

Minnesota Attorney General: Administrative Rules Proceedings

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Version 3
August 20, 2018

Our File #634

ADMIN 1000 (Rev. 1/78)
SF-00006-01

STATE OF MINNESOTA

DEPARTMENT ATTORNEY GENERAL

Office Memorandum

TO : ARTHUR E. NOOT
Commissioner
Department of Public Welfare

DATE: Oct. 21/80

ATTN: PAUL ZERBY
Assistant Attorney General

FROM : JERRY S. ANDERSON
Special Assistant
Attorney General

PHONE: 296-1288

SUBJECT: Rules as Approved In the Matter of the Proposed Adoption of Amendments to the Department of Public Welfare Rule Governing Welfare Per Diem Rates For Nursing Home Providers Under the Title XIX Medical Assistance Program (12 MCAR 2.049).

Enclosed herewith are the rules you have submitted for approval. These rules have been approved by this office and filed with the Secretary of State. Note that they have NOT been filed with the State Register; this must be done promptly by your agency.

Upon receipt and before transmittal to your agency, however, it is important that you recheck these rules as to:

1. Affixation of the stamps of the Attorney General and Secretary of State to the last page of the rules;

2. Coverage by these stamps of all rules submitted; and

3. Inclusion of all pages of the rules in the approved set.

Directly following the approved rules is a complete set of required documents and transcript which must be retained with the rules by you or your agency.

If you have any questions in this regard, please contact me.

JSA/bw
Encl.
cc: Duane Harves
Susan Robertson

Our File 634

As originally submitted, this file was incomplete.
Returned to agency 10/8

Permanent Rule X

Temporary Rule _____

RULES REVIEW CHECKLIST

DATE RULES RECEIVED ~~9/24~~ 10/10 DUE DATE ~~10/14/80~~ 10/30/80

Resubmitted and Received _____

a. Returned to Agency w/o Filing w/Secretary of State _____
b. Approved _____ Date Sent Back to Agency _____

- -

1. Rules as Adopted ? see my notes
2. Rules as Proposed ✓
3. Certificate of Board's Authorizing Resolution, where applicable N/A
4. Order for Hearing ✓
5. Notice of Hearing ✓ 4.28.80
   Sufficiency ✓
6. Secretary of State's List not submitted (one copy only) but see 7, 8, 9 below.
7. Certificate of Acquisition of Secretary of State's List ✓
8. Secretary of State's Certification of Delivery of Secretary of State's List to Agency ✓
9. Affidavit of Mailing A) ✓ B) Additional Mailing ✓
   At least 30 days prior to hearing ✓ 3.21.80
10. Publication in State Register ✓ copy submitted 10/10 ✓ copy not submitted but see HE ¶2
    At least 30 days prior to hearing ✓ 3.24.80
11. Statement of Need and Evidence ✓
12. Hearing Examiner's Report ✓
13. Agency's Findings of Fact incorporated in #15 - order adopting
14. Certificate of Board's Resolution Adopting Rules, where applicable N/A
15. Revised Order Adopting A) ✓ B) Order Adopting ✓ 10.10.80
16. Report of Chief Hearing Examiner A) order, 7.31.80 B) Supp. Order, 9.17.80
17. Order Approving Incorporation by Reference, where applicable N/A
18. Certificate of Compliance with Rulemaking Procedures ✓
19. Copy of Notice of Intent to Solicit Outside Opinion, where applicable N/A
20. Petition by Public, where applicable N/A.

See also OUR File 612 -

STATE OF MINNESOTA

COUNTY OF RAMSEY

BEFORE ARTHUR E. NOOT

COMMISSIONER OF PUBLIC WELFARE

In the Matter of the Proposed Adoption of Amendments to the Department of Public Welfare Rule Governing Welfare Per Diem Rates For Nursing Home Providers Under the Title XIX Medical Assistance Program (12 MCAR 2.049)

ORDER ADOPTING RULES

The above-captioned matter came on for hearing before Mr. Jon L. Lunde, Hearing Examiner appointed by the Chief Hearing Examiner, on April 28, 1980 at the Veterans Service Building after proper notice as required by Minnesota Statutes, Section 15.0412 was served on all persons, associations and other interested groups registered with the Secretary of State for that purpose.

After affording interested persons an opportunity to present written and 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 of 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 adopts these rules identified as 12 MCAR 2.049 (DPW Rule 49) as set forth in the attachment pursuant to the authority vested in me pursuant to Minnesota Statutes, Chapters 15, 246, 253A, 256 and 257.

STATE OF MINNESOTA
DEPARTMENT OF PUBLIC WELFARE

Dated: October 10, 1980

ARTHUR E. NOOT, COMMISSIONER

AG copy as submitted 10/10

Adopted Rule

Department of Public Welfare

Support Services Bureau

12 MCAR 2.049 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

B. Rate Determinatio

1. Method of Calculating Per Diem Rate

c. Allowance for known cost changes

(1) Future cost increases or decreases that are in accordance with the reasonable cost principles of D.1. known as of the report filing date, must be added to or deducted from the historical rate determined according to B.1.a. and b. Such adjustment will be restricted to the elements defined in B.1.c.(1)(a) through (h) and shall be the annualized cost effect of such cost changes exclusive of any portion of the cost change included in the historical rate.

(a) Salary and wage changes to occur during the effective period of the welfare rate:

(i) Future changes according to labor contracts, board resolutions, written policies, or minimum wage laws.

(ii) Changes that are in effect as of the end of the fiscal period covered by the historical cost portion of the welfare per-diem rate.

(b) Changes in facilities or equipment.

(c) The annualized cost effect of complying with federal, state, or local laws and regulations and Department of Public Welfare announced policies on care or facilities.

(d) All taxes except for income taxes.

(e) Interest.

(f) Depreciation.

(g) Utilities and insurance.

(h) Rental payments pursuant to a written lease.

~~(i) Raw food cost increase computed initially by multiplying $1.20 times one-half the percentage increase in the wholesale price index for raw food during calendar 1973. The initial increase is $.14. For reports covering periods ending December 31, 1974 or later, this cost increase shall be calculated as follows:~~

~~(i) Calculate the percentage increase in the wholesale price index for raw food for the period December through November.~~

~~(ii) If the increase is greater than~~ that computed ~~for the prior year, add the difference to (i).~~

~~(iii) If the increase is less than that computed for the prior year, subtract the difference from (i).~~

~~(iv) Multiply one-half of the resulting figure times the sum of $1.20 plus all of the annual increases allowed pursuant to this section.~~

(i) Raw food cost increase computed annually by multiplying the average food cost per day by the percentage change in the consumer price index for raw food costs in Minneapolis-St. Paul as published by the Bureau of Labor and Statistics for the period October through September. The initial average food cost is $1.82 per day and the initial increase is ~~$.27~~ ~~$.19~~ $.22 per day, ~~effective July 1, 1980.~~ Subsequent annual cost changes will be made on a calendar basis.

see HE 7 thru 12

(j) Unidentified cost increases equal to changes in the annual percentage increase in the consumer price index in Minneapolis-St. Paul as published by the Bureau of Labor and Statistics, using the October indices (new series index 1975 equals 100) as applied to the historical cost portion of the facility's previous year's cost less those costs relating to areas where the facility is seeking specific allowances for known cost changes. In no case may the increase be applied against the historical cost of salaries, changes in facilities or equipment, property taxes, interest, depreciation, rental payments or food costs.

C. Reports

4. Cost Allocation Procedures

c. Hospital attached facilities. Hospital attached facilities will include those facilities which are under common ownership and operation with a licensed hospital and are required to adhere to uniform cost reporting for governmental reimbursement programs. Common operation shall be defined as the sharing of services, such as, nursing services, dietary, housekeeping, laundry, plant operations, and/or administrative. The nursing care limitation under D.2.a. and the investment per bed limitation under D.4.b.(1) will be waived when the Medicare cost allocation factors result in these limitations being exceeded. Costs between hospitals and attached facilities must be allocated by the "Medicare Worksheet B" using Medicare allocation factors for the following three cost groups:

HE 7P13-16 Revised Order #6

(1) All expense classifications without depreciation, administration and general.

(2) Depreciation.

(3) Administration and general.

D. Reasonable Cost Principles

2. Nursing Care and Attendant Limitations.

a. Nursing care. Nursing-care costs will be limited by a maximum number of nursing hours per patient day as follows:

Skilled - 2.9 hours

ICF I - 2.3 hours

If the actual average nursing hours per patient day exceed the above limit, the reasonable cost limitation will be calculated by multiplying the ratio of the above stated limit to the average actual nursing hours per patient day for the year times the actual cost per patient day. This limitation will not apply to facilities that qualify for exception under D.8.d. (3) or facilities licensed under DPW Rule 80, or facilities mandated by a correction order from the Department of Health to provide additional nursing care.

b. Attendants (ICF II facilities only). Reasonable costs for attendants in ICF II facilities will be limited to one hour per patient day. If the actual average attendant hours per patient day exceeds this limit, the reasonable cost limitation will be calculated by multiplying the ratio of the stated limit to the average actual attendant hours per patient day for the year times the actual cost per patient day.

c. Limitation Exception. The nursing and attendant care limits established in D.2.a. and b. may be exceeded as described below:

HE 18-

(1) The Department of Public Welfare shall establish the 1980 per diem in accordance with ~~the provisions of this rule.~~ Section D.2.

(2) Increased nursing and attendant care hour costs may only be funded through expenditure reductions in the following cost categories as defined in Section C.3. and as subject to the limitations prescribed elsewhere in this rule:

Dietary

Laundry & linen

Housekeeping

Plant operation & maintenance

Other care related services

General & Administration

Amounts for which a known cost increase has been granted shall not be included in these calculations. Reductions from historical costs in these categories will be recognized.

(3) Subsequent years rates will be determined based on actual nursing and attendant care limits to the extent that they equal reported actual cost reductions in the categories identified in Section D.2.c.(2). ~~This provision of the rule is effective for rates determined July 1, 1980 and thereafter. Section D.2.c. is effective for rates determined July 1, 1980 and thereafter.~~

see HE P26

D. 6. Cost of Capital

b. Investment allowance.

(1) Determination of allowance. Effective July 1, 1980 proprietary homes ~~where cost reports are received after January 1, 1977,~~ shall receive an investment allowance of ~~10.3~~ ~~11~~ 11.1 percent of the original value of the facility for depreciation purposes. 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.

(2) For purposes of this section the following terms shall have the meaning given to them.

(a) Facility means the building in which a nursing home is located and all permanent fixtures attached to it. Facility does not include the land or any supplies and equipment which are not fixtures.

(b) Original value means the lesser of purchase price or appraised value at the time of purchase. Appraisals at the time of purchase shall be on the depreciated replacement cost basis. If a nursing home expands its facility or makes any other capital expenditure which increases the value of the facility, the cost of the expansion or capital expenditure shall be added to the original value. If the Department disputes the cost of the expansion or capital expenditure, it may request an appraisal and use the appraised value as the allowed cost.

APPROVED AS TO FORM AND LEGALITY

10/20 1980

WARREN SPANNAUS, ATTORNEY GENERAL

BY Jerry S. Anderson

SPECIAL ASSISTANT ATTORNEY GENERAL

STATE OF MINNESOTA
DEPARTMENT OF STATE
FILED
OCT 20 1980
Joan Anderson Growe
Secretary of State
12:50 PM

STATE OF MINNESOTA
DEPARTMENT OF PUBLIC WELFARE
CENTENNIAL OFFICE BUILDING
ST. PAUL, MINNESOTA 55155

OFFICE OF THE COMMISSIONER
612/296-2701

GENERAL INFORMATION
612/296-6117

October 10, 1980

PLEASE REPLY TO 296-2738

Jerry Anderson
Assistant Attorney General
Office of the Attorney General
Administration - Finance Division
Room G25 - Administration Building
50 Sherburne Avenue
St. Paul, Minnesota 55155

Re: In the Matter of the Proposed Adoption of the Department of Public Welfare Rate Rules - 12 MCAR 2.049 and 12 MCAR 2.052

Dear Mr. Anderson:

I am enclosing the following documents relating to the above-cited rate rules' amendments:

1. Copies of the Proposed Rules as reproduced in the State Register.

2. Orders Adopting Rules

3. Adopted Rules

4. Hearing Records

I trust that the readmission of these documents will satisfy the filing requirements of your agency. If I can be of further assistance in these matters, I can be contacted at 296-2738.

Very truly yours,

Robert J. Rau

Robert J. Rau, Director
Audit Division
Department of Public Welfare

RJR/sc

RECEIVED
OCT 10, 1980
ADMINISTRATIVE AGENCIES

ADMIN 1000 (Rev. 1/78)
SF-00006-01

STATE OF MINNESOTA

DEPARTMENT ATTORNEY GENERAL

Office Memorandum

TO : ARTHUR E. NOOT
Commissioner of Public Welfare

Attn: Paul Zerby

DATE: Oct. 7, 1980

FROM : JERRY S. ANDERSON
Special Assistant Attorney General

PHONE: 296-1288

SUBJECT: DPW Rules 12 MCAR §§ 2.049 and 2.052

As we discussed on the telephone, the above-entitled rules were submitted to this office in an incomplete form. Therefore, I cannot approve these rules and am returning them to you.

During our conversation you indicated that you would like to have some people from the agency meet with me to discuss the problems I have noted with the rules. Please have them contact me to arrange a time.

JSA:bw
encs.

STATE OF MINNESOTA

COUNTY OF RAMSEY

BEFORE ARTHUR E. NOOT

COMMISSIONER OF PUBLIC WELFARE

RECEIVED
SEP 17 1980
ADMINISTRATIVE HEARINGS

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

REVISED ORDER ADOPTING RULES

The above-captioned matter came on for hearing before Mr. Jon L. Lunde, Hearing Examiner appointed by the Chief Hearing Examiner, on April 28, 1980 at the Veterans Service Building after proper notice as required by Minnesota Statutes, Section 15.0412 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 12 MCAR 2.049 (DPW Rule 49) were considered as originally proposed and shown in the attached Exhibit A hereto. Paul Zerby, Special Assistant Attorney General, Barbara Stromer, Assistant Commissioner for the Bureau of Support Services, Robert Rau, Audit Director, and Richard Tester, Desk Audit Supervisor, appeared in behalf of the Department of Public Welfare. Approximately thirty-five (35) persons attended the hearing. The hearing continued until all interested groups and persons had an opportunity to be heard. Based upon the proceedings as indicated in the Report of the Hearing Examiner dated June 16, 1980, a copy of which is attached as Exhibit B hereto, the Hearing Examiner made Findings of Fact, Conclusions and Recommendation.

Pursuant to Minnesota Statutes, Section 15.0412, Subdivision 4 (1978) said Report was available to all affected persons for at least five (5) days subsequent to the date of the Report.

After affording interested persons an opportunity to present written and 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 of 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, provided however, such adoption and incorporation should not be construed to mean that arguments or assertions summarized in said Report are accepted as relevant and correct. Furthermore, the Report is adopted and incorporated to the following extent:

1. Findings of Fact of the Hearing Examiner 1-8, 13, 14, 15, 17-43 are adopted and accepted as qualified previously in regard to relevancy and accuracy.

2. Findings of Fact 9 of the Hearing Examiner is adopted only insofar as he finds:

> 9. The Department's methodology (bringing the base rate of $1.20 up to date using the C.P.I.) is an appropriate model for computing raw food costs and the appropriate figure for 1980 is $1.91 per patient day (see Table 1, or Exhibit 10). The Department acknowledges the methodological error made by the Department in projecting the rate increase. Consequently, the Department will: 1) replace the C.P.I. "food" index with the "food at home" index as proposed; 2) continue the schedule of adjustments as before by using published percentage changes through October of each year to determine the amount of change effective the following January; and 3) make a mid year adjustment using that methodology to implement use of the proposed formula. Under this proposal, the Department will recompute food cost changes through October 1980 for rates effective after January 1, 1981.

The Department proposes to adjust the existing formula to delete the mathematical calculations for prior year percentage increases and/or decreases and to use "food at home" from the consumer price index in lieu of "food" only from the same index. Therefore a one-time raw food cost adjustment for prior years' (1974-1980) differences is necessary. Based on the most recent consumer price index (July, 1980), the index increased to 253.3 from 237.4 in November, 1979 or a 6.698 increase in the index. In regard to the mid-year effectiveness of this change in formula, the Department adopts the rate of $2.04 ($1.91 x 1.06698%) per day as the reasonable rate for food costs at the date that this rule can become effective.

3. Findings of Fact 10 of the Hearing Examiner is wholly rejected and the Commissioner hereby makes the following Findings of Fact:

10. Chapter 570 (HF 1847-SF 1883)(1980 Laws of Minnesota) required the revision of the formula for allowable raw food cost increases by the amendment of current rules governing nursing home reimbursement. Such rule amendment was required to be promulgated in public hearing no later than August 1, 1980. The act was effective April 16, 1980, the day following its final enactment. Since no effective date was clearly and manifestly authorized by the legislature, the proposed effective date shall be governed by Minn. Stat., Sec. 15.0413, subd.1.

4. Findings of Fact 11 of the Hearing Examiner is adopted only insofar as he finds:

11. In the rule revision effective September 1, 1974 the Department promulgated a raw food cost change based on $1.20 per day with annual increase contingent on the percentage change in the wholesale price change. The cost change provision was presented in public hearing on July 16, 1974 and was accepted by the hearing participants as a reasonable cost item. The methodology for updating the cost change was to compare the percentage change in the index at twelve (12) month intervals using figures available for October of each year so as to publish the allowance effective January 1, of each year. The computed change established the cost per day increase for food costs for the prospective calendar year. The percentage change reflected the actual cost changes in food for a one-year period and such cost changes were set in effect in the subsequent rate/fiscal period.

While there is considerable discussion about the appropriateness of the C.P.I. vs. a comprehensive inflation index an alternative formula has not been developed or commonly employed. Therefore the C.P.I. is still a commonly accepted standard for measuring fluctuations in costs and therefore the use of such index is reasonable, particulary when a component, such as food is applied to that cost category.

5. Findings of Fact 12 of the Hearing Examiner is wholly rejected and the Commissioner hereby makes the following Findings of Fact:

12. The Department's testimony does support the proposed rule provision that an increase in the raw food cost allowance is necessary. Testimony regarding the history of this provision and the application of an acceptable index supports the reasonableness of the proposed increase of the base from $1.91 per day effective January 1, 1980 to $2.04 per day. Although there was other testimony in regard to a greater base, the proposed increase is founded on a base previously established through rule making and the proposed increase does fall within an acceptable range of reasonableness.

6. Findings of Fact 16 of the Hearing Examiner is adopted with the following revision in compliance with the qualifications rendered by the examiner:

   Hospital attached facilities will include those facilities which are under common ownership and operation with a licensed hospital and are required to adhere to uniform cost reporting for governmental reimbursement programs. Common operation shall be defined as the sharing of services, such as, nursing services, dietary, housekeeping, laundry, plant operations and/or administrative.

7. Findings of Fact 44 of the Hearing Examiner is wholly rejected.

8. Conclusions 1, 2, 3 and 5 of the Hearing Examiner are adopted and incorporated herein in full.

9. Conclusion 4 of the Hearing Examiner is wholly rejected and the Commissioner hereby makes the following conclusion:

   4. The Department has demonstrated the need for and reasonableness of each of the proposed rule provisions with an affirmative presentation of the facts.

10. Conclusion 5 of the Hearing Examiner is adopted only insofar as he concludes that the investment allowance rate of 11.1% is reasonable.

11. The Hearing Examiner's recommendation is adopted only insofar as he recommends that the Commissioner of Public Welfare establish both the raw food cost base at $2.04 per day and the investment allowance at 11.1% according to effective dates supported by applicable state law.

IF IS FURTHER ORDERED that the Commissioner hereby adopts the proposed amendments to Rule 49 of the Minnesota Department of Public Welfare as set forth above pursuant to the authority vested in me pursuant to Minnesota Statutes, Chapters 15, 256, 256B, and 570.

STATE OF MINNESOTA
DEPARTMENT OF PUBLIC WELFARE

Dated this 12 day of September, 1980.

By _____
ARTHUR E. NOOT,
Commissioner

Exhibit I

DPW-80-032-JL

STATE OF MINNESOTA
OFFICE OF HEARING EXAMINERS

FOR THE 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.

REPORT OF THE HEARING EXAMINER

The above-entitled matter came on for hearing before Jon L. Lunde, duly appointed Hearing Examiner, on Monday, April 28, 1980, at 9:05 a.m. in the Veterans Service Building, Conference Room D, 12th Street and Columbus Avenue, St. Paul, Minnesota, 55155, pursuant to an Order for Hearing dated March 4, 1980.

Paul Zerby, Special Assistant Attorney General, 4th Floor, Centennial Office Building, 658 Cedar Street, St. Paul, Minnesota, 55155, appeared as counsel for the Minnesota Department of Public Welfare (hereinafter the "Department"). Appearing as witnesses for the Department were Robert J. Rau, Audit Division Director; Richard Tester, Desk Audit Supervisor; and Barbara Stromer, Assistant Commissioner for the Bureau of Support Services.

This is a rule hearing conducted pursuant to Minn. Stat. Ch. 15 to determine whether the Department has authority to adopt the rules proposed and whether they are necessary and reasonable and may be adopted.

Approximately 35 persons appeared at the hearing, 23 of whom signed the hearing register. The hearing continued throughout the day and until all persons present had had an opportunity to be heard. The record remained open for 20 calendar days following the hearing through Monday, May 19, 1980, for the submission of written comments and materials from interested parties. Fifteen written comments were submitted to the Hearing Examiner on or before Monday, May 19th, and a listing of these comments, numbered from 1 through 15, is attached to this Report. The Department offered eleven exhibits which were received into evidence during the hearing (numbered 1-11), and the public offered ten exhibits (lettered A-J).

Pursuant to Minn. Stat. § 15.0412, subd. 4 (1978), 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 (1978). 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 (1978) within ten calendar days.

The Department 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

Procedural Requirements

1. On March 6, 1980, 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 Monday, March 24, 1980, a Notice of Hearing and a copy of the proposed rules were published at 4 State Register 1531-1533.

3. On March 21, 1980, 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 April 2, 1980, 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 Departmental 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 Department did not publish any Notice of Intent to Solicit Outside Opinion in this matter and no comments in response to such a publication were therefore submitted to the Hearing Examiner.

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

Statutory Authority

5. As authority for its adoption of the rules proposed, the Department cited, inter alia, Minn. Stat. §§ 256B.04, 256B.41 and 256B.45 (1978). The former two sections grant the Department broad rule-making power, and the latter specifically mandates annual reconsideration of the investment allowance for proprietary nursing homes. § 256B.04 provides that the Department shall:

> Subd. 2. Make uniform rules and regulations, not inconsistent with law, for carrying out and enforcing the provisions hereof in an efficient, economical, and impartial manner, and to the end that the medical assistance system may be administered uniformly throughout the state, having regard for varying costs of medical care in different parts of the state and the conditions in each case, and in all things to carry out the spirit and purpose of this program, which rules and regulations shall be made with the approval of the attorney general on form and legity, shall be furnished immediately to all county agencies, and shall be binding on such county agencies.

In addition, with specific reference to nursing home rates, § 256B.41 provides:

Subdivision 1. The state agency shall by rule establish a formula for establishing payment rates for nursing homes which qualify as vendors of medical assistance.

Finally, with respect to the investment allowance, § 256B.45 provides in part:

Subdivision 1. The state agency shall by rule establish an investment allowance for nursing homes. For the fiscal year beginning July 1, 1977, the allowance for proprietary homes shall be nine percent of the original value of the facility for depreciation purposes. . . . Beginning in 1978 the state agency shall, no later than May 1 of each year, conduct a public hearing pursuant to the rule making provisions of chapter 15 to determine the percentages to be used in the following fiscal year. . . .

6. The Department is the state agency reponsible for the administration of the medical assistance program (Medicaid) established under Title XIX of the Social Security Act, 42 U.S.C. § 1396 et seq., whereby indigents are provided necessary medical services, including nursing home care. The State's participation in the federal program is generally governed by Minn. Stat. Chap. 256B et seq. The Department has fulfilled its responsibility for establishing rates charged by nursing home providers through the enactment of 12 MCAR § 2.049 (hereinafter "Rule 49"), which was originally adopted on November 1, 1972. The Department is currently proposing four amendments to Rule 49:

(1) To provide a new formula for the computation of raw food costs under subsection B.1.c.(1)(i);

(2) To add clarifying language regarding "hospital attached facilities" to include those facilities that, while freestanding and not physically attached to a hospital, are "characterized by common ownership and operation."

(3) To provide for nursing care hours above currently stated limitations to the extent of specified cost savings.

(4) To increase the investment allowance allowed to proprietary nursing homes from 10.3% to 11% effective July 1, 1980.

Each of these proposed amendments will be discussed separately.

Raw Food Costs (B.1.c.(1)(i)) see p.4. and Revised Order #3 thru #5

7. As originally adopted, Rule 49 treated raw food costs only as historical costs. In 1973, the Rule was amended and an unidentified cost change of 1% of a facility's historical costs per patient day was allowed to facilities in their rate structure to cover those cost changes which were not specifically recognized under the Rule. Raw food cost changes were one of the unidentified costs to be covered under this allowance. The very next year, 1974, the Department amended Rule 49 and specifically identified raw food costs changes as a known cost to be included in the calculation of a facility's rate. Initially, raw food costs were established at $1.20 per patient day with an annual increase based on a percentage of the change in the wholesale price index over a two-year period.

The Department now proposes to replace the current formula for computing increases in raw food costs with one which is based on changes in the consumer price index (CPI) for the Minneapolis-St. Paul area during the period October through September of each year. The proposed amendment establishes an initial

"average"[1] food cost per patient day of $1.82 and provides for a 27¢ increase to $2.09 effective July 1, 1980. Subsequent increases will be made each January 1, commencing January 1, 1981, and will be based on the change in the consumer price index of the preceding October - September.

The $1.82 figure used as the base for computing the July 1, 1980 increase in the raw food allowance, and the figure from which future increases will be computed is the amount that nursing homes are currently receiving under Rule 49. If the proposed method of calculating raw food costs, using the C.P.I., had been followed by the Department since September 1, 1974, using a $1.20 base,[2] raw food costs through November, 1979 would have been $1.91 and are projected (based on the percentage change during the last three years) to rise to $2.09 by November, 1980.[3] In order to raise the current $1.82 allowance to the projected November, 1980 level of $2.09, the Department proposes a 27-cent increase in the raw food cost allowance effective July 1, 1980. This figure is calculated by applying the percentage change in the C.P.I. (col. 4 below) to the former allowance to get the new allowance. Column 2 shows what the Department actually allowed and column 5 shows what would have been allowed using the C.P.I. Its calculations, abstracted from Exhibit 10, are as follows:

Proposed Raw Food Cost Allowance

Table 1

Year	DPW Allowance	C.P.I.	Percentage Change	Proposal Rate Allowance
1973	1.20	149.2	- -	- -
1974	1.34	169.7	13.7%	1.36
1975	1.43	182.9	7.8%	1.47
1976	1.54	181	(1%)	1.46
1977	1.54	193.6	7%	1.56
1978	1.60	217.7	12.4%	1.75
1979	1.73	237.4	9%	1.91
1980	1.82	259.9 (est)	9.47% (est)	2.09 (est)

8. By applying the projected November, 1980 change in the C.P.I. to the raw food cost allowance beginning July 1, 1980, the Department has, in effect, granted the January 1, 1981 rate six months early. Normally, the C.P.I. figures used by the Department under the proposed amendment apply prospectively only. That is, the C.P.I. change between the months of October, 1980, and September, 1981, for example, would determine the raw food cost allowance effective January 1, 1982, and the projected change in the September, 1981, C.P.I. would not be used to determine a new mid-year rate commencing July 1st of 1981.

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[1]Although the base figure was referred to as an "average", it was not based on actual food costs reported to the Department and was not an average of any costs incurred by Minnesota facilities. See Transcript Pages 30 and 50 (hereinafter Tr. 30 and 50).

[2]The $1.20 base figure was that originally used by the Department in 1974. It was the same figure used by the Legislature at that time in computing food costs for state hospitals and in making appropriations therefor.

[3]In arriving at a proposed rate effective July 1, 1980 of $2.09 per hour, the Department did not technically following the methodology established by the proposed amendment because it calculated the raw food costs allowance through 1979 based on a November C.P.I. figure and not on the September C.P.I. figure called for in the rule. What difference, if any, this would make in computation of the ultimate rate is unknown.

Since the 1981 rate (estimated) has been applied six months early, the question arises as to how the 1981 rate will be adjusted. Mr. Rau testified that the base figure used would be $2.09 and that the cost change would be the full index change. (Tr. p. 30) Thus, the increase in the C.P.I. between October, 1979 and September, 1980 (which should be approximately 9.47%) will be applied to the $2.09 and the new rate will be effective January 1, 1981 even though the same or a similar percentage was previously applied in computing the base effective July 1, 1980. Therefore, if the actual percentage change in the consumer price index is 9.47%, the new base rate, commencing January 1, 1981 would be $2.29 (1.0947 x $2.09).

9. If this is a proper interpretation of the Department's intention, it raises several serious questions concerning the reasonableness of the proposed rule. First, if the Department's methodology (bringing the base rate of $1.20 up to date using the C.P.I.) is an appropriate model for computing raw food costs, the appropriate figure for 1980 is only $1.91 per patient day (see Table 1, or Exhibit 10), and no increase on July 1, 1980 would be justified based on prospective or estimated changes in 1980. If $1.91 per patient day is not sufficient to compensate providers for their reasonable raw food costs in 1980, and an adjustment is necessary, then a proper daily allowance should be computed and made effective January 1, 1980, the date the proper rate should have been adopted under its proposed "methodology", or, in the alternative, the mid-year adjustment should be sufficient to compensate providers with their reasonable losses during the first six months of 1980. Unfortunately, the Department presented no facts showing that the mid-year adjustment was intended or does result in a reasonable rate for 1980 by compensating homes for admitted losses during the first half of 1980 in the mid-year adjustment.

10. When asked why the $2.09 mid-year rate was not made retroactive to January 1, 1980, the Department had no explanation other than a general understanding that rules cannot be made retroactive in operation and that budgets and appropriations were based on a July 1, 1980 effective date. Clearly, if homes are entitled to receive $2.09 during the entire year, the rule should be and may be made retroactive to January 1, 1980. As the Supreme Court stated in Mason v. Farmers Ins. Companies, 281 N.W.2d 344, 348 (Minn. 1979):

> In principle, rules may be made retroactive if it is reasonable to do so. See, Summit Nursing Home, Inc. v. United States, 572 F.2d 737 (Ct. Cl. 1978).

In this case, if homes are entitled to receive $2.09 during the entire year, it would be unreasonable for the Department not to make its rates retroactive to January 1, 1980. A lack of state legislative appropriations or inadequate funding do not provide legal basis for failure to implement such a rate. State legislative appropriations or inadequate funding simply are not valid reasons for failure to comply with federal laws and regulations requiring that Medicaid rates be established on a reasonable cost-related basis. Alabama Nursing Home Association v. Califano, 433 F. Supp. 1325 (M. D. of Alabama 1977), reversed in part on other grounds, ___F.2d ___, Civ. No. 79-1694 (5th Cir. 1980).

11. The Department's proposed rate formula raises other serious questions. The Department avers that the amendment is necessary because the current formula for computing raw food costs, recognizing changes in the wholesale price

index over a two-year period, has provided insufficient raw food cost allowances to cover actual raw food cost increases experienced by nursing homes. This fact was not disputed by the public but was unanimously corroborated. However, even though an increase in the raw food cost allowance is obviously necessary, the Department failed to present facts showing that the proposed methodology has any relation to actual costs and there was no showing that the Department's cost-finding technique will provide for reasonable reimbursement. While adoption of the consumer price index and applying it to a base rate of $2.09 does yield a larger raw food cost allowance, which everyone applauds, no facts establish that the current rate is, in fact, reasonable. On the contrary, the very fact that a midyear adjustment in the normal C.P.I. figure is necessary shows that the increase in raw food costs have exceeded the consumer price index methodology which the Department is presently adopting. As such, it is difficult to see how such a methodology can be considered reasonable in application.

Part of the problem arises from the Department's failure to prepare a Statement of Need and Reasonableness which contains sufficient facts to establish the reasonableness of its proposals (it being only two pages in length). The problem is exacerbated by the Department's failure to present further necessary facts at the hearing on its proposal. While the Department indicates what it will do and why some action is needed, it did not show why their formula was reasonable. While the C.P.I. is a commonly accepted standard for measuring changes in costs and is used for making adjustments in wages under collective bargaining agreements, no affirmative facts were presented by the Department showing that its base rate of $2.09, effective July 1, 1979, has any relation to the actual food costs reasonably incurred by nursing homes in the state of Minnesota. On the contrary, the only evidence submitted regarding the actual costs presently incurred by nursing homes was submitted by members of the public, and their figures indicate that the Department's methodology is inadequate as proposed.

12. The Hearing Examiner is left with the unhappy choice of approving a rate which may be more reasonable than that previously allowed but not necessarily reasonable by itself, or by totally rejecting the rate proposed by the Department, thereby potentially depriving nursing homes of an admittedly necessary increase. Unhappily, the latter course must be followed. Minn. Stat. § 15.0412, subd. 4 (1978), pertaining to rulemaking proceedings under the Administrative Procedures Act, provides in part as follows:

> At the public hearing, the agency shall make an affirmative presentation of facts establishing the need for and reasonableness of the rule proposed for adoption. . . .

Minn. Stat. § 15.052, subd. 3, pertaining the Report of the Hearing Examiner, directs him to:

> (4) Make a report on each proposed agency action in which the hearing examiner functioned in an official capacity, stating his findings of fact and his conclusions and recommendations, 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.

In this case, the record supports the conclusion that an increase in the raw food cost allowance is necessary, but the facts do not establish the reasonableness of the increase proposed by the Department. While the increase proposed by the Department is larger than that previously granted and would no doubt afford some relief to the nursing homes in the state, the base rate adopted was wholly arbitrary and was not shown to have been based on reasonable costs incurred in acquiring foods. Based on the information in the record, it is too low. While the Hearing Examiner would like to make a contrary finding, to do so in this case would be contrary to his responsibilities.

It is noted that Mr. Robert McGovern, controller for Gold Medallion Nursing Centers, in his calculation of the increase in raw food costs in the Minneapolis-St. Paul area since 1972, using the same starting point of $1.20, calculated an increase from 124.4 to 244.4 in 1979, or a 96.46% increase, which, when applied to an initial base rate of $1.20 yields an increase of $1.16, or a proper current rate for 1979 of $2.36 ($1.16, plus $1.20). While Mr. McGovern's calculations yielded a higher current rate than Mr. Rau's, Mr. McGovern failed to show that his figures were actually based on the consumer price index for consistent months during the relevant period. Furthermore, Mr. McGovern improperly computed the change in the C.P.I. commencing in 1972. Since the identification of raw food costs and the first allowance was not made until September, 1974, taking note of the C.P.I.between 1973 and 1974, any change between 1972 and 1973 should not have been considered. This accounts for some of the disparity between Mr. McGovern's figures and those of Mr. Rau.

Hospital Attached Facilities (C.4.c.) p.6.

13. Rule 49 C.4.c., in its present form, was adopted in September, 1974 and permits hospital attached facilities a separate maximum rate calculation different from that applied to freestanding facilities. The 1974 amendment was made in order to address certain problems unique to such hospital attached facilities. The Department's interpretation of a "hospital attached facility" has always been that there be a direct physical connection between the hospital and the convalescent and nursing care units involved before those units could be considered as "hospital attached" homes eligible for distinct treatment.

The Department now considers that while some of these units are not physically attached, they should be treated as though they are "hospital attached" where they have "common ownership and operation" and must "adhere to uniform cost reporting for governmental reimbursement programs ." The Department believes that it is unfair to treat essentially similar institutions differently simply because there is no physical connection between them. In this respect, the Department is properly putting substance before form and its decision to treat all similarly situated entities alike is a reasonable and necessary exercise of its informed discretion. Moreover, such a clarification is consistent with Minn. Stat. § 256B.04, subd. 2 (1978), which requires the Department's rules to have "regard for varying costs of medical care in different parts of the state, and the conditions in each case." Since all facilities commonly owned and operated with a hospital, whether physically connected or freestanding, have similar problems unique to them, they should be treated similarly under the Department's rules. This amendment implements such similar treatment.

14. The rule would convert approximately ten currently freestanding facilities to the "hospital attached" category and might have some effect on the computation of regional maximums for such facilities. The extent of that impact is unknown; nonetheless, no one objected to the rule on that basis.

Rick Carter, Deputy Director of the Minnesota Association of Health Care Facilities (hereinafter "MAHCF"), did argue that while these ten freestanding facilities should perhaps be treated as hospital attached for rate purposes, they should not be treated as hospital attached for purposes of the nursing hour limitations.[4] Mr. Carter argued that the type of patient treated by freestanding facilities, whether or not considered as hospital attached for purposes of rates, was the same and that all freestanding facilities should be treated equally for purposes of the nursing hour limitation. Mr. Rau pointed out that hospital attached facilities seldom exceed the nursing hour limits and that the problem of inequity raised by Carter was an unusual one.

15. No evidence was presented by the Department or by the public comparing the residents served by freestanding institutions operated and owned with a hospital to freestanding facilities or to hospital attached (physically) facilities generally. Therefore, a comparison between them based on the type of patient served cannot be made. Suffice it to say that the Department has shown that freestanding facilities commonly owned and operated with hospitals have similarities to those hospital attached facilities which are physically attached to a hospital and justify their common treatment. While the two may not be identical, the Department's rules need not make exceptions to their equal treatment for every particular in which they differ, especially when they may differ (as in regard to type of patient served) so that an unusual variance from nursing hour limitations otherwise applicable might be available. Such a minor and collateral situation does not require special treatment. Perfection in the rules is simply not required.

16. Mr. Rau made it clear that the proposed amendment regarding attached facilities applies for purposes of the application of the entire rule and is not simply for purposes of C.4.c. He said:

> "In making the proposal, it was our intention that any benefits of the rule that would accrue to hospital attached facilities through Rule 49 would go to the benefit of these facilities..." (T. 58)

In his comments, Mr. Rau also mentioned "shared services" as a criterion of a hospital attached facility and this characteristic is repeated in the Statement of Need and Reasonableness. Under questioning from John Broeker, Esq., he explained that shared services is merely the same as common operation and that it was not a new or different criteria the Department intended to impose but merely the inquiry behind the concept of "common operation". Under questioning by Mr. Carter, Rau pointed out that shared laundry and dietary would be the most "prominent" shared services but that shared vending machines would be inadequate to establish common operations. Carter expressed understandable confusion concerning those shared services essential for a finding

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[4]Hospital attached facilities can exceed nursing hour limitations imposed under Rule 49 and which apply to freestanding facilities, if the excess results from Medicare cost reporting. (Tr. 68).

of common operation. He suggested that those shared services essential to a finding of common operation should be specified in the rule. Without such criteria, the Department is permitted unrestrained discretion in its findings of common operation. Such discretion is not illegal, but the uncertainty involved should be clarified now to avoid unnecessary litigation in the future. It is recommended therefore that the Department specify those shared services which the Department will insist must be present before a finding of common operation will be made, e.g., shared dietary, laundry and administrative functions or any two of the above or any others deemed relevant.

see Revised Order #6 Complied p. 6.

17. As explained to Mr. Brian F. McInerney, Vice President, Division of Health Economics of the Minnesota Association of Homes for the Aging, the uniform cost reporting for government reimbursement programs requirement of the proposed rule refers to the federal determination relative to Medicare and not to the reports submitted to the Department under Rule 49 itself. While it is not necessary that a hospital and an attached facility file a joint Medicare report, if shared costs between them must be properly allocated on the reports filed by these institutions, they will qualify under this criteria. Each aspect of the proposed rule must be satisfied in order for the freestanding facility to be considered hospital attached. That is, common ownership, common operation and uniform cost reporting. If, for example, there is common ownership but no uniform cost reporting, the facility would not be considered hospital attached for purposes of the rule.

Nursing Hour Limitations (D.2.c.) p. 7.

18. Rule 49 D.2.a. currently limits nursing care costs to a maximum of 2.9 hours per patient day for skilled care, and 2.3 per patient day for ICF I care. These limitations have been constantly criticized by nursing facilities throughout the state and the Department is currently engaged in a study to determine what these limits should be. During 1979, the Department's 21-member task force reviewed Rule 49 and made interim recommendations regarding the nursing hour limitations in the Rule and adjustments that should be made.[5] In addition, new legislation specifically requiring rule amendments to the current nursing hour limitations of Rule 49 was enacted. Laws 1980, Chapter 570, § 2, amending Minn. Stat. § 256B.47 (1978) (H.F. No. 1847), effective April 16, 1980, provides as follows:

> Subd. 5. The commissioner shall promulgate rules no later than August 1, 1980, to amend the current rules governing nursing home reimbursement, in accordance with sections 15.0411 to 15.052, to allow providers to allocate their resources in order to provide as many nursing hours as necessary within the total cost limitations of the per diem already granted.

19. The Department's proposed amendment is based on this legislation and allegedly on the task force's interim recommendations. The Department admitted, however, that it did not consider the effect, if any, of Minn. Laws 1980, Chapter 614, § 184 (H.F. No. 2476) which provides as follows:

> Sec. 184. [NURSING HOME REIMBURSEMENT RATES.] The commissioner of public welfare shall promulgate temporary rules no later than July 1, 1980 to amend the current rules governing nursing home reimbursement to allow those nursing homes that incurred in calendar year 1979 nursing hours in excess of 2.8 hours

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[5] These recommendations were not made a part of the record and their substance is unknown.

per day for skilled nursing care or 2.2 hours per day for intermediate care to receive reimbursement for actual nursing hours up to a maximum number of 3.2 hours per day for skilled nursing care and 2.45 hours per day for intermediate care for only those cost reports submitted on or after July 1, 1980 and before July 1, 1981.

The Department's proposed amendment to Rule 49 D.2. is intended to be provisional in nature, applicable in 1980 and possibly in 1981, and allows providers to exceed the nursing hour limitations in the Rule with cost savings from areas "that are identified as the unidentified cost change areas of Rule 49" (Tr. 22). Under subsection c.(2), the increased costs may only be funded by reductions in certain costs attributable to the following six categories:

I. Dietary; II. Laundry and Linen; III. Housekeeping; IV. Plant Operation and Maintenance; V. Other Care-Related Services; VI. General and Administration.

20. Under the proposed Rule, for each expenditure in these six cost categories for which no known cost changes have been allowed,[6] any savings (reduced expenditures) between the historical cost of one fiscal year, adjusted for unidentified cost increases, and the next subsequent fiscal year would be available to fund increased nursing care expenditures to the extent that savings in such categories exceeded cost increases in those categories. Therefore, to the extent that a facility can keep its unidentified cost change increases from reaching the unidentified cost change allowance, the savings can be allocated to increased nursing hour costs for the following year without regard to regional maximums. (Tr. 79-84) As Mr. Rau stated (Comment No. 2, p. 2), "It is this agency's position that cost savings in the area of the cost report line-items which are factored by an index percentage may be used for nursing salaries and hours in excess of the nursing hour limitation. These excess hours will then be allowed in the subsequent cost reporting periods." Regarding the amount of the unidentified cost allowance, he stated as follows:

"In regard to the agency's proposal to use cost savings from the unidentified cost allowance, I have sampled twenty-four (24) calendar year-end (1979) DPW Rule 49 costs reports in determination of the average unidentified cost allowance. The attached schedule [none was attached] indicates that the average allowance is 14,558 or $.46 per patient day."

Savings which can be realistically effectuated from this amount is unknown. However, most commenters felt that the savings potential for reallocation to increased nursing costs was not good (Public Comments 5, 8, 10). Mr. Paul L. Mickelson, Assistant Administrator for Walker Methodist Residence and Health Care Center, Inc., made a typical observation. He said:

". . . The difference between the Rule 49 maximum limit (2.9) and the level of nursing care which we would like to provide (3.1) will require an additional $110,000. After listening to the testimony at today's hearing, I have learned that this additional cost would be allowed under Rule 49 only if "savings" were achieved in a few selected areas. The following budget items are not those in which 'savings' can occur: wages and salaries, employee benefits, raw food costs, depreciation and interest, utilities. Also insurance, postage, consultant and contractor costs can be eliminated because the facility has little or no control over these items and are (sic) required to

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[6] This would exclude salaries and food cost savings, if any, and those other costs specified in 12 MCAR § 2.049 B.1.c.(1)(j).

have them. At our facility, these non-"saving" categories constitute ninety-one percent (91%) of our total operating budget. We would then be faced with the inenviable (sic) (if not impossible) task of recovering this $110,000. from the remaining nine percent (9%), which would be about $485,000. The possibilities of such an operation being successful are poor.

Thirdly, with the proposed system, each year as the "savings" in other departments are realized, and as they become "historical costs" to be used in formulation of the next year's room rate, the result will be an unrealistically low rate. This will be especially true if the same 'savings' cannot be effected year after year. The true result of one year's "savings" could be the next year's financial nightmare!"

Although savings from one year could be a subsequent year's "financial nightmare", this provision of the rules is not intended as a permanent, but only a provisional rule. Therefore, such nightmares should not occur.

21. While the proposed amendment may not cover all or even half of a given facility's excess nursing care costs, and even though it may provide only marginal relief, the amendment, in its present form, is specifically required by legislative mandate (Laws 1980, Chapter 570, § 2), and it must be considered necessary as a matter of law. Even though the record contains uncontroverted evidence that an increase in the nursing hour limitations themselves is necessary, the Department is not prepared and cannot be required to establish new limitations at this time even though several persons made that suggestion. The Hearing Examiner is in the position where he must evaluate what has been done and what has been proposed by the Department and cannot properly consider what should be done in other respects that are not properly within the scope of the issues noticed for hearing.

22. Rick Carter, on behalf of the MAHCF, argued that the proposed Rule 49 D.2.c., which limits cost savings for reallocation to increased nursing hours to unidentified cost areas, is illegal and inconsistent with the plain language of Laws 1980, Chapter 570, § 2, which mandated a rule "to allow providers to allocate their resources in order to provide as many nursing hours as necessary within the total cost limitations of the per diem already granted." Carter argued that since known cost changes are admittedly included within the "total cost limitations of the per diem already granted", the Department's rule must make savings from those other areas available for reallocation also.

Mr. Rau, in response, stated that the objective of the proposed rule is to increase nursing hour limitations without increasing costs. (Tr. 107) Furthermore, he pointed out that savings from those categories for which known cost increases have been granted were not made available for reallocation because providers could then deliberately over-project known cost changes and use the "savings" to exceed nursing hour limitations established in the Rule. For that reason, he said that cost savings were restricted to areas where no known cost increases were granted. Although the Department does review projected cost increases submitted by a facility in the area of known costs, over-projections are already a problem which the Department has had difficulty dealing with and over-projected costs and the recovery of those over-projected costs from the various facilities involved has proved difficult. (Tr. 95-97)

23. Apart from the legality problems raised by the proposed rule, it is a wholly reasonable method for temporarily raising nursing hour limitations (until such time as proper limits can be established) without increasing total

state expenses and without permitting a wholesale avoidance of existing limitations by the over-projection of known cost changes. Furthermore, any relief that can be afforded in this area is clearly needed at this time and many homes will be in a position to take advantage of the provisions in the proposed amendment. In that respect, Rau reported as follows: (Comment 2, page 2)

> These statistics indicate that 4.4% of the facilities are over the skilled nursing hour limitation and 2 of the 11 facilities over that limitation are affected by the maximum rate. The statistics further indicate that 48 of the 249 facilities or 19.3% of the facilities provide 2.8 to 2.9 nursing hours.
>
> In the intermediate care level 5.2% of the facilities are over the intermediate nursing hour limitation with none of the facilities affected by the maximum rate. The statistics further indicate that 70 of 270 facilities or 25.9% of the facilities provide 2.2 ao 2.3 nursing hours. These statistics are provided in support of the need for the proposed Section D.2.c. of DPW Rule 49.

24. The issue whether the Department's construction of Laws 1980, Chapter 570, § 2, is proper and whether it can, within the meaning of that law, limit cost savings only from the unidentified cost areas for reallocation to increased nursing hour costs, given the problems which can occur and the deliberate over-projection of known cost changes, if allowed, is one which is properly addressed to the Hearing Examiner. Although issues regarding the "form and legality" of proposed rules are, pursuant to Minn. Stat. § 15.0412, subd. 4 (1978), to be decided by the Attorney General, the Hearing Examiner, by virtue of his responsibility to decide an agency's authority to adopt rules, its compliance with substantive and procedural requirements of law and rule, and the reasonableness of rules proposed, must also address legality issues. In the past, the Hearing Examiners have consistently commented on and made recommendations regarding the legality of rules proposed for adoption.

The provisions of Chapter 570, § 2, are clearly mandatory and require the adoption of a rule by August 1, 1980, permitting nursing homes to allocate their monies to provide as many nursing hours "as necessary" within the total cost limits of their established per diem. Rick Carter, speaking on behalf of MAHCF, argued that the language of this provision is clear and unambiguous and cannot be disregarded by the Department for any reason, not even the desire to avoid the over-projection of known cost changes. Although known cost changes are included within the term "total cost limitations of the per diem already granted", it does not follow that such known cost changes must be available for savings. On the contrary, only savings "necessary" for reallocation to nursing hours need be allowed and what is "necessary" is a determination clearly to be made by the Department and not by the providers themselves. The Department has determined that, pending further study at least, the current rule permits all the reallocation to nursing hours that is presently "necessary." Since only 25 facilities (of a total of 519) now exceed the nursing limits, and since some relief to them is now available, the proposed amendment considered in relation to Chapter 570, alone, would provide for "necessary" allocation. While further allocation would be permitted under Chapter 570, it is not required.

25. The Department's proposed amendment to § B.2.c. does not, however, take cognizance of Laws 1980, Chapter 614, § 184 which requires it to promul-

he means D.2.c see p. 7

gate rules by July 1, 1980, allowing reimbursement to nursing homes for their actual costs of incurred nursing care hours during 1979 (up to 3.2 hours for skilled and 2.45 hours for intermediate care) for cost reports submitted after July 1, 1980 and before July 1, 1981. Mr. Rau admitted that the effect of this law on the proposed rules had not been considered by the Department. It is unknown if this amendment was adopted in response to the Department's proposed Rule permitting partial reallocation, but, at the very least, it evinces a legislative determination that current nursing hour limitations are inadequate and should be raised to the limit specified. The Department presented no evidence indicating whether or not the savings permitted under the Rule as currently proposed would allow nursing hour costs equivalent to those authorized by Ch. 614 but public comment strongly suggested that it would not.

The Department could, on a temporary basis, and until such time as its study and decision on new nursing hour limits are made, permit the allocation of cost savings from unidentified cost areas as well as known cost change areas, as suggested by Mr. Carter, up to the levels specified in Chapter 614. This would implement and harmonize Chapters 614 and 570 without permitting a wholesale and unnecessary avoidance of nursing hour limitations.

At the very least, the language in Chapter 614 regarding the computation of rates for nursing homes commencing July 1, 1980, permitting higher nursing limitations than Rule 49 currently permits, is clearly inconsistent with proposed § D.2.c.(1) which predicates rates based on different maximums. This inconsistency should be eliminated.

26. In the event the Department proceeds to adopt the rule as proposed, it should be pointed out here that Mr. Broeker's suggestion that subsection D.2.c.(1) be amended to clarify its meaning was agreed to by the Department. As amended, the subsection would read as follows:

> (1) The Department of Public Welfare shall establish the 1980 per diem in accordance with Section D.2."

complied p. 8

This reference to § D.2. should be further changed to reflect the new limits required by Chapter 614 and the reference to the appropriate temporary rule substituted for "Section D.2." therein. As explained by Mr. Rau (Tr. 77), this new methodology will not apply unless the facility has a June 30, 1980 or later year ending date.

Similarly, for clarification, the Department agreed to amend the last sentence of § D.2.c.(3) to read as follows:

> "Section D.2.c. is effective for rates determined July 1, 1980 and thereafter."

p.8 this amendment is not effected.

These amendments are necessary for clarification and are reasonable.

Investment Allowance (D.6.b.(1)) p.5

27. Minn. Stat. § 256B.45 provides for an investment allowance to nursing homes. For fiscal year beginning July 1, 1977, the allowance for proprietary homes was set at 9% of the original value of the facility for depreciation purposes, and beginning in 1978, and no later than May 1st of each year, the Department is required to conduct a public hearing to determine the percentage for the next subsequent fiscal year.

Pursuant to that mandate, the Department is necessarily proposing a new rate applicable to proprietary nursing homes effective July 1, 1980. This pro-

posal is contained in § D.6.b.(1), raising the investment allowance from the current 10.3% rate to a new 11.0% rate. The proposed amendment is obviously authorized and necessary and the only question remaining to be decided is the reasonableness of the 11.0% allowance proposed by it.

28. The Department's justification and explanation of the reasonableness of the proposed 11% investment allowance was set forth in its Statement of Need and Reasonableness. Its entire explanation read as follows:

> It is necessary to amend Section D.6.b.(1) so as to increase the investment allowance formula utilized in the rate determination for proprietary providers. A review of the average rates of public debt issued to the Federal Hospital Insurance Trust Fund was 8.198% for calendar year 1978 and 8.874% for calendar year 1979. The total point change was .676. The sum of the current 10.3% investment allowance factor and the .676 increase is 10.976%. The state agency proposes to increase the investment allowance factor to 11%. In prior public hearings on the investment allowance change the Federal Hospital Insurance Trust Fund was used as a source for the percentage change. Therefore, the state agency would propose to increase the investment allowance factor according to the point change in the Federal Hospital Insurance Trust Fund.

29. The Department computed the investment allowance for 1980 based exclusively on the change in the average rate of interest on special issues of public debt obligations issued to the Federal Hospital Insurance Trust Fund (hereinafter "FHITF")[7] during the 24-month period ending December, 1979, compared to the average rate of interest on the same obligations during the 12-month period ending December, 1978. The increase in the two "average" rates is proposed to be the increment by which the investment allowance is to be increased. (i.e., 0.7%) However, the Department has failed to establish that its computations are mathematically meaningful and has failed to establish the reasonableness of a proposed increase to 11%.[8] On the contrary, the methods used by it for computing the average interest rate for obligations utilized by the FHITF in 1978 and in 1979 were not consistent and have led to meaningless comparisons. These comparisons are unreasonable per se.

30. For the 12-month period ending December, 1978, the average rate of interest for the year (averaging the average monthly rates for each of the 12 months) was 8.198%. For the 12-month period ending December, 1979, the average rate of interest for the year (averaging the average monthly rates for each of the 12 months) was 9.115% rounded to the nearest 1,000th. The actual increase in the average monthly interest was, therefore, 0.917% which, when

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[7] The FHITF is a fund established under Title XVIII of the Social Security Act for deposits of Medicare funds. Trustees of the fund invest some of the monies not currently needed in government obligations. The rate of interest on obligations issued to the FHITF determines the return on equity capital Medicare providers are entitled to receive. Figures on this interest rate are published monthly by the Health Care Financing Administration. (See Ex. 12, G and H)

[8] The Department compared the average FHITF rate for 1978, (8.198%) with an "average" rate for 1979 which was based not on an an average of the average interest rates for each of the 12 months in 1979, but rather on an average of the average rate of interest for each of the 12 months and the prior 12 months. Not only is the latter calculation meaningless in establishing an annual change in average rates, it also has no meaningful relationship to the figures it was compared to as Steve Mihalchick, Esq., clearly pointed out. (Tr. 138 - 143)

added to the current allowance of 10.3%, yields a new minimum investment allowance of 11.2%. This is the result the Department should have reached had it used a consistent method for computing the average rates used for comparing averages which existed in 1978 and in 1979.

31. The Department presented no other financial or economic evidence supporting this proposed 11% investment allowance. The earnings of facilities subject to the rule, the numbers subject to regional maximums, the interest expenses of such facilities and the amount of interest expenses disallowed is unknown. Furthermore, the Department did not consider earnings of comparable industries or commonplace investments in computing the investment allowance. Basing the adjustment to the investment allowance on the average change in the FHITF resulted, according to Rau, because prior hearings on the proper investment allowance "centered around" FHITF rates. (Tr. 145) Moreover, in 1979, the Hearing Examiner ruled that the use of the most recent FHITF rates was the most reasonable approach to the investment allowance rate adjustment.

Unfortunately, Rule 49, itself, does not specify the formula or methodology for computing the investment allowance or those economic indicators, circumstances or trends, if any, which should be used in establishing the annual rate. While it is not certain what the precise legislative intent was in adopting the allowance, it is clearly intended as a return on investment (profit) and compensation for cost of capital (interest).

32. In the absence of any specific guidance in these respects, prior hearing examiners have attempted to establish a "range of reasonableness" concerning the investment allowance and have approved a proposed allowance within the range even though recommending higher allowances in both cases. The factors analyzed and the time period analyzed in establishing this range should, of course, be consistently followed from year to year, unless demonstrated to be improper, so that a uniform and consistent treatment is accorded to providers based on real changes from year to year.

33. In 1978, the Department adopted no increase in the allowance because the FHITF allegedly remained stable from April of 1976 to April of 1978. The interest rate for each of those two months was, in fact, not identical (being 7.125% in April, 1976 and 8.0% in April, 1978); however, the 12-month average interest rate ending on those two months was, in fact, 0.062% lower in the month of April, 1978 than it had been in 1976, being 7.437 and 7.375, respectively. (Ex. H, p. 4) Thus, the Department justified no increase in the allowance based on the 12-month average rate of April, 1976 compared to April, 1980.

In 1979, the Department deviated from its 1978 methodology and compared the FHITF rate for April, 1976 to the average rate for the ten-month period ending January, 1979, respectively, 7.125 and 8.413. The difference of 1.288 (8.413 less 7.125) or, 1.3% was added to the original investment allowance of 9% to get a new 10.3% allowance. Had the Department compared the 9.0 rate for March, 1979 with the 7.125 rate for April, 1976, the actual interest rates on those two months, a 1.875 increase in the investment allowance would have been justified raising it to 10.875, the precise amount recommended by the Hearing Examiner in 1979.

Moreover, while the 1978 allowance compared different average rates effective during the months of April, 1976 and 1978, the 1979 allowance is based on a comparison of the monthly rate for April, 1976, and the ten-month average rate ending January, 1979. If an April, 1976 and April, 1979 comparison had been made, consistent with the approach followed in 1978, a 1.126 (8.563 less 7.437) increase in the investment allowance would have been made based on the 12-month averages for those months, raising the investment allowance to 10.1%; and a 1.75 (8.875 less 7.125) increase in the allowance would have been made, raising it to 10.8% if the Department had compared the actual percentage changes occurring between those two months.[9]

34. If more recent FHITF figures were to be used in calculating 1980 investment allowance, as was done in 1978 and as has been consistently recommended by Hearing Examiners, the following would result: (Ex. J)

(i) (1978 method) 12 mo. average ending March, 1980 = 9.646
12 mo. average ending April, 1976 = 7.437
increase 2.209
original allowance + 9.000
11.209%

(ii) March, 1980 rate = 12.375
April, 1976 rate = 7.125
increase 5.250
original allowance 9.000
14.250%

(iii) (Modified 1979 method) 11 mo. average ending March, 1980 = 9.716
12 mo. average ending April, 1976 = 7.437
increase 2.279
original allowance 9.000
11.279%

In each of these cases, the March, 1980 rate was utilized instead of the April, 1980 rate because the actual April rate for 1980 was not made part of the record in this matter. A review of these three examples reveals that except for a comparison of the interest rates made in (ii) (the only one comparing monthly rates instead of averages and an approach never followed by the Department), the resulting investment allowance percentage is greater than the figure proposed by the Department. If one were to contrast the rate for April, 1976 to the rates in effect in January, 1980, as the Department did in determining the 1979 rate, the following figures would result: (Ex. J)

Modified 1979 method

(i) 12-mo. average ending Jan, 1980 9.198
12-mo. average ending April, 1976 7.437
increase 1.76
initial allowance + 9.000
10.760%

Modified 1979 method

(ii) 10-mo. average ending Jan., 1980 9.263
12-mo. average ending April, 1980 7.474
increase 1.826
initial allowance + 9.000
10.826%

- -

9 The figures for April were no doubt unavailable to the Department when its investment allowance for 1979 was proposed.

1979 method

(iii)	10-mo. average ending Jan. 1980	9.263
	rate for April, 1976	7.125
	increase	2.138
	initial allowance	9.000
		11.138%

35. It is clear that if the Department had followed the exact methodology used in 1979, in 1980 (Step iii), by comparing the average FHITF rate during the ten-month period ending January, 1980 with the rate in effect in April, 1976, the current investment allowance would be 11.138%, a full 1/10th of one percent above that which is currently being proposed. As was previously explained, however, the Department departed from its methodology for past years in computing this year's allowance. Why such a departure was taken by the Department was not explained and a consistent methodology should be adopted, even if the ultimate figure reached by the Department is not substantially different than that it would have reached had it used a consistent methodology since 1978. While facilities would have been entitled to a slightly higher investment allowance for 1980 if the Department had used the exact methodology it used in 1979, if the 1980 methodology adopted by the Department had been followed last year, facilities would have been entitled to a lower increase last year. Thus, the 12-month average FHITF interest rate ending December, 1977 was 7.083, while the 12-month average rate ending December, 1978 was 8.198, a difference of 1.115 which would have produced an investment allowance for 1978 of 10.1% (9.0 plus 1.1) instead of the 10.3% granted. If the currently proposed methodology did not produce a reasonable investment allowance in 1979, it is hard to divine why that methodology should be followed in 1980.

36. Rick Carter, on behalf of MAHCF, presented current data on the interest rates associated with relatively common forms of investment. He compared the various rates between April, 1976 and April 7, 1980 (in most cases) and added the point and percentage changes in those rates to the initial investment allowance and calculated what the current allowance would be based on those changes. His computation is as follows:

CHANGES SINCE APRIL, 1976

	April 1976	Most Recent	Point Change	Point Result	Prct. Change	Prct. Result
Fed. Hosp. Ins. Tr.Fd.	7.125	12.375	5.25	14.25	73.7%	15.63
Mortgage Mn. Rate	8.75	17.25	8.5	17.5	97.1%	17.74
Long-Term Bonds	6.72	12.52	5.8	14.8	86.3%	16.77
3-5 Yr. Bond	6.86	13.91	7.05	16.05	102.76%	18.25
91-day Bills	4.91	14.42	9.51	18.51	193.68%	26.43
Public Utilities	9.0	14.01	5.01	14.01	55.67%	14.01
Ind. Bonds.	8.78	12.98	4.20	13.20	47.8%	13.30

C.P.I	167.1	236.5	69.4		41.53%	
Corporate	8.89	13.5	4.61	13.61	51.86%	13.66
Prime Rate	6.75	19.5	12.75	21.75	188.8%	25.99
Avg.				15.96		17.98

He also compared the changes in these areas between May of 1979 and 1980. That comparison was as follows:

Most Recent Period (add to 10.3%)

	May 1979	Most Recent	Point Change	Point Result	Percent Change	Percent Result
Fed.Hosp. Ins.Tr.Fd.	9.0	12.375	3.375	13.675	37.5%	14.16
Mortgage Mn. Rate	10.5	17.25	6.75	17.05	64.28%	16.92
Long-Term Bonds	8.92	12.52	3.6	13.9	40.35%	14.45
3-5 Year Bonds	9.38	13.91	4.53	14.83	48.0%	15.24
91-day Bills	9.53	14.42	4.89	15.19	51.0%	15.55
Public Utilities	10.19	14.01	3.82	14.12	37.4%	14.15
Ind. Bonds	9.52	12.98	3.46	13.76	36.34%	14.04
C.P.I.	214.3	236.5	22.2		10.35%	
Corporate	9.86	13.50	3.64	13.94	36.9%	14.10
Prime Rate	11.5	19.5	7.75	18.05	65.95%	17.09
Avg.				14.95		15.08

37. John Broeker, Esq., on behalf of MAHCF, challenged the adequacy of the proposed investment allowance on the same grounds he raised in 1979. He noted, for example (see Comment No. 4), that since the investment allowance provision was adopted, nursing homes are no longer permitted to upgrade the value of their property every seven years by reappraisal for purposes of obtaining a higher investment allowance, that nursing homes are no longer permitted to charge non-welfare or private-paying patients more than they can charge for welfare patients under the medical assistance program, thereby reducing their income, and further, that the investment allowance intended by the Legislature has been undermined by the Department's narrow definition of "facility" and the application of regional maximums to nursing home rates. Mr. Broeker pointed out the investment allowance this year should be higher than that proposed by the Department "if, for no other reason than to take into account the increments that were not implemented for the years ending June 30, 1978, and 1979, pursuant to the 1978 and 1979 Reports" which were issued by Hearing Examiners but which contained recommendations that were not followed by the

Department. In addition, Mr. Broeker argues that the proposed investment allowance of 11.0% is unreasonably low and is a per se violation of applicable federal law and regulations which require nursing homes to be reimbursed on a "reasonable cost-related basis." Relying on "A Statistical Study of Rate Setting Under DPW Rule 49", the so-called "MSRI Study" as his authority, Mr. Broeker argues that the investment allowance permitted under Rule 49 is not only unreasonably low for purposes of federal law and regulations but it is also confiscatory and unconstitutional. In addition, he argued that the use of the FHITF interest rates in the manner proposed by the Department was not justified and that other economic indicators should have been examined in setting the Department's rate.

38. In each of the last two years, Hearing Examiners have found the investment allowance percentage proposed by the Department to be reasonable, even though a higher allowance was recommended in each case based on the point change in the FHITF rates to April of the appropriate year. Since the rates proposed by the Department in prior years were held to be reasonable, no increase in the recommended rates for 1980 should be made simply because the higher percentages were not adopted, as Mr. Broeker suggested. Where either of two figures are reasonable or within a range of reasonableness, the Department can, in its informed discretion, adopt either, and its decision to adopt the lower figure does not justify a higher allowance the next year.

Furthermore, the fact that the Legislature has abolished the seven-year reappraisal provision of former laws, and eliminated a facility's ability to charge different rates for welfare and non-welfare patients, does not require changes in the investment allowance, although the Department could reasonably consider the effect of those changes in establishing an investment allowance. With respect to the definition of "facility" for purposes of the investment allowance or the applicability of regional maximums, suffice it to say that those factors were not shown to require any increase in the allowance itself, and while not outside the scope of the hearing, their relevance was not established because the proposed rate, considered in the entire context of Rule 49, was not shown to be unreasonably low for purposes of federal law or regulations or constitutionally infirm and confiscatory.

39. Minn. Stat. § 256B.45 provides that the investment allowance shall be the only cost of capital or profit allowance for proprietary homes. This makes obvious sense because the owner's facility is both partially paid off (investment factor), and partially mortgaged (interest expense factor), and in the operation of the facility, the provider incurs certain other interest payments on purchases made (second interest expense factor). The investment allowance compensates for the investment made and the interest incurred.

In analyzing various types and rates of interest for computing a proper investment allowance, those interest rates indicative of a return on investment (public utility, corporate and industrial bonds and the FHITF rate) should be distinguished from those indicative of interest expense or indebtedness (prime rate and mortgage rates, for example). Doing this, one can see a definite relationship. That is, the recent rates of interest on investments are generally lower than rates on interest expense or indebtedness, and long-term interest income on investments (such as corporate bonds), are lower than short-term

investments (such as 91-day bills), just as long-term interest expenses (such as a mortgage) are lower than short-term interest expenses (such as the prime rate). Looked at in this way, interest expense-type figures, such as mortgage rates, should be discounted by the reimbursement provided to proprietary homes on its interest expenses between 9 and 12%. Prior hearing examiners have so held. Furthermore, while MACHF showed the prime rate ending April, 1980, the prime rate is a volatile rate applicable only to short-term loans to favored customers and is not a good indicator of the interest rates paid by nursing homes on non-mortgage loans they were likely to have made during the year. The Minnesota mortgage rate is a more appropriate figure but cannot be given too much weight because that rate increased so dramatically in the past year that an average figure rather than the last month's figure would be more indicative of interest rates paid generally. Furthermore, those homes which had substantial mortgages last year, in view of the stiff rise in interest rates, was, no doubt, small, and most interest expenses incurred would no doubt be at lower levels more akin to investment interest rates. Unfortunately, with respect to short-term borrowing by nursing homes, there is no evidence in the record as to the extent of such borrowing or the interest rates at which such borrowing might have been made.

40. Given the lack of information on the kind of borrowing undertaken by nursing homes in a particular year, the amount of interest expenses they incur, the amount of interest expenses disallowed, and the relationship of their interest expenses to their investment, including the applicability of regional maximums, even an 11.1% investment allowance can only be considered to be marginally reasonable. While that may be sufficient as a matter or law to sustain the proposed rate, assuming a proper method of computation, it is strongly urged that the Department survey interest expenses actually incurred by nursing homes throughout the state and the extent of interest expenses disallowed so that those figures can properly be considered in computing an investment allowance.

41. Looking then at investment interest rates as a method of determining the reasonableness of the proposed investment allowance, it clearly appears that income for the long-term investment, if invested in April, 1980, based on Mr. Carter's figures, is as follows:

Item	Percentage	Point Change since May, 1979
FHITF	12.375%	3.375
Long-term Bonds	12.520%	3.6
Public Utility Bonds	14.01%	3.82
Industrial Bonds	12.98%	3.46
Corporate Bonds	13.50%	3.64
	average	3.579

42. It appears from this that the FHITF rate does closely follow the rate of return offered on other long-term investments and the Department's use of

the FHITF alone is not, therefore, unreasonable. Prior hearing examiners have so held. Furthermore, in view of the high inflation rate of 1979, coupled with the projected recession for 1980, it is not unreasonable for the Department to use the average change in the FHITF during calendar year 1979 to compute the 1980 allowance so long as it does so in a consistent and meaningful way as previously discussed. While budgetary considerations or legislative appropriations do not permit the setting of an unreasonably low allowance, they do obviously necessitate picking a certain time period for evaluation and the choice of some recent period other than that which is the latest period for which figures are available is reasonable. The Department has done so during the past two years and the resulting rates were upheld. Thus, picking December, 1979 as the period for evaluation is not unreasonable even though later figures are available.

43. The range of reasonableness based on the evidence presented is 11.1% to 13.9%. The former being the rate if the methodology followed in 1979 were applied by comparing the FHITF rate for the 10-month period ending January, 1980 and the rate for April, 1976 (9.263 and 7.125) and the latter being the average point change in the five typical long-term investments noted in Finding No. 41 (3.579) since May, 1979 and up to April, 1980 as applied to the 10.3% allowance for 1979. A rate in the lower part of the range is more appropriate, however. Such a lower rate of return has been held proper as a cost containment device and because of the interest reimbursement provisions of state law which give proprietary homes credit for interest between 9 and 12 percent. Furthermore, a rate in the lower portion of the range is also suggested by the fact that the top figure is not based on average changes in various rates throughout the year as it should be.

Dept has picked 11.1% - surprise! see p. 5.

44. What is particularly disturbing to the Hearing Examiner is the fact that the Department does not follow any consistent methodology for computing the investment allowance it has adopted during the past three years. This leaves nursing homes in the state in the unenviable position of having to guess at what information might be relevant to the proceeding at any particular time. It appears to the Hearing Examiner that the only fair and equitable procedure is a consistent method for computing the investment allowance and that the procedure used to determine the 1979 investment allowance should be, in the absence of unusual factors, the very same procedure followed in 1980, so long as the FHITF rate remains consistent and indicative of other trends in the economy. It would be the further recommendation of the Hearing Examiner that the Department undertake a study of the various facilities investments and interest expenses and review its procedure for establishing the investment allowance and consider proposing a formal procedure, listing the types of costs intended to be reimbursed to providers by the allowance and the formula for computing the investment allowance in its rules.

Based on the foregoing Findings of Fact, the Hearing Examiner makes the following:

CONCLUSIONS

1. Due, timely and adequate notice of the hearing was properly served and published by the Department and all substantive and procedural requirements of law and rule have been fulfilled by it.

2. Pursuant to Minn. Stat. § 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 Department has documented its statutory authority to promulgate the proposed rules.

4. The Department has demonstrated the need for and marginal reasonableness of each of the proposed rules, with the exceptions noted in the Findings, pertaining to the investment allowance and the computation of raw food costs, with an affirmative presentation of facts.

5. The range of reasonableness for the 1980 investment allowance is 11.1% to 13.9%.

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

RECOMMENDATION

That the proposed Rules be modified as suggested in the Findings and that as so modified, they be adopted.

Dated this 16 day of June, 1980.

JON L. LUNDE
Hearing Examiner

INDEX OF PUBLIC COMMENTS

1. Comment of Paul G. Zerby, received May 19, 1980, and submitted on behalf of the Department.

2. Comment of Robert J. Rau, Audit Director, received on May 16, 1980, which was submitted on behalf of the Department.

3. Comment of Ferne Lundy, received May 16, 1980, which was submitted on behalf of Fauskee Nursing Home, Inc.

4. Comment of Messrs. Broeker and Mihalchick, received May 19, 1980, which was submitted on behalf of MAHCF.

5 Comment of Rick E. Carter, received May 19, 1980, which was submitted on behalf of MAHCF.

6. Comment by Robert W. McGovern, received May 7, 1980, and submitted on behalf of Gold Medallion Nursing Centers.

7. Comment of Rick E. Carter, received May 7, 1980, which was submitted on behalf of MAHCF.

8. Comment of Paul L. Mikelson, received May 6, 1980 and submitted on behalf of Walker Methodist Residence and Health Center, Inc.

9. Comment of C. D. Ulrich, received May 5, 1980, which was submitted on his own behalf.

10. Comment of Brian F. McInerney, received May 1, 1980, which was submitted on behalf of the Minnesota Association of Homes for the Aging.

11. Comment of Daniel P. Smith, received April 28, 1980, which was submitted on behalf of Saint Benedict's Center.

12. Comment of Don McAlpine, received April 24, 1980, which was submitted on behalf of Elim Homes.

13. Comment of Mayo E. Johnson, received April 24, 1980, and submitted on behalf of Knute Nelson Memorial Home.

14. Comment of Joyce Strong, received April 14, 1980, which was submitted on her own behalf.

15. Comment of Ray Boyer, Sr., received April 24, 1980 and submitted on behalf of Beltrami County, Minnesota.

Department of Public Welfare
Support Services Bureau
Proposed Amendments to Rule Governing Welfare Per Diem Rates for Nursing Home Providers

Notice of Hearing

A public hearing concerning the proposed rule amendment will be held at the Veterans Service Building, Room D, 20 West 12th Street and Columbus Avenue, St. Paul, MN 55155 on April 28, 1980 commencing at 9:00 a.m. The proposed rule amendment may be modified as a result of the hearing process. Therefore, if you are affected in any manner by the proposed rule amendment, 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 L. Lunde, Office of Hearing Examiners, Room 300, 1745 University Avenue, St. Paul, either before the hearing or within five working days after the close of the hearing. 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 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. Copies of the Statement of Need and Reasonableness may be obtained from the Office of Hearing Examiners at a minimal charge.

The existing 12 MCAR § 2.049 (Rule 49) has established the criteria by which welfare rates for nursing homes are determined.

The proposed amendment at D.6.b. (1) relates to the investment allowance and is required in compliance with Minn. Stat. § 256B.45, subd. 1. This subdivision initially authorized the state agency to establish a 9% investment allowance for proprietary facilities effective July 1, 1977. The investment allowance is determined by factoring the original value of the building and its permanent fixtures by the 9 percent factor. The subdivision further authorized the state agency to conduct an annual public hearing to determine the percentage to be used in the following fiscal year. Effective July 1, 1979, there was a percentage change in the investment allowance from 9 percent to 10.3 percent. After review of the current statistics related to the average rates of public debt issued to the Federal Hospital Insurance Trust Fund for the period January 1, 1979 through December 31, 1979, the state agency proposes an increase of the proprietary investment allowance to 11 percent effective July 1, 1980.

The proposed amendment at B.1.c. (1) (i) relates to the raw food cost allowance as a cost change in the prospective rate period. The state agency proposes to delete the existing cost change provision which involves a complex formula in the determination of the per diem allowance. The state agency proposes to replace the existing provision with a raw food cost change computed by factoring the average food cost ($1.82 per day for 1979) by the percentage change in the Consumer Price Index for Food and Beverages in Minneapolis-St. Paul as published by the Bureau of Labor and Statistics for the period October through September. The initial allowance will be a cost change of $.27 per day effective July 1, 1980. Subsequent cost changes will be effective on January 1 of every year.

The proposed amendment at C.4.c. relates to the definition of hospital-attached facilities. The agency proposes to amend the rule to define such facilities as nursing homes which are characterized by common ownership and operation, shared services and uniform cost reporting for governmental reimbursement programs.

The proposed amendment at D.2.a. relates to the nursing care limitations of the rule. The agency proposes to amend the rule to allow facilities to exceed the limitations if the additional cost can be generated by cost savings within the facility's budget.

Amended cost reports will be accepted only for the rate adjustments affected by the change in the investment allowance percentage and the change in the raw food cost allowance. Other rule changes will be effected according to the providers' fiscal year-ends.

The agency's authority to adopt the proposed rule is contained in Minn. Stat. §§ 256B.04, 256B.27, 256B.41, and 256B.45.

The state agency estimates that the additional expenditure on the part of local bodies in the State because of the rule amendments will be $101,000 for each of the next two years.

Copies of the proposed rule are now available and at least one

KEY: RULES SECTION — Underlining indicates additions to proposed rule language. ~~Strike outs~~ indicate deletions from proposed rule language. **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."

free copy may be obtained by writing to Susan Canine, Department of Public Welfare, 1st Floor, Centennial Office Building, St. Paul, MN 55155, telephone (612) 296-2738. Additional copies will be available at the hearing. If you have any questions on the content of the proposed rule amendment, contact Robert Rau, Supervisor, Audits Division, Department of Public Welfare, 1st Floor, Centennial Office Building, St. Paul, MN 55155.

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, 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, MN 55155, telephone (612) 296-5615.

March 10, 1980

Arthur E. Noot
Commissioner of Public Welfare

Amendments as Proposed

12 MCAR § 2.049 Rule for determining welfare per diem rates for nursing home providers under the Title XIX Medical Assistance Program.

B. Rate determination.

1. Method of calculating per diem rate.

c. Allowance for known cost changes.

(1) Future cost increases or decreases that are in accordance with the reasonable cost principles of D.1. known as of the report filing date must be added to or deducted from the historical rate determined according to B.1.a. and b. Such adjustment will be restricted to the elements defined in B.1.c. (1) (a) through (h) and shall be the annualized cost effect of such cost changes exclusive of any portion of the cost change included in the historical rate.

(a) Salary and wage changes to occur during the effective period of the welfare rate:

(i) Future changes according to labor contracts, board resolutions, written policies, or minimum wage laws.

(ii) Changes that are in effect as of the end of the fiscal period covered by the historical cost portion of the welfare per diem rate.

(b) Changes in facilities or equipment.

(c) The annualized cost effect of complying with federal, state, or local laws and regulations and Department of Public Welfare announced policies on care or facilities.

(d) All taxes except for income taxes.

(e) Interest.

(f) Depreciation.

(g) Utilities and insurance.

(h) Rental payments pursuant to a written lease.

~~(i) Raw food cost increase computed initially by multiplying $1.20 times one-half the percentage increase in the wholesale price index for raw food during calendar 1973. The initial increase is $.14. For reports covering periods ending December 31, 1974 or later, this cost increase shall be calculated as follows:~~

~~(i) Calculate the percentage increase in the wholesale price index for raw food for the period December through November.~~

~~(ii) If the increase is greater than that computed for the prior year, add the difference to (i).~~

~~(iii) If the increase is less than that computed for the prior year, subtract the difference from (i).~~

~~(iv) Multiply one-half of the resulting figure times the sum of $1.20 plus all of the annual increases allowed pursuant to this section.~~

(i) Raw food cost increase computed annually by multiplying the average food cost per day by the percentage change in the consumer price index for raw food costs in Minneapolis-St. Paul as published by the Bureau of Labor and Statistics for the Period October through September. The initial average food cost is $1.82 per day and the initial increase is $.27 per day effective July 1, 1980. Subsequent annual cost changes will be made on a calendar basis.

(j) Unidentified cost increases equal to changes in the annual percentage increase in the consumer price index in Minneapolis-St. Paul as published by the Bureau of

Labor and Statistics, using the October indices (new series index 1975 equals 100) as applied to the historical cost portion of the facilities previous year's cost less those costs relating to areas where the facility is seeking specific allowances for known cost changes. In no case may the increase be applied against the historical cost of salaries, changes in facilities or equipment, property taxes, interest, depreciation, rental payments of food costs.

C. Reports.

4. Cost allocation procedures.

c. Hospital attached facilities. Hospital attached facilities will include those facilities which are under common ownership and operation with a licensed hospital and are required to adhere to uniform cost reporting for governmental reimbursement programs. The nursing care limitation under D.2.a. and the investment per bed limitation under D.4.b. (1) will be waived when the Medicare cost allocation factors result in these limitations being exceeded. Costs between hospitals and attached facilities must be allocated by the "Medicare Worksheet B" using Medicare allocation factors for the following three cost groups:

(1) All expense classifications without depreciation, administration and general.

(2) Depreciation.

(3) Administration and general.

D. Reasonable cost principles.

2. Nursing care and attendant limitations.

a. Nursing care. Nursing-care costs will be limited by a maximum number of nursing hours per patient day as follows:

Skilled	2.9 hours
ICF I	2.3 hours

If the actual average nursing hours per patient day exceed the above limit, the reasonable cost limitation will be calculated by multiplying the ratio of the above stated limit to the average actual nursing hours per patient day for the year times the actual cost per patient day. This limitation will not apply to facilities that qualify for exception under D.8.d. (3) or facilities licensed under 12 MCAR § 2.080 or facilities mandated by a correction order from the Department of Health to provide additional nursing care.

b. Attendants (ICF II facilities only). Reasonable costs for attendants in ICF II facilities will be limited to one hour per patient day. If the actual average attendant hours per patient day exceeds this limit, the reasonable cost limitation will be calculated by multiplying the ratio of the stated limit to the average actual attendant hours per patient day for the year times the actual cost per patient day.

c. Limitation exception. The nursing and attendant care limits established in D.2.a. and b. may be exceeded as described below :

(1) The Department of Public Welfare shall establish the 1980 per diem in accordance with the provisions of this rule.

(2) Increased nursing and attendant care hour costs may only be funded through expenditure reductions in the following cost categories as defined in C.3. and as subject to the limitations prescribed elsewhere in this rule:

Dietary
Laundry & linen
Housekeeping
Plant operation & maintenance
Other care related services
General & Administration

Amounts for which a known cost increase has been granted shall not be included in these calculations. Reductions from historical costs in these categories will be recognized.

(3) Subsequent years rates will be determined based on actual nursing and attendant care limits to the extent that they equal reported actual cost reductions in the categories identified in D.2.c. (2). This provision of the rule is effective for rates determined July 1, 1980 and thereafter.

6. Cost of capital.

b. Investment allowance.

(1) Determination of allowance. Proprietary homes where cost reports are received after January 1, 1977 shall receive an investment allowance of 10.3 11 percent of the original value of the facility for depreciation purposes. 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.

(2) For purposes of this section the following terms shall have the meaning given to them.

(a) Facility means the building in which a nursing home is located and all permanent fixtures attached to it. Facility does not include the land or any supplies and equipment which are not fixtures.

(b) Original value means the lesser of purchase price or appraised value at the time of purchase. Appraisals at the time of purchase shall be on the depreciated replacement cost basis. If a nursing home expands its facility or makes any other capital expenditure which increases the value of the facility, the cost of the expansion or capital expenditure shall be added to the original value. If the department disputes the cost of the expansion or capital expenditure, it may request an appraisal and use the appraised value as the allowed cost.

KEY: RULES SECTION — Underlining indicates additions to proposed rule language. ~~Strike outs~~ indicate deletions from proposed rule language. **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."

Proposed Rule

Department of Public Welfare

Support Services Bureau

12 MCAR 2-049 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

B. Rate Determination

c. Allowance for known cost changes

(1) Future cost increases or decreases that are in accordance with the reasonable cost principles of D.1. known as of the report filing date, must be added to or deducted from the historical rate determined according to B.1.a. and b. Such adjustment will be restricted to the elements defined in B.1.c.(1)(a) through (h) and shall be the annualized cost effect of such cost changes exclusive of any portion of the cost change included in the historical rate.

(a) Salary and wage changes to occur during the effective period of the welfare rate:

(i) Future changes according to labor contracts, board resolutions, written policies, or minimum wage laws.

(ii) Changes that are in effect as of the end of the fiscal period covered by the historical cost portion of the welfare per-diem rate.

(b) Changes in facilities or equipment.

(c) The annualized cost effect of complying with federal, state, or local laws and regulations and Department of Public Welfare announced policies on care or facilities.

(d) All taxes except for income taxes.

(e) Interest.

(f) Depreciation.

(g) Utilities and insurance.

(h) Rental payments pursuant to a written lease.

~~(i) Raw food cost increase computed initially by multiplying $1.20 times one-half the percentage increase in the wholesale price index for raw food during calendar 1973. The initial increase is $.14. For reports covering periods ending December 31, 1974 or later, this cost increase shall be calculated as follows:~~

~~(i) Calculate the percentage increase in the wholesale price index for raw food for the period December through November.~~

~~(ii) If the increase is greater than~~ that computed ~~for the prior year, add the difference to (i).~~

~~(iii) If the increase is less than that computed for the prior year, subtract the difference from (i).~~

~~(iv) Multiply one-half of the resulting figure times the sum of $1.20 plus all of the annual increases allowed pursuant to this section.~~

(i) Raw food cost increase computed annually by multiplying the average food cost per day by the percentage change in the consumer price index for raw food costs in Minneapolis-St.Paul as published by the Bureau of Labor and Statistics for the period October through September. The initial average food cost is $1.82 per day and the initial increase is $.27 per day effective July 1, 1980. Subsequent annual cost changes will be made on a calendar basis.

(j) Unidentified cost increases equal to changes in the annual percentage increase in the consumer price index in Minneapolis-St. Paul as Published by the Bureau of Labor and Statistics, using the October indices (new series index 1975 equals 100) as applied to the historical cost portion of the facilities previous year's cost less those costs relating to areas where the facility is seeking specific allowances for known cost changes. In no case may the increase be applied against the historical cost of salaries, changes in facilities or equipment, property taxes, interest, depreciation, rental payments of food costs.

C. Reports

Cost Allocation Procedures

a. General provisions for all providers.

(1) Costs will be classified in accordance with categories defined in Regulation C.3.b. and, if applicable, by care level defined in Regulation C.3.a.

(2) Classification of costs to cost categories C.3.b. will involve one or more of the following steps:

(a) Direct identification, without allocation, which will be accomplished in the routine classification of transactions when costs are recorded in the books and records of the provider.

(b) In instances in which individuals have multiple duties, the person's salary cost will be allocated to categories C.3.b. on the basis of management's estimate of time spent on various activities. This procedure will not be applied to administrators or other chief executives' salaries in facilities with 60 or more licensed beds.

(c) Other costs that cannot be classified to cost categories through use of procedure C.4.a.(2)(a) and C.4.a.(2)(b) will be classified in the administrative category.

(3) Adjustments for costs otherwise reimbursed. Recorded costs will be reduced for costs related to other activities not subject to rate determination as defined in regulation C.3.b.(8).

(4) Non-allowable cost adjustments. Recorded costs will be adjusted when such costs exceed reasonable cost principles defined in Section D of these regulations. All adjustments will be footnoted with the applicable regulation number. Costs previously excluded by C.3.b. (8) will not require further adjustment.

b. Specific care level allocation procedures for multi-level providers. Cost allocation procedures are necessary to determine costs among different care level facilities. Allocation procedures are defined in the following sections and will be applied in the order stated except where noted otherwise. Regardless of method selected, a reasonable identification of costs to care level must result.

(1) Nursing care - Any combination of allocation procedures (a), (b), and (c) below can be used as long as the

None of above included in Rule as Adopted nor does it appear in Rules as Proposed as published in SR - 3/24/80

result is a reasonable approximation of actual costs incurred by care level.

(a) Direct identification (without allocation) in the routine classification of transactions when costs are recorded in the books and records of the provider (e.g. invoice and time record account classification).

(b) Cost allocation on the basis of regularly validated time or cost studies.

(c) Remaining costs (e.g. nursing supervisor, supplies, etc.) not classified under methods (a) or (b) above will be allocated on the ratio of costs identified to care levels (using (a) and/or (b) above), one care level to another.

(d) If methods (a), (b), or (c) above cannot be used, costs will be allocated on the basis of actual patient days weighted by the ratio of maximum allowable nursing care and attendant hours as defined in regulation D.2.

(2) Dietary

(a) Cost allocation on the basis of regularly validated time or cost studies.

(b) Cost allocation based on the number of meals served.

(c) Cost allocation based on the actual patient days.

(3) Laundry and linen, housekeeping, and plant operation and maintenance. The following allocation procedures can be applied to individual department costs or the combination of these three departments at the option of the provider.

(a) Same as C.4.b.(1)(b) time or cost studies.

(b) Allocation on the ratio of square feet of floor space devoted directly to each care level.

(c) Same as C.4.b.(1)(c) - patient days.

(4) Other care related services

(a) Same as C.4.b.(1)(b) time or cost study.

(b) Same as C.4.b.(1)(c) - patient days

(5) General and administration - Cost allocation on the ratio of the combined cost by care level determined for categories C.4.b.(1) through (4) and (6).

(6) Depreciation, interest and real estate and personal property taxes.

(a) Location of equipment when determinable.

(b) Same as C.4.b.(3)(b) square feet.

(c) Same as C.4.b.(2)(c) patient days. This allocation procedure must be used if actual patient days in any care level exceeds certified capacity patient days.

(7) Earnings allowance - Cost allocation on the ratio of the combined cost by care level determined for categories C.4.b.(1) through (4) and (6).

None of above included in Rules as Adopted nor in Rules as Proposed as published in SR 3.24.80

C.4.

c. Hospital attached facilities. The nursing care limitation under D.2.a. and the investment per bed limitation under D.4.b.(1) will be waived when the Medicare cost allocation factors result in these limitations being exceeded. Costs between hospitals and attached facilities must be allocated by the "Medicare Worksheet B" using Medicare allocation factors for the following three cost groups:

(1) All expense classifications without depreciation, administration and general.
(2) Depreciation.
(3) Administration and general.

Hospital attached facilities will include those facilities which are under common ownership and operation with a licensed hospital and are required to adhere to uniform cost reporting for governmental reimbursement programs.

D. Reasonable Cost Principles

2. Nursing Care and Attendant Limitations.

a. Nursing care. Nursing-care costs will be limited by a maximum number of nursing hours per patient day as follows:

Skilled - 2.9 hours
ICF I - 2.3 hours

If the actual average nursing hours per patient day exceed the above limit, the reasonable cost limitation will be calculated by multiplying the ratio of the above stated limit to the average actual nursing hours per patient day for the year times the actual cost per patient day. This limitation will not apply to facilities that qualify for exception under D.8.d.(3) or facilities licensed under DPW Rule 80, or facilities mandated by a correction order from the Department of Health to provide additional nursing care.

b. Attendants (ICF II facilities only). Reasonable costs for attendants in ICF II facilities will be limited to one hour per patient day. If the actual average attendant hours per patient day exceeds this limit, the reasonable cost limitation will be calculated by multiplying the ratio of the stated limit to the average actual attendant hours per patient day for the year times the actual cost per patient day.

c. Limitation Exception. The nursing and attendant care limits established in D.2.a. and b. may be exceeded as described below:

(1) The Department of Public Welfare shall establish the 1980 per diem in accordance with the provisions of this rule.

(2) Increased nursing and attendant care hour costs may only be funded through expenditure reductions in the following cost categories as defined in Section C.3. and as subject to the limitations prescribed elsewhere in this rule

Dietary
Laundry & linen
Housekeeping
Plant operation & maintenance
Other care related services
General & Administration

Amounts for which a known cost increase has been granted shall not be included in these calculations. Reductions from historical costs in these categories will be recognized.

(3) Subsequent years rates will be determined based on actual nursing and attendant care limits to the extent that they equal reported actual cost reductions in the categories identified in Section D.2.c.(2).
This provision of the rule is effective for rates determined July 1, 1980 and thereafter.

b. Investment allowance.

(1) Determination of allowance. Proprietary homes where cost reports are received after January 1, 1977, shall receive an investment allowance of ~~10.3~~ 11 percent of the original value of the facility for depreciation purposes. 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.

(2) For purposes of this section the following terms shall have the meaning given to them.

(a) Facility means the building in which a nursing home is located and all permanent fixtures attached to it. Facility does not include the land or any supplies and equipment which are not fixtures.

(b) Original value means the lesser of purchase price or appraised value at the time of purchase. Appraisals at the time of purchase shall be on the depreciated replacement cost basis. If a nursing home expands its facility or makes any other capital expenditure which increases the value of the facility, the cost of the expansion or capital expenditure shall be added to the original value. If the Department disputes the cost of the expansion or capital expenditure, it may request an appraisal and use the appraised value as the allowed cost.

Exhibit C

Revised 9/17/80

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SEP 17 1980
ADMINISTRATIVE
HEARINGS

Adopted ~~Proposed~~ Rule

Department of Public Welfare

Support Services Bureau

12 MCAR 2-049 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

B. Rate Determinati

1. Method of Calculating Per Diem Rate

c. Allowance for known cost changes

(1) Future cost increases or decreases that are in accordance with the reasonable cost principles of D.1. known as of the report filing date, must be added to or deducted from the historical rate determined according to B.1.a. and b. Such adjustment will be restricted to the elements defined in B.1.c.(1)(a) through (h) and shall be the annualized cost effect of such cost changes exclusive of any portion of the cost change included in the historical rate.

(a) Salary and wage changes to occur during the effective period of the welfare rate:

(i) Future changes according to labor contracts, board resolutions, written policies, or minimum wage laws.

(ii) Changes that are in effect as of the end of the fiscal period covered by the historical cost portion of the welfare per-diem rate.

(b) Changes in facilities or equipment.

(c) The annualized cost effect of complying with federal, state, or local laws and regulations and Department of Public Welfare announced policies on care or facilities.

(d) All taxes except for income taxes.

(e) Interest.

(f) Depreciation.

(g) Utilities and insurance.

(h) Rental payments pursuant to a written lease.

~~(i) Raw food cost increase computed initially by multiplying $1.20 times one-half the percentage increase in the wholesale price index for raw food during calendar 1973. The initial increase is $.14. For reports covering periods ending December 31, 1974 or later, this cost increase shall be calculated as follows:~~

~~(i) Calculate the percentage increase in the wholesale price index for raw food for the period December through November.~~

~~(ii) If the increase is greater than~~ that computed ~~for the prior year, add the difference to (i).~~

~~(iii) If the increase is less than that computed for the prior year, subtract the difference from (i).~~

~~(iv) Multiply one-half of the resulting figure times the sum of $1.20 plus all of the annual increases allowed pursuant to this section.~~

(i) Raw food cost increase computed annually by multiplying the average food cost per day by the percentage change in the consumer price index for raw food costs in Minneapolis-St.Paul as published by the Bureau of Labor and Statistics for the period October through September. The initial average food cost is $1.82 per day and the initial increase is ~~$.27~~ ~~$.15~~ $.22 per day, ~~effective July 1, 1980.~~ Subsequent annual cost changes will be made on a calendar basis.

(j) Unidentified cost increases equal to changes in the annual percentage increase in the consumer price index in Minneapolis-St. Paul as published by the Bureau of Labor and Statistics, using the October indices (new series index 1975 equals 100) as applied to the historical cost portion of the facilities previous year's cost less those costs relating to areas where the facility is seeking specific allowances for known cost changes. In no case may the increase be applied against the historical cost of salaries, changes in facilities or equipment, property taxes, interest, depreciation, rental payments of food costs.

6. Cost of Capital

b. Investment allowance.

(1) Determination of allowance. Effective July 1, 1980 Proprietary homes ~~where cost reports are received after January 1, 1977,~~ shall receive an investment allowance of ~~10.3~~ ~~11~~ 11.1 percent of the original value of the facility for depreciation purposes. 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.

(2) For purposes of this section the following terms shall have the meaning given to them.

(a) Facility means the building in which a nursing home is located and all permanent fixtures attached to it. Facility does not include the land or any supplies and equipment which are not fixtures.

(b) Original value means the lesser of purchase price or appraised value at the time of purchase. Appraisals at the time of purchase shall be on the depreciated replacement cost basis. If a nursing home expands its facility or makes any other capital expenditure which increases the value of the facility, the cost of the expansion or capital expenditure shall be added to the original value. If the Department disputes the cost of the expansion or capital expenditure, it may request an appraisal and use the appraised value as the allowed cost.

C. Reports

4. Cost Allocation Procedures

c. Hospital attached facilities. Hospital attached facilities will include those facilities which are under common ownership and operation with a licensed hospital and are required to adhere to uniform cost reporting for governmental reimbursement programs. Common operation shall be defined as the sharing of services, such as, nursing services, dietary, housekeeping, laundry, plant operations, and/or administrative. The nursing care limitation under D.2.a. and the investment per bed limitation under D.4.b.(1) will be waived when the Medicare cost allocation factors result in these limitations being exceeded. Costs between hospitals and attached facilities must be allocated by the "Medicare allocation factors for the following three cost groups:

(1) All expense classifications without depreciation, administration and general.

(2) Depreciation.

(3) Administration and general.

D. Reasonable Cost Principles

2. Nursing Care and Attendant Limitations.

a. Nursing care. Nursing-care costs will be limited by a maximum number of nursing hours per patient day as follows:

Skilled - 2.9 hours

ICF I - 2.3 hours

If the actual average nursing hours per patient day exceed the above limit, the reasonable cost limitation will be calculated by multiplying the ratio of the above stated limit to the average actual nursing hours per patient day for the year times the actual cost per patient day. This limitation will not apply to facilities that qualify for exception under D.8.d. (3) or facilities licensed under DPW Rule 80, or facilities mandated by a correction order from the Department of Health to provide additional nursing care.

b. Attendants (ICF II facilities only). Reasonable costs for attendants in ICF II facilities will be limited to one hour per patient day. If the actual average attendant hours per patient day exceeds this limit, the reasonable cost limitation will be calculated by multiplying the ratio of the stated limit to the average actual attendant hours per patient day for the year times the actual cost per patient day.

c. Limitation Exception. <u>The nursing and attendant care limits established in D.2.a. and b. may be exceeded as described below</u>:

(1) The Department of Public Welfare shall establish the 1980 per diem in accordance with ~~the provisions of this rule.~~ Section D.2.

(2) Increased nursing and attendant care hour costs may only be funded through expenditure reductions in the following cost categories as defined in Section C.3. and as subject to the limitations prescribed elsewhere in this rule:

Dietary

Laundry & linen

Housekeeping

Plant operation & maintenance

Other care related services

General & Administration

Amounts for which a known cost increase has been granted shall not be included in these calculations. Reductions from historical costs in these categories will be recognized.

(3) Subsequent years rates will be determined based on actual nursing and attendant care limits to the extent that they equal reported actual cost reductions in the categories identified in Section D.2.c.(2). ~~This provision of the rule is effective for rates determined July 1, 1980 and thereafter. Section D.2.c. is effective for rates determined July 1, 1980 and thereafter.~~

STATE OF MINNESOTA
OFFICE OF HEARING EXAMINERS

FOR THE 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 OF THE
CHIEF HEARING EXAMINER

A

WHEREAS, a hearing was held on April 28, 1980, before Jon L. Lunde, 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 the Hearing Examiner made pursuant to Minn. Stat. § 15.052, subd. 3, was issued to the Department of Public Welfare (hereinafter "Department") on June 16, 1980; and

WHEREAS, the Department has now determined to adopt rules pursuant to Minn. Stat. § 15.0412, subd. 4; and

WHEREAS, the Department has submitted said rules to the Chief Hearing Examiner for review pursuant to Minn. Stat. § 15.052, subd. 4, and Rule 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 has met all requirements of Minn. Stat. § 15.0412, subd. 4.

NOW, THEREFORE, upon receipt of this Order, the Department 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 31st day
of July, 1980.

DUANE R. HARVES
Chief Hearing Examiner

DPW-80-032-JL

STATE OF MINNESOTA
OFFICE OF ADMINISTRATIVE HEARINGS

FOR THE 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.	SUPPLEMENTAL ORDER OF THE CHIEF HEARING EXAMINER (B)

WHEREAS, on July 31, 1980, the Department of Public Welfare (hereinafter "DPW") submitted the above-entitled rules to the Chief Hearing Examiner for review pursuant to Minn. Stat. § 15.052, subd. 4, and Rule 9 MCAR § 2.110; and

WHEREAS, on July 31, 1980, the Chief Hearing Examiner issued his Order finding that the rules as proposed to be adopted were not substantially different from those adopted at the public hearing and that the DPW had met all requirements of Minn. Stat. § 15.0412, subd. 4; and

WHEREAS, the DPW subsequently submitted the rules and the record of the proceedings to the Attorney General for his review as to form and legality pursuant to Minn. Stat. § 15.0412, subd. 4; and

WHEREAS, the Attorney General recommended to the DPW that certain of the rules be amended; and

WHEREAS, the DPW has now resubmitted the rules to the Chief Hearing Examiner for his review; and

WHEREAS, the Chief Hearing Examiner finds that the changes made in the rules do not make the rules substantially different from those proposed at the public hearing.

NOW, THEREFORE, upon receipt of this Order, the DPW has the responsibility of resubmitting the complete hearing record and the rules as adopted by the DPW 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 17th day
of September, 1980.

DUANE R. HARVES
Chief Hearing Examiner

State of Minnesota

Department of Public Welfare

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APR 2 1980
OFFICE OF HEARING EXAMINERS

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 (12 MCAR 2.049)

Statement of Need and Reasonableness

The regulations cited in 12 MCAR 2.049 comprise 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 July 6, 1979.

The need to conduct a public hearing on this rule arises from a review of the existing rule by MDPW. The review indicated that certain provisions of the rule must be revised in order to make the rule more conducive to the reasonable costs incurred in the provision of nursing home care. The need to conduct a public hearing also arises from Minn. Stat., Sec. 256B.45, Subd. 1. According to this statute, MDPW was authorized to establish by rule an investment allowance for proprietary nursing homes and to conduct an annual public hearing thereafter to determine the percentage change in this investment allowance. The basic investment allowance was established at nine (9) percent through public hearing sessions conducted on November 12-13, 1976. This investment allowance was increased to 10.3% effective July 1, 1979 through a public hearing conducted on July 6, 1979. The proposed amendment will increase the investment allowance percentage to 11% for welfare rates paid effective July 1, 1980.

It is necessary to revise Section B.1.c.(1)(i) so as to provide a more reasonable formula for the inflationary projection of raw food costs. The formula which currently exists in the rule is complex in that it involves a mathematical computation which recognizes an increase or decrease in the wholesale price index over a two-year period. Over the last few years the formula has provided cost changes for raw food which have not been sufficient to meet the actual raw food cost increases. The state agency, therefore proposes to replace the existing provision with an annual raw food cost change computed by factoring the average raw food cost ($1.82 initially) by the percentage change in the Consumer Price Index for Food and Beverages in Minneapolis-St.Paul as published by the Bureau of Labor and Statistics for the period October through September. The initial allowance for all providers will be $.27 per day effective July 1, 1980. Subsequent cost changes will be effective on January 1 of every year and will be effective for providers according to the commencement of their new fiscal years.

It is necessary to amend Section C.4.c. so as to define hospital-attached facilities for purposes of the various rate determination provisions of the rule. Certain nursing homes are physically attached to a hospital and thereby are clearly operated in conjunction with such hospital.

Department Exhibit No. 7
File No. DPW-80-032-JL
Date 4-28-80

Between these two service vendors the factors of common ownership and operation, shared services and uniform cost accounting and reporting can be readily ascertainable. There are other nursing homes which are not physically attached to a hospital, but they are nonetheless operated in conjunction with a hospital. The factors of common ownership and operation, shared services and uniform cost accounting and reporting can also be readily ascertained. The state agency proposes to clarify in the rule that hospital-attached facilities include those facilities which are characterized by common ownership and operation, shared services and uniform cost reporting for governmental reimbursement programs.

It is necessary to amend Section D.2.a. so as to allow additional productive nursing hours in excess of the stated limitation as the result of cost savings from other cost categories. If the service vendor can effect cost reductions from non-salary and/or non-projectable line-item costs, the vendor may be allowed in the prospective rate costs for additional nursing hours to the extent of the cost savings. This provision is reasonable in that it allows the vendor the flexibility to utilize historical cost savings for the procurement of nursing service in excess of the limitation. The additional nursing hours will not result in additional costs to the welfare program based on this transfer of costs.

It is necessary to amend Section D.6.b.(1) so as to increase the investment allowance formula utilized in the rate determination for proprietary providers. A review of the average rates of public debt issued to the Federal Hospital Insurance Trust Fund was 8.198% for calendar year 1978 and 8.874% for calendar year 1979. The total point change was .676. The sum of the current 10.3% investment allowance factor and the .676 increase is 10.976%. The state agency proposes to increase the investment allowance factor to 11%. In prior public hearings on the investment allowance change the Federal Hospital Insurance Trust Fund was used as a source for the percentage change. Therefore, the state agency would propose to increase the investment allowance factor according to the point change in the Federal Hospital Insurance Trust Fund.

Barbara T. Stromer, Assistant Commissioner, Bureau of Support Services and Robert J. Rau, Director of the Audit Division will testify in support of the proposed rule changes. Their testimony will be substantially in accord with this Statement of Need and Reasonableness. This agency has not scheduled any other individuals to testify on the rule changes. Any statistical data used in the determination of the proposed rule changes will be introduced as exhibits in the hearing.

COMMISSIONER OF PUBLIC WELFARE

Date: April 1, 1980

ARTHUR E. NOOT

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EXAMINERS

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

LINDA M. NELSON, being first duly sworn, deposes and says:

That on the 21 day of March, 1980, 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

Title XIX Nursing Homes
Title XIX Nursing Home CPA's and Accountants

516 Notices

Linda M. Nelson

Subscribed and sworn to before me
this 24 day of March
1980.

Margaret Holt

MARGARET HOLT
NOTARY PUBLIC-MINNESOTA
RAMSEY COUNTY
My Comm. Expires Sept. 22, 1984

Department Exhibit No. 6
File No. DPW-80-032-JL
Date 4-28-80

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EXAMINERS

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 MAILING

Linda M. Nelson, being first duly sworn, deposes and says:

That on the 21 day of March, 1980, at the City of St. Paul, County of Ramsey, State of Minnesota, she 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 all persons and associations at the addresses listed on the attached Certificate of the Secretary of State.

Linda M. Nelson

Subscribed and sworn to before me
this 24 day of March.
1980.

Margaret Holt

MARGARET HOLT
NOTARY PUBLIC-MINNESOTA
RAMSEY COUNTY
My Comm. Expires Sept. 22, 1984

Department Exhibit No. 4
File No. DPW-80-032-JL
Date 4-28-80

RECEIVED
APR 2 1980
OFFICE OF HEARING EXAMINERS

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

LINDA M. NELSON, 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 20th day of March, 1980, 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 20th day of March, 1980, 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.

Linda M. Nelson

Subscribed and sworn to before me this 24 day of March, 1980.

Margaret Holt

MARGARET HOLT
NOTARY PUBLIC-MINNESOTA
RAMSEY COUNTY
My Comm. Expires Sept. 22, 1984

Department Exhibit No. 3
File No. DPW-80-032-JL
Date 4-28-80

STATE OF MINNESOTA
DEPARTMENT OF PUBLIC WELFARE

RECEIVED
APR 2 1980
OFFICE OF HEARING EXAMINERS

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 347 labels 4 sheets constitute the complete list of persons, associations, and other interested groups who as of 8:00 o'clock A .M., this 20th day of March, 1980, 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

Joan Anderson Growe

BY Dana Bratt

Department Exhibit No. 5
File No. DPW-80-032-JL
Date 4-28-80

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

A public hearing concerning the proposed rule amendment will be held at the Veterans Service Building, Room D, 20 West 12th Street and Columbus Avenue, St. Paul, MN 55155 on April 28, 1980 commencing at 9:00 a.m. The proposed rule amendment may be modified as a result of the hearing process. Therefore, if you are affected in any manner by the proposed rule amendment, 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 L. Lunde, Office of Hearing Examiners, Room 300, 1745 University Avenue, St. Paul, either before the hearing or within five working days after the close of the hearing. 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 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. Copies of the statement of need and reasonableness may be obtained from the Office of Hearing Examiners at a minimal charge.

The existing 12 MCAR 2.049 (Rule 49) has established the criteria by which welfare rates for nursing homes are determined.

The proposed amendment at Section D.6.b.(1) relates to the investment allowance and is required in compliance with Minn. Stat., Section 256B.45, Subd. 1. This subdivision initially authorized the state agency to establish a 9% investment allowance for proprietary facilities effective July 1, 1977. The investment allowance is determined by factoring the original value of the building and its permanent fixtures by the 9 percent factor. The subdivision further authorized the state agency to conduct an annual public hearing to determine the percentage to be used in the following fiscal year. Effective July 1, 1979, there was a percentage change in the investment allowance from 9 percent to 10.3 percent. After review of the current statistics related to the average rates of public debt issued to the Federal Hospital Insurance Trust Fund for the period January 1, 1979 through December 31, 1979, the state agency proposes an increase of the proprietary investment allowance to 11 percent effective July 1, 1980.

The proposed amendment at Section B.1.c.(1)(i) relates to the raw food cost allowance as a cost change in the prospective rate period. The state agency proposes to delete the existing cost change provision which involves a complex formula in the determination of the per diem allowance. The state agency proposes to replace the existing provision with a raw food cost change computed by factoring the average food cost ($1.82 per day for 1979) by the percentage change in the Consumer Price Index for Food and Beverages in Minneapolis-St. Paul as published by the Bureau of Labor and Statistics for the period October through September. The initial allowance will be a cost change of $.27 per day effective July 1, 1980. Subsequent cost changes will be effective on January 1 of every year.

The proposed amendment at Section C.4.c. relates to the definition of hospital-attached facilities. The agency proposes to amend the rule to define such facilities as nursing homes which are characterized by common ownership and operation, shared services and uniform cost reporting for governmental reimbursement programs.

The proposed amendment at Section D.2.a. relates to the nursing care limitations of the rule. The agency proposes to amend the rule to allow facilities to exceed the limitations if the additional cost can be generated by cost savings within the facility's budget.

Amended cost reports will be accepted only for the rate adjustments affected by the change in the investment allowance percentage and the change in the raw food cost allowance. Other rule changes will be effected according to the providers' fiscal year-ends.

The agency's authority to adopt the proposed rule is contained in Minn. Stat. §§ 256B.04, 256B.27, 256B.41, and 256B.45.

The state agency estimates that the additional expenditure on the part of local bodies in the State because of the rule amendments will be $101,000 for each of the next two years.

Copies of the proposed rule are now available and at least one free copy may be obtained by writing to Susan Canine, Department of Public Welfare, 1st Floor, Centennial Office Building, St. Paul, MN 55155, telephone (612) 296-2738. Additional copies will be available at the hearing. If you have any questions on the content of the proposed rule amendment, contact Robert Rau, Supervisor, Audits Division, Department of Public Welfare, 1st Floor, Centennial Office Building, St. Paul, MN 55155.

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, 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, MN 55155, telephone (612) 296-5615.

Dated: March 11, 1980

Arthur E. Noot
Commissioner of Public Welfare

DF/aob

DPW-80-032-JL

RECEIVED
MAR 6 1980
OFFICE OF HEARING
EXAMINERS

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 rules be held at the Veterans Service Building, Room D, 20 West 12th Street and Columbus Avenue, St. Paul, Minnesota on April 28, 1980 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, 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.

Dated: March 4, 1980

Arthur E. Noot
Commissioner

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 XX
MEDICAL ASSISTANCE
PROGRAM

AFFIDAVIT OF MAILING
NOTICE OF SUBMITTAL
TO THE ATTORNEY GENERAL

LINDA M. NELSON, being first duly sworn, deposes and says:

That on the 24th day of September, 1980, at the City of St. Paul, County of Ramsey, State of Minnesota, she served the attached Notice 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 all persons who had so requested to be notified.

Linda M. Nelson

Subscribed and sworn to before me
this 24 day of September,
1980.

Margaret Holt

MARGARET HOLT
NOTARY PUBLIC-MINNESOTA
RAMSEY COUNTY
My Comm. Expires Sept. 22, 1984

STATEMENT OF COMPLIANCE WITH

MANUAL OF RULE MAKING PROCEDURES

Re: In the Matter of the Proposed Adoption of Amendments to the Department of Public Welfare Rule 49 Governing Welfare Per-Diem Rates for Nursing Home Providers Under the Title XIX Medical Assistance Program

I, Assistant Attorney General Paul G. Zerby, do hereby declare that I have examined the proposed rules and all related documents and that, based on them and my personal familiarity with the applicable procedures, the Manual of Rule Making Procedures has been followed.

Paul G. Zerby

Assistant Attorney General

Dated: 9/23/80