

1/6/92

MINNESOTA DEPARTMENT OF HEALTH

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

STATEMENT OF NEED AND REASONABLENESS

INTRODUCTION

The Department of Health is required to establish a schedule of fines for uncorrected violations of the Supervised Living Facilities rules and Minnesota Statutes, sections 144.411 to 144.417, 144.651 and 626.557 relating to the operation of supervised living facilities.

LEGAL AUTHORITY

Minnesota Statutes, section 144.653, subdivision 6, requires the Commissioner to establish fines for uncorrected deficiencies in supervised living facilities. Laws of Minnesota 1991, chapter 286, section 4 amended Minnesota Statutes, section 144.653, subdivision 5 to authorize the agency to issue correction orders for failure to comply with the following Minnesota Statutes: sections 144.411 to 144.417, Minnesota Clean Indoor Air Act; section 144.651, Patients and Residents of Health Care Facilities Bill of Rights; and section 626.557, Reporting of Maltreatment of Vulnerable Adults.

FINE LEVELS

Minnesota Statutes, section 144.653, subdivision 6, states that the Commissioner shall:

promulgate by rule a schedule of fines applicable for each type of uncorrected deficiency.

This rule is necessary to implement this statutory requirement. The underlying premise behind a system of fines is to ensure that there is an efficient mechanism to promote compliance with statutes and rules, and that the licensee operates in accordance with these statutes and rules. To assist the Commissioner in conceiving and designing such a system, the Department examined the rationale behind the system of fines already in place in nursing homes for noncompliance with correction orders: 8 S.R. 225 to 240 (1983), and 8 S.R. 1524 (1983) (proposed August 15, 1983, adopted December 26, 1983, and codified in Minnesota Rules, parts 4655.9320 to 4655.9341). That system relates the amount of the fine to the impact on the resident resulting from noncompliance with the statute or rule. In other words, it looks at how noncompliance jeopardizes the health, treatment, safety, comfort, or well-being of residents. This rule adopts

this system of fines for the reasons set forth in 8 S.R. 225 to 240 (1983), referred to above. The nursing home schedule adopts an eight-tier level of fines: \$50, \$100, \$150, \$200, \$250, \$300, \$350, and \$500. The minimum penalty assessment of \$50 is assigned to those rules that do not directly jeopardize the health, safety, treatment, comfort or well-being of residents; the \$100 penalty assessment is assigned to those rules that are related to the administration and management of the nursing home; the \$150 and \$200 penalty assessments are assigned to those rules that are related to the physical environment and physical plant of the facilities (the \$150 penalty assessment is assigned to those rules that do not necessarily impact directly on the health and safety of residents but do impact on the comfort or well-being of residents, and the \$200 penalty assessment is assigned to those rules that may impact on the health or safety of residents); the \$250 penalty assessment is assigned to those rules and statutes that relate to the protection of the individual rights of residents; the \$300 penalty assessment is assigned to those rules that are necessary to ensure that services are properly provided; the \$350 penalty assessment is assigned to those rules that are related to the direct provision of services to residents; and the maximum penalty assessment of \$500 is assigned to those rules and statutes that present an imminent risk of harm to the health, treatment, comfort, safety or well-being of nursing home residents.

It is reasonable to adopt the fine levels and categories established for nursing home violations because the nursing home rules and the rules and statutes governing supervised living facilities are all designed to protect and promote the health, safety, and well-being of consumers by regulating the provision of services to persons in health care facilities. Therefore, fines developed to address and promote compliance with the nursing home rules and applicable statutes should also address and promote compliance with the rules and applicable statutes for supervised living facilities. The fines themselves are reasonable because they take into consideration the potential for harm to clients while at the same time establishing sufficient sanctions to ensure compliance with applicable statutes and rules.

The provisions of the law specify that \$1000 is the maximum fine that can be assessed for each deficiency not corrected, and that for each subsequent reinspection the licensee may be fined an additional amount for each deficiency which has not been corrected. The Department believes that the proposed schedule is a sufficient economic deterrent for this industry and is not overly burdensome.

The proposed schedule of fines has been arranged in the numerical sequence of the rules with the fines for specific portions of a rule designated under that rule number. It should be noted that in certain situations different fine amounts have been assigned to the various elements contained within one section or subsection. For example, \$300, \$100 and \$50 assessments have been assigned to the provisions of Minnesota Rules, part 4665.4600. The impact of a violation of the various elements contained in that rule would have a different degree of impact on the health, safety, treatment, comfort or well-being of the residents. Since the potential for harm is different, it became necessary to isolate the elements of this particular rule section to assure that the fine assigned to each element reflects the potential for harm.

In situations where a rule has a number of specific elements which could constitute a violation and when the impact of noncompliance with each one of these elements is the same, only one fine amount has been assigned and each element would be subject to the issuance of a penalty assessment in that amount. For example, Minnesota Rules, part 4665.4200, which relates to the

control of medications, has been assigned a \$500 penalty assessment. However, there are a number of separate elements within that rule that could result in the issuance of a correction order. A violation of any of these elements would result in a \$500 penalty assessment.

Failure to Correct Deficiency After a Fine Has Been Imposed

Minnesota Statute 144.653, subdivision 6, states that for each subsequent reinspection, the licensee may be fined an additional amount for each deficiency which has not been corrected. If, upon subsequent reinspection after a fine has been imposed the deficiency has still not been corrected, another fine will be assessed. This fine will be double the amount of the previous fine. This is reasonable because an uncorrected order after ample opportunity to correct and one previous reinspection demonstrates bad faith by the licensee. It also increases the impact on the health, safety, treatment, comfort or well-being of the facility's residents.

RULEMAKING PROCESS

A Notice of Solicitation of Outside Information or Opinions Regarding Proposed Rules Governing Fines for Uncorrected Violations of the Supervised Living Facility Rules was published in the *State Register*, 15 S.R. 2311, on April 22, 1991. Subsequently, the 1991 legislation was passed and a Notice of Solicitation of Outside Information or Opinions Regarding Proposed Rules Governing Fines for Uncorrected Violations by Supervised Living Facilities of Certain Statutory Requirements was published in the *State Register*, 16 S.R. 103, on July 15, 1991. The purpose of these notices was to notify interested parties that the Minnesota Department of Health was beginning the rulemaking process and requesting information and opinions from them concerning a schedule of fines for supervised living facilities. A letter soliciting information or opinions on the fine schedule for violations of the supervised living facility rules was sent to mental health provider and consumer organizations, and to licensed supervised living facilities for chemical dependency treatment on June 6, 1991. A second letter soliciting information on the fine schedule for violations of the statutes was sent to the same organizations and facilities on July 9, 1991. The comments received have been few in number and of a general nature.

SMALL BUSINESS CONSIDERATIONS

Rules that regulate supervised living facilities are exempt from the requirements concerning small business considerations, under section 14.115, subdivision 7, clause (3).

CONCLUSION

Based on the information above, it is reasonable to assign eight levels of penalty assessments ranging from \$50 - \$500 based on the impact of noncompliance on the resident's health, safety, treatment, comfort or well-being. Each rule and statutory requirement was evaluated against these criteria and an appropriate penalty assessment was assigned. It is reasonable for the Department to increase the amount of fine as a sanction for failure to comply.

EXPERT WITNESSES

The Department does not plan to solicit outside expert witnesses to testify for the Department at the public hearing. The Department intends to have the following employees testify or be available at the hearing: Mary Absolon, Assistant Director of the Division of Health Resources, and Sandra Abrams, Division of Health Resources. Other Department staff may substitute for the above named individuals.

12/5, 1991



Marlene E. Marschall
Commissioner