.

Summary

Section 8 attempts to establish some objective illustrations of the factors that would be considered in deciding whether the issuance of a variance or waiver would be appropriate. The underlying criteria would still be the standards contained in section 7 requiring the need to assure compliance with the laws or rules or to protect the interests of the residents.

> 9. Types of conditions or limitations. The types of conditions or limitations that may be attached to the license include at least the following:
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> a. restrictions on the number or types of residents to be admitted or permitted to remain in the nursing home;
>
> b. restrictions on the inclusion of specified individuals as controlling persons or managerial employees; or
>
> c. imposition of schedules for the completion of specified activities.

General comments

Section 9 is also intended to be descriptive as opposed to an all-inclusive listing of the types of conditions or limitations that could be attached to a nursing home's license. The nature of a condition or limitation can be specifically identified only after the specific facts involving a situation are known and a solution to the problem agreed upon. It would be impossible to develop a listing of all of the types of conditions and limitations that might be used by the Department. However, the criteria contained in section 7 will be the benchmark upon which the appropriateness of a condition or limitation will be measured. The condition or limitation must assure for compliance with the licensure laws or rules or protect the health, treatment, safety, comfort and well-being of the nursing home residents.

Restrictions on types and numbers of residents

Subsection a. describes a condition or limitation that would restrict the

number or types of residents to be admitted or permitted to remain in the nursing home. This type of condition or limitation would be used in situations when an area of a nursing home would not be available for resident occupation during construction or remodeling or in situations where the resources of a nursing home to appropriately care for specific types of individuals are not available.

Limitations on controlling persons or managerial employees

Subsection b. describes a condition or limitation which would prohibit specified individuals from being a controlling person or managerial employee of a nursing home. This type of condition or limitation would be used in situations when an individual was precluded from being a controlling person or managerial employee in accordance with the provisions of Minn. Stat. §144A.02. The issuance of a conditional or limited license would assure that the statutory provision is complied with by the licensee of the nursing home.

Schedule for completion of specified activities

Subsection c. describes a condition or limitation that would impose upon the license a schedule for the completion of specified activities. This type of condition or limitation would be used when it is necessary to assure compliance with specified activities in a period of time. The schedule would clearly notify the licensee that continued licensure would be contingent upon the satisfactory completion of the described activities.

10. Statement of conditions or limitations. The department shall notify the applicant or licensee, in writing, of its decision to issue a conditional or limited license. The department shall inform the applicant or licensee of the reasons for the condition or limitation and of the right to appeal. Unless otherwise specified, any condition or limitation remains valid as long as the licensee of the nursing home remains unchanged or as long as the reason for the condition or limitation exists. The licensee shall notify the department when the reasons for the condition

or limitation no longer exists. If the department determines that the condition or limitation is no longer required, it shall be removed from the license.

The existence of a condition or limitation must be noted on the face of the license. If the condition or limitation is not fully stated on the license, the department's licensure letter containing the full text of the condition or limitation must be posted alongside the license in an accessible and visible location.

Sections 7 to 9 described the need for and the types of conditions or limitations that could be imposed by Department. The remaining 3 sections of this particular section of the proposed rules deal with the procedural aspects of attaching a condition or limitation, the effect of a condition or limitation and the appeal rights of the nursing home.

Notification

The first paragraph of section 10 relates to the notification to the licensee or applicant for licensure of the decision to issue a conditional or limited license and the period of time during which such conditions or limitations will remain effective.

Content of notice

In order to assure for a proper notice to the applicant or to the licensee, the Department will be required to inform that individual of the decision to issue a conditional or limited license. As part of that notice, the Department will state the reasons underlying the decision to issue a conditional or limited license. This will provide the licensee or applicant an explanation of the Department's reasons and provide information upon which decisions can be made and implemented to alleviate the problem resulting in the condition or limitation. The notice will, of course, notify the licensee or the applicant with the right to appeal the Department's decision.

Effective time period for a condition of limitation

The period of time during which a condition or limitation will be effective is described in the second sentence of the first paragraph. The first part of that sentence provides that the condition or limitation will continue for as long as the licensee of the nursing home remains unchanged. In certain situations, it may be necessary for the condition or limitation to be permanently affixed to the license as long as the licensee remains unchanged. Thus, the condition would be attached to the initial license and continue to be placed on the license at the time of the annual renewals. However, the Department believes that the provisions contained in the second part of this sentence would be the general rule. This ties the duration of the condition or limitation to the existence of the problem which necessitated the issuance of this license restriction. If the licensee can demonstrate that compliance has been attained, the continued need for condition or limitation would be reviewed by the Department. The rule will place the burden on the licensee to notify the Department when the problems resulting in the condition or limitation have been corrected. This would then initiate the Department's verification of the licensee's claim and, if the problem was resolved, the Department would remove the condition or limitation.

Statement on the license

The second paragraph of section 10 requires that the condition or limitation be noted on the license issued by the Department. The requirement that the condition or limitation be specified on the license is mandated by the provisions of Minn. Stat. §144A.02, subdivision 1. If it is not possible to include the full text of the condition or limitation on the license, the rule will require that the licensure letter of the Department, which would contain

the full text of any condition or limitation, be posted alongside the license in an accessible and visible location. In certain situations, it would not be possible to fully state the condition or limitation on the license. In those situations, the license would reference the existence of a condition or limitation and refer to the licensure letter. The posting of the licensure letter in these situations would assure compliance with the statutory provision as well as assuring that notice of any condition or limitation is available to the residents and public. Posting the letter alongside the license in an accessible and visible location will assure that the condition or limitation is fully disclosed.

> 11. Effect of a condition or limitation. A condition or limitation has the force of law. If a licensee fails to comply with a condition or limitation, the department may issue a correction order or assess a fine or it may suspend, revoke, or refuse to renew the license in accordance with Minnesota Statutes, section 144A.11.
>
> If the department issues a correction order, it shall determine the time allowed for correction. That time period must be specified in the correction order and must be related to the nature of the violation and the interests of the residents. If the department assesses a fine, the fine is $250. The fine accrues on a daily basis in accordance with Minnesota Statutes, section 144A.10.

Effect of condition or limitation

Section 11 describes the effect of a condition or limitation and also describes the consequences of a licensee's non-compliance with the terms of the condition of limitation. The rule provides that the condition or limitation would have the force of law. The granting of a condition or limitation provides to the licensee the right to operate the nursing home which would normally not have been granted without such condition or limitation. Since the condition or limitation was necessary to assure compliance with the licensure laws or rules or to protect the interests of the nursing home residents, it is necessary that such condition or limitation impose upon the licensee the obligation to

comply with the stated provisions. The existence of a condition or limitation modifies the responsibilities of the licensee by requiring compliance with the condition or limitation as well as with the licensure laws and rules. In order to fully assure that compliance with the licensure law and rules will be attained and to protect the interests of the residents, it is required that any conditions or limitation have the force and effect of law.

Non-compliance with a condition or limitation

The second sentence of the first paragraph details the consequences of noncompliance with the terms of the condition or limitation. The rule provides the Commissioner two options: the issuance of a correction order or penalty assessment or the initiation of proceedings to suspend or revoke the nursing home's license. The Department believes that it is necessary to maintain the ability to issue correction orders to compel compliance with the terms of a condition or limitation. Without this provision, the only sanction would be the initiation of a license revocation hearing. The issuance of a license condition or limitation places an obligation on the licensee to comply with those terms or face the loss of the license. However, it would not be inconceivable to have a situation when the licensee may not be in total compliance with the terms of the condition or limitation but such noncompliance would not justify a revocation of the license. This is, of course, a factual determination but in these situations the issuance of a correction order within a stated period of time for compliance might be sufficient for the licensee to regain compliance. If the order is not complied with, a penalty assessment would be issued. The intermediate sanction of the issuance of a correction order and possible penalty assessment would protect the residents of the facility from possible relocation if revocation was the only available sanction for noncompliance.

Issuance of correction orders

The second paragraph of section 11 relates to the procedures that would be followed if a correction order or penalty assessment mechanism was utilized to enforce compliance with the terms of a license condition or limitation.

The provisions of Minn. Stat. §144A.10, subdivision 4 require that the Commissioner establish by rule a schedule of allowable time periods for correction of a nursing home deficiency. As will be discussed later, the development of the schedule of allowable time periods is premised as the nature of the rule and the steps that a nursing home would be required to follow to attain compliance. However, since the actual terms of a condition or limitation would not be known until actually issued by the Department, a prospective setting of a time period is not possible. However, in order to provide an objective criteria to be followed in selecting an allowable time period for correction, the proposed rule will require that the Department take into consideration the nature of the violation and the interests of the residents. This analysis will provide a reasonable basis for establishing the time period since it will include a consideration of the steps to be taken by the facility as well as the impact that continued noncompliance would have on the nursing home residents.

Issuance of a penalty assessment

Minn. Stat. §144A.10, subdivision 6 requires that the Commissioner promulgate in rule a schedule of fines. The maximum fine is $250 per day. The schedule of fines is based on the risk of harm to which residents would be subject if a correction order was not complied with. However, since the nature of the condition or limitation is not known until issued, a prospective setting of a fine is also not possible. For that reason, the Department has specified in the proposed rule that the maximum fine amount of $250 per day will be assessed if a nursing home fails to comply with a correction order issued as

a result of noncompliance with the terms of a condition or limitation. The Department believes that the maximum fine amount is appropriate since the granting of the license with the condition or limitation provided the licensee the right to operate or to continue to operate the nursing home. Without the issuance of the condition or limitation, the probable result would have been the denial of the license or the initiation of proceedings to revoke the license. The facility's failure to comply with the condition or limitation is a serious violation of the licensure provisions and the imposition of the maximum daily fine will be an incentive to regain compliance as well as serving as a deterrent to avoid a situation of noncompliance.

The last sentence of the second paragraph provides notice that any fine will accrue on a daily basis as required by the provisions of Minn. Stat. §144A.10.

> 12. Appeal procedure. The applicant or licensee may contest the issuance of a conditional or limited license by requesting a contested case proceedings under the Administrative Procedure Act, Minnesota Statutes, sections 15.0418 to 15.0426, within 15 days after receiving the notification described in 10. The request for a hearing must set out in detail the reasons why the applicant contends that a conditional or limited license should not be issued. Except in a proceeding challenging the decision to condition or limit a current or renewal license, the applicant has the burden of proving that an unrestricted license should be issued.

Time period for submission of notice to appeal

Section 12 provides the licensee or applicant for licensure the right to contest the Department's decision to issue a conditional or limited license. The rule provides that any challenge to the issuance of a conditional or limited license would be made by requesting a contested case proceeding under the provisions of the Administrative Procedures Act. The rule will require that the notice of appeal be submitted within 15 days of the receipt of the notice from the Department. The Department believes that the 15 day period is necessary in order to

assure for a prompt determination of the licensure status of a facility. The fifteen day period is identical to the period of time provided for the appeal of a penalty assessment, Minn. Stat. §144A.10, subdivision 8, or for requesting an appeal from the denial of a variance or waiver request, 7 MCAR §1.044 X.7. The Department does not believe that the 15 day time period would impose an unreasonable demand on the licensee or the applicant for licensure and also believes that the importance in clarifying the licensure status of a nursing home justifies this time period.

Content of Notice

The rule will also require that the request for a hearing set out in detail the reasons why the conditions or limitations should not be placed on the license. Section 10 requires that the Department state its reasons for conditioning or limiting the license. Thus, the applicant or licensee will be fully appraised as to the reasons supporting this decision. If the condition or limitation is not considered appropriate, the reasons to support this conclusion should be furnished to the Department. The rule would allow for a clarification of the issues being appealed and could possible lead to informal discussions between the parties which would eliminate the need for the formal hearing. The licensee or the applicant for licensure would be in a position to readily state the grounds for requesting the appeal and this provision would not present a hardship to the parties.

Burden of proof

The final sentence of the rule relates to the burden of proof in the contested case proceeding. The Department will have the burden of proof in situations when the condition or limitation is placed on a current license or at the time a license is renewed. However, the rule places the burden of proof upon

an applicant for a license and will require that this party demonstrate that they are entitled to an unrestricted license. The rule is in accord with a Minnesota Supreme Court decision entitled In re Application of the City of White Bear Lake, 247 N.W. 2d 901 (1976). The Court stated:

> ..."In administrative proceedings, the general rule is that an applicant for relief, benefits, or a privilege has the burden of proof." 73 C.J.S., Public Administrative Bodies and Procedures, §124. In this State the burden of proof generally rests on the one who seeks to show he is entitled to the benefits of a statutory provision. 3A Dunnell, D.g. (3 ed.) § 3468 and 3469.
>
> -Id,at 904

The above statement clearly holds that if the applicant for license believes that they have the right to receive an unconditional or unlimited license, that party will have the burden to establish their right to the license.

7 MCAR §1.048A.8.c.(7) Record of patients'/residents' funds - personal fund account

> (7) Upon the request of the patient or resident or the patient's or resident's legal guardian or conservator or representative payee, the nursing home or boarding care home shall return all or any part of the patient's or resident's funds given to the nursing home or boarding care home for safekeeping, including interest, if any, accrued from deposits. The nursing home or boarding care home shall develop a policy specifying the period of time during which funds can be withdrawn ~~on each day of the week~~. This policy must ensure that the ability to withdraw funds is provided in accordance with the needs of the residents. The nursing home or boarding care home shall notify patients and residents of the time periods during which funds can be withdrawn. The nursing home or boarding care home shall establish a procedure allowing residents to obtain funds to meet unanticipated needs on days when withdrawal periods are not scheduled. Funds kept outside of the facility shall be returned within five business days.

The proposed amendment to this section of the personal funds rule will modify the requirement relating to the time periods during which residents can withdraw funds from their accounts in a nursing home or boarding care home. The former rule required that a nursing home and boarding care home specify a period of time during which funds can be withdrawn on each day of the week. As written, this rule presented difficulties to a number of nursing homes and boarding care homes since weekend staff coverage was normally not provided for the facility's business office, where the fund accounts are generally maintained. The concerns expressed to the Department involved the additional costs that would be incurred to provide business office coverage during weekends and holidays as well as concerns relating to the proper handling of fund accounts if other individuals, not familiar with the bookkeeping procedures, were authorized to dispense funds during the weekends. Since the rule was adopted, the Department has granted 29 waivers from the provisions of this rule. Those waivers were granted as the result of the facility's difficulties

in complying with the rule. In each instance, the granting of the waiver was based on the equivalent measures that would be taken by the facility to provide residents access to the funds. These equivalent measures would include notification to the residents that funds would not normally be available on weekends and would also often provide for some means by which residents could obtain funds if an unexpected situation arose.

The number of waivers granted by the Department as well as the number of questions received regarding this rule has prompted the Department to reassess the requirements that funds be available for withdrawal on a seven day a week basis. The proposed amendment reflects the Department's belief that daily withdrawal need not be mandated as a minimum requirement. Under the provisions of the proposed rule, the nursing home or boarding care home will still be required to establish a policy specifying the periods of time during which funds can be withdrawn. However, the rule will now specifically require that the policy be developed in accordance with the needs of the residents. The Department believes that past practices in the facility will provide an appropriate basis to calculate resident needs and the Department would encourage that the facility solicit resident opinions regarding appropriate time periods. The rule requires that the facility's residents be notified of the times for withdrawing funds. This requirement will provide the residents with the necessary information to anticipate any need for funds and to arrange for the withdrawal of funds during the designated time periods. It must be kept in mind that the decision to handle the personal funds of residents is an option for the facility. The change contained in this amendment will provide a facility with additional flexibility and not jeopardize the interests of the residents. However, the rule will require that each facility

develop a procedure which will allow a resident to have access to funds to meet unanticipated demands on days when withdrawal periods are not scheduled. Waiver requests have generally been granted only upon the facility's assurance that a mechanism was available to meet the unanticipated needs of residents. These procedures ranged from the establishment of a petty cash fund to assuring that an individual, e.g. administrator or business office employee, would be available to come to the facility. The Department believes that this mechanism is important to assure that residents can receive funds when an unexpected need arises. The facility would have flexibility in establishing these procedures. This provision would fully protect the needs of residents without creating a serious problem for the facility to implement.

7 MCAR §1.053 N. Administration of medications by unlicensed personnel

> N. Administration of medications by unlicensed personnel. THE FOLLOWING APPLIES TO BOTH NURSING HOMES AND BOARDING CARE HOMES: Unlicensed nursing personnel who administer medications in a nursing home or boarding care home must have completed a medication administration training program for unlicensed personnel in nursing homes which is offered through a Minnesota postsecondary educational institution. The nursing home or boarding care home shall keep written documentation verifying completion of the required course by all unlicensed nursing personnel administering medications.

The purpose of this proposed amendment is to assure that unlicensed personnel who are permitted to administer medications in a nursing home or boarding care home are trained in the theory and skills needed to properly administer medications. This rule does not impose a new standard on a nursing home or boarding care home, but rather, incorporates into the licensure rules existing federal certification requirements relating to the use of unlicensed personnel to administer medications. The Department feels that it is important to include this provision in the licensure rules since it cannot be guaranteed that this provision will continue to be retained in the federal certification regulations. The inclusion in the licensure rules will provide the assurance that this important requirement is retained. The appropriate training of unlicensed personnel is necessary to assure that this critical function is performed properly so as not to jeopardize the health and safety of the residents.

The federal provision relating to the personnel allowed to administer medication in a skilled nursing facility is found in 42 CFR 405.1124(g), which states, in pertinent part:

> Drugs and biologicals are administered only by physicians, licensed nursing personnel, or by other personnel who have completed a State-approved training program in medication administration....
>
> (Emphasis supplied)

A similar provision, relating to intermediate care facilities, is found in 42 CFR 442.337(a) which states:

> Before administering any medications to a resident, a staff member must complete a State-approved training program in medication administration.
>
> (Emphasis supplied)

Pursuant to those federal regulations, medication administration training programs for unlicensed personnel were established by the Department of Health with assistance from the Department of Education. The courses are primarily offered in area-vocational technical institutions. These courses have uniform instructor qualifications, curriculum and test-out procedures. Since the enactment of the federal regulations, all unlicensed personnel administering medications in a skilled nursing facility or an intermediate care facility have been required to complete these training courses.

The proposed amendment to the State licensure laws will not modify this practice nor will the rule create additional requirements to be met by the nursing home or boarding care home. The rule will require that unlicensed personnel who administer medications in a nursing home or boarding care home complete a medication training program. This requirement follows the provisions of the federal regulations. Only 9 out of the 440 licensed nursing homes are not certified. Thus, the overwhelming majority of nursing homes already must meet the requirements of the federal regulations. The 9 non-

certified nursing homes will have to meet the new licensure requirements if they elect to have unlicensed personnel administer medications. The Department does not believe that this change in the licensure laws will significantly impact on these 9 facilities. The proposed rule will also apply to boarding care homes that are also certified as intermediate care facilities. The ICF regulations require that the facility establish procedures for medication administration and, as noted above, those rules require the training of unlicensed personnel who are permitted to administer medications. (Uncertified boarding care homes are permitted to distribute medications to residents, however, this is not the same as medication administration. Distribution implies only that the facility assists the residents in taking the medications prescribed by a physician. Administration of medications involves the preparation of the medications, checking the patient's records, distributing the medication and the recording of the medications.)

The proposed rule requires that the medication administration training programs be offered through a Minnesota post-secondary education institution. This requirement will assure that the training program meets the requirements established by the Departments of Health and Education to implement the federal regulations. The Department believes that it is necessary to insert this requirement in the licensure rules. The training programs are widely offered throughout the state and have been repeatedly evaluated to assure that the course structure and content will appropriately train unlicensed personnel to administer medications. This requirement will continue to assure that the training programs will be offered in a manner which appropriately trains the unlicensed personnel.

The final part of this rule will require that the nursing home and boarding care home maintain written documentation verifying completion of the course by its unlicensed nursing personnel. The Department will issue to each course participant a certificate of completion upon verification from the educational institution that the individual has successfully completed the course. A copy of this document is to be retained by the facility to provide the necessary documentation that the staff has completed the training requirements. This provision is based on the requirements contained in 7 MCAR §1.048 A.11.f. which requires a nursing home or boarding care home to retain, in each employees' personnel file, a listing of all institutes and training courses attended.

7 MCAR §1.056 Schedule of fines for uncorrected deficiencies

7 MCAR §1.057 Schedule of fines for uncorrected deficiencies.

The proposed amendments to this rule are required as the result of the other amendments being proposed by the Department. Minn. Stat. §144.653, subd. 6 and Minn. Stat. §144A.10, subd. 6, require that the Department promulgate by rule a schedule of fines. The amendments to 7 MCAR §1.057 correspond to the new rules being proposed at this time.

Section C. Boarding care homes

A new section, Section C., has been added to this rule which identifies a specific listing of fines that are applicable to boarding care homes only. Prior to this amendment, the applicable fine schedule for boarding care homes was contained in sections A. and B. However, the enactment of new rules in October 1980, and the proposed adoption of rules at this time require that this new section be included.

In October, 1980, the Department adopted amendments to the nursing home and boarding care home rules. As part of that package, a new section was added to 7 MCAR §1.057 which established an amended fine schedule which was applicable to nursing homes only. That provision, (which will be renumbered as section D.) established the daily fine schedule for the rules adopted in October, 1980. The fine schedule differed from the earlier schedule adopted in 1975 in that the fines would apply only to nursing homes, would accrue on a daily basis, and included a new fine level. Since the schedule of fines applicable to boarding care homes was not amended, fines issued to a boarding care home continued to be assessed at either the $50 or the $250 level. However, in preparing the current set of amendments for this hearing, it was noted that a boarding care

home would be assessed a $250 fine for a violation of a rule which would only result in a $50 daily fine for a nursing home. For example, the provisions of 7 MCAR §1.048 A.8.a., relating to the development of a policy concerning the handling of residents' funds, would result in a $50 daily fine to a nursing home. However, since this provision was not specifically enumerated in section A. of the rule, a boarding care home would be assessed $250. Since the criteria utilized in selecting the $50 fine categories are similar, the Department felt that it was necessary to amend the fine schedule to assure that fines issued to boarding care homes are equitable. Thus, it was necessary to develop a new section to the fine rule.

The criteria utilized to determine which rules would be subject to a $50 fine at the time of the initial adoption of the fine schedule in 1975 is contained in the justification submitted at that hearing. A copy of the pertinent sections of that document is attached as Appendix D. As noted in the criteria, the rules for which a $50 fines would be assessed are those rules which do not directly relate to the provision of patient care and for which noncompliance would not present a hazard to the patient's health or safety. In addition, noncompliance with rules in this category would not effect the capability of the home to provide an overall high quality of care nor would noncompliance jeopardize the resident's personal or property or impact on the financial stability of the facility. This criteria was similar to the criteria utilized to select the rules which would be assessed against a nursing home at the $50 daily level. That criteria was contained in the Statement of Need and Reasonableness presented at the public hearing in April, 1980. A copy of the pertinent portions of the Statement of Need and Reasonableness are attached as Appendix E. Briefly, that criteria identifies those rules which would have

only a minimal relationship to the health, safety, treatment, comfort or well-being of a patient and for which noncompliance would not jeopardize the health or safety of a patient. Since the criteria are similar, the Department wishes to correct this oversight and has modified the schedule of fines accordingly.

Section C.1. contains those rules which would result in the issuance of a $50 penalty assessment for a boarding care homes failure to comply with a correction order issued by the Department. Subsections a. - g. relate to the provisions of the new rules being proposed at this hearing which are applicable to boarding care homes, the pet rule and the VAA rule; while subsections h. - q. reference the rule amendments adopted in October, 1980. As previously discussed, this latter category is included at this time to assure uniformity in the fine schedules for nursing homes and for boarding homes. For each of the rules enumerated in this section, it is the Department's position that the criteria, utilized to select those rules subject to the $50 fine level, has been met. These rules do not directly relate to the provision of care or relate to the financial stability of the facility. In addition, noncompliance with the rules would not present a hazard to resident health or safety, or jeopardize the resident's property or personal rights. Noncompliance with the rules would also not affect the capability of the facility to provide an overall high quality of care to residents. The following comments will summarize the provisions of the rules identified in section C.1. and briefly note the Department's rationale for including the rules in this fine category.

a. 7 MCAR §1.042 B.1.

The failure to develop a written policy specifying whether or not pet animals can be kept on the premises would not affect the provision of resident care nor

would the residents be jeopardized by the absence of the written policy. The operation of the facility or the provision of care would not be adversely affected by the failure to develop the written policy.

b. 7 MCAR §1.042 B.2.

The failure of the written policy to specify whether or not individuals would be permitted to retain pets or to specify the restrictions placed on keeping pets would also not directly affect the provision of resident care nor would this failure jeopardize the residents in the facility. The operation of the facility or the provision of care would not be adversely affected by a violation of this rule.

c. 7 MCAR §1.042 B.3.

The failure to consult with facility staff and with residents prior to developing the policy on pets is also not related to the provision of resident care nor would noncompliance with this rule jeopardize the residents of a boarding care home. The failure to comply with this requirement would not adversely affect the operation of the facility or the provision of care to the residents.

d. 7 MCAR §1.042 C.1.

This rule requires that a policy be developed which specifies the types of pet animals that can be retained in the boarding care home. The failure to develop the written policy would not directly relate to the provision of care to residents nor would noncompliance jeopardize the facility's residents. The lack of a policy would not affect the operation of the facility or the provision of care to the residents.

e. 7 MCAR §1.042 C.5.

The failure to retain copies of the veterinarian's recommendations and records of examinations does not relate to the provision of care nor would this failure jeopardize the residents in the facility. The failure to retain these documents would not adversely affect the operation of the home or the provision of care.

f. 7 MCAR §1.043 C.2.a.

The rule requires that the facility abuse plan be developed by an interdisciplinary committee selected by the administrator. The rule is necessary to assure that the plan is based on a broad range of input and appropriately addresses the specific situation in each facility. However, the failure to establish an interdisciplinary committee in itself would not directly relate to resident care nor would noncompliance jeopardize the interests of the residents. It is conceivable that an individual could develop an acceptable plan for the facility; however, the Department feels that the rule is necessary and reasonable to increase the probability that an effective plan is developed. Nevertheless, the failure to comply with this particular rule would not adversely affect the operation of the facility or the provision of care to residents.

h. 7 MCAR §1.048 A.4.

The failure of the boarding care home to maintain records for a period of five years after the death or discharge of a resident would not directly relate to resident care nor would noncompliance with the rule jeopardize the residents of the facility. Noncompliance with this rule would also not adversely affect the operation of the home or the provision of care to residents.

i. 7 MCAR §1.048 A.8.a.

The failure to specify in the facility's admission policies whether or not the personal funds of residents would be accepted for safekeeping would not directly relate to the provisions of resident care nor would noncompliance with this rule jeopardize the residents in the facility.

j. 7 MCAR §1.048 A.8.b.(2)

This rule requires that the boarding care home retain a copy of the resident's written authorization for the home to handle the resident's funds. The failure to retain this authorization would not directly relate to the provision of resident care nor would noncompliance jeopardize the residents in the facility. The failure to obtain an authorization as required by 7 MCAR §1.048 A.8.b.(1) would subject the boarding care home to a $250 penalty assessment. However, the failure to obtain the authorization is different from the failure to retain a copy of the authorization in the resident's record. Since this failure would also not affect the operation of the home or the provision of care, the $50 fine is appropriate.

k. 7 MCAR §1.048 A.8.c.(3)

This rule prohibits an entity operating more than one facility from

commingling the personal funds of residents from more than one facility into one account. A violation of this rule would not directly relate to the provision of resident care nor would noncompliance with this rule jeopardize the residents in the facility. A violation of this rule would not affect the operation of the facility or the provision of care to residents.

l. 7 MCAR §1.048 A.8.c.(5)

The failure of a boarding care home to deposit a resident's funds in excess of $150 in a financial institution also does not directly relate to the provision of care to a resident nor would noncompliance jeopardize a resident in the facility. The rule is designed to assure that funds over $150 are maintained in a safe location; however, noncompliance with this rule would not necessarily jeopardize the resident's assets. Noncompliance would not affect the operation of the home or the provision of care.

m. 7 MCAR §1.048 A.8.c.(6)

The failure of the boarding care home to prorate interest that might have accrued to a resident is not related to the provision of care to the resident nor would noncompliance jeopardize the residents in a boarding care home. A violation of this rule would require that the facility take the necessary corrective action and allocate any accrued interest to the residents. The failure to prorate interest would not necessarily imply that the accrued interest owing to a specific resident was used for the purposes of the nursing home or for other residents which is prohibited under the provisions of 7 MCAR §1.048 A.8.c.(2). A violation of this rule would not adversely affect the operation of the facility or the provision of care to residents.

n. 7 MCAR §1.048 A.8.d.

This rule requires that the boarding care home make the arrangements to return personal funds to residents at the time of discharge from the facility. The failure to comply with this rule would not directly relate to the provision of care to the resident nor would the violation jeopardize the resident. The boarding care home would be required to return the funds to the resident, however, the violation of the rule would not adversely affect the operation of the home or the provision of care to the residents.

o. 7 MCAR 1.048 A.8.e.

This rule requires that the home provide a complete accounting of any funds held by the home at the time of a resident's death. Noncompliance with the rule would not directly relate to the provision of care to a resident nor would noncompliance jeopardize the interests of the resident. A violation of the rule would not adversely affect the operation of the home or the provision of care.

p. 7 MCAR §1.052 A.1.b.

The failure of the boarding care home to develop a policy regarding the use of double beds would not directly relate to the provision of resident care or jeopardize the residents in the facility. A violation of the rule would not adversely affect the operation of the home or the provision of care.

q. 7 MCAR §1.055 U.1.b.(1)(c)

The failure of the boarding care home to provide space for at least four racks of clean dishes would not directly relate to the provision of resident care nor would noncompliance jeopardize the residents in the facility. The primary

purpose of this rule is to assure that adequate space for the air drying of dishes and utensils is conveniently provided. However, a violation of this rule would not adversely impact on the operation of the facility or on the provision of care.

Section C.2. identifies those rules which would result in a $250 penalty assessment for the boarding care homes noncompliance with a correction order. The rules referenced in this section correspond to the provisions of the pet rule and the VAA rule. The Department's decision to impose the $250 assessment for a violation of these rules is consistent with the criteria developed to support the initial fine schedule in 1975. At that time, the Board of Health felt that the two level fine system was appropriate. Since the Department is not altering the structure of the fine schedule, the use of the $250 fine level has been retained. In accordance with the criteria used in 1975, any rule which did not meet all of the criteria developed to select those rules subject to the $50 fine would be assessed at the $250 level. Thus, if any one of the 5 criteria used by the Board was not met, the rule would be subject to the maximum $250 fine. The following comments will summarize the provisions of the rules identified in section C.2. and briefly note the Department's rationale for including these rules in this fine category.

a. 7 MCAR §1.042 C.2.

This rule requires that the facility's policy specifying the types of pet animals to be retained in the home be developed after consultation with a veterinarian and a physician. The rule was developed to assure that pets which have a higher risk of transmitting diseases to residents are not allowed to be

kept in the facility. A violation of this rule could jeopardize the health and safety of residents by possibly subjected the residents to an animal-borne disease. For that reason, the maximum fine is appropriate.

b. 7 MCAR §1.042 C.3.

This rule requires that pet animals be kept in good health. The rule is necessary to eliminate any potential harm that could be presented to residents by keeping a sick animal on the premises. Since a violation of the rule would present a risk to the resident's health and safety, the maximum fine is appropriate.

c. 7 MCAR §1.042 C.4.

This rule requires that any pet animal be examined and receive any necessary immunizations or treatments in accordance with the veterinarian's recommendations. This rule is necessary to assure that the pet animals are maintained in good health which, in turn, reduces any risk to the resident's health or safety. For that reason, the maximum fine is appropriate.

d. 7 MCAR §1.042 C.6.

This rule requires that the facility assume overall responsibility for any pet kept on the premises. This rule is necessary to assure that pets are appropriately cared for and to assure that the keeping of pets on the premises would not jeopardize the health and safety of the residents. For that reason, the maximum fine is appropriate.

e. 7 MCAR §1.042 C.7.

This rule requires that the boarding care home ensure that pets kept on the premises do not create a nuisance or otherwise jeopardize the health, safety,

comfort, treatment or well-being of the residents. A violation of this rule would affect the health or safety of residents and the maximum fine for a violation of this rule is appropriate.

f. 7 MCAR §1.042 C.8.

This rule requires that the facility designate a specific individual to be responsible for the care of all pets in the facility and for ensuring the cleanliness and maintenance of cages, tanks or other areas used to house pets. The rule is necessary to ensure that proper supervision of any pets kept in the facility is provided. The violation of this rule could lead to the failure to properly monitor the impact of pets on the residents and this could prevent a hazard to resident health or safety. For that reason, the maximum fine for a violation of this rule is appropriate.

g. 7 MCAR §1.042 C.9.

This rule identifies those areas within the facility where pets would be prohibited. This rule is necessary to avoid the contamination of areas where sanitary conditions are important such as food service areas or medication storage areas. Contamination of these areas could jeopardize the health or safety of residents and, for that reason, the maximum assessment is appropriate.

h. 7 MCAR §1.043 B.

This rule requires that the facility comply with the provisions of the Vulnerable Adult Abuse Reporting Act. That law includes the provisions relating to the mandatory reporting of suspected cases of abuse or neglect and the implementation of the law is designed to protect residents from possible abuse or neglect. The law and the rule do relate to the provision of resident

care and noncompliance would jeopardize the health and safety of the residents. For these reasons, the maximum fine amount is appropriate.

i. - m. 7 MCAR §§1.043C.1.; C.2.b.; C.2.c.; C.2.d.; C.2.e.
Each of the above rules relates to the development of the facility abuse plan. This plan is designed to identify and remedy conditions which make residents susceptable to abuse or neglect. The failure to develop this plan in conformance with the laws and rules could jeopardize the health and safety of residents. The rules cited above require that the facility develop and implement the abuse plan, require that this plan be based on an assessment of the population, environment and the physical plant; include a plan to correct or alleviate any conditions making residents susceptable to abuse; establish a schedule for completing any identified problems; and, requires an annual review of the plan. These elements are necessary to ensure the proper implementation of the plan which is designed then to minimize resident's susceptibility to abuse. These rules relate to resident health and safety and the maximum fine is appropriate.

n. - s. 7 MCAR §§1.043 D.1.; D.2.a.; D.2.b.; D.2.c.; D.2.d.; D.2.e.
Each of the above rules relates to the development of the individual abuse prevention plans. These plans are intended to identify each individual's susceptibility to abuse and then to include measures to minimize the risk of abuse. These plans are related to the provision of care to residents and are important to protect the resident's health and safety. The rules cited above require that the facility establish the policies and procedures for the development of these plans, and require that the plans be based on an interdisciplinary team review. These rules are important to the health and safety of the residents since the rules provide for the implementation of these plans

and will assure that the various needs of a resident are considered and evaluated during the plan development. The rules also require that the plan be developed as part of the care plan for the resident and that the plan include measures to minimize the risk of abuse to each resident. These provisions also relate to the health and safety of the residents since the rules will provide for the prompt development of these plans and require that specific steps be identified to minimize any potential for abuse. The rules will also require the annual review of the plans as well as requiring any necessary revision. These elements are important to ensure that the plan is current with the resident's conditions. Since the individual abuse prevention plans are an important measure to assure for the resident's health and safety, the Department believes that the maximum fine is appropriate.

t. - x. 7 MCAR §§1.043 E.1.; E.2.; E.3.; E.4.; E.5.

Each of the above rules relates to the establishment of an internal reporting mechanism designed to ensure that all suspected cases of abuse or neglect are promptly investigated and reported to the appropriate agencies. The cited rules would impact on the health and safety of residents since the rules are necessary to assure that any suspected incidents of abuse or neglect are promptly investigated and reported to appropriate agencies. The establishment of this internal system will also enable corrective actions to be promptly implemented which would reduce the possibility of further abuse or neglect. The rules require that specific individuals be designated within the facility who will be responsible for the review, investigation and reporting of suspected cases of abuse. These provisions will assure that the facility is able to promptly deal with any suspected cases of abuse and this will protect the health and safety of residents. The prompt review of suspected cases of abuse or neglect will also enhance the capability of the facility to provide an

overall high quality of care. The rules will also require that records be maintained by the facility and that copies of these records be forwarded to the Department's Office of Health Facility Complaints. This will also protect the health and safety of residents by encouraging a detailed investigation of the facility as well as providing necessary information to the agencies responsible for investigating suspected cases of abuse or neglect. The rules will also require that residents be notified as to the existence of this mechanism and informed of their right to report suspected cases of abuse or neglect. This requirement is also related to resident health and safety since it will assure that residents are fully informed as to their rights under the provisions of the law. Since the internal reporting system is designed to protect residents by the prompt investigation of suspected cases of abuse or neglect, the Department believes that the maximum fine is appropriate.

y. 7 MCAR §1.043 F.

This rule requires that the boarding care home notify its staff of the mandatory reporting requirements contained in the law and include an explanation of the facility's abuse plan, the individual abuse plans and the internal reporting mechanism in its orientation and inservice training programs. This rule relates to the protection of resident's health and safety by assuring that the facility's staff will be aware of the requirements of the law and rule which are designed to protect residents from abuse or neglect. In addition, this information will enhance the facility's capability to provide an overall high quality of care by assuring that the staff is aware of its responsibilities. The Department believes that the maximum fine amount is appropriate.

Section D. Nursing Home Assessments

The amendments to this section of the schedule of fines, which was adopted in October, 1980, are required as the result of the other rules being proposed at this time. As previously mentioned, the selection of the fine amount was based on the criteria used to justify this section of the fine schedule at the public hearing in April, 1980. (Appendix E) Since the Department is not modifying the structure of the rule, but only adding new sections to correspond with the proposed rules, the criteria has again been utilized.

Section D.1. contains those rules which will result in a $50 daily fine for noncompliance with a correction order. In accordance with the established criteria, these rules have only a minimal impact on the health, safety, treatment, comfort or well-being of residents and noncompliance with these rules would not jeopardize the health or safety of a resident. The rules listed in section D.1. a. - f. are the same rules previously discussed in C.1. a. - f., the boarding care home fine schedules. As noted in the discussion of those rules, each of the rules do not directly relate to resident care nor would noncompliance jeopardize the health and safety of the residents. Since the criteria used for the selection of the $50 fine for boarding care homes and the $50 daily fine for nursing homes is quite similar, the Department relies on the comments contained in the Statement of Need and Reasonableness to support the provisions of section C.1. a. - f., above, to support the need and reasonableness of section D.1. a. - f.

Two additional rules, which do not apply to boarding care homes, are also included in the $50 daily fine category. The additional sections are as follows:

h. 7 MCAR §1.044 Y.2.

This rule establishes the procedures governing the submission and processing of an application for a renewal license. Since compliance with the provisions of these rules would have only a minimal impact on the health, safety, treatment, comfort or well-being of residents, and since noncompliance would not jeopardize the health and safety of residents, the imposition of the $50 daily fine is required. The rule is primarily procedural in nature and the failure to submit an application within the time frame specified in the rule or to submit the correct licensure fee would not have an impact on the residents.

y. 7 MCAR §1.044 Y.3.

This rule requires that the Department be notified, in writing, at least 14 days prior to the transfer of an interest in the nursing home. Since compliance with the provisions of this rule would have only a minimal impact on the health, safety, treatment, comfort, or well-being of residents and since noncompliance would not jeopardize the health and safety of residents, the imposition of the $50 daily fine is required. The rule is procedural in nature and directed towards assuring that the Department is advised of all transfers of interest in a nursing home. While the failure to comply with the rules would subject the licensee to a correction order and possible assessment, such noncompliance would not impact on the care or services provided to residents.

Section D.2. contains those rules which would result in a $150 daily fine for noncompliance with a correction order. In accordance with the established criteria, the failure to comply with these rules could potentially create a situation jeopardizing the health, safety, treatment, comfort or well-being of a patient. It is the Department's position that the rules identified in the

section of the fine schedule meet that criteria. The specific rules contained in section D.2. are discussed below.

a. 7 MCAR §1.042 C.

This rule requires that the facility's policy specifying the types of pet animals to be retained in the nursing home be developed after consultation with a veterinarian and a physician. The rule was developed to assure that pets which have a higher risk of transmitting diseases to residents are not allowed to be kept in the facility. The failure to comply with this rule could result in the nursing home allowing pets in the facility which could transmit diseases to the residents. The failure to comply with the rule has the potential for jeopardizing the health and safety of the residents.

b. 7 MCAR §1.042 C.3.

This rule requires that pet animals be kept in good health. The purpose of this rule is also to reduce the posibility that residents could be subjected to an animal-borne disease. A violation of this rule has the potential for jeopardizing the health and safety of the residents.

c. 7 MCAR §1.042 C.4.

This rule requires that any pet animal be examined and receive any necessary immunizations or treatments in accordance with the veterinarian's recommendations. This rule is necessary to assure that pets are maintained in good health which, in turn, reduces any risk to resident's health and safety. Noncompliance with this rule could potentially jeopardize the residents in the facility.

d. 7 MCAR §1.042 C.6.

This rule requires that the facility assume overall responsibility for any pet kept on the premises. The rule is necessary to assure that pets are appropriately cared for and to assure that the keeping of pets on the premises would not jeopardize the health and safety of the residents. The licensee of the nursing home is responsible for the activities and services provided to the residents. In order to assure that the keeping of pets does not interfere with the resident's health, safety or rights, it is necessary to require that the licensee assume responsibility in this area. Failure to comply with this rule would result in a lack of supervision which potentially could jeopardize the health, safety, comfort or well-being of residents.

e. 7 MCAR §1.042 C.7.

This rule requires that the boarding care home ensure that pets kept on the premises do not create a nuisance or otherwise jeopardize the health, safety, comfort, treatment or well-being of the residents. The failure to comply with this rule could potentially jeopardize the residents in the nursing home.

f. 7 MCAR §1.042 C.8.

This rule requires that the facility designate a specific individual to be responsible for the care of all pets in the facility and for ensuring the cleanliness and maintenance of cages, tanks or other areas used to house pets. This rule is also necessary to assure that proper supervision of any pets kept in the facility is provided. A violation of this rule would result in the failure to provide a uniform system for supervision and this could result in pets creating a nuisance or otherwise jeopardizing the residents in the nursing home.

g. 7 MCAR §1.042 C.9.

This rule identifies those areas within the facility where pets would be prohibited. This rule is necessary to avoid the contamination of areas where sanitary conditions are important such as food service areas or medication storage areas. Contamination of these areas could potentially jeopardize the health, safety, treatment, comfort or well-being of residents.

h. 7 MCAR §1.043 B.

This rule requires that the facility comply with the provisions of the Vulnerable Adult Abuse Reporting Act. That law includes the provisions relating to the mandatory reporting of suspected cases of abuse or neglect. The law is designed to protect residents from abuse or neglect. The law and the rule relate to the protection of resident health and safety and noncompliance could potentially jeopardize the residents in the facility.

i. - m. 7 MCAR §§1.043 C.1.; C.2.b.; C.2.c.; C.2.d.; C.2.e.

Each of the above rules relates to the development of the facility abuse plan. This plan is designed to identify and remedy conditions which would make residents susceptible to abuse. The failure to develop this plan in conformance with the law and these rules could potentially joepardize the residents in the nursing home. The cited rules require the development of the facility abuse plan, require that this plan be based on an assessment of the population, environment and physical plant; include a plan to correct or alleviate any conditions making residents susceptible to abuse; establish a schedule for completing any identified problems; and, requires an annual review of the plan. These elements are necessary to ensure the proper implementation of the facility abuse plan, which is designed to minimize the possibility of abuse. Failure to comply with these provisions could potentially jeopardize

the health, safety, treatment, comfort or well-being of residents.

n. - s. 7 MCAR §§1.043.D.1.; D.2.a.; D.2.b.; D.2.c.; D.2.d.; D.2.e. Each of the above rules relates to the development of the individual abuse prevention plans. These plans are intended to identify each individual's susceptibility to abuse and then to include measures to minimize the risk of abuse. These plans are related to the provision of care to residents and are important to protect the resident's health and safety. The rules cited above require that the facility establish the policies and procedures for the development of these plans, and require that the plans be based on an inter-disciplinary team review. These rules are important to the health and safety of the residents since the rules provide for the implementation of these plans and will assure that the various needs of a resident are considered and evaluated during the plan development. The rules also require that the plan be developed as part of the care plan for the resident and that the plan include measures to minimize the risk of abuse to each resident. These provisions also relate to the health and safety of the residents since the rules will provide for the prompt development of these plans and require that specific steps be identified to minimize any potential for abuse. The rules will also require the annual review of the plans as well as requiring any necessary revisions. These elements are important to ensure that the plan is current with the resident's conditions. Since the individual abuse prevention plans are an important measure to assure for the resident's health and safety, noncompliance with these rules could potentially jeopardize the resident's health, safety, treatment, comfort or well-being.

t. - x. 7 MCAR §§1.043 E.1.; E.2.; E.3.; E.4.; E.5.

Each of the above rules relates to the establishment of an internal reporting mechanism designed to ensure that all suspected cases of abuse or neglect are promptly investigated and reported to the appropriate agencies. The cited rules would impact on the health and safety of residents since the rules are necessary to assure that any suspected incidents of abuse or neglect are promptly investigated and reported to appropriate agencies. The establishment of this internal system will also enable corrective actions to be promptly implemented which would reduce the possibility of further abuse or neglect. The rules require that specific individuals be designated within the facility who will be responsible for the review, investigation and reporting of suspected cases of abuse. These provisions will assure that the facility is able to promptly deal with any suspected cases of abuse and this will protect the health and safety of residents. The rules will also require that records be maintained by the facility and that copies of these records be forwarded to the Department's Office of Health Facility Complaints. This will also protect the health and safety of residents by encouraging a detailed investigation by the facility as well as providing necessary information to the agencies responsible for investigating suspected cases of abuse or neglect. The rules will also require that residents be notified as to the existence of this mechanism and informed of their right to report suspected cases of abuse or neglect. The failure to comply with these rules could potentially jeopardize the health, safety, treatment, comfort and well-being of residents.

y. 7 MCAR §1.043 F.

This rule requires that the nursing home notify its staff of the mandatory reporting requirements contained in the law and include an explanation of the

facility's abuse plan, the individual abuse plans and the internal reporting mechanism in its orientation and inservice training programs. This rule relates to the protection of resident's health and safety by assuring that the facility's staff will be aware of the requirements of the law and rules which are designed to protect residents from abuse or neglect. The failure to comply with the provisions of this rule could potentially jeopardize the health, safety, treatment, comfort or well-being of residents.

nn. 7 MCAR §1.053 N.

The rule relates to the training of unlicensed personnel permitted to administer medications in the nursing home. The rule is necessary to ensure that these individuals are properly trained in this important function. Failure to comply with this rule could potentially jeopardize the health, safety, treatment, comfort or well-being of residents.

7 MCAR §1.058 Allowable time periods for correction

7 MCAR §1.058 Allowable time periods for correction

General comments

This rule, which was initially adopted in October, 1980, is being amended as the result of the rules being proposed at this time. The amendments will specify the periods of time that a nursing home will be allowed for compliance with a correction order. The development of this schedule is required under the provisions of Minn. Stat. §144A.10. subdivision 4 which states, in pertinent part:

> ...The commissioner of health by rule shall establish a schedule of allowable time periods for correction of nursing home deficiencies.

As with the schedule of fines previously discusses, the Department has also used the same criteria contained in the 1980 Statement of Need and Reasonableness to determine the periods of time for the various amendments to this rule. A copy of the pertinent portions from that document are attached as Appendix F. As explained in that document, the Department has established 3 time periods for correction - 14 days, 30 days and 60 days. A 14 day time period is provided to comply with correction orders issued for a violation of a rule which can be corrected by a nursing home utilizing the internal resources of that facility; a 30 day time period is provided for those rules that would usually require some contacts with individuals not part of the nursing home's staff; while the 60 day time period is reserved for those rules where outside resources would have to be employed to attain compliance with a correction order.

At the time of the public hearing to discuss the November, 1980 amendments, the schedule of allowable time periods for correction was criticized on the

basis that the Statement of Need and Reasonableness for that proposed rule did not contain a general discussion of the current time periods used by the Department nor did it describe specific facts to justify the time periods provided in the rule. As indicated in that Statement of Need and Reasonableness, the time periods selected by the Department were based on criteria which made distinctions between the rule violations which could be corrected by internal resources of the nursing home and those violations which would normally require outside assistance to correct. That criteria has been used in developing the amendments to this section. A detailed explanation of the criteria and how the criteria is applied will be discussed below.

The Department does not believe that it is necessary for the proposed rule to be "justified" in light of the past experience gained by the Department in assigning time periods for correction. In fact, the very requirement that a schedule of allowable times for correction has to be developed in rule precludes a meaningful comparison between the former practices of the Department and the future implementation of this rule.

Prior to the enactment of the November, 1980 rules, the surveyor conducting the inspection would recommend a specific period of time for correction which would be reviewed by the surveyor's immediate supervisor. The selection of the time period for correction would depend on the judgement of the surveyor and the supervisor based on a consideration of the nature of the rule, the degree of harm presented to residents and the ability of the nursing home to correct the deficiency. While many correction orders provided 30, 60 or 90 days for correction, it would not be unusual to find correction orders calling for differing time periods. Due to the many issues which must be considered

in selecting a period of time, and since the need to fully protect residents by assuring compliance with the rules as quickly as possible must be weighed against the ability of a nursing home to attain compliance, it was the Department's belief that the actual selection of the time periods for correction was to be made, in most cases, by the survey staff which was responsible for conducting the inspection. Thus, it is not possible to include in this Statement of Need and Reasonableness, a list of the time periods provided for correction since such a listing does not exist. Since the selection of the time periods for correction was not uniformily established, it would be possible to find correction orders issued under the same rule and based on similar deficiencies to have differing periods of time for correction. The differences would result from differences in the degree of harm presented, the ability of the nursing home to correct or the extent of the deficiency.

The statutory requirement that the time periods for correction be specified in rule reduces the ability of the survey staff to exercise judgement in the selection of the time periods since the schedule of times must be based on general criteria as opposed to the specific facts and circumstances revealed during an inspection. Once the schedule of time periods is promulgated into rule, the Department will be bound to follow its provisions; thus, the ability to exercise independent judgement based on the facts identified at the inspection will be eliminated in most situations. This does not mean, however, that the proposed rule and the criteria supporting the time periods selected is not based on the knowledge and experience gained by the Department in implementing the provisions of the correction order/penalty assessment system. That knowledge and experience was used to define the criteria which supports the three selected time periods; however, since the schedule of times cannot

be based on specific factual situations, the experience of the Department has been channelled into generalized criteria to support a uniform schedule of fines.

The Department also believes that it is not possible to delineate specific "facts" to support the proposed rule. The statutory requirement that the allowable periods of time for correction be prospectively established as opposed to the Department's previous practice of setting the time for correction after the inspection based on the risk of harm presented by noncompliance and the ability of the nursing home to correct eliminates that ability to conclusively demonstrate why a particular rule is required to be corrected in 14 days. The Department cannot predict the specific findings that will be made during a survey to be conducted at a future time. The extent of noncompliance is an unknown factor and, for that reason, a specific analysis to support the time period provided in the rule which would include time studies or other empirical data cannot be developed. The prospective setting of time periods for correction necessitates that the Department develop criteria which provides a reasonable method for assigning a period of time for correction to a particular rule. Since the specific nature of the violation is unknown, until the time of the inspection, the criteria must be stated in broad terms. The Department has developed criteria which takes into consideration the ability of the nursing home to correct. The Department does not contend that the time frames selected and the criteria for those time frames will eliminate situations where the time period specified in the rule, when applied to the specific factual situation observed at the time of the inspection, is not sufficient to attain compliance; or conversely, that the time period is short enough to fully protect the health, safety, treatment, comfort

and well being of the residents. The rule addresses these types of situations by providing a mechanism by which the Department can reduce the period of time stated in the rule as well as providing a mechanism by which the nursing home could request an extension of the time period provided. It is well established that the provisions of a rule bind the agency as well as the entity subject to the regulation. The Department has attempted to assure that the provisions of the rule are workable and will not unduly hinder the enforcement responsibilities of the Department or place an unreasonable burden on the nursing home. The statute clearly requires that the time frames be established and the development of a rule which allows for unlimited flexibility in the selection of the time periods for correction would result in a rule which is subject to arbitrary and capricious application and enforcement.

The Department believes that the amendments to this rule are needed and reasonable and it is also the Department's position that the need for and reasonableness of the rule must be based on the Department's rationale for the selection of the criteria and the time periods for correction. The Administrative Procedures Act does not require a conclusive demonstration that the proposed rule is the only alternative available to an agency nor does the APA require that a proposed rule be supported by adjudicative trail type facts.

It is the Department's position that the time periods provided in the proposed rule are necessary to assure compliance with the provisions of the licensing laws. The licensing law places an obligation upon the licensee of a nursing home to operate the facility in compliance with the law and rules. The licensee, controlling persons and managerial employees are aware of this

obligation at the time of the issuance of the license. The licensee is responsible for taking steps to ensure that the facility is operated in accordance with the licensing rules and it would not be unreasonable to assume that some sort of a monitoring system would exist in each nursing home to assess, on a periodic basis, compliance with the standards in that particular facility.

Since the Department is responsible for protecting the rights of residents residing in nursing homes, the Department believes that the time frames selected in the proposed rule are necessary to assure that compliance with an identified violation is attained in the quickest possible period of time. The Department believes that the time periods selected provide sufficient time to make the corrections as well as to provide an assurance to nursing home residents that corrections will be made within the quickest possible period of time. While the time frames selected by the Department may be considered too short, it is the Department's position that, in order to fully protect the rights of nursing home residents, the time frames should be as short as reasonably possible. To extend the amount of time provided could lead to situations where immediate steps to obtain compliance are delayed. It should again be emphasized that the rule has a mechanism by which a request for an extension of time can be made. It is the Department's position that the extension mechanism provides adequate protection to a nursing home in cases where compliance cannot be attained within the time period specified in the correction order. If the facility can demonstrate that actions have been taken, in a good faith manner, to comply with the correction orders, the extension will be granted by the Department. The criteria used to evaluate the extension request is not unduly restrictive or burdensome to the operators of a nursing home. It should be noted that the approach taken by the Department to support the November, 1980 rules, upon

which these amendments are based, was accepted by the Hearing Examiner.

14 day time periods

The majority of the rule amendments have been assigned a 14 day time period. As previously mentioned, it is the Department's position that a violation of one of these rules can be corrected through the use of the facility's internal resources. For example, a violation of 7 MCAR §1.053 N., which requires that unlicensed personnel administering medications complete the specified training program, would be corrected by prohibiting that individual from administering medications until the required training is achieved. This could be accomplished by assuring that the Director of Nursing make the necessary scheduling changes or monitor the activities of the nursing staff to assure that only qualified individuals administer medications. A violation of 7 MCAR §1.043 C.2.e., which requires that the facility abuse plan be reviewed annually, would be corrected by assuring that such a meeting be scheduled. Since the interdisciplinary team would be comprised of nursing home personnel, it would not be unreasonable to require that a meeting be held within 14 days after the receipt of the correction order. It is the Department's position that each of the rules which have been assigned a 14 day time period can be corrected through the utilization of the nursing home's internal resources.

30 day time periods

The remaining rules have been assigned a 30 day time period for correction. These rules would generally require some contact with individuals outside of the nursing home in order to complete the necessary corrective measures. However, the nursing home would still have control over the steps required to attain compliance and would not have to depend solely on the activities

of these outside parties. For example, 7 MCAR §1.042 B.3. will require that a nursing home develop a policy specifying whether or not pets can be kept on the premises only after consultation with staff and residents. If a nursing home was issued a correction order under this rule, it would be necessary for the home to contact residents and staff and solicit their opinions regarding the keeping of pets on the premises. Since it would be necessary to consult with individuals not employed by the facility, the thirty day period for corection has been provided. The facility would still control the steps needed to comply with this order; however, outside input is also necessary.

The other rules which have been assigned a thirty day period for correction also meet the criteria established in the rules.

Specific comments

A.1. - 7 MCAR §1.044 Y.2. and 3.

The two rules identified under this provision have been assigned a 14 day time period for correction. These rules relate to the processing of renewal license requests and the submission of a notice of a transfer of interest in the nursing home. Compliance with a correction order would be attained by the submission of the required documents and this activity would be performed by facility staff. For that reason, the 14 day time period is required.

A.6.b. - 7 MCAR §1.053 N.

This provision relating to the training of unlicensed personnel administering medications has been assigned a 14 day time period for correction. This provision was discussed in the general comment section, above.

A.9. - 7 MCAR §1.042

The first five sections of the pet rule have been assigned a 30 day period of time for correction. These five rules would require that individuals outside of the facility be contacted prior to completion of the order.

7 MCAR §1.042 B.1., 2. and 3. relate to the development of a policy which will specify whether or not pets can be kept on the premises of the nursing home. As discussed above in the general comments, compliance with these sections would require consultation with the facility residents and the 30 day period is required.

7 MCAR §1.042 C.1. and 2. also relate to the development of a policy specifying the types of pet animals that can be kept on the premises. This policy must be based on input received from a veterinarian and a physician, and since these individuals are not employed by the facility, the 30 day period is required.

The remaining sections of the pet rule have been assigned a 14 day period for correction. It is the Department's position that compliance with any of the provisions would be attained through the use of internal resources available to the facility.

7 MCAR §1.042 C.3., 4. and 5. require that pets are kept in good health, receive treatments and immunizations in accordance with the veterinarian's recommendations, and that copies of the veterinarian's recommendations be maintained on file in the nursing home. Compliance with a correction order issued under one of these rules would be attained by the actions of the facility staff.

Facility staff would be responsible for monitoring the health of a pet, for assuring that pets receive the necessary veterinarian treatments and that records of examinations, treatments, etc. are maintained. An order issued under one of the provisions of these rules would direct the administrator to initiate certain action and such action could be completed within the 14 day time period.

7 MCAR §1.042 C.6., 7., 8., and 9. require that the facility assume overall responsibility for pet animals kept on the premise, designate an individual for the care of pet animals,require that measures be taken to assure that pets do not create a nuisance and restrict pets from certain areas in the facility. If a correction order was issued under one of the provisions of these rules, compliance would be attained by facility personnel. For example, the facility would have to initiate measures to clarify its responsibility for the pets in the facility, facility administration would be responsible for designating a facility employee, measures would have to be initiated to assure that pets are properly controlled and restricted to the appropriate areas. These corrective measures can be made through the home's own personnel.

A.10. - 7 MCAR §1.043

All of the sections of the VAA rule have been assigned a 14 day period for correction. It is the Department's position that a correction order issued under any one of these rules would be corrected without the need to consult with or rely on parties outside of the nursing home.

7 MCAR §1.043 B. requires that the nursing home comply with the provisions of the VAA law, Minn. Stat. §626.557. Compliance with a correction order issued

under this rule would require that the facility examine its operating policies and procedures and to then develop the necessary provisions to comply with the law. This activity would be completed by facility personnel. If appropriate policies and procedures had previously been developed, an order issued under this rule might require that the facility take the required steps to implement these provisions. Again, compliance would be attained by notifying staff of the provisions of the law, conducting training sessions, etc. This activity would be performed by facility staff.

7 MCAR §1.043 C. relates to the development of the facility abuse plan. The development of this plan would also be the responsibility of the facility administration and staff. The appointment of the committee, the assessment of the population, environment and physical plant and the development of the plan would be directed by the facility administration and based on input from the facility staff. The identification of conditions in need of correction and the schedule for correcting any identified problems would also be done by the facility. Finally, it will be the facility's responsibility to provide for an annual review of the plan and for any necessary plan revision. A correction order issued under one of these provisions could be corrected by the facility without relying on assistance from outside sources; e.g., the administration would appoint the committee, a committee meeting would be held, or the plan revised to conform with the law or rules, etc. The 14 day time period for a violation of one of these provisions is reasonable.

7 MCAR §1.043 D. relates to the development of the individual abuse plans for each resident. The development of this plan would also be the responsibility of the facility administration and staff. The development of the policies

and the establishment and review of the plans would be performed by facility staff. A correction order issued under one of the provisions of this rule could be corrected by facility staff without reliance on outside resources; e.g. the necessary policies would be developed by staff, the staff would monitor compliance with the provisions calling for the establishment of the plan, steps would be taken by facility staff to review existing plans, etc. The 14 day time period for a violation of one of these provisions is reasonable.

7 MCAR §1.043 E. relates to the development of the internal reporting system. This requirement would also be met by facility staff. The establishment of the mechanism, the designation of individuals, the record keeping requirements and explanations to residents would all be done by facility staff without the need for reliance on outside resources. Any order issued under one of the provisions of this section could be corrected by the facility. The 14 day time period is reasonable.

The last section, 7 MCAR §1.043 F. requires that the facility notify its staff of the mandatory reporting requirements and provide orientation and inservice training on the abuse plans and the reporting system. These provisions would also be carried out by facility staff and any orders issued could be corrected by the facility without reliance on outside resources. The 14 day time period is reasonable.

C. Decreasing the time allowed for correction

> C. Decreasing the time allowed for correction. The department shall allow the nursing home the period of time for correction specified in section A. unless the department determines that a violation must be corrected within a shorter time because noncompliance will jeopardize the health, treatment, safety, comfort, or well-being of the

nursing home residents. If the department orders a shorter period of time for correction, that time period must be specified in the correction order and must be related to the nature of the violation and the interests of the residents. No provision in 7 MCAR §1.058 prevents the department from ordering immediate correction of a deficiency if necessary to protect the health, treatment, safety, comfort, and well-being of the nursing home residents.

As previously mentioned, the amendments to this rule have not altered the provisions relating to the procedure to be followed for requesting an extension of the allowable time period for correction. However, the Department feels that it is also necessary to incorporate a provision to decrease the allowable time for correction in the event that noncompliance for the time provided in the rule would jeopardize the interests of the nursing home's residents. The requirement that a period of time for correction be specified in rule has the effect of forcing the Department to comply with these provisions. In some situations, the length of time mandated in the rule could allow a condition posing serious risks to the residents to continue for 14, 30 or 60 days. In certain instances, strict compliance with the rule could result in harm to the nursing home residents. It should be noted that this provision would only apply to those rules which have a time period specified in the rule. (These amendments and the October, 1980 amendments.) Time periods for correction for the other rules are set by Department staff based upon a consideration of the severity of harm that could occur and the time required by the nursing home to correct. The proposed rule states, as a general rule, that the Department will allow the nursing home the period of time established in Section A. However, the rule will allow the Department the discretion to reduce that time period if it determines that noncompliance for that period of time could jeopardize the health, safety, treatment, comfort or well-being of the residents. For example, 7 MCAR §1.046 L.2.e.

requires that the Director of Nursing be responsible for providing training to the nursing home staff regarding the procedures to be followed for the administration of oxygen. A 14 day time period was assigned to this rule since compliance could be obtained by the scheduling of training sessions by the Director of Nursing. However, if the Department observes or is made aware of an improper practice by a member of the nursing staff, the continuation of this practice for a 14 day period could result in serious harm or to the death of the resident. To be bound by the strict provisions of the rule in such a situation would be absurd. Since the facts surrounding a violation of a rule constantly differ and since the consequences of noncompliance cannot be foreseen, the prospective setting of time periods is inherently difficult. For that reason, it is necessary to assure that the Department's responsibility to enforce the licensure rules in a manner which will not jeopardize a resident's health or safety is not unduly restricted.

The Department believes that the rule sets an enforcable standard since the time periods would only be reduced in instances where the health, safety, treatment, comfort or well-being of a resident is jeopardized. The rule will require that the time period be stated in the order and also that the time period selected be based on the nature of the violation and the interests of the residents.

The rule also specifically states that nothing in 7 MCAR §1.058 will prevent the Department from ordering an immediate correction of a deficiency if necessary to protect the health, treatment, safety, comfort and well-being of the residents. The Department feels that this requirement is also necessary to assure that immediate correction of a serious deficiency can be

ordered regardless of the time period specified in the rule.

7 MCAR § 1.337 General Provisions (pertaining to Dual Option Requirements of the Health Maintenance Organization Rules)

B. Applicability to employers.

1.-4. (Unchanged.)

5. An employer which is preempted from complying with Minnesota Statutes, Section 62E.17, subdivision 1, as a result of the Employee Retirement Income Security Act, United States Code, title 29, section 1144(a) and 1144(b)(2)(B) is not an "applicable employer" for the purposes of 7 MCAR §§ 1.366 to 1.380.

Minn. Stat. § 62E.17, Subd. 4 grants rulemaking authority to the Commissioner to adopt rules as necessary to implement the provisions of Minn. Stat. § 62E.17. The Commissioner exercised this authority in promulgating 7 MCAR § 1.377 to 1.380. The Commissioner now deems it necessary to add a new clause to Section 1.377.

The Dual Option provision of the HMO rules requires certain employers to offer employees an option of health insurance or HMO coverage if a dual option is available. The rules furthermore establish the process for implementation of this provision.

Subsequent to the promulgation of these rules, it has become apparent that the enforceability of the statute and the rules in this matter are significantly affected by the Employee Retirement Income Security Act of 1974 (ERISA). In Section 514(a), (b)(2)(B) of ERISA broad preemption of state laws is established in regard to employee benefit plans.

Court decisions on this matter have made it more clear that Minn. Stat. § 62E.17 and the dual option rules are preempted. For example, the result of the St. Paul Electrical Workers Welfare Fund v. Markman, 490 F. Supp. 931 (1980)

was to, among other results, enjoin the operation of Minn. Stat. §§ 62E.17 as to certain employers. That case held that the federal ERISA law preempted the application of the Minnesota Comprehensive Health Insurance Act. A copy of the St. Paul Electrical Workers case is attached.

The Commissioner believes that the rules adopted under the above statute are likewise preempted. Accordingly, it is appropriate that this rule be promulgated to disclosed the preemption to the extent of ERISA applicability. Specific exemption from the application of ERISA is provided for government employers, churches, and certain other employers.

This rule is also proposed as a result of the recommendation of the Legislative Commission to Review Administrative Rules on February 24, 1982. Their recommendation was that the Commissioner amend 7 MCAR § 1.377 to exclude ERISA-covered employers from regulation under these rules, at the next appropriate set of rules hearings. Attached is a copy of the recommendation.

Therefore, this rule is reasonable and necessary in order to clarify the relationship of the federal ERISA law to this State law and rule. The Commissioner believes that the public is served by rules which most accurately describe the enforceability of a state law and rule where federal law interacts.

Plaintiffs argue that an insurer choosing not to comply with the statute must stop selling insurance in the state and therefore breach its contractual obligations on outstanding non-cancelable and guaranteed renewal contracts. The argument assumes that an insurer cannot continue to renew policies in this state after it has stopped doing business in this state. But this is an unjustified assumption. Since an insured has a contractual right to renew non-cancelable and guaranteed renewal policies, permitting the insurer to renew those types of policies merely authorizes an insurance company to honor contractual obligations under outstanding contracts. An *insured* may enforce its rights under a policy even though the *insurer* is no longer licensed to do business in the state. Minn.Stat. § 72A.41, subd. 3. *See also, American Mutual Services Corp. v. United States Liability Insurance Co.*, 293 F.Supp. 1082 (E.D.N.Y.1968); *Ganser v. Fireman's Fund Insurance Co.*, 34 Minn. 372, 25 N.W. 943 (1885).[9]

The court has considered other arguments urged by plaintiffs but finds them without merit. We declare the challenged statutes to be a valid exercise of legislative authority within the Constitution and direct the clerk to enter judgment for defendants.

ST. PAUL ELECTRICAL WORKERS WELFARE FUND, a Trust, Electrical Workers Health and Welfare Fund, a Trust, Twin City Pipe Trades Welfare Fund a Trust, Sheet Metal Workers 547 Welfare Plan, a Trust, Minnesota Wisconsin Health and Welfare Plan, a Trust, St. Paul Chapter, National Electrical Contractors Association, a Minnesota Not For Profit Corporation, Weber Electric, Inc., a Minnesota Corporation, Thomas R. Frantes and Frank Horak, in their own behalf as Trustees of Twin City Pipe Trades Welfare Fund, and Clyde W. Millerberud and John J. Galles, Plaintiffs,

v.

Michael D. MARKMAN, Commissioner of the Insurance Division of the Department of Commerce of the State of Minnesota; Minnesota Comprehensive Health Association, a Minnesota corporation, and Clyde E. Allen, Commissioner of Revenue for the State of Minnesota, Defendants.

Civ. No. 3-78-269.

United States District Court,
D. Minnesota,
Third Division.

May 21, 1980.

Beneficiaries and trustees of employee welfare trust brought suit contending that the Minnesota Comprehensive Health Insurance Act was preempted by the Employee Retirement Income Security Act as applied to trustees of employee welfare benefit plans and employers who establish such plans. On the beneficiaries' and trustees' motion for summary judgment, the District

9. Minn.Stat. § 72A.41 makes it unlawful for an insurance company to transact business without a certificate of authority. "Transaction of business," includes "The collection of a premium," . . . or (d) the transaction of any matter subsequent to the execution of [an insurance] contract . . ." *Id.* at subd. 2. Subdivision 3 provides that the "failure . . to obtain a certificate of authority shall not impair the validity of any act or contract of such company . . ." Honoring its obligations under outstanding insurance contracts, after its certificate of authority has been suspended, can therefore not be deemed to be the illegal transaction of insurance business. *See also*, Minn.Stat. § 60A.05, after revocation or suspension of a foreign insurer's certificate of authority "no *new* business shall thereafter be done by it . . ." (emphasis added.)

Court, Devitt, Chief Judge, held that insofar as the Act subjected employee welfare benefit plans and employers who funded those plans to substantive and reporting requirement provisions of the state insurance laws, the Act was preempted by ERISA.

Motion granted.

Insurance ⇐4.1
States ⇐4.4

Insofar as Minnesota Comprehensive Health Insurance Act subjected employee welfare benefit plans and employers who funded those plans to substantive and reporting requirement provisions of Act, Act was preempted by Employee Retirement Income Security Act. M.S.A. §§ 62A.16, 62A.17, 62E.01 et seq.; Employee Retirement Income Security Act of 1974, § 514(a), (b)(2)(B), 29 U.S.C.A. § 1144(a), (b)(2)(B).

William K. Ecklund and James M. Dawson, Felhaber, Larson, Fenlon & Vogt, P.A., and William M. Bradt, Hansen, Dordell & Bradt, St. Paul, Minn., for plaintiffs.

Warren Spannaus, Atty. Gen., Richard B. Allyn, Chief Deputy Atty. Gen., and Karen G. Schanfield, Sp. Asst. Atty. Gen., St. Paul, Minn., for defendants.

MEMORANDUM AND ORDER

DEVITT, Chief Judge.

Plaintiffs move for summary judgment and seek a declaratory judgment and a permanent injunction arguing, *inter alia*, that the Minnesota Comprehensive Health Insurance Act, Minn.Stat. § 62E.01 *et seq.*, and Minn.Stat. §§ 62A.16, 62A.17, as applied to trustees of employee welfare benefit plans and employers who establish such plans, have been pre-empted by the Employee Retirement Income Security Act. (ERISA), 29 U.S.C. § 1001 *et seq.* In addition, plaintiffs argue that the Act is preempted by the National Labor Relations Act and that the Act violates the privilege and immunities and the contract clauses of the United States Constitution. This case was combined with *Insurer's Action Council, Inc., et al. v. Markham, et al.*, D.C., —— F.Supp. ——, Civ. 3-76-440, as a companion case. The parties submitted a stipulation of facts on the ERISA pre-emption issue. Arguments were heard on April 25 and May 5, 1980.

Based upon the stipulation of facts, briefs, arguments and the record, the court finds that the Minnesota Comprehensive Health Care Act, to the extent set forth herein, is pre-empted by section 514(b)(2)(B) of the Employee Retirement Income Security Act, 29 U.S.C. § 1144(b)(2)(B). Accordingly defendants are permanently enjoined from enforcing the provisions of the Act against the employer or trust plaintiffs.

ERISA Pre-emption

This case presents, once again, the complex issue concerning the scope of section 514 of the Employee Retirement Income Security Act. 29 U.S.C. § 1144(a).

Plaintiffs object to the attempt by the state of Minnesota to regulate the employee welfare benefit plans or employers who fund those plans. Plaintiffs are beneficiaries and trustees of an employee welfare trust, an association of employers organized for purposes of collective bargaining and a member of that Association.

Minn.Stat. § 62E.10, subd. 1 requires all "insurers, self insurers, fraternals and health maintenance organizations" to join the association. The association is a tax exempt association, *Id.*, created for purposes of providing reinsurance to insurers, Minn.Stat. §§ 62E.04, subd. 6, 62E.10, subd. 7, and to underwrite and administer a state plan which is designed to make available adequate insurance coverage to the high risk or uninsurable. Minn.Stat. §§ 62E.08, 62E.10 and 62E.11. "'Self insurer,' means an *employer* or an *employee welfare benefit fund or plan* which directly or indirectly provides a plan of health coverage to its employees and administers the plan of health coverage itself or through an insurer, trust or agent . . ." Minn.Stat. § 62E.02, subd. 21 (emphasis added). Failure to maintain membership in the associa-

ion can result in termination of the mem-er's right to do business in the state. Minn.Stat. § 62E.10, subd. 3.

The self-insurers are subject to certain annual reporting requirements which include, ". . . the self insurer's total cost of self insurance and other information the commissioner may by rule require relating to the self insurer's plan of health coverage." Minn.Stat. § 62E.035. In addition self-insurers must include in their plans of insurance, a continuation provision permitting resident employee insureds to continue coverage for up to six months after termination of employment; Minn.Stat. §§ 62E.16, 62A.16 and 62A.17, and a conversion privilege, permitting insureds under a group policy to convert the group coverage to an individual insurance policy.

The Act imposes additional requirements on employers. The Act requires that employers who make available health care coverage to their employees provide a number 2 qualified plan. Minn.Stat. § 62E.03, subd. 1; and a dual option. Minn.Stat. § 62E.17, subd. 1. The qualified plan provision sets forth specific minimum coverage requirements, which include major medical coverage. Minn.Stat. §§ 62E.06, subd. 1(a), subd. 2; the plan must be submitted to the Insurance Commission for certification. Minn. Stat. § 62E.05. Failure to comply can result in loss of tax benefits. Minn.Stat. § 62E.03, subd. 2. The dual option provision requires certain employers to offer the qualified plan coverage through either an accident and health insurance contract or a health maintenance organization contract. Minn.Stat. § 62E.17, subd. 1.

The employee benefit plans here in question provide health and welfare benefits to participants, are established pursuant to a written agreement between the union and an employer or group of employers and are administered by a Board comprised of an equal number of representatives from labor and management. The trustees of the plans are authorized to provide the benefits through the purchase of insurance or as self-insurers. With one exception, however, all plans act as self-insurers for purposes of all benefits. The Sheetmetal Workers 547 Welfare Plan contracts with an insurer to underwrite insurance over a stop loss amount but is self insured below that amount.

The plans are employee welfare benefit plans and are subject to the reporting and fiduciary responsibility provisions of ERISA. None of the plans meet the qualified plan, dual option or conversion requirements of Minn.Stat. §§ 62E.01 *et seq.*; 62A.16 and 62A.17. Each of the employer and trust plaintiffs meet the definition of "self-insurer," Minn.Stat. § 62E.02, subd. 21, and are treated as self-insurers by defendants.

It is therefore clear that the Minnesota Comprehensive Health Insurance Act subjects employee welfare benefit plans and employers who fund those plans to substantive and reporting requirement provisions of the state insurance laws. The issue here is whether the state insurance law provisions, as applied to plaintiffs, are pre-empted by section 514 of ERISA.

The scope of section 514 is set forth in three sections. Section 514(a) creates a broad pre-emption covering "any and all state laws" "relate[d] to any employee benefit plan." 29 U.S.C. § 1144(a). Section 514(b)(2)(A) creates an equally broad exemption to the pre-emption provision covering "any law of any State which regulates insurance, banking or securities." Subparagraph (B) of that subdivision limits the scope of the (2)(A) exemption, by prohibiting states from "deeming" employee benefit plans or trusts to be insurance companies for purposes of subjecting those plans to state regulations. There is no doubt that the provisions here in question "relate to" employee benefit plans, and that they are part of an insurance law. This case turns on the scope of the "deemer" provision of section 514(b)(2)(B).

> Section 514(b)(2)(B) provides *inter alia*, Neither an employee benefit plan . ., nor any trust established under such a plan, shall be deemed to be an insurance company or other insurer . . . or to be engaged in the business of insurance

> . . . for purposes of any law of any State purporting to regulate insurance companies . . . .

The provisions here in question fall squarely within the prohibitions of Section 514(b)(2)(B) and are therefore not entitled to the insurance law exemption provisions of Section 514(b)(2)(A). Minnesota statutes section 62E.02, subd. 21 specifically defines employee welfare benefit funds or plans as self-insurers, and thereby subjects the plan to additional reporting, § 62E.035, and membership § 62E.10, requirements. The Act has thus subjected the benefit plans to regulations addressed to traditional insurers and therefore falls outside the insurance law savings clause. *Wadsworth v. Whaland*, 562 F.2d 70, 76 (1st Cir. 1977) *cert. denied* 435 U.S. 980, 98 S.Ct. 1630, 56 L.Ed.2d 72 (1978); *Hewlett-Packard Company v. Baines*, 425 F.Supp. 1294 (N.D.Cal.) *aff'd* 9 Cir., 571 F.2d 502 *cert. denied* 439 U.S. 831, 99 S.Ct. 108, 58 L.Ed.2d 125 (1978).

Defendants argue that the pre-emption provision of ERISA applies only to state laws regulating areas covered by ERISA and that the Minnesota Act does not do so. Though that argument may well apply where the regulation of pension plans is indirect, *Wadsworth, supra; Insurer's Action Council v. Heaton*, 423 F.Supp. 921, 926 (D.Minn.1976), the argument cannot prevail where, as here, the state attempts to directly regulate the pension plans by "deeming" the plans to be self-insurers. *Wadsworth, supra* at 76 ("in the event [that] they are [insurers] we would have no difficulty finding explicit pre emption by ERISA notwithstanding the saving clause.")

It is no answer to argue that the Act is not pre-empted because it subjects the employee benefit plans to some insurance regulations rather than the entire scheme of insurance laws, and that the provisions governing the content of insurance policies are not of a nature requiring uniform national legislation. Section 514(b)(2)(B) prohibits treating employee benefit plans as insurers "for purposes of *any law* of any state purporting to regulate insurance companies, . . ." (emphasis added), and where "Congress' command is explicitly stated in the statute's language" pre-emption must be found. *Jones v. Rath Packing Company*, 430 U.S. 519, 525, 97 S.Ct. 1305, 1309, 51 L.Ed.2d 604 (1979) (dictum). The court need not, therefore, consider the degree of conflict, *See Jones, supra*, at 533–43, 97 S.Ct. at 1313–1318, the pervasiveness of the federal statutory scheme, *City of Burbank v. Lockheed Air Terminal, Inc.*, 411 U.S. 624, 93 S.Ct. 1854, 36 L.Ed.2d 547 (1973), or the need for national uniformity, *Id.* at 639, 93 S.Ct. at 1862, in holding that the provisions of the Minnesota Act have been pre-empted by ERISA.

The court finds no significant distinction between the provisions expressly governing employee benefit plans and those directed at employers. The employer provisions do not apply to all employers but only to those who "provide[s] or make[s] available . . . a plan of health coverage . . . ." Minn.Stat. §§ 62E.03; 62E.17. The statute purports to regulate employers only to the extent that the employers provide welfare benefit plans. The provisions governing the employer, therefore, constitute a direct regulation of the employee benefit plans.

In granting summary judgment the court holds only, that where the state attempts to directly regulate employee benefit plans under the auspices of the insurance laws, that such regulations fall within the express language of section 514(b)(2)(B) and must therefore give way to the federal law. This case does not concern legislation directed solely at insurance companies which may have the effect of regulating the contents of all insurance policies, including those which are part of an employee welfare benefit plan.

To the extent that the provisions of Minn. Stat. § 62E.01, *et seq.* and §§ 62A.16 and 62A.17 purport to directly regulate employee welfare benefit plans, the trust, funds established under such plans, and employers who provide the plans, they are pre-empted by section 514(b)(2)(B). The court need not therefore consider the remaining issues presented. Summary judgment is GRANTED in favor of plaintiffs, defendants are

manently ENJOINED from enforcing above provisions to the extent set forth ein.

TRANSAMERICA INSURANCE COMPANY

v.

ELLEFONTE INSURANCE COMPANY

and

Roussel Corporation.

Civ. A. No. 78-431.

United States District Court, E. D. Pennsylvania.

May 21, 1980.

Declaratory judgment action was ought to determine which of two liability surers was obliged to defend and/or indemnify drug manufacturer. On motions r summary judgment, the District Court, annum, J., held that: (1) fetuses were ersons" capable of sustaining "bodily inry" within meaning of liability policies, id (2) where drugs were ingested by pregnt women during time that first insurer ovided drug manufacturer with coverage r bodily injury but deformed children ere born during period that second insurer ovided coverage, insurable "occurrence" curred during first insured's policy, at me fetuses' limbs began to grow in a eformed manner, for purposes of childrens' uses of action, but separate insurable "ocrrence" occurred during second policy pe od, when parents became aware of chilren's deformities at birth, for purposes of arents' causes of action.

Motions denied.

1. Insurance ⇐435(1)

Fetuses were "persons" capable of sustaining "bodily injury" within meaning of liability policies.

See publication Words and Phrases for other judicial constructions and definitions.

2. Insurance ⇐178.2

Where drugs were ingested by pregnant women during time that first insurer provided drug manufacturer with coverage for bodily injury but deformed children were born during period that second insurer provided coverage, insurable "occurrence" occurred during first insured's policy, at time fetuses' limbs began to grow in a deformed manner, for purposes of childrens' causes of action, but separate insurable "occurrence" occurred during second policy period, when parents became aware of children's deformities at birth, for purposes of parents' causes of action.

James M. Peck, Duane, Morris & Heckscher, Philadelphia, Pa., for plaintiff.

Francis E. Marshall, Marshall, Dennehey & Warner, Philadelphia, Pa., for Bellefonte Insurance Co.

Marvin V. Ausubel, Trubin, Sillcocks, Edelman & Knapp, New York City, for Roussel Corp.

MEMORANDUM AND ORDER

HANNUM, District Judge.

I. *Case History and Factual Summary.*

On February 9, 1978, the plaintiff Transamerica Insurance Company [hereinafter "Transamerica"], filed this Complaint seeking declaratory judgment relief pursuant to 28 U.S.C. § 2201. The essence of the action requires a determination concerning which of the two insurance companies, Transamerica and/or the defendant Bellefonte Insurance Company [hereinafter "Bellefonte"], provided insurance coverage to the defendant Roussel Corporation [hereinafter "Roussel"] with respect to suits "brought by or on behalf of persons after the expiration of Transamerica's policy period." Presently

Legislative Commission to
Review Administrative Rules

Senator Timothy J. Penny
Chairman
Representative Paul McCarron
Vice-Chairman

Kathleen P. Burek
Executive Director

March 1, 1982

Dr. George Petterson
Commissioner
Department of Health
717 Delaware Avenue S.E.
Minneapolis, MN 55440

Dear Dr. Petterson:

I am writing to inform you of the action which the LCRAR has taken with respect to the Health Department rule 7MCAR 1.738A.2. As you are aware, we held a hearing on this rule, at the request of Representative Tad Jude, on February 1. The Commission met again on February 24 to hear staff recommendations on this issue. The Commission voted to adopt Senator Wayne Olhoft's recommendation that your department amend 7MCAR 1.377A.1, to exclude ERISA-covered employers from regulation under your rules, at the next appropriate set of rules hearings. We understand this exclusion is the current practice of your department, on advice of your counsel. Mr. Wayne Carlson of your staff informs us that you will be issuing an administrative bulletin to inform the HMO's and employers your department regulates your policy of excluding ERISA employers. The LCRAR does not ordinarily approve of "policies" and "bulletins" in place of rules, but we understand the cost constraints your department faces. Further, this policy seems to be dictated by federal law, leaving your department with little option.

The enclosed minutes and staff report will provide you with additional information. Please feel free to contact Kathy Burek, our Executive Director, if you have any further questions.

Sincerely,

Senator Tim Penny
Chairman, LCRAR

TP:lsh
Encls.

cc: Wayne Carlson

Room 430, State Office Building • St. Paul, Minnesota 55155 • (612) 296-1143

Minutes of the LCRAR meeting on February 24, 1982, in Room 118, State Capitol, at 6:00 P.M.

MEMBERS PRESENT:

Senator Tim Penny, Chairman
Senator Wayne Olhoft
Senator Glen Taylor
Representative Wayne Simoneau
Representative Tom Berkelman
Representative Dave Fjoslien

MEMBERS ABSENT:

Representative Paul McCarron
Representative Bill Peterson
Senator Bill Luther
Senator Carl Kroening

STAFF PRESENT:

Ms. Kathy Burek, Executive Director
Ms. Terri Lauterbach, Counsel
Lorraine Hartman, Secretary

Senator Tim Penny called the meeting to order at 6:10 P.M. with a quorum present. Senator Penny asked Ms. Burek to give a short summary of the final report on the Department of Health rule 7MCAR 1.738A.2, relating to the offer of a dual health care option under collective bargaining.

Ms. Burek read the report with the following recommendations:

Staff recommends that the policy committees be asked to review the Minnesota Comprehensive Health Care Act, especially M.S. 62E.17, in light of St. Paul Electrical Workers vs. Markman, with the purpose of clarifying the duties of employers and bargaining units with regard to health care benefit packages.

Staff recommends that the Health Department amend 7MCAR 1.377A.1, using the noncontroversial rulemaking procedure, to exclude employers covered by ERISA from regulation under this rule. Notice of intent to adopt a rule without a public hearing should appear in the State Register by June 30, 1982.

There being no questions by the members, the chairman asked if anyone from the Health Department wished to comment.

Mr. Wayne Carlson from the Health Department stated that he had visited with Ms. Burek regarding these recommendations. He stated that the Health Department asked if they might issue an administrative bulletin on the second recommendation to the HMO's and employers that they deal with pointing out that the federal Act has pre-empted this in the ERISA provisions on this and then at a later date when they take their HMO rules for other kinds of change, that they just build this change in at that time. This is strictly a matter of costs. Mr. Carlson asked that the Commission allow them to do this in place of the second recommendation.

Senator Olhoft moved that the Commission adopt both of the recommendations with the following modification to the second recommendation: Staff recommends that the Health Department amend 7MCAR 1.377A.1 at its next appropriate set of ruleshearings to exclude employers covered by ERISA from regulation under this rule. Ms. Burek suggested that it might be included in Senator Olhoft's motion that the Health Department be directed to issue an administrative bulletin as suggested by Mr. Carlson. Senator Penny stated that it could be but that he felt the Department had already agreed to do that. Mr. Carlson said, yes, that they would go ahead with the administrative bulletin as stated earlier.

Chairman asked Rep. Tad Jude, who brought this complaint before the Commission, if he wished to comment. Rep. Jude stated as he understands it now that the Department is being asked to conform to the latest court rulings but not what is on the law books in the state. He stated that he felt it had taken a turn which he didn't envision and didn't completely approve of but did not feel in the position to overturn the court decision.

Chairman further explained that for the time being the best that the Commission can do is to provide rules that are consistent with the provisions of ERISA and let the policy committees of the legislature look at the matter for clarification. There being no further discussion, chairman renewed Senator Olhoft's motion that the Commission adopt both of the recommendations,changing the second recommendation as stated by Senator Olhoft. MOTION CARRIED.

Meeting adjourned at 6:25 P.M. Meeting was taped.

Lorraine Hartman

Lorraine Hartman, Secretary

Senator Tim Penny, Chairman

7 MCAR §1.392 Schedule of fines for uncorrected deficiencies - supervised living facilities

General comments

The licensure rules for supervised living facilities, adopted in 1974, did not include a schedule of fines for noncompliance with correction orders. While these facilities, which are licensed under the provisions of Minn. Stat. §§144.50 - .56 are subject to the issuance of correction orders, the Department has not adopted a schedule of fines which is required if penalty assessments are to be issued. Since the SLF rules have not previously been amended there has not been the opportunity to develop a schedule of fines applicable to this class of licensed facilities. However, since the rules relating to pets and to the implementation of the Vulnerable Adult Abuse Act will apply to supervised living facilities, this schedule of fines is required.

It is clear; however, that supervised living facilities are subject to the issuance of penalty assessments. Minn. Stat. §144.653, subd. 6 specifically applies to all facilities licensed under the provisions of Minn. Stat. §§144.50 - .58. That statute requires that a penalty assessment be issued if a facility fails to comply with the provisions of a correction order. The only obstacle which has prevented the issuance of assessments to SLFs has been the absence of a schedule of fines in rule.

The schedule of fines pertains only to the pet rule and the VAA rule and is based on the criteria used to adopt the schedule of fines for nursing homes and boarding care homes in 1975. While the provisions of Minn. Stat. §144.653, subd. 6 authorize fines of up to $1,000.00, the Department does not wish to exercise that authority at this time. Eventually, all provisions of the SLF

rules will be subject to the issuance of an assessment. At the time of the development of that rule, further consideration as to the development of new fine categories will be explored. Until that time, the Department believes that the criteria used in 1975 for the nursing home and boarding care home rules are appropriate to the SLF setting. The criteria will be found in Appendix D.

As noted in Appendix D, the criteria utilized to support the 1975 fine schedule was based on the impact that noncompliance with a rule would have on the health or safety of a facility resident. The criteria identified five provisions to be considered in determining whether a particular rule would be subject to the minimum fine of $50. If those five factors were not met, the rule would be subject to the maximum fine of $250. The approach taken to develop the schedule of fines for nursing homes and boarding care homes equally applies to a supervised living facility. The fine is based on the degree of harm that noncompliance with a rule would present to a facility resident. The Department is charged with the responsibility of protecting the interests of all residents in a health care facility regardless of the licensure classification of the particular institution. The fine schedule is based on the impact that a violation of a rule would have on a resident and the degree of harm presented by a violation of a rule applicable to all classifications of licensed facilities would be the same. The SLF fine schedule is identical to the fine schedule contained in 7 MCAR §1.057 C., relating to boarding care homes, and the underlying criteria of the SLF fine schedule is similar to the criteria developed for the nursing home fine schedule, 7 MCAR §1.057 D.

The licensing law for supervised living facilities clearly establishes that a

SLF would be subject to the issuance of a fine and the law also specifies the procedure relating to the issuance of an assessment. Minn. Stat. §144.653, subd. 2 requires that all facilities required to be licensed under 144.50 - .58 be periodically inspected to insure compliance with the licensure laws and rules. If violations of the rules are documented during an inspection, the provisions of Minn. Stat. §144.653, subdvisions 5 and 6 specify the actions to be taken by the Department. Those provisions state:

> Subd. 5. Correction orders. 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 an applicable regulation promulgated under the administrative procedures act by the state commissioner of health pursuant to section 144.56, a correction order shall be issued to the licensee. The correction order shall state the deficiency, cite the specific regulation violated, and specify the time allowed for correction.
>
> Subd. 6. Reinspections; fines. 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 him 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 and regulation a schedule of fines applicable for each type of uncorrected deficiency.

The Department has issued correction orders to supervised living facilities since the enactment of this law. However, since a schedule of fines applicable to the SLF rules had not been promulgated, it was not possible for the Department to issue a penalty assessment if the facility failed to comply with the correction order in the time specified in the order. It is the Department's position that the promulgation of the rules at this time requires that a schedule of fines corresponding to those rules also be developed. The failure

to develop a schedule of fines applicable to the current SLF rules does not preclude the promulgation of the proposed fine schedule at this time.

It should be noted that the law governing the issuance of penalty assessments clearly states that a facility will not be subject to a fine unless it has failed to comply with the previously issued correction order. The correction order identifies the rule violated and cites the deficiency. The facility is then provided a period of time to attain compliance. The facility will not be assessed unless the required reinspection demonstrates that the corrective actions have not been taken. Minn. Stat. §144.653, subd. 8 provides that the facility can request a hearing on any assessment issued to it.

The correction order/penalty assessment mechanism as applied to nursing homes and hospitals has provided an effective mechanism to enforce compliance with the licensure laws by providing a method to guarantee that a licensee meets its responsibilities imposed under the licensure laws. The mechanism only penalizes those facilities that have failed to initiate steps to come into compliance with the violations noted in the correction order. While the schedule of fines is based on the severity of harm that could result due to the failure to make corrections, the fines must also be considered as a sanction against the licensee for disregarding a correction order and allowing a state of noncompliance to continue. Such inaction on the part of the licensee is a deliberate violation of the statutory requirements imposed upon the licensee and clearly justifies the imposition of a fine.

The Department believes that this rule is directly required by the statutory provisions discussed above. The law clearly calls for the development of the

schedule of fines and the Department's promulgation of the schedule of fines applicable to nursing homes and boarding care homes has been consistently upheld in contested case proceedings as well as in judicial appeals. Three District Court decisions relating to the development and implementation of the fine schedule are attached as Appendix G. While those decisions specifically relate to the enforcement of the law as applied to nursing homes, the decisions would be equally applicable to supervised living facilities. The decisions discuss the constitutionality of the law, the mandatory imposition of fines and the mandatory amount of fines.

The Department also believes that the use of the 1975 criteria to support this fine schedule is reasonable. As previously mentioned, the criteria is based on the impact that noncompliance would have on residents in a facility. Since the schedule of fines enumerated in 7 MCAR §§1.3920. 1.a. - q. and 2.a. - y. is identical to the boarding care home schedule of fines contained in 7 MCAR §§1.057C. 1.a. - g. and 2.1. - y. a specific discussion of the provisions of the SLF fine schedule is not provided. Rather, the Department relies on and incorporates the provisions establishing the need for and reasonableness for the boarding care home schedule of fines to support the need for and reasonableness of this rule.

APPENDICES

minnesota department of health
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April 29, 1982

TO : Interested Parties

FROM : George R. Pettersen, M.D.
Commissioner of Health

SUBJECT: Nursing Home Rules

As you are probably aware, the Department's request to hold a public hearing on the entire package of proposed nursing home rules was modified by the Legislative Advisory Commission at its meeting on March 23, 1982, to promulgating only those nursing home rules which will have no fiscal impact. The Department expects continuing discussion on these rules in legislative committee hearings during the next session.

The Department is currently preparing proposed rules and amendments of rules which will be presented at public hearing this summer. The proposed rules will amend existing nursing home and boarding care home rules as well as establish new standards, as required by statute, which will be applicable to all health care facilities. The rules include the following:

1. Licensure rules. (Nursing homes) The amendments will provide for the implementation of the licensure requirements contained in Minn. Stat. §144A.01 - .17. This includes the provisions requiring the disclosure of controlling persons and managerial employees, the procedures for processing transfers of interests and provides the Department the authority to issue conditional or limited licenses.

2. Vulnerable Adult Abuse Act. (All health care facilities) The rule will address following provisions contained in Minn. Stat. §626.557, the development of the facility abuse prevention plans, individual abuse prevention plans for each resident and the establishment of the internal mechanism for the reporting of abuse.

3. Pets. (All health care facilities) The amendments will establish the provisions relating to the keeping of pet animals in a health care facility.

4. Personal fund accounts. (Nursing homes and boarding care homes) The Department will propose an amendment from the current requirement that the facility provide access to funds 7 days per week. The proposed amendment will allow the facility to establish, by policy, the periods for withdrawing funds. However, if withdrawal periods are not provided 7 days per week, the facility will be required to have some arrangement to meet the needs of the residents on days when formal withdrawal periods are not provided.

5. Medication aides. (Nursing homes and boarding care homes) The amendment will incorporate into the licensure rules the present certification requirement governing the training of unlicensed personnel who administer medications.

Once the amendments have been approved by the Revisor of Statutes Office, copies will be available for distribution. If you have any questions on these rules, please call Mike Tripple, Survey and Compliance Section, (612) 296-5448.

of the residues. Not actually equipped to handle waste disposal, the St. Louis firm contracted with the Bliss Waste Oil Company to remove the material. The Company is owned and operated by Russel Bliss, who deals in waste oil, lubricants, organic solvents, and transformer oils generated by automobile service stations and industrial sources. For many years, Mr. Bliss had been spraying the nonrefinable grades of waste oils on horse arenas as a means of dust control.

From February to October, 1971, the Bliss Waste Oil Company transferred six truckloads (approximately 18,000 gallons) of industrial residues containing about 300 ppm dioxin from the original storage tank to its own storage tanks in eastern Missouri. Three horse arenas and a farm road on Mr. Bliss's own property are known to have received the dioxin-contaminated oil. The dioxin concentration of the soil in the most serious affected horse arena was analyzed at about 30 ppm. The overall toll in the four disposal areas can be summarized as follows: Ten persons developed toxic symptons (two children became seriously ill), and at least 63 horses died along with 6 dogs, 12 cats, 70 chickens, hundreds of birds, numerous rodents and insects. In addition, there were 26 known abortions and six birth abnormalities among the horses.

Two lawsuits, for a total of $954,000 in compensatory and punitive damages, had been filed by the former owners of one of the horse arenas against Bliss Waste Oil Company, et al. Also, a lawsuit for $60,000 has been filed by several horse owners against one of the other two horse arenas. The estimated total financial loss, based on filed lawsuits (excluding punitive damages), is close to $500,000.

8. Having determined that there is a need for rules to regulate hazardous waste, this Report will address the issue of whether the proposed rules are reasonable.

9. In determining the reasonableness of the within considered hazardous waste rules, the Examiner applied the following meaning to the word "reasonableness": "Reasonableness" is the opposite of arbitrariness and caprice. An arbitrary and capri

cious standard can be defined as follows:

> That standard [arbitrary and capricious] is a narrow one, to be applied only where administrative action "is not supportable on any rational basis" or where it is "willfull and unreasoning action, without consideration and in disregard of the facts or circumstances of the case."

Greenhill v. Bailey, 519 F.2d 5, 10 (8th Cir. 1975). Reasonableness, then, means to have a rational basis for the action.

In setting forth the findings that establish the rational basis for adoption of these hazardous waste rules, the Agency is not limited to only those facts that are supported by substantial evidence in the record. Rulemaking is a legislative function; it is not an adjudicatory function like a contested case is. There is a difference between the kind of facts relied on in a rulemaking hearing and the kind of facts relied on in an adjudication. Professor Kenneth Culp Davis identifies this difference:

> Two main elements in rulemaking are (1) facts, and (2) ideas about policies. The two are generally interwoven in such a degree that in some parts of the whole problem of what to do, they are inseparable. Even so, a main element in rulemaking is necessarily the policy choice that the administrator must make. Adoption of a rule may require some understanding of facts, but it always requires legislating. Courts must leave administrators free to legislate, within the limits of rationality. And legislating inevitably involves the addition of something to the facts in the rulemaking record.

K. Davis, Administrative Law of the Seventies, (Cumulative Supp. 1977) (emphasis in original).

The Minnesota Supreme Court has recognized the difference between legislative facts and adjudicatory facts and has identified the support needed to uphold the two kinds of facts. In St. Paul Area Chamber of Commerce v. Minnesota Public Service Comm'n., 251 N.W.2d 350 (Minn. 1977), the Court said:

> [T]he substantial evidence test of § 15.0425 [is] applicable to commission decisions only when it is acting in a quasi-judicial manner, in a role similar to that of a trial judge sitting without a jury. In cases where the commission acts primarily in a judicial capacity, that is, hearing the views of opposing sides presented in the form of written and oral testimony, examining the record, and making findings of fact, the administrative process is best served by allowing the district court to apply the substantial evidence standard on review. . . .

> . . .[H]owever, rate allocation is not a judicial or quasi-judicial function. Once revenue requirements have been determined it remains to decide how, and from whom, the additional revenue is to be obtained. It is at this point that many countervailing considerations come into play. The commission may then balance factors such as cost of service, ability to pay, tax consequences, and ability to pass on increases in order to achieve a fair and reasonable allocation of the increase among consumer classes. . . .It is clear that when the commission acts in this area it is operating in a legislative capacity, as the above cases have stated. The careful balancing of public policies and private needs is not a matter for the courts, unless statutory authority has been exceeded or discretion abused. . . .In ascertaining whether or not the statute has been contravened, the district court must give wide latitude to the commission in allowing it to consider many factors which might not ordinarily be considered by a court, as we have explained above. This is so because, while the court is qualified to review agency findings when an agency acts in a quasi-judicial manner in factual matters, it is not so qualifided to review legislative judgments when social policies must be weighed in the balance.

Id. at 356-357.

In the within considered rulemaking proceeding, many of the facts are legislative facts --policy decisions and judgments. A dermal toxicity value that distinguishes a hazardous waste from a nonhazardous waste is a legislative fact. There is no one right answer--there are only reasonable answers.

In another Public Service Commission ratemaking case, Northwestern Bell Telephone Co. v. State, 253 N.W.2d 815 (Minn. 1977), the Minnesota Supreme Court distinguished the two kinds of facts involved in exercising a legislative function. There the Court said:

> In determining the extent of the allowable adjustment, it appears that the PSC was acting in both a judicial and a legislative capacity. In finding as a fact the amount of the 1974 impact of the contract, the PSC's decision was amply supported by the evidence. In deciding to limit the adjustment to a one-year period, the PSC determined as a matter of public policy that changes occurring more than one year beyond the test year would best be considered in proceedings taking into account all of the facts necessary to accurately set Bell's rates. This determination cannot be said to be arbitrary or unjust. . . .

Id. at 822. See also, Northwestern Bell Telephone Co. v. State, 299 Minn. 1, 216 N.W.2d 841 (1974) and Reserve Mining Co. v. Herbst, 256 N.W.2d 808 (Minn. 1977).

Although the federal rulemaking process differs from that of Minnesota, it would be helpful to examine the federal system.

An example of a federal agency acting on legislative facts is Mourning v. Family Publications Service, Inc., 411 U.S. 356 (1973), where the U.S. Supreme Court upheld regulations of the Federal Reserve Board governing credit transactions of more than four installments. Professor Davis' discussion of the Mourning case is helpful:

> [T]he Supreme Court had no power to change "four" to three or five, because Congress had delegated that power to the Board and the Board had made its determination. On the question of what the number should be, the Court could do no more than determine whether "four" was arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law.

K. Davis, Administrative Law of the Seventies, 206 (Cumulative Supp. 1977).

Dry Color Manufacturers' Ass'n v. Department of Labor, 486 F.2d 98 (3rd Cir. 1973), involved temporary emergency standards of the Department of Labor intended to prevent exposure to 14 chemicals found to be carcinogens. In striking down the regulations, the Court essentially said the Department did not have sufficient reasons for the regulations. Davis, however, is critical of the Court's decision:

> If carcinogenicity of the chemicals in humans can be neither proved nor disproved by scientific evidence, the problem for rulemakers is not one of fact; it is one of making a legislative choice of policy in light of the absence of evidence. When an agency is assigned the task of making rules that are in the public interest, it seldom can prove with evidence what is in the public interest; it has to use its policy preferences when proof is lacking.

K. Davis, Administrative Law of the Seventies, 674 (1976).

Some of the recent cases involving rulemaking by federal agencies in the environmental and health areas indicate the kind of latitude agencies have in making these legislative policy decisions. A leading example is Ethyl Corp. v. EPA, 541 F.2d 1, 8 E.R.C. 1785 (D.C. Cir. 1976), where the Court upheld regulations of the EPA requiring a reduction of lead in gasoline.

> Man's ability to alter his environment has developed far more rapidly than his ability to foresee with certainty the effects of his alterations. It is only recently that we have begun to appreciate the danger posed by unregulated modification of the world around us, and have created watchdog agencies whose task it is to warn us, and protect

> us, when technological "advances" present dangers unappreciated--or unrevealed--by their supporters. Such agencies, unequipped with crystal balls and unable to read the future, are nonetheless charged with evaluating the effects of unprecedented environmental modifications, often made on a massive scale. Necessarily, they must deal with predictions and uncertainty, with developing evidence, with conflicting evidence, and, sometimes, with little or no evidence at all. Today we address the scope of the power delegated one such watchdog, the Environmental Protection Agency (EPA). We must determine the certainty required by the Clean Air Act before EPA may act to protect the health of our populace from the lead particulate emissions of automobiles.
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> . . .We find that deletion of the findings requirement for action under Section 211(c)(1)(a) [of the Clean Air Act] was a recognition by Congress that a determination of endangerment to public health is necessarily a question of policy that is to be based on an assessment of risks and that should not be bound by either the procedural or the substantive rigor proper for questions of fact.
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> . . .The Administrator may apply his expertise to draw conclusions from suspected, but not completely substantiated, relationships between facts, from trends among facts, from theoretical projections from imperfect data, from probative preliminary data not yet certifiable as "fact", and the like. We believe that a conclusion so drawn--a risk assessment--may, if rational, form the basis for health-related regulations. . . .
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> All of this is not to say that Congress left the Administrator free to set policy on his own terms. To the contrary, the policy guidelines are largely set, both in the statutory term "will endanger" and in the relationship of that term to other sections of the Clean Air Act. These prescriptions direct the Administrator's actions. Operating within the prescribed guidelines, he must consider all the information available to him. Some of the information will be factual, but much of it will be more speculative--scientific estimates and "guesstimates" of probable harm, hypotheses based on still-developing data, etc. Ultimately he must act, in part on "factual isues", but largely "on choices of policy, on an assessment of risks, [and] on predictions dealing with matters on the frontiers of scientific knowledge . . . ." Amoco Oil Co. v. EPA, supra 163 U.S. App. D. C. at 181, 501 F.2d at 741. A standard of danger--fear of uncertain or unknown harm--contemplates no more.

Id. at 6, 24, and 28, 8 E.R.C. at 1786, 1801, and 1804-1805. The Amococase cited in Ethyl was another case by D. C. Circuit in which the court upheld for the most part regulations of EPA prohibiting use of leaded gasoline in automobiles fitted with

catalytic converters. Amoco Oil Co. v. EPA, 501 F.2d 722, 6 E.R.C. 1481 (D.C. Cir. 1974).

Another leading case in this area, and one relied on by the Ethyl court, is Industrial Union Department, AFL-CIO v. Hodgson, 499 F.2d 467 (D.C. Cir. 1974), involving a review of asbestos regulations promulgated by the Secretary of Labor. There the court said:

> From extensive and often conflicting evidence, the Secretary in this case made numerous factual determinations. With respect to some of those questions, the evidence was such that the task consisted primarily of evaluating the data and drawing conclusions from it. The court can review that data in the record and determine whether it reflects substantial support for the Secretary's findings. But some of the questions involved in the promulgation of these standards are on the frontiers of scientific knowledge, and consequently as to them insufficient data is presently available to make a fully informed factual determination. Decision making must in that circumstance depend to a greater extent upon policy judgments and less upon purely factual analysis.

Id. at 474 (footnote omitted).

10. Note must be taken that during the hearing process and before the close of the record, the Pollution Control Agency made various amendments to the proposed rules as originally published for hearing.

One of the principal benefits of a public hearing process is that it gives the administrator the benefit of criticisms and suggestions from representatives of the industries that will be regulated. It was just such a give-and-take process that prompted the Pollution Control Agency to amend the rules as finally proposed for adoption.

Because of such amendments, it will be necessary during certain portions of this Report, to specify whether an examination of the "reasonableness" of the proposed rules is being examined in light of the original proposal or the rules as finally proposed for adoption.

11. In determining the issue of "reasonableness", this Report will first examine the reasonableness of the wastes regulated by reason of being designated as "hazardous" pursuant to the proposed rules.

cathods, in carload lots, f.o.b. Port Colborne, Ontario, Canada, United States import duty (if any) included, as reported in said journal. The average market price of other metals and of mineral products per pound for each month shall be that quoted for their usual and customary shipping quantities, f.o.b. the usual and customary place of shipment, United States import duty (if any) included, as reported in said journal. If said journal or its successors ceases to furnish such quotations, or its quotations cease to be recognized in the trade, or a particular metal or mineral product is not listed, then the quotations of such other source as the parties may agree upon shall govern.

(10)-(15) Renumber as 10.-15.

(16) (aa)-(ee) Renumber and reletter as 16. a.-e.

(17)-(34) Renumber as 17.-34.

~~(h) [Section 8.] Effective date. These rules and regulations shall become effective upon filing of same in the offices of the secretary of state and commissioner of administration in accordance with Minnesota Statutes, 1965, Section 15.0413, and shall remain in full force and effect until modified, amended, or revoked.~~

Department of Public Welfare
Support Services Bureau

Proposed Rule Concerning the Investigation and Reporting of Maltreatment of Vulnerable Adults in DPW Facilities (12 MCAR § 2.010)

Notice of Hearing

A public hearing concerning the above entitled matter will be held in Room 83, State Office Building, 435 Park Street, St. Paul, Minnesota 55155 on June 15, 1982, commencing at 9:00 a.m. and continuing until all interested persons have an opportunity to be heard. The proposed rule may be modified as a result of the hearing process. Therefore, if you are affected in any manner by the proposed rule, you are urged to participate in the rule hearing process.

Following the agency's presentation at the hearing, all interested or affected persons will have an opportunity to ask questions and make comments. Statements may be made orally and written material may be submitted. In addition, whether or not an appearance is made at the hearing, written statements or material may be submitted to Jon Lunde, Hearing Examiner, Office of Administrative Hearings, 400 Summit Bank Building, 310 South Fourth Avenue, Minneapolis, Minnesota 55415, 612/341-7645, either before the hearing or within five working days after the public hearing ends. The hearing examiner may, at the hearing, order that the record be kept open for a longer period not to exceed 20 calendar days. The rule hearing procedure is governed by Minn. Stat. §§ 15.0411-15.0417 and 15.052, and by 9 MCAR §§ 2.101-2.112 (Minnesota Code of Agency Rules). If you have any questions about the procedure, call or write the hearing examiner.

Notice is hereby given that 25 days prior to the hearing, a statement of need and reasonableness will be available for review at the agency and at the Office of Administrative Hearings. This statement of need and reasonableness will include a summary of all the evidence and argument which the agency anticipates presenting at the hearing justifying both the need for and the reasonableness of the proposed rule. Copies of the statement of need and reasonableness may be obtained from the Office of Administrative Hearings at a minimal charge.

Rule 10 (12 MCAR § 2.010) establishes standards for the protection of vulnerable adults in facilities licensed by the Department of Public Welfare as established in Minn. Stat. § 626.557 (1980), "Reporting of Maltreatment of Vulnerable Adults."

This rule applies to all residential and nonresidential programs providing services to adults and licensed pursuant to Minn. Stat. §§ 245.78 to 245.812.

This rule contains the following:

1. A list of definitions;

2. The contents required in the program abuse and prevention plan; in the individual plan, and in the internal reporting and investigating policies and procedures;

3. The time frames for: developing the plan; orientation of clients to the plan; developing the individual abuse and neglect prevention plan for each vulnerable adult; review and revision of the individual plan; orientation for clients to the internal reporting system and orientation of reporters to requirements of Minn. Stat. § 626.557 and 12 MCAR § 2.010; and

4. The requirements for review and revision of the plan; for distribution of the plan; for the involvement of the client and/or

client representative in developing the plan; for the posting of policies and procedures relating to Rule 10; for conducting in-service training for mandated reports at least annually; and for establishing and maintaining a current list of persons who provide services in or to the facility who meet the definition of a mandated reporter.

The agency's authority to adopt the proposed rule is contained in Minn. Stat. § 626.557.

The adoption of this rule will not require expenditure of public monies by local public bodies totaling or exceeding $100,000 in either of the two years immediately following adoption of the rule.

The programs required to meet the provisions of this rule will be developing their program abuse and neglect prevention plans within their existing administrative program staff. The individual abuse and neglect prevention plans will be developed by the existing interdisciplinary team as a part of the clients individual program plan.

Copies of the proposed rule are now available and at least one free copy may be obtained by writing to Vivian Miller, Department of Public Welfare, Centennial Building, St. Paul, MN 55155, telephone (612) 296-2852. Additional copies will be available at the hearing. If you have any questions on the content of the proposed rule contact Vivian Miller.

Any person may request notification of the date on which the hearing examiner's report will be available, after which date the agency may not take any final action on the rules for a period of five working days. Any person may request notification of the date on which the hearing record has been submitted or resubmitted to the Attorney General by the agency. If you desire to be so notified, you may so indicate at the hearing. After the hearing, you may request notification by sending a written request to the hearing examiner, in the case of the hearing examiner's report, or to the agency, in the case of the agency's submission or resubmission to the Attorney General.

Minn. Stat. ch. 10A requires each lobbyist to register with the State Ethical Practices Board within five days after he or she commences lobbying. A lobbyist is defined in Minn. Stat. § 10A.01, subd. 11, 1979 supp., as any individual:

(a) Engaged for pay or other consideration, or authorized by another individual or association to spend money, who spends more than five hours in any month or more than $250, not including *his own* travel expenses and membership dues, in any year, for the purpose of attempting to influence legislative or administrative action by communicating or urging others to communicate with public officials; or

(b) Who spends more than $250, not including *his own* traveling expenses and membership dues, in any year, for the purpose of attempting to influence legislative or administrative action by communicating or urging others to communicate with public officials.

The statute provides certain exceptions. Questions should be directed to the Ethical Practices Board, 41 State Office Building, St. Paul, Minnesota 55155, telephone (612) 296-5615.

April 22, 1982

Arthur E. Noot
Commissioner of Public Welfare

Rule as Proposed (all new material)

12 MCAR § 2.010 Reporting maltreatment of vulnerable adults in licensed facilities.

A. Applicability. Rule 12 MCAR § 2.010 applies to residential and nonresidential programs providing services to adults and licensed pursuant to Minn. Stat. §§ 245.781-245.812.

B. Definitions. As used in 12 MCAR § 2.010, the following terms have the meanings given them.

1. Abuse. "Abuse" means:

a. Any act which constitutes a violation of Minn. Stat. § 609.322, related to prostitution;

b. Any act which constitutes a violation of Minn. Stat. §§ 609.342-609.345, related to criminal sexual conduct; or

c. The intentional and nontherapeutic infliction of physical pain or injury, or any persistent course of conduct intended to produce mental or emotional distress.

2. Agency. "Agency" means any individual, organization, association, or corporation which regularly provides services to adults and is licensed by the Department of Public Welfare pursuant to Minn. Stat. §§ 245.781-245.812.

KEY: PROPOSED RULES SECTION — Underlining indicates additions to existing rule language. ~~Strike outs~~ indicate deletions from existing rule language. If a proposed rule is totally new, it is designated "all new material." ADOPTED RULES SECTION — Underlining indicates additions to proposed rule language. ~~Strike outs~~ indicate deletions from proposed rule language.

3. Client. "Client" means a vulnerable adult, as defined in 12.

4. Client representative. "Client representative" means any family member, legal guardian, or other interested person acting or speaking in place of a client or on behalf of a client.

5. Facility. "Facility" means a residential or nonresidential facility providing services to adults and licensed by the Department of Public Welfare pursuant to Minn. Stat. §§ 245.781-245.812.

6. Governing body. "Governing body" means the individual, corporation, partnership, voluntary association, or other public or private organization legally responsible for the operation of a day care or residential facility or service or agency.

7. Interdisciplinary team. "Interdisciplinary team" means the individuals from the various disciplines which are required by Department of Public Welfare licensing rules to be involved in program and treatment planning. If only one person is designated by the rule under which the program is licensed to develop the individual program plan with the client, this person shall consult with members of other disciplines as required by that licensing rule to be involved in developing the individual program or treatment plan.

8. Investigative authority. "Investigative authority" means the local police department, county sheriff, local welfare agency, or appropriate licensing or certifying agency.

9. Mandated reporter. "Mandated reporter" means each employee of a program and each person providing client-related services in or to a program.

10. Neglect. "Neglect" means failure by a caretaker to supply or to ensure the supply of necessary food, clothing, shelter, health care, or supervision for a client.

11. Program. "Program" means a residential or nonresidential facility or an agency providing services to adults and licensed by the Department of Public Welfare pursuant to Minn. Stat. §§ 245.781-245.812.

12. Vulnerable adult. "Vulnerable adult" means any person 18 years of age or older who is a resident of a facility or who receives services at or from a program.

C. Program abuse and neglect prevention plan.

1. Requirement. The program's governing body shall establish and enforce a written abuse and neglect prevention plan. This plan shall be completed within 60 days of the effective date of this rule.

2. Plan contents. The plan must contain the following information:

a. An assessment of the population, the physical plant for each facility and for each site when living arrangements are provided by an agency, and its environment, identifying the factors which may encourage or permit abuse or neglect;

b. A description of the specific steps which will be or have been taken to minimize the risk of abuse or neglect identified in any of the assessed areas, including physical plant repairs and modifications responsive to problems in the program's environment where necessary; and

c. A timetable for the implementation of corrective actions that will be taken, such as training staff, initiating new procedures, or adjusting staffing patterns.

3. Assessment factors.

a. The assessment of the population shall include an evaluation of the following factors: the age, sex, mental functioning, physical and emotional health or behavior of clients; the need for specialized programs of care for clients, the need for training of staff to meet identified resident needs, and the existence of a documented history of abuse or neglect of clients.

b. The assessment of the physical plant, if required, shall include an evaluation of the following factors: the condition and design of the building as it relates to the safety of the clients and the existence of areas in the building which are difficult to supervise.

c. The assessment of the environment, if required, shall include an evaluation of the following factors: the location of the program in a particular neighborhood or community, the type of grounds surrounding the building, the type of internal programming, the program's staffing patterns, and the existence of a documented history of abuse or neglect by staff.

4. Plan review. The program's governing body shall review the plan at least annually using the assessment factors in the plan and any reports of abuse or neglect that have occurred. The governing body shall revise the plan so that it reflects the results of the review.

5. Plan orientation for clients. The program shall provide for its clients a general orientation to the program abuse and neglect prevention plan. Client representatives shall have the opportunity to be included in the orientation. The program shall provide this initial orientation within 60 days after the effective date of this rule, and, thereafter, for each new client within 24 hours of admission.

6. Plan distribution. The program shall post a copy of the plan in a prominent location in the facility and at each site when living arrangements are provided by an agency and have a copy available for review by clients, client representatives, and mandated reporters upon request.

D. Individual abuse and neglect prevention plan.

1. Requirement. The client's interdisciplinary team shall develop an individual abuse and neglect prevention plan, and this plan shall be implemented for each client. The team shall develop a plan for each current client within 60 days after the effective date of this rule and, thereafter, for each new client as part of the initial individual program plan, as required by the Department of Public Welfare rule under which the program is licensed.

2. Plan contents. The plan must be a part of the client's individual program plan and must include the following information:

a. An assessment of the client's susceptibility to abuse, including self-abuse and neglect;

b. A statement of the specific measures which will be taken to minimize the risk of abuse and neglect to the individual client when the individual assessment indicates the need for specific measures in addition to the general measures specified in the program abuse and neglect prevention plan; and

c. Documentation of results of the individual assessment when it does not indicate the need for specific measures in addition to the general measures specified in the program abuse and neglect prevention plan.

3. Plan review. The review and evaluation of the individual abuse and neglect prevention plan shall be done as part of the review of the client's individual program plan. The interdisciplinary team shall review the abuse and neglect prevention plans at least annually, utilizing the individual assessment and any reports of abuse or neglect relating to the client. The plan shall be revised to reflect the results of this review.

4. Client participation. Whenever possible, the client shall participate in the development of the individual abuse and neglect prevention plan. The client shall have the right to have a client representative participate with or for the client in the development of the plan. If the client or client representative does not participate, the reasons shall be documented by the team in the plan.

E. Internal reporting and investigation system and records.

1. Establishment. The program's governing body shall establish and enforce internal written reporting and investigating policies and procedures for abuse and neglect, including suspected or alleged abuse and neglect. The same policies and procedures shall apply in all cases, regardless of the results of the internal investigation.

2. Reporting. The policies and procedures must include a process for the mandatory reporting of abuse or neglect of vulnerable adults. The policies and procedures must specify how reports are to be made and provide for all reports to be made promptly when a mandated reporter has reasonable cause to believe that a client is being or has been abused or neglected, or has knowledge that a client has sustained a physical injury which is not reasonably explained by the client's history of injuries. The policies and procedures shall also contain a provision that persons other than mandated reporters may and should report incidents of abuse or neglect and shall identify the persons to whom internal reports should be made. The procedure shall specify that reports may be made directly to the outside investigative authorities or to the person designated by the program or both. The person responsible for forwarding internal reports to outside authorities shall be clearly identified. All mandated reporters shall be informed of their responsibility to ensure that their report reaches the appropriate outside investigative authorities. Reporters shall be informed when a report has been forwarded and to whom it has been forwarded. Reports shall include the following information:

a. The name and location of the client and the program;

b The nature of the abuse or neglect;

c. Pertinent dates and times;

d. Any history of abuse or neglect;

e. The name and address of the reporter;

f. The name and address of the alleged perpetrator; and

g. Any other information that might be helpful in investigating the abuse or neglect.

3. Investigation. The policies and procedures shall include identification of the person responsible for the internal review and investigation of abuse or neglect. However, if the person responsible for the review and investigation is suspected of committing the abuse or allowing the neglect, another person shall be designated to conduct the review and investigation.

4. Records. The policies and procedures shall include a provision requiring that records are maintained regarding the internal review and investigation of cases of abuse and neglect. These records shall contain a summary of the findings, persons involved, persons interviewed, persons and investigating authorities notified, conclusions and any actions taken. The records shall be dated and authenticated by signature and identification of the person doing the review and investigation.

5. Communication. The policies and procedures shall include a provision requiring the communication of all knowledge and written information regarding incidents of abuse or neglect to the Department of Public Welfare.

6. Cooperation. The policies and procedures shall include a provision requiring the cooperation of the program with the department in the course of the investigation.

7. Orientation for clients. The program shall provide for its clients an orientation to the internal reporting system. Client representatives shall have the opportunity to be included in the orientation. The program shall provide this initial orientation within 60 days after the effective date of this rule and, thereafter, for each new client within 24 hours of admission.

8. Distribution of copies. The program shall post a copy of the internal reporting policies and procedures in a prominent location in the facility or at the offices of an agency and have it available upon request to mandated reporters, clients, and client representatives.

F. Personnel requirements.

1. Orientation of reporters. Within 60 days after the effective date of this rule, the program shall inform mandated reporters about the requirements of Minn. Stat. § 626.557, the provisions of 12 MCAR § 2.010, and all internal policies and procedures related to vulnerable adults. All staff shall be informed that individuals, other than those mandated to report, may report suspected cases of abuse or neglect to the appropriate investigative authorities and that staff must provide information to those requesting it regarding the procedure for contacting the authorities. Thereafter, the program shall provide this orientation for new mandated reporters no later than during the first shift worked.

2. Training. The program shall conduct in-service training at least annually for mandated reporters to review Minn. Stat. § 626.557, the provisions of 12 MCAR § 2.010, and all internal policies and procedures related to vulnerable adults.

3. List of persons providing services. The program shall establish and maintain a current list of persons who provide services in or to the program who meet the definition of a mandated reporter.

Waste Management Board

Proposed Rules Governing Supplementary Review

Notice of Intent to Adopt Rules without a Public Hearing

Notice is hereby given that the State Waste Management Board proposes to adopt the above-entitled rules without a public hearing. The Waste Management Board has determined that the proposed adoption of these rules will be noncontroversial in nature and has elected to follow the procedures set forth in Minnesota Statutes § 15.0412, subd. 4(h) (1980).

Persons interested in these rules shall have 30 days to submit comments on the proposed rules. The proposed rules may be modified if the modifications are supported by the data and views submitted to the agency and do not result in a substantial change in the proposed language.

Unless seven or more persons submit written requests for a public hearing on the proposed rules within the 30-day comment period, a public hearing will not be held. In the event a public hearing is required, the agency will proceed according to the provisions of Minnesota Statutes §.15.0412, subds. 4-4(f).

Persons who wish to submit comments or a written request for a public hearing should submit such comments or request to:

Waste Management Board
Attention: Sharon Decker
123 Thorson Building
7323-58th Avenue North
Crystal, Minnesota 55428
(612) 536-0816

minnesota department of health
717 s.e. delaware st. minneapolis 55440

January 21, 1981

Dear Administrator/Person in Charge:

As you know, the 1980 Session of the State Legislature passed Minnesota Statutes § 626.557 on Reporting of Maltreatment of Vulnerable Adults. This law which became effective on January 1, 1981, is intended to protect adults who are dependent upon others for their care and to assist persons supplying the services in providing a safe environment for these adults.

Enclosed is a copy of the law. A review of the provisions of this law will assist you in identifying your responsibilities in fulfilling the requirements of the law, e.g. the reporting mechanism mandated under Subdivision 3 and 4, establishment of a facility abuse prevention plan and an individual resident abuse prevention plan under Subdivision 14, etc.

In reviewing the provisions of this legislation you will note that the primary jurisdiction for the implementation of this law lies with the Department of Public Welfare. Staff of that Department has informed me that they are developing rules clarifying county agency responsibilities. They are also intending to establish a task force to review the law's provisions, discuss the implementation of the law and suggest procedures to assist in facilitating coordination between the various agencies in their enforcement of the law.

You will note under Subdivision 16(b) that licensing agencies are required to promulgate whatever rules are necessary to implement the provisions of this law. This Department is reviewing their responsibilities under the law in preparation for rule development; however, to assure coordinated efforts with other agencies it is this Department's intent to promulgate rules subsequent to the discussions arising out of the task force. This should not, however, delay a facility's activity in addressing their responsibilities since the specificity of the law provides you with enough detail to develop policies and procedures for implementing the law. The language of this law is specific enough in most areas to identify the facility responsibilities. This Department will be monitoring each facility to ascertain compliance with the intent of the law. Non-compliance will necessitate issuance of a correction order and/or initiation of any other action in accordance with Subdivision 11.

You will note in Subdivision 14(a) the requirement that a facility establish and enforce an ongoing written abuse prevention plan. Many of you already have such a mechanism and may need only to revise an existing plan to incorporate the factors listed in this subdivision, i.e. physical plant assessment, environmental factors, population factors which may contribute to abuse situations and a statement specifying measures to be taken to minimize the risk of abuse. You may find it helpful to establish a committee to formulate a reporting system both for internal reporting and for reporting to appropriate agencies, to develop preventive measures to minimize the risk of abuse, to review cases of potential abuse or charges of neglect; for policy and procedure revisions, etc. Note also in Subdivision 14(b) each facility is responsible for developing an individual abuse prevention plan which will identify the vulnerability of each adult and a plan of care for the adult. Some questions have been raised regarding this provision. Many of you have already addressed such issues in your current patient/resident care plan. I would suggest, therefore, that you evaluate your existing plans for compliance with the provisions of this portion of the law and revise and/or expand upon them as you identify the need.

Hopefully, a concern such as avoidance of duplication of visits, and more clarification of terms such as "neglect" will be addressed in the task force discussions. In the interim, please feel free to contact this Department at (612) 296-5420 for any questions or to relay any suggestions you desire be taken to the task force meetings.

Any questions or comments regarding the overall implementation of this law should be directed to Mr. Arthur Jauss, Adult Services Coordinator, Department of Public Welfare, at (612) 296-3730.

Sincerely yours,

Clarice Seufert, Chief
Survey and Compliance Section
Health Systems Division

CS:ac
Attachment

JUSTIFICATION

For a proposed rule relating to a schedule of fines for non-compliance with correction orders issued to nursing homes and boarding care homes.

INTRODUCTION

Minnesota statutes, section 144.653, subdivision 5 (1974) states:

> Whenever a duly authorized representative of the State Board 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 an applicable regulation . . ., a correction order shall be issued to the licensee . . . .

Subdivision 6 of that statute allows the Board of Health to assess a penalty if, upon reinspection, it is found that the licensee has not yet complied with a correction order.

This law was amended by Minnesota Laws 1975, chapter 310, section 7. That section increased the amount of the penalty assessment, from the previous limit of $250, to $1000. However, this amendment also required that the Board promulgate, by rule and regulation, a schedule of fines applicable for each type of deficiency. This amendment, which became effective of June 5, 1975, had the effect of ending the Board's authority to issue penalty assessments until a schedule of fines was promulgated in accordance with the Administrative Procedure Act.

At its August, 1974 meeting, the Board adopted a policy establishing two levels of assessments, one at $50 and the other at $250. Three criteria were developed to select the sections of the regulations requiring the $50 penalty assessment. Two additional criteria were adopted by the Board at its June, 1975 meeting. The five criteria will be outlined later.

The proposed schedule of fines is based on the Board policy of August, 1974 as amended in June, 1975. While the Board now has the authority to establish fines of up to $1,000, the importance of re-implementing the penalty assessment system was a decisive factor in reaching the decision to use the Board policy as a temporary schedule of fines. The time factor involved in establishing a schedule using the $1,000 limit would have prevented use of the penalty assessment system for a greater length of time. The importance of adopting this regulation as soon as possible to

assure that the Department could effectively enforce its regulations was considered essential. The Board policy was felt to be a reasonable basis for establishing this regulation. In addition, a revision of the nursing homes regulations has begun and it was felt that once the existing regulations were reviewed and revised, it would be more appropriate to establish a new fee schedule based on the new regulations.

The various sections of the nursing home and boarding care home regulations have been classified into five categories. These are:

1. Regulations relating to the health and safety of patients and residents;
2. Regulations relating to the medical treatment of patients and residents;
3. Regulations relating to the comfort of patients and residents;
4. Regulations relating to the personal well-being of patients and residents; and
5. Regulations relating to the operation and maintenance of a nursing home or boarding care home.

The regulations which are classified under the heading of health and safety relate to those conditions in the home which are necessary in order to assure patient health and safety. Items such as sanitation, dietary facilities, etc. are listed in this category. The health and safety category differs from the regulations under the medical treatment category in that the latter group is concerned with individual needs rather than general needs of all patients and residents in a facility. The medical treatment category includes the provisions in the regulations relating to proper charting, proper administration of medications, etc.

The comfort and well-being categories are also similar in nature. The difference between the two groups is that the comfort category deals primarily with the physical aspects, such as clean linen and adequate furnishings. The items listed under the well-being category relate to the mental and emotional concerns of a patient or resident.

The fifth category contains regulations of a general nature dealing primarily with those items that must be met to assure the proper administration of a facility.

The criteria used to determine which sections of the nursing home and boarding care home regulations would be subject to the $50 penalty assessment are:

1. The requirements in these regulations do not directly relate to the provision of patient care;
2. Noncompliance with any one of these regulations would not present a hazard to patient health and safety;

3. The requirements, if not in full compliance, will not substantially affect the capability of the facility to provide an overall high quality of care to patients and/or residents;
4. Noncompliance with any one of these regulations would not jeopardize the patient's or resident's property, personal rights, or dignity; and
5. The requirements in these regulations do not relate to the financial stability of the operation or management of the facility.

It should be noted that the regulations which meet these criteria and are thus assessed at the lower level are not to be considered as non-essential or unimportant. The assessments were reduced on the basis that these regulations do not directly relate to the welfare of the patient or resident. Regulations not meeting these criteria will be assessed at a level of $250.

It is important to also realize that the contents of the regulations are not being justified at this time. The regulations listed below have been properly adopted and thus have the force and effect of law. The purpose of this document is to justify only the amount of the assessment.

7 MCAR § 1.057 Schedule of Fines for Uncorrected Deficiencies.

I General

This rule establishes the amount of a fine that will be assessed to a nursing home or a boarding care home for non-compliance with correction orders. Section A. and Section B. are existing rules while Section C. is a new schedule of fines that is based on the rules presented at the April 1, 1980 public hearing. The only change made in Section A. is the re-numbering to be in accordance with the requirements for the Minnesota Code of Agency Rules. Section B, in addition to being re-numbered, contains the appropriate reference to the provisions of Section C. The statutory authority for promulgating Section C. is contained in Minnesota Statutes § 144A.10 subd. 6 (1978) which provides that: "a nursing home. . . shall be assessed a civil fine in accordance with a schedule of fines promulgated by rule of the Commissioner of Health. A fine shall be assessed for each day the facility remains in noncompliance and until a notice of correction is received by the Commissioner of Health. . . ." Thus, it should be noted that the provisions of Section C. will, first, apply only to facilities licensed as a nursing home and, second, will provide for the daily accrual of fines in accordance with the provisions of Minn. Stat. § 144A.10 subd. 6 and subd. 7. (1978) It should also be emphasized that the new schedule of fines will only apply to the new rules and that the existing schedule of fines contained in Sections A. and B. will still be applicable to nursing homes and to boarding care homes in accordance with the provisions of Minn. Stat. § 144.653 and the continuity provisions of Minn. Stat. 144A.29 (1978). The provisions of Section C. will only apply to those rules specifically enumerated within that section.

The schedule of fines contained in Section C. provides for three levels of assessments in the amount of $50, $150 and $250. The Department has the authority to assess fines up to $250 per day (Minn. Stat. 144A.10, subd. 6.) While it

would be possible to develop a greater number of fine levels, the Department feels that the establishment of three levels provides a workable and equitable mechanism. The three levels were based on the degree of harm that would result if the nursing home fails to comply with the provisions of the rule. A $50 penalty assessment will be issued for a violation of these rules which have only a minimal relationship to the health, safety, treatment, comfort or well-being of a patient in the nursing home. A violation of these rules would not create a situation which would jeopardize the health or safety of a patient. A $150 penalty assessment will be issued for a violation of those rules which could potentially create a situation jeopardizing the health, safety, treatment, comfort or well-being of the patient. A $250 penalty assessment will be issued for a violation of these rules which would create a situation jeopardizing the health, safety, treatment, comfort or well-being of the patients.

The Department believes that the three levels provide a rational basis for issuance of penalty assessments based on a degree of harm that a violation of the rule would present to the patients in a nursing home. It should be emphasized that the Department cannot issue a fine to a nursing home until after the issuance of a correction order and until the expiration of the specified period of time for correction has elasped. Thus, prior to being in a situation which would result in the issuance of a fine, the nursing home is fully informed as to the nature of the deficiencies and provided a period of time in which to make the necessary corrections. It is only in those situations where the facility has failed to comply with the correction order and upon reinspection the Department determines that the facility is still in non-compliance with the licensing rule that the fine will be assessed.

7 MCAR Section 1.058 Allowable Time Periods For Correction

I General Comments

This proposed rule, which designates specific time periods for the nursing home to come into compliance with a correction order, is a new rule. The development of this rule is mandated by the provisions of Minnesota Statutes, 144A.10, subdivision 4. That statute specifies in part that "...the Commissioner of Health by rule shall establish a schedule of allowable time periods for correction of nursing home deficiencies." Thus, the necessity for the development of this proposed rule is clearly and specifically stated in the licensing statutes. It should be noted, that the proposed schedule of allowable time periods for correction only applies, at this time, to the specific rules that are subject to the April 1, 1980 hearing. The remaining nursing home rules will be given specific allowable time periods for correction at the time those rules are amended. It should also be noted that the provisions of Minnesota Statutes, § 144A.10, apply only to those facilities which are licensed as nursing homes. Thus, the provisions of this rule would not apply to facilities presently licensed as boarding care homes since those facilities are licensed and regulated under the provisions of Minnesota Statutes § 144A.50-122.56, and 144.653(1978).

There are two general sections to the provisions of 7 MCAR § 1.058. The first section, Section A, enumerates the specific time periods that will be allowed for correction of a nursing home deficiency. Section B, on the other hand, provides a mechanism by which the administrator of a nursing home can request an extension of a period of time for correction. This later section is necessary in order to provide the administrator with a mechanism to request an extension of time in situations where he can demonstrate that it was not possible to attain compliance

with the correction order in the period stated in the rules. A further analysis of the extension provisions will be discussed in detail, below.

The allowable time periods for correction were limited to three specific time categories, 14 days, 30 days, and 60 days. The reason for limiting the allowable periods of correction to these three categories was to establish a relatively uniform framework upon which the specific rules could be classified. The three categories also represent a reasonable attempt to provide sufficient time to the administrators of a facility to obtain compliance and when the provisions for extension of times are considered, the established time periods are not unreasonable.

The 14 day allowable time period for correction is used for those rules which can be easily corrected by a facility utilizing the internal resources of the nursing home. Thus, for those orders which can be corrected by the development of internal policies, or by utilizing the resources of the existing nursing home staff, the Department feels that a 14 day period to obtain compliance with the correction order is reasonable. In situations where the administrator can demonstrate to the Department that the period of time is not sufficient, the administrator would be allowed to request an extension of the specific time period for correction. It should also be pointed out, that the allowable time period for correction does not commence until the facility has received a copy of the correction order. The provisions of Minn. Stat. 144A.10 subd. 3, require that the correction orders be mailed to the facility by certified mail. Thus, the time period for correction will not commence to run until the facility receives the correction orders. However, the administrator and staff of the nursing home, even prior to the actual receipt of the written correction orders, have been informed of the Department's findings that were made during a survey. The Department is required to hold an

exit interview with the administrator and other facility staff to discuss the findings made during the survey of the facility and, at that time, the administrators are informed of the areas that will more than likely result in the issuance of a correction order. Thus, the administrators are given advance notice of the deficiencies found in the facility and steps to attain compliance with those correction orders should commence at that time.

The thirty day allowable time period for correction is utilized for those rules that, while possibly capable of being corrected through the utilization of nursing home resources, would usually require some contacts with individuals outside of the facility. In those situations where an order allows a thirty day period for correction, the facility has additional time to make the necessary internal arrangements as well as to contact people outside of the facility to assure that compliance is indeed attained within this period of time. The Department feels that the thirty day time period for these rules is reasonable and will provide the administrator of the facility sufficient time to make the necessary arrangements. Then, if the administrator can demonstrate that he has indeed actually been seeking to attain compliance and has run out of time, an extension may be granted under the requirements of the rule.

The third category of time, the sixty day time limit, is reserved for those specific rules where outside resources would generally have to be contacted since the nursing home would not be expected to have internal resources to attain compliance. This section is generally used for those requirements which specify the purchasing of equipment or the obtaining of contracts to perform work on the physical plant structure of the facility. The sixty day time period would allow time for the administrator to obtain bids, to enter into contracts and, if necessary, also to

contact or seek the approval of the facility's board of directors for any sort of major repairs. Again, the Department feels that the sixty day time period would provide a reasonable amount of time to the administrator to make the necessary contacts and arrangements to obtain either the equipment or to make the arrangements for outside individuals to come in and to complete the work in the facility. Again, the administrator could request an extension of time if compliance could not be attained within sixty days.

It should be emphasized that the administrators of nursing homes are aware of the requirements that are contained in the existing licensing rules. Since the administrators have notice of the requirements that are expected of them, the ability of the administrator to operate the facility in compliance with these minimum standards at all times is to be considered the standard by which their operation is to be measured. However, the Department does indeed realize that it cannot be expected that the facility is continually operated in total compliance with the rules. However, the Department feels that when noncompliance with the rules is demonstrated by Department surveyors, it is incumbent upon the nursing home to immediately take the steps that will bring that facility into compliance with the provisions of the licensing rules. The 14 day, 30 day and 60 day time periods should allow sufficient time for the administrator to take the necessary steps to attain compliance and when coupled with the requirement that the facilities are expected to be operated at the minimum level at all times, these time periods do not put an undue burden upon the administrator of the facility. However, by developing a mechanism to request an extension of time based upon the examination of the efforts of the administrator, the Department has also recognized situations where compliance may not be attained within the period of time and has allowed the administrator to request extensions for good cause.

STATE OF MINNESOTA
COUNTY OF HENNEPIN

DISTRICT COURT
FOURTH JUDICIAL DISTRICT

77 DEC 30 PM 3:39

COURT ADMINISTRATOR

White Park Nursing Home,

Petitioner,

vs.

Minnesota State Board of Health,

Respondent.

DC File No. 731,359

ORDER AND MEMORANDUM

The above entitled matter came on for hearing before the Honorable Jonathan Lebedoff, one of the Judges of the above named Court, on August 26, 1977, pursuant to an Order of the Hennepin County District Court Administration for hearing during the week of August 22, 1977.

Kathryn E. Baerwald appeared on behalf of the petitioner; John A. Breviu appeared on behalf of the respondent.

The Court continued the matter for oral argument on November 15, 1977, with John M. Brooker appearing on behalf of petitioner and Mr. Breviu again appearing on behalf of respondent.

The Court having heard the arguments of counsel and upon all the files and records herein,

IT IS HEREBY ORDERED:

1. That petitioner's motion is granted and that Dr. Warren Lawson, Commissioner of Health, and the Minnesota Department of Health be substituted as respondents in this action.

2. That petitioner's motion for an order reversing the order of the Minnesota State Board of Health or, in the alternative, reducing the amount of the assessment to $50.00 is continued for the purpose of allowing the parties to brief the constitutional questions raised by said motion, as is more fully set out in the attached Memorandum.

3. [illegible] Memorandum be made a part of [illegible].

BY THE COURT:

Jonathan Lebedoff

DEC 30 1977

MEMORANDUM

Pursuant to Minn. Stat. § 15.0424 (1976), the petitioner Waite Park Nursing Home has appealed from a decision by respondents Dr. Warren Lawson, Commissioner of Health, and the Minnesota Department of Health in an administrative contested case proceeding. The petitioner has presented two major issues for the Court's consideration regarding the decision of the respondents: (1) whether the decision of respondents upholding the assessment against the petitioner for violation of respondents' correction order was supported by substantial evidence, or (2) if the first issue is answered affirmatively, whether respondents' decision to impose a $250.00 fine is an error of law.

In discussing the first issue raised by the petitioner, the Court must determine whether the decision below upholding the assessment against the petitioner was supported by substantial evidence. Since the Court's scope of review of the facts in this case is a relatively narrow one, the Court is compelled to accept the decision of the respondents if there is "such relevant evidence as a reasonable mind might accept as adequate to support a conclusion." Minneapolis Van and Warehouse Company v. St. Paul Terminal Warehouse Company, 288 Minn. 294, 180 NW2d 175, 178 (1970). This Court cannot, within its narrow scope of review, substitute its judgment for that of the respondents when their decision is supported by substantial evidence.

The Court is satisfied from its review of the facts that the substantial weight of the evidence supports the respondents' finding that the petitioner did not substantially comply with the respondents' correction order requiring the recordation of monthly weights. Since the evidence supports the finding that petitioner did not substantially comply, it is not necessary for this Court to reach the issue posed by the petitioner as to whether a finding of substantial compliance would warrant dismissal of the assessment. Furthermore, the Court does not

believe that petitioner's claim of its good faith attempt to comply is a viable defense in the absence of a finding of substantial compliance.

Relative to the issue of whether there was substantial evidence to support a finding that there was a violation of the correction order, the petitioner claims that it was entitled to present oral arguments disputing the finding of a violation by the hearing examiner before the board of health. The Court finds no merit to this contention. The petitioner had a full opportunity to present evidence and cross-examine the board's witnesses at the hearing. Moreover, the petitioner had the opportunity to present oral and written arguments to the hearing examiner, as well as written argument before the board. The petitioner has cited no authority for the proposition that it is entitled to oral argument before the board after it already has had the opportunity to fully present its position in written form before the board and in both written and oral form before the hearing examiner.

Nor is there any merit to the petitioner's claim that MHD 48 (b) was unreasonable per se or unreasonable as it was applied to the petitioner. The Court believes that the rule requiring the recordation of nursing home patients' weights is reasonable on its face. Furthermore, the Court does not believe that the order was unreasonably applied in this case, where there was sufficient evidence to support the finding that petitioner had not substantially complied with the requirements of that order.

The second, and more difficult, major issue is whether the respondents' decision to impose a $250.00 fine is an error of law. The narrow question presented by the petitioner before this Court is whether the respondents correctly interpreted and applied the rules and law with respect to the fine. Minn. Stat. § 144.653, subd. 6 (Supp. 1975) provides in relevant part that "[t]he board of health shall promulgate by rule and regulation a schedule of fines applicable for each type of uncorrected deficiency." Pursuant to this statute, the board of health promulgated a schedule of fines which is set out in MHD 57. The pertinent fine in this case, MHD 57 (b), states:

> (b) A $250 penalty assessment will be issued under the provisions of Minn. Stat. § 144.653, subd. 6 (1974) for noncompliance with correction orders relating to [MHD 48 (b)].

The Court accepts the argument of the respondents that according to the literal wording of this rule the hearing examiner and the respondents do not have discretion in assessing the amount of the fine. Minn. Stat. § 144.653, subd. 8, requires that the hearing examiner impose a penalty "as determined by the board in accordance with subdivision 6 (of § 144.653)." Therefore, the hearing examiner must impose a fine which is consistent with the board of health's schedule of fines referred to in § 144.653, subd. 6. Since the applicable fine, MHD 57(b), is mandatory, the hearing examiner does not have discretionary authority to modify the fine as designated in the board's schedule of fines. According to this interpretation of the rule, it follows that any modification of the designated fine would have been beyond the scope of the hearing examiner's authority.

Even assuming arguendo that the hearing examiner could modify the fine, the Court believes that Minn. Stat. § 144.653, subd. 8 does not bestow final decision making power upon the hearing examiner with regard to the assessment of a fine. Minn. Stat. § 144.653, subd. 8, states in relevant part:

> Upon determining that the license of a facility required to be licensed under sections 144.50 to 144.58 has not corrected the deficiency specified in the correction order, the hearing officer shall impose a penalty as determined by the board in accordance with subdivision 6. The hearing and review thereof shall be in accordance with the relevant provisions of the administrative procedures act.

(Emphasis added.)

The relevant provision of the Administrative Procedure Act that controls in the instant case is Minn. Stat. § 15.052, subd. 3 (Supp. 1975). That section of the APA provides that the hearing examiner's duties include the making of a report "stating his findings of fact and his conclusions and recommendations." Therefore, except in the few cases noted

by the respondents, the agency, not the hearing examiner, has the authority to render a final decision of the matter based in part upon the hearing examiner's findings, conclusions and recommendations. Minn. Stat. § 15.0421 (Supp. 1975). Moreover, it is the agency which is vested with the power to interpret its own regulations and guidelines. Jet Services, Inc. v. Hoffman, 420 F. Supp. 1300 (M.D. Fla. 1976); Vonasek v. Hirsch and Stevens, Inc., 65 Wis.2d 1, 221 NW2d 815 (1974). Thus, if the hearing examiner misinterprets a rule or regulation of the agency, the agency has the authority to render its decision consistent with its own interpretation of a particular rule.

However, accepting the respondents' interpretation of the law as compelling a non-discretionary fine, the Court cannot help but question whether the application of the rule requiring a set fine is violative of the constitutional principles of due process. While the petitioner did not directly attack the constitutional validity of MHD 57(b), the petitioner, by reference to Riverview Nursing Home v. Minnesota State Board of Health, Hennepin County District Court File No. 711,145 (January 23, 1976) and Cedar Pines Nursing Home v. Minnesota State Board of Health, Hennepin County District Court File No. 719,108 (November 18, 1977), does raise the question as to whether constitutional principles of due process require that substantial compliance and the good faith efforts of a facility to comply with a correction order be taken into account in the determination of a fine. The Court appreciates the fact that the Riverview and Cedar Pines cases involve a statute which is worded differently from the applicable rule in this case. However, the fact that the instant rule contains non-discretionary language does not excuse this Court from its obligation to examine the rule in light of constitutional principles of due process. It is significant that the decisions in Riverview and Cedar Pines went beyond just merely interpreting the applicable statute in those cases,

but were based in part upon what was believed to be constitutionally required by due process. In both cases, the Court held that good faith intent to comply and substantial compliance with the correction order were to be considered in assessing the fine to be imposed.

If the petitioner contends that constitutional principles of due process require the consideration of good faith and substantial compliance in assessing a fine, the constitutional validity of MHD 57(b) is necessarily drawn into question. Since this issue was not directly addressed by either of the parties, but only indirectly by the petitioner, the Court will grant leave to the parties to submit further memoranda regarding this crucial issue.

The parties may have until Wednesday, December 28, 1977, to submit to the Court memorandums on the constitutional question. The Court will be free at any time after that date for further appearances consistent with any of the issues in this case.

J.G.L.

FILED
'77 NOV 30 PM 3:35
BY HENRY G. [illegible]
COURT ADMINISTRATOR

APPENDIX G-2

STATE OF MINNESOTA — DISTRICT COURT

COUNTY OF HENNEPIN — FOURTH JUDICIAL DISTRICT

JAN 31 PM 2:03

RECEIVED
FEB 01 1978
Legal Office
Minn. Dept. of Health

Waite Park Nursing Home, Petitioner,	)	File No. 731,359
-vs-	)	ORDER AND MEMORANDUM
Minnesota Department of Health and Dr. Warren Lawson, Commissioner of Health, Respondents.	)	

The above-entitled matter came on for hearing before the Honorable Jonathan Lebedoff, one of the Judges of the above-named Court, on August 26, 1977, pursuant to an Order of the Hennepin County District Court Administration for hearing during the week of August 22, 1977.

Kathryn E. Baerwald appeared on behalf of the Petitioner; John A. Breviu appeared on behalf of the Respondent.

The Court continued the matter for oral argument on November 15, 1977, with John M. Broeker appearing on behalf of Petitioner and Mr. Breviu again appearing on behalf of Respondent.

The Court having heard the arguments of counsel and upon all the files and records herein,

IT IS HEREBY ORDERED:

1. That Petitioner's motion for an order reversing the order of the Minnesota Department of Health and Dr. Warren Lawson, Commissioner of Health or, in the alternative, reducing the amount of the assessment to $50.00 is in all things denied.

2. Let the attached Memorandum be made a part of this Order.

BY THE COURT:

Jonathan Lebedoff
Judge of District Court

Dated: January 31, 1978

MEMORANDUM

The present case involves an appeal brought by Petitioner Waite Park Nursing Home from an administrative decision by the Respondents, the Minnesota Department of Health and Dr. Warren Lawson. The facts surrounding the instant matter have been more fully discussed in this Court's Order and Memorandum of November 30, 1977. As part of the Court's Order and Memorandum of November 30, 1977, this Court found that the respondents' conclusion that the petitioner had not substantially complied with a Department of Health correction order relating to Minn. Rule MHD 48(b) was supported by substantial evidence in the record. However, at that time, the Court reserved ruling on petitioner's request for an order reversing the decision of the respondents, or in the alternative, reducing the assessed fine of $250.00 to $50.00 until the parties had submitted briefs regarding the constitutionality of Minn. Rule MHD 57(b).

Minn. Rule MHD 57(b) is one portion of a schedule of fines promulgated under Minn. Stat. § 144.653, subd. 8 (Supp. 1975). The rule states:

> (b) A $250 penalty assessment will be issued under the provisions of Minn. Stat. § 144.653, subd. 6 (1974) for noncompliance with correction orders relating to [MHD 48(b)].

(Emphasis added.)

In accepting the respondents' position that the rule requires a mandatory fine of $250.00 to be assessed for each violation, this Court was concerned whether the constitutional principles of due process required the consideration of good faith and substantial compliance in assessing the fine. Since the constitutionality of a mandatory assessment amount was only indirectly raised by the petitioner, the Court granted leave to the parties to brief this issue.

In reviewing the briefs that were submitted by the parties relevant to this issue, the Court is persuaded that Minn. Rule 57(b), as part of a mandatory schedule of fines promulgated under statutory authority, is constitutional. As was pointed out by the respondents, the petitioner bore a heavy burden in

overcoming the presumption that a law is valid. As was stated by the Minnesota Supreme Court in Dimke v. Finke, 209 Minn. 29, 32, 295 N.W. 75, 78 (1940):

> Every law is presumed to be constitutional in the first instance. An act will not be declared unconstitutional unless its invalidity appears clearly or unless it is shown beyond a reasonable doubt that it violates some constitutional provision. The power of the court to declare a law unconstitutional is to be exercised only when absolutely necessary in the particular case and then with great caution.

Likewise, in State v Carlson, 291 Minn. 368, 375, 192 N.W.2d 421, 426 (1971), the Minnesota Supreme Court stated:

> A law is not to be declared unconstitutional by the courts unless palpably so. The power of the court in this regard is to be exercised only when absolutely necessary, and then with extreme caution. Unless a law is unconstitutional beyond a reasonable doubt, it must be sustained.

It is the opinion of the Court that the petitioner has not met its heavy burden of proof in showing that the predetermined schedule of administrative penalties is constitutionally invalid. Rather, the Court is persuaded that the assessment of a predetermined fine is a constitutionally permissible exercise of the State's police power in promoting public health objectives. It is significant that the implementation of mandatory predetermined civil and criminal fines has been consistently unheld by the courts. Helvering v. Mitchell, 303 U.S. 391, 400 (1938); Lloyd Sabaudo Societa Anonima v. Elting, 287 U.S. 329 (1932); People of the City of Pontiac v. Courts, ____ Mich ____, 257 N.W.2d 101 (1977); Multi-Line Insurance Rating Bureau v. Commissioner of Insurance, 357 Mass. 19, 225 N.E.2d 787 (1970); People v Spence, 367 A.2d 983 (Del. 1976); People v Hall, 396 Mich 650, 242 N.W.2d 377 (1976); State v. Fearick, 69 N.J. 32, 350 A.2d 277 (1976); State v. Walker, 307 Minn. 105, 235 N.W.2d 810 (1975). Moreover, as was observed by the respondents, the Minnesota Supreme Court on at least one occasion has indicated a preference for mandatory predetermined administrative penalties in order to maintain uniformity and avoid discrimination. State v. Duluth, M & N Ry. Co., 207 Minn. 630, 292 N.W. 409 (1939).

Since this Court has already found that substantial evidence in the record supports the finding that the petitioner had violated a Department of Health correction order, we cannot help but

conclude that the Department of Health was correct in its imposition of the mandatory predetermined fine of $250.00 as provided in Minn. Rule MHD 57(b). Under the present schedule of fines, once there has been a finding of a lack of substantial compliance with the requirements of a correction order, the Department of Health has no discretion in determining the amount of the assessment, but is bound to follow and impose the predetermined assessment provided for in Minn. Rule MHD 57.

For the above reasons and the reasons stated in the Court's Order and Memorandum of November 30, 1977, the petitioner's request for an order reversing the decision of the Minnesota Department of Health, or in the alternative, reducing the amount of the assessment, should be denied.

STATE OF MINNESOTA

COUNTY OF HENNEPIN

DISTRICT COURT

FOURTH JUDICIAL DISTRICT

Viewcrest Nursing Home,
District Court File No. 758150,

Midway Manor Nursing Home,
District Court File No. 758151,

Viewcrest Nursing Home,
District Court File No. 758325,

Midway Manor Nursing Home,
District Court File No. 758707,

Viewcrest Nursing Home,
District Court File No. 759730,

Park Point Manor Nursing Home,
District Court File No. 760216,

Park Point Manor Nursing Home,
District Court File No. 761979,

St. Paul's Church Home,
District Court File No. 771970,

Pelican Lake Nursing Home,
District Court File No. 771505,

Petitioners,

vs.

Commissioner of Health of
the State of Minnesota,

Respondent.

FINDINGS OF FACT, CONCLUSIONS OF LAW, AND ORDER

This matter came before the undersigned, Acting Judge of District Court, pursuant to the petitions of the above-referenced petitioners for review of various orders made by respondent Minnesota Commissioner of Health (hereinafter "Commissioner"). These petitions were consolidated into this action by order of Eugene Minenko, Chief Judge of the District Court.

Petitioners were represented by the firm of Broeker, Hartfeldt, Hedges & Grant through Barbara J. Blumer and Steve M. Mihalchick. The Commissioner was represented by Attorney General Warren Spannaus, through John A. Breviu and William G. Miller, Special Assistant Attorneys General.

Upon all the files, records, proceedings, the briefs and arguments of counsel, and having been fully advised in the premises, the Court hereby makes the following:

FINDINGS OF FACT

I.

All petitioners herein are nursing homes duly licensed by the Commissioner.

II.

Pursuant to Minn. Stat. §144.653 et seq. (1978) and Minn. Stat. §144A.01 et seq. (1978), the Commissioner has promulgated and does enforce a code of rules which set the standards under which nursing homes are required to operate. Minn. Rules MHD 44-67 (7 MCAR §§ 1.044-1.067).

III.

The Minnesota Office of Health Facility Complaints has been duly authorized to serve as agent of the Commissioner in the issuance of correction orders and assessments to health care facilities and was so authorized at all times relevant to this action.

IV.

This matter is before the Court as a consolidation of nine separate petitions for judicial review of the issuance of penalty assessments by the Commissioner to each petitioner for violation of various rules governing the operation of nursing homes.

V.

Upon the initial determination by a representative of the Commissioner that each petitioner had violated one or more of the above-referenced rules, a correction order or orders were issued to each petitioner informing it of the deficiencies present and the provisions of the rule which were violated, providing suggested methods of correction, and setting time periods for the correction of the violation.

VI.

Each petitioner was reinspected following the expiration of the time period given for compliance with the correction order.

VII.

At the reinspection, each petitioner was found by the inspectors to remain in violation of the correction orders at issue.

VIII.

A notice of assessment was sent to each facility based upon each continued violation. The amount of the assessment was set as provided by Minn. Rule MHD 57.

IX.

Each petitioner availed itself of the opportunity to contest the issuance of the assessments at an administrative hearing before an independent examiner, pursuant to the Minnesota Administrative Procedure Act, Minn. Stat. §§15.041-15.43.

X.

The recommendation of the hearing examiner, together with the entire record in each of the cases at issue herein, was presented to the Commissioner for final action. Upon review of the record in each of the cases at issue herein, the Commissioner upheld the issuance of the assessments and ordered payment.

XI.

All factual findings made by the Commissioner as a part of the record of the consolidated matter herein are supported by substantial evidence.

CONCLUSIONS OF LAW

1.

All petitioners herein are properly before this Court.

2.

Minn. Stat. §§144.653 and 144A.10, subd. 6 (1978), when read in conjunction with the entire statutory scheme for

the regulation of nursing homes, provide sufficient standards to control the discretion of the Commissioner of Health, and the delegation of rulemaking authority contained therein is in all respects constitutional.

3.

Minn. Stat. §§144.653 and 144A.10 properly delegate to the Commissioner the authority to set by rule the schedule of fines found in Minn. Rule MHD 57.

4.

The Office of Health Facility Complaints has the authority to issue assessments to nursing homes under the authority of Minn. Stat. §§144A.10 (1978).

5.

The Office of Health Facility Complaints has the authority to issue assessments to nursing homes as a duly authorized agent of the Commissioner of Health.

6.

The schedule of fines contained in Minn. Rule MHD 57 was effective during all times relevant to this action by virtue of the continuity provision of Minn. Stat. §144A.29, subd. 1 (1978).

7.

Minn. Stat. §144A.10, subd. 5 (1978) does not set a time limit during which reinspection must occur, but rather provides that no assessment shall be based upon a reinspection made before the expiration of the time period set for correction of the violation or given in the correction order.

8.

All reinspections herein were made within a reasonable time from the expiration of the time period for correction set forth in each correction order.

9.

The facts found by the Commissioner, and not challenged by petitioner Midway Manor, establish violation

by Midway Manor of the provisions of Minn. Rules MHD 54 (a) (1), 54(a)(3), 54(a)(2), 56(3) and 67(a)(1)(ff).

10.

The facts found by the Commissioner, and not challenged by petitioner Viewcrest Nursing Home, establish violation by Viewcrest of the provisions of Minn. Rules MHD 55(h) and 55(3).

11.

The issues of "substantial compliance," "good faith efforts to comply" and the validity of a basically uniform schedule of fines, although raised by petitioners in their Petitions for Judicial Review, were neither briefed nor argued by petitioners and are not properly before this Court.

ORDER

IT IS HEREBY ORDERED that the Orders, Assessments, Findings of Fact and Conclusions of Law made by the Minnesota Commissioner of Health relative to the above-entitled consolidated matter are in all respects affirmed.

BY THE COURT:

Roberta K. Levy
Acting Judge of District Court

Dated this 9 day of January, 1981.

MEMORANDUM

The above-consolidated matters involve the petitions of nine nursing homes for judicial review of decisions rendered by the Minnesota Commissioner of Health (hereinafter "Commissioner"). In each of the cases under consideration, a contested hearing was held and the Commissioner imposed penalty assessments for violation of rules governing the operation of nursing homes. The Court granted petitioners' motion to amend their petitions to raise the unconstitutionality of certain provisions of the applicable statute on improper delegation grounds at the hearing of this cause.

Minn. Stat. §15.0425 (1978) sets forth the scope of judicial review of administrative decisions:

> 15.0425 SCOPE OF JUDICIAL REVIEW. In any proceeding for judicial review by any court of decisions of any agency as defined in §15.0411, subd. 2 the court may affirm the decision of the agency or remand the case for further proceedings; or it may reverse or modify the decision if the substantial rights of the petitioners may have been prejudiced because the administrative finding, inferences, conclusions or decisions are: (a) in violation of constitutional provisions; or (b) in excess of the statutory authority or jurisdiction of the agency; or (c) made upon unlawful procedures; or (d) affected by other error of law; or (e) unsupported by substantial evidence in view of the entire record as submitted; or (f) arbitrary or capricious.

It is well established that the reviewing court is to accord considerable deference to an agency decision when it is supported by substantial evidence. See e.g. Murphy Motor Freight, 307 Minn. 444, 339 N.W. 2d 926 (1976); Gibson v. Civil Services Board, 285 Minn. 123, 171 N.W.2d 712 (1969). Deference to agency findings is based upon the agency's unique knowledge of and expertise in the regulated field. St. Paul Area Chamber of Commerce v. Minnesota Public Service Commission, 251 N.W.2d 350 (Minn. 1977). If supported by substantial evidence, the reviewing court is to uphold an agency determination although

it may have reached a different decision. Reserve Mining Co. v. Herbst, 256 N.W.2d 808 (Minn. 1977); Vicker v. Starkey, 265 Minn. 464, 122 N.W.2d 169 (1963).

The Court rejects petitioners' argument that a standard of review other than the substantial evidence test should be applied by this Court. However, having reviewed all files and records herein, the Court is convinced that under any standard, the Commissioner's findings and conclusions in each of the cases herein are correct and should be in all respects affirmed.

Insofar as the common issues of law are concerned, petitioners challenge the Commissioner's penalty assessments in each case on essentially four grounds: (1) that the Office of Health Facility Complaints has no authority to issue assessments; (2) that the Commissioner has no present authority to impose the assessments in question; (3) that the assessments must be dismissed due to the failure to make timely reinspections as required by Minn. Stat. §144A.10 subd. 5; and (4) that Minn. Stat. §144.653 subd. 6 and Minn. Stat. §144A.10 subd. 6 are unconstitutional due to the absence of criteria or standards to control agency discretion.

The Court is unpersuaded by petitioners' contention that the Office of Health Facility Complaints (hereinafter "OHFC") lacks the requisite authority to issue the challenged assessments. Minn. Stat. 144A.10 subd. 4 and 5 (1978) allows the Commissioner to authorize a representative to issue correction orders, to conduct reinspections, and if the facility has not complied with the correction orders, to issue a notice of assessment. There is no legislative restriction on the authority of the Commissioner to designate the representative of his choice to carry out the duties set forth in Minn. Stat. §144A.10. By reviewing and upholding the assessments imposed by the OHFC, the Commissioner has clearly recognized it as his representative.

Secondly, petitioners argue that because no schedule of fines has been adopted by the Commissioner as mandated under Minn. Stat. §144A.10 subd. 6 (1978), the Commissioner has no authority to issue penalty assessments. The subject statute provides:

> A nursing home which is issued a notice of noncompliance with a correction order shall be assessed a civil fine in accordance with a schedule of fines promulgated by rule of the commissioner of health. The fine shall be assessed for each day the facility remains in noncompliance and until a notice of correction is received by the commissioner of health in accordance with subdivision 7. No fine may exceed $350 per day of noncompliance.

(Emphasis added).

The Court finds the argument of petitioners unpersuasive. The existing schedule of fines found in Minn. Rule MHD 57 was promulgated in 1975 pursuant to the authority of Minn. Stat. §144.653 subd. 6 (1974, as amended in 1975). By virtue of the continuity provision contained in Minn. Stat. §144A.29 subd. 1 (1978), the rule clearly remains effective and is dispositive of the issue. Minn. Stat. §144A.29 subd. 1 provides:

> The provisions of any rule affecting nursing homes...heretofore promulgated in accordance with chapter 144...shall remain effective with respect to nursing homes...until repealed, modified or superceded by a rule promulgated in accordance with Laws 1976, chapter 173.

Although arguably, the Commissioner may be criticized for failing to expeditiously promulgate rules in accordance with Minn. Stat. §144.10 subd. 6, the Commissioner's absence of diligence does not vitiate the schedule of fines contained in MHD 57.

Petitioner's third argument is that the failure to make timely reinspections requires dismissal of the challenged assessments. The reinspections in the cases herein involved occurred three to five months after the period allowed for

correction had expired. Minn. Stat. §144A.10 subd. 5 (1978) provides in part:

> A nursing home issued a correction order under this section shall be reinspected at the end of the period allowed for correction. The reinspection may be made in conjunction with the next annual inspection or any other scheduled inspection.

By Minn. Law 1977 ch. 326 §5, the legislature amended the statute by adding the last sentence. The amendment allows a measure of flexibility and specifically permits the agency to choose when the reinspection will occur. Hence, petitioners are not entitled to dismissal of the subject assessment on timeliness grounds.

Petitioners' final argument is that Minn. Stat. §144.653 subd. 6 (1976) and Minn. Stat. §144A.10 subd. 6 (1978) are unconstitutional because the subject provisions allow the Commissioner to adopt rules fixing the amount of penalty assessment for violation of a nursing home rule without sufficient standards to control or guide administrative discretion. Those provisions provide:

> 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 him 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 and regulation a schedule of fines applicable for each type of uncorrected deficiency. Minn. Stat. §144.653 subd. 6.
>
> A nursing home with is issued a notice of noncompliance with a correction order shall be assessed a civil fine in accordance with a schedule of fines promulgated by rule of the commissioner of health. The fine shall

> be assessed for each day the facility remains in noncompliance and until a notice of correction is received by the commissioner of health in accordance with subdivision 7. No fine for a specific violation may exceed $250 per day of noncompliance. Minn. Stat. §144A.10.

Minnesota has permitted a broad delegation of discretionary authority to administrative officers. City of Minneapolis v. Krebes, 303 Minn. 219, 266 N.W.2d 615 (1975). If a law relates to the administration of a regulation which is necessary for the protection of the general health, safety and welfare and if it is impracticable to define a comprehensive rule, the lack of a specific, express standard in the legislation will not render the law unconstitutional. Anderson v. Commissioner of Highways, 267 Minn. 308, 126 N.W.2d 778 (1964). It simply would not be practical for the legislature to anticipate the numerous possible violations for which a correction order may issue. Setting forth a maximum fine and allowing the Commissioner to apply his expertise in promulgating a specific schedule of fines is sufficient for constitutional purposes. The challenged statutes confer upon the Commissioner the power to fashion a reasonable schedule of fines for the violation of specific nursing home rules. See Lee v. Delmont, 228 Minn. 101, 36 N.W. 2d 530 (1949).

For the foregoing reasons, the challenged assessments are in all respects affirmed.

R.K.L.