

Minnesota Attorney General: Administrative Rules Proceedings

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Version 3
August 20, 2018

Our File # 5[illegible]28

RULES REVIEW CHECKLIST

DATE RULES RECEIVED 7-12-79 Temporary Rule _____

Resubmitted and Received _____

DUE DATE 8/1

a. Returned to Agency w/o filing w/Secy of State 8/1
b. Approved 8/1 Date Sent Back to Agency 8/1

- -

1. Rules as Adopted ✓
2. Rules as Proposed ✓
3. Certificate of Board's Authorizing Resolution, where applicable N.A.
4. Order for Hearing ✓
5. Notice of Hearing ✓
   (i) Sufficiency ✓
6. Secretary of State's List ✓
7. Certificate of Acquisition of Secretary of State's List ✓
8. Affidavit of Mailing ✓
   (i) At least 30 days prior to hearing ✓
9. Statement of Need and Evidence ✓
10. Hearing Examiner's Report ✓
11. Agency's Findings of Fact ✓
12. Certificate of Board's Resolution Adopting Rules, where applicable N.A.
13. Order Adopting ✓
14. Report of Chief Hearing Examiner ✓
    (i) Finding of No Substantial Change ✓
    (ii) Permission to Incorporate by Reference, where applicable N.A.
15. Certificate of Compliance with Rulemaking Procedures ✓
16. Copy of Notice of Intent to Solicit Outside Opinion, where applicable N.A.
17. Petition by Public, where applicable N.A.

Our File: #528

P. Kenneth Kohnstamm
Special Assistant
Attorney General

August 1, 1979

Lee E. Sheehy

In the Matter of the Proposed Amendments to DPW Rule 49 Governing Compensation of Nursing Home Facilities For Treatment of Welfare Patients.

cc: Marshall Whitlock
Melvin Goldberg
Duane Harves

DPW Rule 49

B. RATE DETERMINATION

B.1.b.(2) Per-diem rates for non-proprietary facilities may include an efficiency allowance. If the facility's allowable historical cost per patient per day for the most recently completed fiscal year is less than the allowable welfare rate exclusive of Sections B.4.a.&~~b~~B. and as adjusted for the lack of implementation of known cost changes, an efficiency allowance will be granted equal to the difference between the allowable historical cost and the allowable welfare rate subject to a maximum efficiency allowance of 60 cents per patient per day. For each year after the year in which the non-proprietary facility was originally purchase and there is no transfer of ownership of the facility, the efficiency allowance maximum will be increased one cent per patient per day subject to a maximum of an additional 25 cent per patient per day after 25 years. If a non-proprietary facility is operated on a lease basis, there shall not be recognized as an allowable cost for the operator any rental fees in excess of the total amount allowed for depreciation, interest, and pursuant to B.1.b.(2), provided however that such a rental fee may be recognized in entirety for the period that it was incurred under a lease entered into before April 13, 1976 and prior to the subsequent renewal of said lease. This provision of the Rule will be effective for rates paid non-proprietary facilities on January 1, 1978 and subsequent until such time as it is disapproved by HEW.

D. REASONABLE COST PRINCIPLES

D.6.b.(1) Determination of allowance. Proprietary homes where cost reports are received after January 1, 1977, shall receive an investment allowance of nine percent of the original value of the facility for depreciation purposes. ~~Non-proprietary-homes-whose-fiscal-year-begins-after-June-30,-1977 shall-receive-an-investment-allowance-of-two-percent-of-the original-value.~~ For each year after the year in which the nursing home was originally purchased in which there is no transfer of ownership of a nursing home, the investment allowance shall be increased by one percent of the original investment allowance, but the increases shall be limited to a maximum of 25 percent of the original investmant allowance effective for rates paid on August 1, 1977.

Underlining indicates proposed additions; strikeouts indicates proposed deletions.

Exhibit D

APPROVED AS TO FORM AND LEGALITY
AUG. 1 1979
WARREN SPANNAUS, ATTORNEY GENERAL
BY
SPECIAL ASSISTANT ATTORNEY GENERAL

STATE OF MINNESOTA
DEPARTMENT OF STATE
FILED
AUG 1 1979
Joan Anderson Growe
Secretary of State
12:00 p.m.

STATE OF MINNESOTA

DEPARTMENT OF PUBLIC WELFARE

IN THE MATTER OF THE PROPOSED ADOPTION OF AMENDMENTS TO DPW RULE 49 GOVERNING WELFARE PER-DIEM RATES FOR NURSING HOME PROVIDERS UNDER THE TITLE XIX MEDICAL ASSISTANCE PROGRAM

ORDER ADOPTING RULES

The above-entitled matter came on for hearing before Peter Erickson, Hearing Examiner, Office of Hearing Examiners of the State of Minnesota, at 9:00 a.m. on Thursday, January 18, 1979, at the Minnesota Veterans' Home, Building 15, Auditorium Chapel Building, Minnehaha Avenue and 51st Street, Minneapolis, Minnesota, after proper notice required by Minnesota Statutes Section 15.0412 (1978) was served on all persons, associations, and other interested groups registered with the Secretary of State for that purpose.

At said hearing proposed amendments to the above-captioned rule were considered as originally proposed as shown in Exhibit A attached hereto. Mr. Robert Rau, Director of the Audit Division, made the agency presentation at the hearing. The hearing continued until all interested persons and groups had an opportunity to be heard. Based upon all the records and proceedings the Examiner issued a Report of Hearing Examiner, dated March 8, 1979 and an Addendum to Report of Hearing Examiner, dated March 12, 1979, copies of which are attached hereto as Exhibits B and C respectively. The Examiner's Report contains Findings of Fact and a Recommendation.

Pursuant to Minnesota Statutes Section 15.0412, subd. 4 (1978), the Examiner's Report and Addendum to Report have been available to all effected persons for over five days subsequent to the date of the report.

After affording interested persons an opportunity to present written and/or oral statements, having reviewed all of the testimony, having considered all of the evidence adduced, having considered the report of the Hearing Examiner, and upon all the proceedings and testimony herein and applicable statutory standards or criteria, and having determined the need for the above-captioned rules and the reasonableness thereof,

NOW THEREFORE, IT IS ORDERED THAT the Commissioner hereby adopts and incorporates herein the Report of the Hearing Examiner, dated March 8, 1979, and accordingly amends the last two sentences of B.1.b.(2) as follows:

> If a non-proprietary facility is operated on a lease basis, there shall not be recognized as an allowable cost for the operator any rental fees in excess of the total amount allowed for depreciation, interest, and pursuant to B.1.b.(2), provided however that such a rental fee may be recognized in entirety for the period that it was incurred under a lease entered into before April 13, 1976 and prior to the subsequent renewal of said lease. This provision of the Rule will be effective for rates paid non-proprietary facilities on January 1, 1978 and subsequent until such time as it is disapproved by HEW.

IT IS FURTHER ORDERED THAT the above-captioned rules from and after this day of June , 1979, shall read in their entirety as set forth in the attached Exhibit D, pursuant to the authority vested in me under Minnesota Statutes 256B.46 (1978).

Dated: June 26, 1979.

STATE OF MINNESOTA
DEPARTMENT OF PUBLIC WELFARE

Arthur E. Noot
Commissioner

ADMIN 1000 (Rev. 1/78)

STATE OF MINNESOTA

DEPARTMENT ATTORNEY GENERAL

Office Memorandum

TO : Lee Sheehy
Attorney General's Office
Department of Administration

DATE: July 11, 1979

FROM : P. Kenneth Kohnstamm
Attorney General's Office
Department of Public Welfare

PHONE: 6-6673

SUBJECT: Rule 49

Please find enclosed the documents pertinent to your review of the Department of Public Welfare's proposed revision of Rule 49. I have enclosed two full copies of the documents listed in the AG Rule and third copies of the Proposed Rule and Order Adopting Rules as you indicated were necessary in our phone conversation. Also enclosed are the written comments received from the public, both before and after the hearing. There was no notice of intent to solicit outside comment placed in the State Register.

If I've messed this up, please let me know.

PKK/klm
Enclosures

RECEIVED
JUL 12 1979
ATTORNEY GENERAL
ADMINISTRATIVE AGENCIES

RECEIVED
MAR 8 1979
ATTORNEY GENERALS OFFICE
WELFARE DIVISION

STATE OF MINNESOTA
OFFICE OF HEARING EXAMINERS

FOR THE DEPARTMENT OF PUBLIC WELFARE

In the Matter of the Proposed Amendments to DPW Rule 49 governing compensation of Nursing Home Facilities for treatment of Welfare Patients.

REPORT OF HEARING EXAMINER

The above-entitled matter came on for hearing before Hearing Examiner Peter C. Erickson of the State Office of Hearing Examiners at 9:00 a.m. on Thursday, January 18, 1979, at the Minnesota Veterans Home, Building 15, Auditorium Chapel Building, Minnehaha Avenue and 51st Street, Minneapolis, Minnesota.

Ken Kohnstamm, Special Assistant Attorney General, and Robert Rau, Director of the Audit Division, appeared on behalf of the Department of Public Welfare. The hearing continued until all interested groups or persons had had an opportunity to be heard concerning the adoption of the proposed amendments.

Pursuant to Minn. Stat. § 15.0412, subd. 4, this Report shall be available for review to all affected individuals upon request for at least five days.

Thereafter, the Department of Public Welfare shall, if it proposes to adopt the rules as originally proposed or amended, submit a copy of the Order Adopting Rules, a copy of any additional agency findings, a copy of the rules as originally proposed, and a copy of the rules as adopted to the Chief Hearing Examiner for review pursuant to Minn. Stat. § 15.052, subd. 4. The submission to the Chief Hearing Examiner shall precede review by the Attorney General. The Chief Hearing Examiner shall complete his review and submit his report to the Department on the issues of substantial changes in the rule and compliance with Minn. Stat. § 15.0412 within ten calendar days. The Department of Public Welfare will be responsible for filing the rules with the Attorney General and for notifying persons who have indicated that they wish to be notified of such filing.

Based upon all the records and proceedings herein, the Examiner makes the following:

FINDINGS OF FACT

1. On December 6, 1978, the Department filed the following documents with the Chief Hearing Examiner:

   (a) A copy of the proposed rules.
   (b) The Order for Hearing proposed to be issued.
   (c) The Notice of Hearing proposed to be issued.
   (d) A Statement of the number of persons expected to attend the hearing and estimated length of the Agency's presentation.

2. On December 18, 1978, a Notice of Hearing and a copy of the proposed rules were published at 3 State Register 1299.

3. On December 13, 1978, the Department mailed the Notice of Hearing to all persons and associations who had registered their names with the Secretary of State for the purpose of receiving such notice.

4. On December 13, 1978, the Department served a copy of the Notice of Hearing on the following:

All Minnesota County Welfare Departments

All Minnesota Human Service Boards

All Minnesota Area Mental Health Boards

All Minnesota State Hospitals

463 Nursing Home and Board and Care Homes

95 Interested Parties.

5. On December 22, 1978, the Department filed the following documents:

(a) The Order for Hearing and authorizing resolution.
(b) The Notice of Hearing as mailed.
(c) The Affidavit of Receipt of the Secretary of State's list.
(d) The Affidavit of Mailing the Notice to all persons on the Secretary of State's list.
(e) The Secretary of State's Certificate and list.
(f) The Statement of Need and Reasonableness.
(g) The names of Department personnel who will represent the Agency at the hearing together with the names of any other witnesses solicited by the Agency to appear on its behalf.

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

6. The record remained open through February 7, 1979, for the receipt of written comments and statements.

7. Statutory authority to promulgate the proposed amendments is contained in Minn. Stat. sec. 256B.46.

8. DPW Rule 49 is the procedure whereby nursing home facilities are compensated for treatment they give to welfare patients. The rule is subject to the approval of the Department of Health, Education and Welfare pursuant to 22 C.F.R., Chapter IV, Subpart C, sec. 447.272 - 447.316 which require that payments to nursing home facilities be based on a reasonable cost-related methodology. DPW makes such payments through the method established in Rule 49. The Rule was originally promulgated in 1972 and has undergone various revisions from time to time. The purpose of some of these past revisions has been to allow nursing home owners a profit or cost of capital allowance as part of the payment. The Department's purpose in seeking the proposed incentive allowance is to allow the non-profit facilities to replace fixed assets as they become obsolete. In 1976, the State Legislature attempted to fill this need by means of an investment allowance. Minn. Stat. sec. 256B.45, subd. 1, provides in relevant part:

> For the fiscal year beginning July 1, 1977, the allowance for nonproprietary homes shall be two percent of the original value for depreciation purposes.

In 1977, the Legislature amended the above to include subdivision 2 which provides:

> For each year after the year in which the nursing home was originally purchased in which there is no transfer of ownership of a nursing home, the investment allowance shall be increased by one percent of the original investment allowance, but the increase shall be limited to a maximum of 25 percent of the original investment allowance.

These provisions were adopted in the rule and it was submitted to HEW for approval. HEW refused approval of the investment allowance scheme because, in the judgment of DPW, it was not sufficiently related to cost.

Aware of the requirement that the rule was subject to HEW approval, the 1976 Legislature included subsection 46 to Minn. Stat. 256B. which provides:

> In the event that the United States government disallows the investment allowance provided for in section 256B.45 for nonproprietary homes, the state agency shall by rule establish an incentive allowance for nonproprietary nursing homes consistent with federal requirements. The incentive allowance shall include incentives to reward efficient management and quality care. The incentive allowance may also be graduated so that it increases with (1) the length of time that a nursing home is owned by the same owner and (2) the owner's net investment as a percentage of the net asset value of the facility.

This subdivision is the authority for the proposed amendments under consideration. The proposed amendments substitute a so-called efficiency allowance for the investment allowance which was disapproved by HEW. The efficiency allowance requires each facility to submit historical costs each year. These costs are used as a basis for establishing a per day projected cost. Each facility is allowed to add 60¢ per patient day to its actual costs. The per day projected costs are subtracted from this figure so that if a facility, through efficient management and cost control, stays within its projected costs, it can recover up to 60¢ per patient day as an investment or efficiency allowance. The amendments also allow for an increase in this 60¢ maximum to the extent of 1¢ per patient day for each continuous year of ownership to a maximum of 25¢ per patient day. The result is a maximum allowance of 85¢ per patient day after 25 years of continuous ownership.

9. Comments by various organizations were received, both at the hearing and in writing, before and after the hearing.

(a) The first group to testify at the hearing was the Minnesota Association of Homes for the Aging, represented by Mr. John Thompson. He indicated that facilities received much less under the proposed efficiency allowance as a temporary rule than had been received by facilities under the investment allowance of 256B.45. According to his figures, 82% of the facilities received less under the proposed system and 35% of the facilities received no efficiency allowance at all. The causes for the smaller allowances were analyzed by the Association's economist who found that, in their experience, efficient management had less to do with the amount received as an allowance than other factors not within the facilities' control. This organization proposed that the proposed amendments not be recommended, but that a new methodology be developed and applied retroactively. The organization indicated that they are developing a suitable methodology and that other groups were also.

(b) The next group to comment was the Minnesota Association of Health Care Facilities, represented by John Broeker, Esq. This organization was also disenchanted from its experience with the temporary rule. Its first objection was similar to that made by the Minnesota Association

of Homes for the Aging. That is, facilities were receiving less than what the Legislature intended. The second objection related to the use of 60¢ as a maximum per patient day allowance since, under the investment allowance scheme, 60¢ per patient day was the average amount received by facilities. Its third objection was that the 1¢ per patient day increase for continuous ownership should be an actual amount receivable and not just an increase in the maximum allowable. Their fourth objection concerns the language of the rule dealing with the provision for leased facilities. Specifically, the word "interest" should be added so that it reads as follows:

> If a non-proprietary facility is operated on a lease basis, there shall not be recognized as an allowable cost for the operator any rental fees in excess of the total amount allowed for depreciation, interest, and pursuant to B.1.b.(2). This provision of the rule will be effective for rates paid non-proprietary facilities on January 1, 1978 and subsequent until such time as it is disapproved by HEW.

The Association also recommended that allowance be made for the "grandfather clause" of Minn. Stat. sec. 256B.45, subd. 3, which exempts those facilities with leases entered into before April 13, 1976. The fifth objection raised by the Association relates to the lack of any provision for new facilities. Under the proposed rule, new facilities would not receive an allowance until they had been in operation for two years. Finally, the Association pointed out that if a facility does not meet its efficiency in one year, it is almost impossible for that facility to fully recover from that poor year in subsequent years. This organization recommends that the proposed rule be adopted for a limited period of time until a better methodology can be adopted.

(c) The last party to comment was Mr. James Pederson representing Valley View Manor Nursing Home. Mr. Pederson's comments were similar to those set forth above. Specifically, the efficiency allowance is not a reasonable substitute for the investment allowance: the 60¢ figure is too low to be used for a maximum; and the 1¢ per patient day increase for continuous ownership should be receivable and not only an increase in the maximum.

10. After the hearing, the Department of Public Welfare submitted a posthearing amendment to the lease provision of the rule as suggested in Finding No. 9(b) above.

C O N C L U S I O N S

1. Due, timely and adequate legal notice of the hearing was properly served and filed by the Department of Public Welfare. All other substantive and procedural requirements of statute or rule have been complied with.

2. Pursuant to Minn. Stat. sec. 15.052, subd. 3 (1978), it is the duty of the Hearing Examiner to: ". . . (4) make a report on each proposed agency action . . . taking notice of the degree to which the agency has (i) documented its statutory authority to take the proposed action; (ii) fulfilled all relevant, substantive and procedural requirements of law or rule; and (iii) demonstrated the need for and reasonableness of its proposed action with an affirmative presentation of facts."

3. The Examiner concludes that the Department of Public Welfare has documented its statutory authority to promulgate the proposed rules.

4. The Examiner concludes that the Department has demonstrated the need for and reasonableness of the proposed rules with an affirmative presentation of facts. As was pointed out in both oral and written comments, however, the implementation of the rule must be carefully studied so that inequities may be remedied by rule revisions. At this point, the Examiner recommends that the proposed rule be amended in accordance with the amendment set out in Finding 9(b), and that the portion dealing with leased facilities be modified to reflect the exemption contained in Minn. Stat. sec. 256B.45, subd. 3.

5. The statutory authority for the rule, Minn. Stat. sec. 256B.46, does not express a legislative intent to meet the same standards as those established in Minn. Stat. sec. 256B.45. The legislative intent of Minn. Stat. sec. 256B.46 is that the Department promulgate a rule which is acceptable to HEW and which, if possible, provides for graduated increases commensurate with continuous ownership of the facility and the net asset value of the facility. The proposed rule conforms to that intent. However, the Legislature obviously expressed a preference for an allowance as provided in Minn. Stat. sec. 256B.45. The Department of Public Welfare should attempt to approximate those standards with future revisions of Rule 49. The Examiner does not feel that a time limit or "sunset law" provision is appropriate.

Based upon the foregoing Conclusions, the Examiner makes the following:

R E C O M M E N D A T I O N

That the Department adopt the proposed rule as amended in accordance with Conclusion 4 above.

Dated this 8 day of March, 1979.

Peter C. Erickson

PETER C. ERICKSON
Hearing Examiner

M E M O R A N D U M

Economically speaking, the nonproprietary nursing homes want as much reimbursement from DPW as is possible. In these proposed rules, DPW has made subjective policy judgments which lessen, or in some cases deny, incentive reimbursement to some facilities as compared to the initial investment allowance. As was stated by John Broeker at hearing; however, the "reimbursement afforded by the proposed rule is better than no reimbursement at all". I.e., if this rule is not adopted, there would not even be an incentive allowance, which was supposed to supplant the investment allowance.

Mr. Broeker's position does not, however, relieve DPW of the burden to show both the need for and necessity of the proposed rule. The Examiner has already concluded that, at a bare minimum, that burden has been met. Mr. Broeker's concern is that this proposed rule, although it is "better than nothing", will not be changed when a better methodology is devised. The Examiner can only comment that the proposed rule is quite obviously not the "best" rule. State agencies do not, however, have the statutory burden of promulgating the "best" rule. A "better" rule was not proposed by anyone at the hearing or in written comments. The Examiner has no doubt that DPW has benefited from the public comments received herein and will work with those individuals toward a more equitable reimbursement allocation to all nonproprietary nursing home facilities.

PCE

DPW-79-013-PE

RECEIVED
MAR 13 1979
ATTORNEY GENERALS OFFICE
WELFARE DIVISION

STATE OF MINNESOTA
OFFICE OF HEARING EXAMINERS

FOR THE DEPARTMENT OF PUBLIC WELFARE

In the Matter of the Proposed Amendments to DPW Rule 49 governing compensation of Nursing Home Facilities for treatment of welfare Patients.

ADDENDUM TO
REPORT OF HEARING EXAMINER

The purpose of this addendum is to clear up a misunderstanding which has resulted from the language contained in the memorandum to the Report on the above-entitled matter. The Examiner must point out that the Minnesota Association of Health Care Facilities did submit proposed rule alternatives as part of its written comments. These alternatives would provide an efficiency allowance roughly equivalent to the two percent investment allowance using a maximum of 90 cents per patient day rather than 60 cents as proposed by DPW. An alternative of this type was initially submitted in a petition for adoption of Rule 49 amendments dated April 21, 1978. The Examiner has made no subjective judgment regarding which of the alternatives or the rule proposed by DPW is the"better" rule.

Dated this 12th day of March, 1979

Peter C. Erickson

PETER C. ERICKSON
Hearing Examiner

Exhibit C

DPW F

PROPOSED AMENDMENTS

DPW RULE 49 - REGULATIONS OF THE MINNESOTA DEPARTMENT OF PUBLIC WELFARE FOR DETERMINING WELFARE PER DIEM RATES FOR NURSING HOME PROVIDERS UNDER THE TITLE XIX MEDICAL ASSISTANCE PROGRAM DPW RULE 49.

Note: Only sections B.1.b.(2) and D.6.b.(1) of Rule 49 contain proposed amendments. Attached are the above sections.

The complete Rule 49 is available from:

Jackie Bovaird
1st Floor Centennial Bldg.
St. Paul, MN 55155

Telephone: 612-296-2738

Copies of the complete Rule 49 will also be available at the hearing.

DPW Rule 49

B. RATE DETERMINATION

B.1.b.(2) Per-diem rates for non-proprietary facilities may include an efficiency allowance. If the facility's allowable historical cost per patient per day for the most recently completed fiscal year is less than the allowable welfare rate exclusive of Sections B.4.a.& B. and as adjusted for the lack of implementation of known cost changes, an efficiency allowance will be granted equal to the difference between the allowable historical cost and the allowable welfare rate subject to a maximum efficiency allowance of 60 cents per patient per day. For each year after the year in which the non-proprietary facility was originally purchased and there is no transfer of ownership of the facility, the efficiency allowance maximum will be increased one cent per patient per day subject to a maximum of an additional 25 cents per patient per day after 25 years. If a non-proprietary facility is operated on a lease basis, there shall not be recognized as an allowable cost for the operator any rental fee in excess of the total amount allowed for depreciation and pursuant to B.1.b.(2). This provision of the rule will be effective for rates paid non-proprietary facilities on January 1, 1978 and subsequent provided this provision of the rule is approved by HEW.

Underlining indicates proposed additions; strikeouts indicates proposed deletions.

Exhibit A

D. REASONABLE COST PRINCIPLES

D.6.b.(1) Determination of allowance. Proprietary homes where cost reports are received after January 1, 1977, shall receive an investment allowance of nine percent of the original value of the facility for depreciation purposes. ~~Non-proprietary homes whose fiscal year begins after June 30, 1977, shall receive an investment allowance of two percent of the original value~~. For each year after the year in which the nursing home was originally purchased in which there is no transfer of ownership of a nursing home, the investment allowance shall be increased by one percent of the original investment allowance, but the increases shall be limited to a maximum of 25 percent of the original investment allowance effective for rates paid on August 1, 1977.

Underlining indicates proposed additions; strikeouts indicates proposed deletions.

STATE OF MINNESOTA
DEPARTMENT OF PUBLIC WELFARE

IN THE MATTER OF THE PROPOSED ADOPTION OF AMENDMENTS TO DPW RULE 49 GOVERNING WELFARE PER-DIEM RATES FOR NURSING HOME PROVIDERS UNDER THE TITLE XIX MEDICAL ASSISTANCE PROGRAM

ORDER FOR HEARING

IT IS HEREBY ORDERED that a public hearing on the above-captioned rule be held in the Minnesota Veterans Home, Building 15, Auditorium Chapel Building, Minnehaha Avenue and East 51st Street, Minneapolis, Minnesota, 55417 on January 18, 1979, commencing at 9:00 A.M. and continuing until all persons have had an opportunity to be heard.

IT IS FURTHER ORDERED that a Notice of Hearing be mailed to all persons or representatives of associations or other interested groups who have registered their names with the Secretary of State for that purpose.

IT IS FURTHER ORDERED that the Notice of Hearing be published in the State Register.

Edward J. Dirkswager Jr.

EDWARD J. DIRKSWAGER, JR.
Commissioner

Dated: November 29, 1978.

DPW 4

STATE OF MINNESOTA
DEPARTMENT OF PUBLIC WELFARE

IN THE MATTER OF THE PROPOSED ADOPTION OF AMENDMENTS TO DPW RULE 49 GOVERNING WELFARE PER-DIEM RATES FOR NURSING HOME PROVIDERS UNDER THE TITLE XIX MEDICAL ASSISTANCE PROGRAM.

NOTICE OF HEARING

NOTICE IS HEREBY GIVEN that a public hearing in the above-entitled matter will be held in Minnesota Veterans Home, Building 15, Auditorium Chapel Building, Minnehaha Avenue and East 51st Street, Minneapolis, Minnesota, 55417 on January 18, 1979, commencing at 9:00 A.M. and continuing until all persons have had an opportunity to be heard.

All interested or affected persons will have an opportunity to participate. Statements may be made orally and written materials may be submitted at the hearing. In addition, written materials may be submitted by mail to Peter C. Erickson, Hearing Examiner, Office of Hearing Examiners, 1745 University Avenue, St. Paul, Minnesota, 55104, 612-296-8118 either before the hearing or within 5 working days after the public hearing ends. The Hearing Examiner may extend the written comment period up to 20 calendar days at the hearing.

Present Rule 49 established the criteria by which welfare rates for nursing homes are established. The proposed amendments to Rule 49 are required in compliance with 45 CFR 249.33 which are the federal standards for Payments for Skilled Nursing Facility and Intermediate Care Facility Services. Likewise, the proposed amendments are required in compliance with Mn. Stat., Section 256B.46 (1976 Laws of Minnesota, Chapter 282, Subdivision 6). Mn. Stat., Section 256B.45, Subdivision 1 authorized the state agency to establish a 2% investment allowance for nonproprietary facilities effective July 1, 1977. Approval for such an investment allowance was not granted by the appropriate federal agency. Therefore, effective January 1, 1978 the 2% nonproprietary investment allowance was deleted from Rule 49 by temporary rule and a non-proprietary efficiency allowance replaced the deleted allowance on the same date by means of another temporary rule. The proposed nonproprietary efficiency allowance will be determined from a comparison of the facility's prior year's operating costs plus projected cost changes to the current year's operating costs. If the provider can operate within the costs budgeted for the fiscal year, he can include in allowable costs an efficency allowance not to exceed 60 cents per day. This limit will increase by 1 cent per day for each year of continuous ownership to a maximum at 25 cents per day. This amount will allow a maximum efficiency allowance of 85 cents per day. Copies of the proposed rule are now available and one free copy may be obtained by writing to Jacqueline Boviard, Department of Public Welfare, 1st Floor, Centennial Office Building, St. Paul, Minnesota, 55155. Additional copies will be available at the door on the date of the hearing. The agency's authority to promulgate the proposed rule is contained in Minn. Stat. § 256B.27, 256B.41 and 256B.46.

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 Hearing Examiners. This statement of need and reasonableness will include a summary of all of the evidence which will be presented by the agency at the hearing justifying both the need for and the reasonableness of the proposed rule/rules. Copies of the statement of need and reasonableness may be obtained from the Office of Hearing Examiners at a minimal charge.

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).

> "NOTICE: The proposed rule is subject to change as a result of the rule hearing process. The Agency therefore strongly urges those who are potentially affected in any manner by the substance of the proposed rule to participate in the rule hearing process."

Please be advised that Minn. Stat. Chapter 10A, required each lobbyist to register with the Ethical Practices Board within five days after he commences lobbying. Lobbying includes attempting to influence rule making by communicating or urging others to communicate with public officials. A lobbyist is generally any individual who spends more than $250 per year for lobbying or any individual who is engaged for pay or authorized to spend money by another individual or association and who spends more than $250 per year or five hours per month at lobbying. The statute provides certain exceptions at Minn. Stat. Sec. 10A.01 Subd. 11. Questions should be directed to the Ethical Practices Board, 41 State Office Building, St. Paul, Minnesota, 55155, phone (612) 296-5615.

Edward J. Dirkswager Jr.

EDWARD J. DIRKSWAGER, JR.
Commissioner

Date: November 29, 1978

DPW5

STATE OF MINNESOTA
DEPARTMENT OF PUBLIC WELFARE

IN THE MATTER OF THE PROPOSED ADOPTION OF AMENDMENTS TO DPW RULE 49 GOVERNING WELFARE PER-DIEM RATES FOR NURSING HOME PROVIDERS UNDER THE TITLE XIX MEDICAL ASSISTANCE PROGRAM

AFFIDAVIT OF RECEIPT OF THE SECRETARY OF STATE'S LIST

DIANE LYN HENDERSON, being duly sworn on oath deposes and says:

1) That she is an employee of the Special Services Division of the Department of Public Welfare for the State of Minnesota.

2) That on the 12 day of December, 1978 she went to the Secretary of State's office for the State of Minnesota and requested a current list of all representatives of associations or other interested groups or persons who had registered their names with the Secretary of State for the purpose of obtaining notices of public hearings relating to the promulgation of rules pursuant to M.S. 15.0412.

3) That on the 12 day of December, 1978 in response to the above request, the Secretary of State provided her with such a list, a copy of which is attached hereto and incorporated by reference.

Further affiant sayeth not.

Diane Lyn Henderson

Subscribed and sworn to before me

this 12th day of December,

1978.

Margaret Holt

MARGARET HOLT
NOTARY PUBLIC MINNESOTA
HENNEPIN COUNTY
My comm. expires Sept. 22, 1984

DPW 6

STATE OF MINNESOTA
DEPARTMENT OF PUBLIC WELFARE

IN THE MATTER OF THE PROPOSED ADOPTION OF AMENDMENTS TO DPW RULE 49 GOVERNING WELFARE PER-DIEM RATES FOR NURSING HOME PROVIDERS UNDER THE TITLE XIX MEDICAL ASSISTANCE PROGRAM

CERTIFICATE OF DELIVERY OF THE SECRETARY OF STATE'S LIST

I hereby certify that the attached 56 labels 4 sheets constitute the complete list of persons, associations, and other interested groups who as of 2:10 o'clock P.M., this 12th day of December, 1978, have requested pursuant to M.S. 1976, 15.0412 Subd. 4, that their names be placed on file with the Secretary of State for the purpose of receiving notice of public hearing on proposed rules on the subject captioned above.

SECRETARY OF STATE

Joseph Anderson Growe

BY Donna Scott

DPW 3-
(2 - 9814
Mailing)

STATE OF MINNESOTA
DEPARTMENT OF PUBLIC WELFARE

IN THE MATTER OF THE PROPOSED ADOPTION OF AMENDMENTS TO DPW RULE 49 GOVERNING WELFARE PER-DIEM RATES FOR NURSING HOME PROVIDERS UNDER THE TITLE XIX MEDICAL ASSISTANCE PROGRAM

AFFIDAVIT OF ADDITIONAL MAILING

DIANE LYN HENDERSON, being first duly sworn, deposes and says:

That on the 13th day of December, 1978, at the City of St. Paul, County of Ramsey, State of Minnesota, in addition to mailing the attached Notice of Hearing to all persons and associations listed on the Secretary of State's list, she also served the attached Notice of Hearing by depositing in the United States mail at said City of St. Paul, a true and correct copy thereof, properly enveloped, with postage prepaid to the following agencies:

All Minnesota County Welfare Departments
All Minnesota Human Service Boards
All Minnesota Area Mental Health Boards
All Minnesota State Hospitals
463 Nursing Home and Board and Care Homes
95 Interested Parties

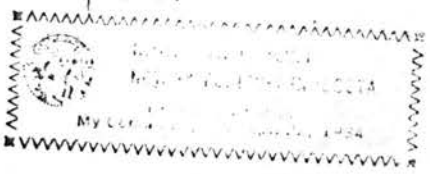
Diane Lyn Henderson

Subscribed and Sworn to before me

this 19th day of December

1978.

Margaret Holt



State of Minnesota
Department of Public Welfare

DPW 8

In the Matter of the Proposed
Amendment to Rule 49 of the
Minnesota Department of Public
Welfare

Statement of Need and
Reasonableness

DPW Rule 49 is an existing rule of the Minnesota Department of Public Welfare (MDPW) originally subjected to public hearing on June 28-30, 1972 and implemented effective November 1, 1972. There have been several amendments made to this rule through public hearings, the most recent adopted amendment being proposed in public hearing on October 25, 1977.

The need to conduct a public hearing on this rule arises from the Department of Health, Education and Welfare's (HEW) administration of 42CFR Chapter IV Subpart C, 447.272 - 447.316 which require that the payment of nursing home services be based on a reasonable cost-related methodology as developed by the state agency and approved by HEW. HEW'S authority to require the cost-related methodology is stated in 42 USC 1396a(a)(13)(E). The need to conduct a public hearing also arises from Minn. Stat., Sec. 256B.46. According to this statute, MDPW was authorized to establish by rule an incentive allowance for non-profit facilities consistent with the approval of HEW.

Minn. Stat., Sec. 256B.45, Subdivision 1, authorized an investment allowance for non-profit facilities effective July 1, 1977. The allowance was initially determined to be two (2) percent of the original value of the facility for depreciation purposes. Minn. Stat., Sec. 256B.46 authorized, in the alternative, that an incentive allowance for non-profit facilities be allowed if HEW would not approve the (2) percent investment allowance. HEW would not approve the Minnesota State Plan for reimbursement of nursing homes under Title XIX of the Social Security Act unless the two (2) percent non-profit investment allowance were deleted from the rate methodology. In compliance with Minn. Stat., Sec. 256B.46 MDPW proposed, therefore, through temporary rules on February 27, 1978 (published in State Register, Volume, No. 34, Page 1596) and April 3, 1978 (published in State Register, Volume 2, No. 39, page 1825) respectively to delete the existing investment allowance and to establish an efficiency allowance for non-profit facilities effective January 1, 1978.

This allowance was intended to provide a reasonable cost incentive to those non-profit providers who were capable of controlling their operational costs within the prior year's Rule 49 historical and projected current year's cost changes. Prior to January 1, 1978 non-profit providers were allowed to include in their annual welfare rate requests a cost of capital allowance initially (Section 4936e.-Rev. 7-01-73) and the aforementioned two (2) percent investment allowance (Section D.6.b.(1) - Rev. 7-01-77) at a later day. These allowances had been subjected to the public hearing and rule-making processes and had been deemed reasonable and acceptable to the varied rule reviewers.

However, effective January 1, 1978 HEW would not approve this inclusion of either the cost of capital allowance or the two (2) percent investment allowance in Rule 49. In order to retain the financial benefits of the cost of capital/investment allowance, and also encourage cost containment, cost efficiency, and adherence to the agency's reasonable cost principles of Rule 49, MDPW proposed an efficiency allowance whereby current year allowable Rule 49 costs, exclusive of any cost of capital/investment allowance, would be compared to the prior year's cost base plus projected cost changes, exclusive of any unimplemented cost changes. If the provider properly established its budget in the prior year's request for welfare rate and then controlled the facility costs within that budget, the residual amount should be the cost of capital/investment allowance which had been included in the prior year's cost base.

Under this proposed efficiency allowance provision the provider could retain his historical cost of capital/investment allowance by monitoring his budgeted and actual costs and by employing corrective action in those cost categories or situations where costs appeared inordinate. This proposed rule provision is reasonable since it allows non-profit providers to retain the cost of capital/investment allowance previously deemed reasonable through the rule-making process by exercising budgetary/expenditure restraints. Under the aforementioned federal reasonable cost-related basis HEW has already approved the inclusion of the proposed non-profit efficiency allowance in Rule 49.

In explanation of the above-cited narrative, the following hypothetical situation is offered to identify the efficiency allowance computation:

Welfare Rate Determination - Calendar Year 1977

1976 Allowable Historical Cost Per Day	$17.00
1976 2% Investment Allowance	.60
1977 Projected Known Cost Changes	2.00
Rule 49 Allowable Cost/Rate Per Day - 1977	$19.60
1977 Allowable Historical Cost Per Day	$19.00
Efficiency Allowance	.60

From the 1976 DPW Rule 49 cost report the provider substantiated historical costs of $17.00 per day and requested 1977 known cost changes in the amount of $2.00 per day. In addition the provider was allowed an investment allowance of $.60 per day under the prior rate methodology. Therefore, if the provider can operate within his established budget, the residual amount of his welfare rate will be the $.60 per day investment allowance which was established in the 1976 base year.

MDPW may have available at the public hearing the agency's Deputy Commissioner, James J. Hiniker, and the agency's Audit Director, Robert J. Rau, to present the proposed changes to DPW Rule 49. A representative of HEW may also be present to explain the federal

government's position on the deletion of the 2% non-profit investment allowance and addition of the efficiency allowance. Federal regulations, state laws and intergovernmental correspondence pertaining to this matter may also be presented at the public hearing.

December 22, 1978

Edward J. Dirkswager, Jr.
Commissioner

DPW-79-013-PE

STATE OF MINNESOTA
OFFICE OF HEARING EXAMINERS

FOR THE DEPARTMENT OF PUBLIC WELFARE

RECEIVED
JUL 3 1979
ATTORNEY GENERALS OFFICE
WELFARE DIVISION

IN THE MATTER OF THE PROPOSED)
AMENDMENTS TO DPW RULE 49)
GOVERNING COMPENSATION OF)
NURSING HOME FACILITIES FOR)
TREATMENT OF WELFARE PATIENTS.)

REPORT OF THE
CHIEF HEARING EXAMINER

WHEREAS, a hearing was held on January 18, 1979, before Peter C. Erickson, a Hearing Examiner of the State Office of Hearing Examiners, on the above-entitled matter in compliance with Minn. Stat. § 15.0412, Subd. 4; and

WHEREAS, the Report of Hearing Examiner made pursuant to Minn. Stat. § 15.052, Subd. 3, was issued to the Department of Public Welfare on March 8, 1979, and an addendum to that Report was issued on March 12, 1979; and

WHEREAS, the Department of Public Welfare has now determined to adopt rules pursuant to Minn. Stat. § 15.0412, Subd. 4; and

WHEREAS, the Department of Public Welfare has submitted said rules to the Chief Hearing Examiner for review pursuant to Minn. Stat. § 15.052, Subd. 4, and 9 MCAR § 2.110; and

WHEREAS, the Chief Hearing Examiner finds that the final proposed rules are not substantially different from those proposed at the public hearing and that the Department of Public Welfare has met all requirements of Minn. Stat. § 15.0412, Subd. 4.

NOW, THEREFORE, upon receipt of this Report, the Department of Public Welfare has the responsibility of submitting the complete hearing record and the rules as adopted by the Department to the Attorney General, notifying all persons who requested to be informed that the hearing record has been submitted to the Attorney General, and publishing in the State Register, all pursuant to Minn. Stat. § 15.0412, Subd. 4.

Dated this 2nd day
of July, 1979.

DUANE R. HARVES
Chief Hearing Examiner

STATEMENT OF COMPLIANCE WITH
MANUAL OF RULEMAKING PROCEDURES

I, Special Assistant Attorney General P. Kenneth Kohnstamm, do hereby declare that I have examined the proposed amendments to DPW Rule 49 and all related documents and that, based on them and my personal familarity with the applicable procedures, the Manual of Rulemaking Procedures has been followed.

Dated: July 6, 1979.

P. Kenneth Kohnstamm

P. KENNETH KOHNSTAMM
Special Assistant
Attorney General

4th Floor Centennial Office Bldg.
St. Paul, Minnesota 55155
Telephone: 612/296-6673

of that provision to the amended version of 12.21, Subd. 3., they can be construed to be in harmony. The Omnibus Energy Act provides that orders, rules and regulations promulgated by the governor under the rulemaking authority granted in Section 12.21, Subd. 3 (1), once approved by the Executive Council, has the force and effect of law during energy supply, as well as civil defense emergencies.