


# Minnesota Attorney General: Administrative Rules Proceedings

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Version 3
August 20, 2018

Our File No. 700

RULE REVIEW CHECKLIST

DATE RULE RECEIVED 5/6
DATE FOR REVIEW 5/18
DATE DUE 5/26

Adopted w/a hearing X
Adopted w/o a hearing
Temporary rule

Approved 5/26 Disapproved Returned to Agency 5/29

Resubmitted Due
Approved Disapproved Returned to Agency

Date filed w/Secretary of State 5/21

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✓ Rule as Adopted

✓ Rule as Proposed See S.R.

✓ Order Adopting 4.27.81 combined w/ FofF

? Notice of Intent to Solicit Outside Opinion 10.6.80

✓ Order for rulemaking see HE 7,8,9,10,11 and FofF
12.23.80 Date of Hearing

✓ Certificate of Board's Authorizing Resolution

✓ Notice of rulemaking
✓ Sufficiency

✓ Affidavit of Mailing Notice of rulemaking
11.18.80 At least 30 days prior to hearing/~~adoption~~

✓ Mailing list Certificate

✓ Publication in State Register
11.17.80 At least 30/~~20~~ days prior to hearing/~~adoption~~

✓ Hearing Examiner's Report

✓ Chief Hearing Examiner's Report(s)
✓ 2.24.81 Approving H.E.'s Report
✓ 5.1.81 Approving agency action

✓ Agency's Findings of Fact combined w/ Order Adopting

N/A LCRAR Report or agency Affidavit

✓ Certificate of Board's Resolution Adopting Rules

N/A Order Approving Incorporation by Reference

✓ Statement of Need and Reasonableness

N/A Petition for Adoption of a Rule

✓ Record (includes ~~transcript or tape~~, exhibits, comments received by agency, requests for a hearing, and other relevant materials)

✓ Certificate of Compliance w/Rulemaking Procedures

✓ Affidavit of Mailing Notice of Submission to Attorney General

✓ Notice of Submission to the Attorney General

ADMIN 1000 : Rev. 1 73
SF-00005-01

STATE OF MINNESOTA

DEPARTMENT ATTORNEY GENERAL

# Office Memorandum

TO : Phillip C. Newberg
Executive Secretary
Minnesota Board of Examiners
for Nursing Home Administrators

DATE: 5/28/81

ATTN : Joanne M. Ogata
Special Assistant Attorney General

FROM : H. Theodore Grindal HTG
Special Assistant
Attorney General

PHONE: 6-1288

SUBJECT: In the Matter of the Proposed Amendments to Minn. Rules NHA 10 and 13 Providing for Waiver of Certain Licensure Requirements and in the Matter of the Proposed Repeal of Minn. Rules 22 and 23 and Portions of Minn. Rules 10

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. Please 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 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 to the rules in the approved set.

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

HTG/gy
Enc.
cc: Duane Harves
Susan Robertson

Sherry Yudelman

AG copy

RECEIVED
APR 30 1981
ADMINISTRATIVE
HEARINGS

Rules As Adopted Showing Changes From Rules As Proposed In State Register

7 MCAR § 6.010 Requirements

F of F 2

A. No initial license shall be issued to a person as a nursing home administrator unless the individual:

1. is at least 18 years of age.

2. is of sound physical and mental health.

3. is of good moral character and otherwise suitable.

4. has furnished satisfactory evidence, as required by the Board, that he/she possesses the general administrative abilities needed to satisfactorily administer a nursing home and possesses the ability to relate the administration of a nursing home to the physical, psychological, spiritual, emotional and social needs of patients and to create a compassionate and helpful environment.

5. has paid all license and examination fees as established by the Board.

6. has achieved a passing score, to be reasonably established by the Board, on all required examinations, unless otherwise hereinafter provided.

7. has satisfactorily completed a Board approved practicum course in long term care administration of a minimum of 300 clock hours under the guidance of a licensed nursing home administrator preceptor and the supervision of a faculty person coordinating the course at the college or university offering the course.

8. has a Baccalaureate degree (or a higher degree) from an accredited institution. If this degree is not in health care administration with courses in long term care, the degree must include at least one course in each of the following areas: Management, long term care programs, gerontology, issues in health care, medical terminology, business or health care law, accounting or fiscal management~~, and a practicum experience of a minimum of 300 clock hours in a long term care facility.~~ The requirements of this section do not apply to those individuals who are applying for renewal of their license.

B. Waiver Provisions:

1. The Board ~~may~~ shall waive ~~NHA 10(a)(7) and 10(a)(8)~~ 7 MCAR ~~§§ 6.010A.7 and~~ 6.010A.8 if the applicant submits satisfactory evidence of having actively served full time (40 hrs. per week) as a licensed nursing home administrator in another state for a minimum period of two continuous years and meets all other licensure requirements.

2. The Board ~~may~~ shall waive ~~NHA 10(a)(7)~~ 7 MCAR § 6.010A.7 if the applicant submits evidence of having completed satisfactorily one year full time as an administrator or in an assistant administrator position in a health care facility.

3. The Board ~~may~~ shall waive the requirements of ~~NHA 10(a)(7) and 10(a)(8)~~ 7 MCAR §§ 6.010A.7 and 6.010A.8 for any applicant who, on April 15, 1980, was registered with the Commissioner of Health as a hospital administrator and who was administratively responsible on April 15, 1980, for a nursing home (convalescent and nursing care unit) ~~(C&NC)~~ attached to a hospital and had served in that capacity for a period of three (3) or more years. Any applicant applying for licensure pursuant to this rule shall be required to pass the currently used written examination.

HE 20

4. The Board ~~may~~ shall waive all, except the following, requirements of ~~NHA 10(a)(7) and 10(a)(8)~~ 7 MCAR §§ 6.010A.7 and 6.010A.8 for any applicant who, on April 15, 1980, was registered with the Commissioner of Health as a hospital administrator and who was administratively responsible on April 15, 1980, for a nursing home (convalescent and nursing care unit) ~~(C&NC)~~ attached to a hospital and had served in that capacity for a period of less than three (3) years:

F&F 4

a. Long Term Care Programs

b. Gerontology.

Any applicant applying for licensure pursuant to this rule shall be required to pass the currently used written examination.

HE 20

5. The Board ~~may~~ shall waive any provision of its rules requiring a demonstration of medical knowledge which is contrary to the religious beliefs of the Church of Christ, Scientist for any applicant who seeks to obtain a license restricted to administering a nursing home operated exclusively in accordance with the teachings of the Church of Christ, Scientist. Any license issued pursuant to this section shall be endorsed to restrict the license to administering such institutions.

6. The Board shall waive the requirements of 7 MCAR §§ 6.010A.6, 6.010A.7 and 6.010A.8 for any applicant who on April 15, 1980, was registered with the Commissioner of Health as a hospital administrator and who was administratively responsible on April 15, 1980, for a nursing home (convalescent and nursing care unit) attached to a hospital, and who is applying for a license restricted to the administration of a nursing home attached to a hospital. Any license issued pursuant to this subpart shall be endorsed to restrict the licensee to the administration of a nursing home attached to a hospital.

HE 25-38
F&F 5

7 MCAR § 6.013 License—Issuance

A. An applicant for license as a nursing home administrator who has complied with the requirements of the licensing law and the standards provided herein ~~and has passed the examinations,~~ F&F 6 shall be issued a license on a form provided for that purpose by the Board, certifying that such applicant has met the requirements of the laws, rules and regulations entitling him to serve, act and practice, and otherwise hold himself out as a duly licensed nursing home administrator subject to any endorsements on the license. Any license issued by the Board shall be under the hand and seal of the chairperson and secretary of the Board.

7 MCAR §§ 6.022 and 6.023

Withdraw proposed repeal of NHA 22 and 23 (7 MCAR §§ 6.022 and 6.023). see HE 15 — these sections have already been repealed - in 1978!

APPROVED AS TO FORM AND LEGALITY

May 26, 1981

WARREN SPANNAUS, ATTORNEY GENERAL

BY Theodore Arendt

SPECIAL ASSISTANT ATTORNEY GENERAL

STATE OF MINNESOTA
DEPARTMENT OF STATE
FILED
MAY 27 1981
Joan Anderson Growe
Secretary of State

3:15 P. M.

STATE OF MINNESOTA

COUNTY OF HENNEPIN

BEFORE THE MINNESOTA

BOARD OF EXAMINERS FOR
NURSING HOME ADMINISTRATORS

In the Matter of Proposed Amendments to Minn. Rules NHA 10 and 13 Providing for Waiver of Certain Licensure Requirements and in the Matter of Proposed Repeal of Minn. Rules NHA 22 and 23 and Portions of Minn. Rule NHA 10

FINDINGS OF FACT, CONCLUSIONS AND ORDER ADOPTING RULES

The Minnesota Board of Examiners for Nursing Home Administrators (hereinafter "Board") held a hearing on the above-entitled matter before Hearing Examiner Jon L. Lunde on the 23rd day of December 1980, at 9:30 AM in Room 105, Minnesota Department of Health Building, 717 Delaware Street Southeast, Minneapolis, Minnesota 55414, after proper notice had been given as required by Minn. Stat. § 15.0412 (1980).

Interested persons were given an opportunity to present written and oral information, statements, arguments and testimony. After having considered all the evidence upon the records, files and proceedings herein, and applicable statutory standards and criteria, and having confirmed the need for the above-captioned rules, the Board hereby adopts as its own the Findings and Conclusions of the Hearing Examiner in his Report dated February 19, 1981 (NHA-81-002-JL) except for Findings 8-11, 17, 21, 22, 25 through 38, and the last sentence of Conclusion 3, with the following additional Findings of Fact and Conclusions in response to concerns raised by the Hearing Examiner in his Report.

A copy of the Hearing Examiner's Findings and Conclusions is attached hereto and made a part hereof.

The Board makes the following additional findings:

1. Hearing Examiner's Report; Findings 8-11: When the Board first learned that the United States Department of Health and Human Services (hereinafter "HHS") and the Minnesota Department of Health (hereinafter "MDH") had taken the position that administrators of convalescent and nursing care units (hereinafter "C&NC units") attached to hospitals must become licensed as nursing home administrators, it sent a letter dated July 1, 1980, soliciting comments from the affected hospital administrators and concerned professional associations. Numerous written comments were received in response to this letter which were introduced into the record as Exhibit A. Several persons also attended and participated at a Board meeting convened on July 22, 1980, for the purpose of discussing the licensure status of administrators of C&NC units attached to a hospital. On October 6, 1980, a Notice of Intent to Obtain Information from Non-Agency Sources was published in the State Register. No responses from the public were received pursuant to this Notice.

In his Report at Findings 8-11 the Hearing Examiner concluded that the letter dated July 1, 1980, was a technical violation of Minn. Stat. § 15.0412, subd. 6 (1980). The Board takes exception to this conclusion. Minn. Stat. § 15.0412, subd. 6 (1980) provides:

> When an agency seeks to obtain information or opinions in preparing to propose the adoption, amendment, suspension, or repeal of a rule from sources outside of the agency, the agency shall publish notice of its action in the state register and shall afford all interested persons an opportunity to submit data or views on the subject of concern in writing or orally. Such notice and any written material received by the agency shall become a part of the hearing record to be submitted to the attorney general under subdivision 4.

As previously noted in the Board's Post-Hearing Submission at p. 6, the statute imposes absolutely no time requirement of when a Notice of Intent to Obtain Information must be published in the State Register. The Hearing Examiner acknowledged this fact but noted that "it is reasonable to assume that such publication was meant to be a meaningful act and that all persons would be given equal notice of the solicitation and an equal opportunity to present comments." (Finding 9, p. 4) The Board concurs with the Hearing Examiner's conclusion that the publication of the Notice of Intent to Obtain Information is intended to be a meaningful act, but disagrees with the Hearing Examiner's underlying assumption that in order for the Notice to be meaningful and in "technical" compliance with

the statute it must be published before any contact with the public has been made or within some unspecified time after such contact has been made. To make these conclusions, the Board would have to add language and requirements to the statute which simply are not currently present. There can be no "technical violation" of a statute which does not have technical time requirements to violate.

Indeed, the Legislature's failure to specify a required timetable in the statute for publication of the Notice of Intent to Obtain Information from Non-Agency Sources was probably intentional. To assume that the Notice of Intent must be published prior to any contact with the public would unnecessarily restrict the normal day-to-day functioning of administrative agencies. In addition, if this were the requirement any well-meaning but ill-informed agency member could effectively prohibit the agency from promulgating a rule merely because he or she had a conversation with someone prior to publication of a Notice of Intent to Obtain Information. Although both participants at the hearing and the Hearing Examiner referred extensively to Dean Auerbach's article describing Minnesota's rulemaking process to support the assertion that the Board violated Minn. Stat. § 15.0412, subd. 6, they failed to include the section in which Dean Auerbach describes the problems an agency would encounter if all public contact had to be preceded with a published Notice of Intent to Obtain Information from Non-Agency Sources:

> Administrative agencies have been created and delegated authority to promulgate rules because, in part, they can be expected to deal with particular subject matters on a day-to-day basis that puts them in constant communication with the individuals and groups affected or potentially affected by the agencies' rules or proposals. This ability to engage in ex parte, pre-hearing conversations, conferences and investigations is essential if the agencies are to perform their tasks fairly and effectively. To do their jobs satisfactorily and comply with the pre-proposal notice provision of section 15.0412(6), the agencies would need to publish standing notices in the State Register stating that they are constantly seeking information or opinions that might lead them to propose the adoption, amendment, suspension, or repeal of rules. Such notices, of course, would be of little value.

63 Minn. L. Rev. 151, 172 (1979)

Perhaps for this reason then the Legislature failed to specify when a Notice of Intent must be published. Instead, it merely required that one should be published sometime prior to the hearing to alert those individuals who may be

interested in the Board's activities but who may not have been aware of those activities through other communication channels. Although the publication of the Notice in this case did occur after the Board had already begun to solicit information from interested persons, it occurred well in advance of the actual completion of the final draft of the proposed rules which was published in the State Register on November 17, 1980. The public had ample time to engage in prehearing consultation with the Board after the Notice was published. The Board concurs with the Hearing Examiner's finding that "the Board was not acting in bad faith, all parties had an opportunity to address all issues and no prejudice to any parties was established." (Finding 10, p. 5) Thus, the Board finds that it did not violate either the spirit or the letter of Minn. Stat. § 15.0412, subd. 6 (1980) when it published its Notice of Intent to Solicit Information on October 6, 1980.

2. Hearing Examiner's Report; Finding 17: Proposed 7 MCAR § 6.010A.8 was intended to be a recodification of NHA 10(d) with a few minor amendments. That rule and the proposed amendments were:

> 8. ~~(d) After July 1, 1978, no initial license shall be issued unless the applicant~~ has a Baccalaureate degree (or higher degree) from an accredited institution. If this degree ~~(or a higher degree)~~ is not in health care administration with courses in long term care, the degree must include at least one course in each of the following areas: Management, long term care programs, gerontology, issues in health care, medical terminology, business or health care law, accounting or fiscal management, and a practicum experience of a minimum of 300 clock hours in a long term care facility.

The Board proposed at the hearing that the first clause of the rule should be deleted since all initial applicants are now applying pursuant to this rule. In addition, the Board proposed that the parenthetical material found in the second sentence should be moved to the first sentence for stylistic reasons. In his Report, the Hearing Examiner noted that the first clause in the original rule specifically made the requirements applicable to "initial" licenses only. He concluded that the subpart "must be amended to make it clear that the degree requirement does not apply to those nursing home administrators who were previously licensed." Finding 17, p. 7)

The Board's position is that currently licensed individuals who are seeking annual renewal of their license need not re-demonstrate any of the requirements of 7 MCAR § 6.010A. For example, no one has been requested to

retake the examination required by 7 MCAR § 6.010A.6. Nevertheless, to make this intent more clear, the Board is adding the word "initial" to the first phrase of 7 MCAR § 6.010A to reflect the intent of the Board that none of the requirements of 7 MCAR § 6.010A need be re-demonstrated by a currently licensed individual who is applying for renewal of his or her license. The Board is also adding an additional sentence to 7 MCAR § 6.010A.8 which reads: "The requirements of this section do not apply to those individuals who are applying for renewal of their license." This language is slightly different than that proposed by the Hearing Examiner, because the Board believes it should be made clear that individuals who once were licensed but have voluntarily relinquished their license should be held to the same standards as individuals who have never been licensed.

3. Hearing Examiner's Report; Findings 21 and 22: The Board proposed that Minn. Rules NHA 10(b)(2), (b)(3), (b)(5), (c), and (f) be repealed. When the Board originally promulgated Minn. Rule NHA 10 it set up a timetable during which the requirements for licensure would gradually become more stringent. Thus, for example, NHA 10(b) set forth the requirements prior to July 1, 1975; NHA 10(c) set forth the requirements from July 2, 1975, to July 1, 1978; and NHA 10(d) set forth the requirements from July 2, 1978, to the present. The Board did not propose the repeal of Minn. Rules NHA 10(b)(4) or 10(b)(1). NHA 10(b)(4) allows for waiver of the practicum experience described in NHA 10(b)(1) if an applicant submits evidence of having completed one year full time as an administrator or assistant administrator of a health care facility. At a Board meeting held on June 30, 1980, the Board expressed its intent that although the remaining portions of Minn. Rule NHA 10(b) had been superseded by other sections, the Board never intended that Minn. Rule NHA 10(b)(4) be repealed. As a result, when the currently proposed amendments were drafted, NHA 10(b)(4) was left intact and recodified as 7 MCAR § 6.010B.2. Because NHA 10(b)(4) referenced NHA 10(b)(1), this rule was also left intact and recodified as 7 MCAR § 6.010A.7.

A practicum experience is also required by Minn. Rule NHA 10(d) (recodified as 7 MCAR § 6.010A.8) for those applicants whose Baccalaureate or higher degree is not in health care administration with courses in long term care.

Thus, the rules reference the practicum requirement in both 7 MCAR §§ 6.010A.7 and 6.010A.8.

The Hearing Examiner noted that the recodified NHA 10(e) (7 MCAR § 6.010B.1) allowed for waiver of both 7 MCAR §§ 6.010A.7 and 6.010A.8. He also noted that the prior NHA 10(e) did not provide for waiver of the practicum referred to in NHA 10(b)(1) (recodified as 7 MCAR § 6.010A.7) and that the Board did not present any facts at the hearing showing the reasonableness and necessity for allowing waiver of part A.7 in 7 MCAR § 6.010B.1. Therefore, the Hearing Examiner concluded that the reference to 7 MCAR § 6.010A.7 in part B.1 must be deleted. (Finding 21, p. 8) The Hearing Examiner went on to note that the deletion would be inconsequential since a waiver of the practicum contained in 7 MCAR § 6.010A.7 is specifically referenced in part B.2 and that anyone who qualified for a waiver under B.1 would also qualify under B.2.

The drafting problems that the Hearing Examiner addressed in Findings 21 and 22 of his Report appear to have been caused by the Board's attempt to retain the waivers which were available in both Minn. Rules NHA 10(b)(4) and 10(e). The Hearing Examiner noted that the practicum requirement has always been referenced in two separate provisions (i.e. NHA 10(b)(1) and NHA 10(d)). (Finding 22, p. 9) However, counsel for the Minnesota Association of Health Care Facilities (hereinafter MAHCF) correctly pointed out in his posthearing comment that the Board does not and never did intend to impose two separate practicum requirements.

In response to the concerns raised by the Hearing Examiner in Findings 21 and 22 of his Report and in response to the concerns raised by MAHCF, the Board is amending 7 MCAR § 6.010A.8 by deleting the reference to the practicum and amending 7 MCAR §§ 6.010B.1 and 6.010B.2 correspondingly, to read as follows:

7 MCAR § 6.010 Requirements

A. . . .

8. has a Baccalaureate degree (or a higher degree) from an accredited institution. If this degree is not in health care administration with courses in long term care, the degree must include at least one course in each of the following areas: Management, long term care programs, gerontology, issues in health care, medical terminology, business or health care law, accounting or fiscal

management. The requirements of this section do not apply to those individuals who are applying for renewal of their license.

B. Waiver Provisions:

1. The Board shall waive 7 MCAR § 6.010A.8 if the applicant submits satisfactory evidence of having actively served full time (40 hrs. per week) as a licensed nursing home administrator in another state for a minimum period of two continuous years and meets all other licensure requirements.

2. The Board shall waive 7 MCAR § 6.010A.7 if the applicant submits evidence of having completed satisfactorily one year full time as an administrator or in an assistant administrator position in a health care facility.

As noted in the Hearing Examiner's Report, these amendments do not amount to a substantial change in the Rules as proposed under 9 MCAR § 2.111. (Finding 22, p. 9) In addition, these amendments incorporate the suggestions of the Hearing Examiner described in Findings 19 and 20.

4. Amendments to 7 MCAR §§ 6.010B.3, 6.010B.4 and 6.010B.5: In addition to amending 7 MCAR §§ 6.010B.3, 6.010B.4 and 6.010B.5 in the manner suggested by the Hearing Examiner in Findings 19 and 20 of his Report, the Board has also amended 7 MCAR §§ 6.010B.3 and 6.010B.4 by replacing the term "convalescent and nursing care unit" with the term "nursing home." "Convalescent and nursing care unit" (hereinafter C&NC unit) is a term of art which is defined in Minnesota Department of Health rule Minn. Rule MHD 44(B). The term was originally coined when C&NC units were not separately licensed but were instead included within the hospital's license. Because all C&NC units are now defined as nursing homes under Minn. Stat. § 144A.01 (1980), the Board is amending 7 MCAR §§ 6.010B.3 and 6.010B.4 to replace the term "C&NC unit" with the more generic term "nursing home"; however, the term "nursing home" will be followed with the term "convalescent and nursing care unit" in parentheses. This amendment does not alter the content of the rules and is not a substantial change under 9 MCAR § 2.111.

5. Hearing Examiner's Report; Findings 25 to 38: Although C&NC units attached to hospitals have been licensed as nursing homes since 1976, the administrators of such units were not required to be licensed as nursing home administrators because of a statutory exemption contained in Minn. Stat. § 144A.04, subd. 5 (1980). That statute states, in relevant part that:

> A nursing home which is located in a facility licensed as a hospital pursuant to sections 144.50 to 144.56, may employ as its administrator the registered administrator of the hospital if the individual meets minimum education and long term care experience criteria set by rule of the commissioner of health.

In 1980, the Legislature repealed the registration law for hospital administrators. Minn. Laws 1980, ch. 567, § 2. However, the Legislature left intact Minn. Stat. § 144A.04 (1980) which permits registered hospital administrators to administer attached C&NC units without obtaining a nursing home administrator's license. Thus, the question arose as to whether the repeal of the hospital administrator registration law contained in Minn. Stat. §§ 144.50-144.65 (1978) also repealed, by implication, that portion of Minn. Stat. § 144A.04 (1978) which permits a "registered hospital administrator" to manage a total hospital facility, including an attached C&NC unit, without obtaining a nursing home administrator's license.

In an opinion issued on December 22, 1980, the Attorney General concluded that there was no implied repeal of Minn. Stat. § 144A.04, subd. 5 and consequently those hospital administrators who were registered with the Department of Health on April 15, 1980, the day before the repeal of the hospital administrators' registration law was effective, need not be licensed as nursing home administrators.

As the Hearing Examiner noted in his Report, the effect of the Attorney General's opinion was discussed extensively at the hearing. Some persons took the point of view that if under state law persons who were on April 15, 1980, registered with the Commissioner of Health as hospital administrators and who were administratively responsible for C&NC units attached to hospitals are not required to be licensed as nursing home administrators, then proposed rules 7 MCAR §§ 6.010B.3 and 6.010B.4 are unnecessary. Some persons took the viewpoint that the Attorney General's opinion was incorrect as a matter of law. The Board's position is that regardless of whether state law requires these rules, there is a clear need under federal law for the Board to exercise its discretion in adopting these rules. The Board does not contend that it derives any authority from federal law to promulgate these rules; its authority to promulgate rules, as the Hearing Examiner found in Finding 12, exists under state law in Minn. Stat.

§§ 144A.20, 144A.22-144A.24 (1980). Nevertheless, the need for the rules exists by virtue of the position taken by HHS and its enforcement agency, MDH, that licensure of administrators of C&NC units is a prerequisite for receiving federal medical assistance monies.

In Findings 25 to 38, the Hearing Examiner cogently set forth his analysis and corresponding conclusion that the Attorney General's opinion reached an erroneous result and that state law does require administrators of C&NC units attached to hospitals to be licensed as nursing home administrators. Although the Board has carefully reviewed the Hearing Examiner's Report, we find it unnecessary to expressly adopt the conclusion of law that the Hearing Examiner expressed in those sections.

The Board realizes that questions of statutory interpretation and constitutionality can only be definitively decided by a court of law or the Legislature. Thus, the question of whether administrators of C&NC units attached to hospitals are required to be licensed under state law is one that cannot be resolved in this rule hearing nor is it a central issue in this hearing.

Some persons at the hearing suggested that if C&NC administrators are not required by state law to be licensed as nursing home administrators, the Board need not adopt 7 MCAR §§ 6.010B.3 and 6.010B.4. However, the issue is not whether the Board is required to adopt the rules. Even if state law did require C&NC administrators to be licensed as nursing home administrators, no statute imposes any requirement on the Board to promulgate rules to accommodate licensure for these persons. Rather, the issue is whether a problem exists which the proposed rules can remedy and whether the suggested solution for the problem is reasonable. The Board finds that a problem does exist which can be remedied by these proposed rules. The rules are, therefore, needed.

The Hearing Examiner found that the Board has established that 7 MCAR §§ 6.010B.3 and 6.010B.4 are necessary and reasonable in their entirety and the Board concurs with this finding and adopts it as its own. (Finding 32, Conclusion 4) Whether the need for the rules arises out of a confusion over state law or the requirements of federal law is insignificant; what is significant is that the legal licensure status of administrators of C&NC units attached to hospitals is

sufficiently murky that rules ought to be promulgated to allow different avenues of licensure for those persons affected. The very fact that so many different legal interpretations of state and federal law were expressed at the hearing demonstrates that the Board is acting reasonably in establishing a procedure which accommodates all of the possible interpretations.

6. Hearing Examiner's Report; Findings 32 and 36: The Hearing Examiner recommended that the Board include an additional waiver provision to its rules which would allow for waiver of the educational requirements, as well as the licensure examination, if applicants were seeking a license restricted to the administration of a C&NC unit attached to a hospital. The Board has adopted this recommendation and has amended its rules accordingly by adopting the following language:

> 7 MCAR § 6.010B.6 The Board shall waive the requirements of 7 MCAR §§ 6.010A.6, 6.010A.7 and 6.010A.8 for any applicant who on April 15, 1980, was registered with the Commissioner of Health as a hospital administrator and who was administratively responsible on April 15, 1980, for a nursing home (convalescent and nursing care unit) attached to a hospital and who is applying for a license restricted to the administration of a nursing home attached to a hospital. Any license issued pursuant to this subpart shall be endorsed to restrict the licensee to the administration of a nursing home attached to a hospital.

In addition, the Board has adopted an amendment to 7 MCAR § 6.013A repealing the phrase "and has passed the examination" since an examination is already required by 7 MCAR § 6.010A.6 and the phrase, if it were not repealed, would be inconsistent with 7 MCAR § 6.010B.6. Because this phrase did not add any substantive content to 7 MCAR § 6.013A, its deletion is not a substantial change in the rules for purposes of 9 MCAR § 2.111.

## CONCLUSIONS

1. That the rules be adopted as follows in accordance with the Hearing Examiner's Report dated February 19, 1981, as adopted by the Board and in accordance with the foregoing Findings of Fact:

a. Amend 7 MCAR § 6.010A to read:

> A. No initial license shall be issued to a person as a nursing home administrator unless the individual:

(Board Finding 2)

b. Amend 7 MCAR § 6.010A.8 to read:

8. has a Baccalaureate degree (or a higher degree) from an accredited institution. If this degree is not in health care administration with courses in long term care, the degree must include at least one course in each of the following areas: Management, long term care programs, gerontology, issues in health care, medical terminology, business or health care law, accounting or fiscal management. The requirements of this section do not apply to those individuals who are applying for renewal of their license.

(Board Findings 2, 3; Hearing Examiner Findings 17, 22)

c. Amend 7 MCAR § 6.010B.1 to read:

1. The Board shall waive 7 MCAR § 6.010A.8 if the applicant submits satisfactory evidence of having actively served full time (40 hrs. per week) as a licensed nursing home administrator in another state for a minimum period of two continuous years and meets all other licensure requirements.

(Board Finding 3; Hearing Examiner Findings 19, 20, 21)

d. Amend 7 MCAR § 6.010B.2 to read:

2. The Board shall waive 7 MCAR § 6.010A.7 if the applicant submits evidence of having completed satisfactorily one year full time as an administrator or in an assistant administrator position in a health care facility.

(Board Finding 3; Hearing Examiner Findings 19, 20, 22)

e. Amend 7 MCAR § 6.010B.3 to read:

3. The Board shall waive the requirements of 7 MCAR §§ 6.010A.7 and 6.010A.8 for any applicant who, on April 15, 1980, was registered with the Commissioner of Health as a hospital administrator and who was administratively responsible on April 15, 1980, for a nursing home (convalescent and nursing care unit) attached to a hospital and had served in that capacity for a period of three (3) or more years. Any applicant applying for licensure pursuant to this rule shall be required to pass the currently used written examination.

(Board Finding 4; Hearing Examiner Findings 19 and 20)

f. Amend 7 MCAR § 6.010B.4 to read:

4. The Board shall waive all, except the following, requirements of 7 MCAR §§ 6.010A.7 and 6.010A.8 for any applicant who, on April 15, 1980, was registered with the Commissioner of Health as a hospital administrator and who was administratively responsible on April 15, 1980, for a nursing home (convalescent and nursing care unit) attached to a hospital and had served in that capacity for a period of less than three (3) years:

a. Long Term Care Progams

b. Gerontology.

Any applicant applying for licensure pursuant to this rule shall be required to pass the currently used written examination.

(Board Finding 4; Hearing Examiner Findings 19 and 20)

g. Amend 7 MCAR § 6.010B.5 to read:

5. The Board shall waive any provision of its rules requiring a demonstration of medical knowledge which is contrary to the religious beliefs of the Church of Christ, Scientist for any applicant who seeks to obtain a license restricted to administering a nursing home operated exclusively in accordance with the teachings of the Church of Christ, Scientist. Any license issued pursuant to this section shall be endorsed to restrict the license to administering such institutions.

(Board Finding 4; Hearing Examiner Finding 20)

h. Amend 7 MCAR § 6.010B. by adding a subpart 6 to read:

6. The Board shall waive the requirements of 7 MCAR §§ 6.010A.6, 6.010A.7 and 6.010A.8 for any applicant who on April 15, 1980, was registered with the Commissioner of Health as a hospital administrator and who was administratively responsible on April 15, 1980, for a nursing home (convalescent and nursing care unit) attached to a hospital and who is applying for a license restricted to the administration of a nursing home attached to a hospital. Any license issued pursuant to this subpart shall be endorsed to restrict the licensee to the administration of a nursing home attached to a hospital.

(Board Finding 6; Hearing Examiner Findings 32, 33, 36, 37)

i. Amend 7 MCAR § 6.013 to read:

7 MCAR § 6.013 License—Issuance

A. An applicant for licensure as a nursing home administrator who has complied with the requirements of the licensing law and the standards provided herein shall be issued a license on a form provided for that purpose by the Board, certifying that such applicant has met the requirements of the laws, rules and regulations entitling him to serve, act and practice, and otherwise hold himself out as a duly licensed nursing home administrator subject to any endorsements on the license. Any license issued by the Board shall be under the hand and seal of the chairperson and secretary of the Board.

(Board Finding 6)

j. Withdraw the proposed repeal of Minn. Rules NHA 22 and 23.

(Hearing Examiner Finding 15)

2. That the Board has demonstrated the need for and reasonableness of the amendments to the Board rules based upon the foregoing Findings of Fact and Conclusions and therefore the Board issues the following:

ORDER

NOW, THEREFORE, IT IS HEREBY ORDERED:

That the proposed amendments to the rules as published in 5 S.R. 771–775, identified as amendments to Minn. Rules NHA 10 and 13 providing for waiver of certain licensure requirements, the proposed repeal of Minn. Rules 22 and 23, and portions of Minn. Rule NHA 10, are adopted with the amendments noted in the Findings of Fact and Conclusion this 27th day of April, 1981, pursuant to authority vested in me by the Certificate of Board's Resolution Adopting Rules, dated April 9, 1981.

MINNESOTA BOARD OF EXAMINERS
FOR NURSING HOME ADMINISTRATORS

Phillip C Newberg

PHILLIP C. NEWBERG
Executive Secretary

NHA-81-002-JL

STATE OF MINNESOTA
OFFICE OF ADMINISTRATIVE HEARINGS

FOR THE BOARD OF EXAMINERS FOR NURSING HOME ADMINISTRATORS

In the Matter of Proposed Amendments to Minn. Rules NHA 10 and 13 Providing for Waiver of Certain Licensure Requirements and in the Matter of the Proposed Repeal of Minn. Rules NHA 22 and 23 and Portions of Minn. Rule NHA 10.

REPORT OF THE CHIEF HEARING EXAMINER

The above-entitled matter came on for review by the Chief Hearing Examiner pursuant to the provisions of Minn. Stat. § 15.0412, subd. 4d (1980) which provides in part:

> If the [hearing examiner's] report contains a finding that the proposed rule is substantially different from that which was proposed at the public hearing, or that the agency has not met the requirements of section 15.0412, subdivisions 4 through 4f, it shall be submitted to the chief hearing examiner for approval. If the chief hearing examiner approves the finding of the hearing examiner, he shall advise the agency of actions which will correct the defects, and the agency shall not adopt the rule until the chief hearing examiner determines that the defects have been corrected. If the chief hearing examiner determines that the need for and reasonableness of the rule has not been established pursuant to subdivision 4, clause (c), and if the agency does not elect to follow the suggested actions of the hearing examiner to correct that defect, then the agency shall submit the proposed rule to the legislative commission to review administrative rules for the commission's advice and comment. The agency shall not proceed to adopt the rule until it has received and considered the advice of the commission; provided, that the agency is not required to delay adoption longer than 30 days after the commission's receipt of the agency's submission.

Based upon a review of the record in this proceeding, the Chief Hearing Examiner hereby approves the Report of the Hearing Examiner in all respects and specifically as to any finding of substantial change or of failure to comply with Minn. Stat. § 15.0412, subd. 4-4f (1980) or of failure to establish need for and reasonableness of the proposed rule.

In order to correct the defects enumerated by the Hearing Examiner, the agency shall either take the action recommended by the Hearing Examiner or reconvene the rule hearing if appropriate. If the agency chooses to reconvene the rule hearing, it shall do so as if it is initiating a new rule hearing, complying with all substantive and procedural requirements imposed on the agency by law or rule.

If the agency chooses to take the action recommended by the Hearing Examiner, it shall, prior to submitting the rules to the Attorney General for review, submit to the Chief Hearing Examiner a copy of the rules as initially published in the State Register, a copy of the rules as proposed for final adoption in the form required by the State Register for final publication, and a copy of the agency's Findings of Fact and Order Adopting Rules. The Chief Hearing Examiner will then make a determination as to whether the defect in regard to substantial change and the requirements of Minn. Stat. § 15.0412, subd. 4-4f (1980) have been corrected.

Should the agency make changes in the rules other than those recommended by the Hearing Examiner, it shall also, prior to submitting the rule to the Attorney General, submit the complete record to the Chief Hearing Examiner for a review in regard to substantial changes.

Dated: February 24, , 1981.

DUANE R. HAIVES
Chief Hearing Examiner

STATE OF MINNESOTA
OFFICE OF ADMINISTRATIVE HEARINGS

FOR THE BOARD OF EXAMINERS FOR NURSING HOME ADMINISTRATORS

In the Matter of Proposed Amendments to Minn. Rules NHA 10 and 13 Providing for Waiver of Certain Licensure Requirements and in the Matter of the Proposed Repeal of Minn. Rules NHA 22 and 23 and Portions of Minn. Rule NHA 10.

REPORT OF THE HEARING EXAMINER

The above-entitled matter came on for hearing before Jon L. Lunde, duly appointed Hearing Examiner, on Tuesday, December 23, 1980, at 9:30 a.m. in the Department of Health Building, Room 105, 717 Delaware Street S.E., Minneapolis, Minnesota, 55414, pursuant to an Order for Hearing dated October 31, 1980. This was a rulemaking proceeding conducted pursuant to Minn. Stat. Chapter 15, to determine whether the Board of Examiners for Nursing Home Administrators (the "Board") has authority to adopt the rules proposed and whether they are necessary and reasonable and may be adopted.

Joanne M. Ogata, Special Assistant Attorney General, 136 University Park Plaza Building, 2829 University Avenue S.E., St. Paul, Minnesota, 55414, appeared as counsel for the Board. Also appearing on behalf of the Board was Phillip C. Newberg, its Executive Secretary and only witness.

Approximately 15 persons attended the hearing and 13 of them signed the hearing register. The hearing continued throughout the morning and until all persons present had an opportunity to be heard. After the hearing, but before the expiration of the 20-day comment period, three public comments and one Board comment were submitted to the Hearing Examiner, as well as a copy of correspondence from the Board to the Regional Office of the U. S. Department of Health and Human Services. The Chief Hearing Examiner extended the due date for this Report from February 11, 1981 to February 19, 1981, at the request of the Hearing Examiner.

The Board of Examiners for Nursing Home Administrators must wait at least five working days before taking any final action on the rules; during that period, this Report must be made available to all interested persons upon request.

Pursuant to the provisions of Minn. Stat. § 15.0412, subd. 4d (1980), this Report has been submitted to the Chief Hearing Examiner for his approval. If the Chief Hearing Examiner approves the findings of this Report, he will advise the Board of actions which will correct the defects and the Board may not adopt the rule until the Chief Hearing Examiner determines that the defects have been corrected. However, in those instances where the Chief Hearing Examiner identifies defects which relate to the issues of need or reasonableness, the Board may either adopt the Hearing Examiner's recommendations to cure the defects or, in the alternative, if the Board does not elect to adopt the recommendations, it may submit the proposed rule to the Legislative Commission to Review Administrative Rules for the Commission's advice and comment. Provisions relating to this submission to the Commission may be found in Minn. Stat. § 15.0412, subd. 4d (1980).

If the Board elects to adopt the recommendations of the Hearing Examiner and makes no other changes and the Chief Hearing Examiner determines that the defects have been corrected, then the Board shall submit the rule to the Attorney General for review of form and legality. If the Board makes changes in the rule other than those recommended by the Hearing Examiner, then it shall submit the rule, with the complete record, to the Chief Hearing Examiner for a review of the changes before adopting it and submitting it to the Attorney General. Procedures relating to this subsequent review by the Chief Hearing Examiner are set forth in Minn. Stat. § 15.0412, subd. 4e (1980).

When the Board submits the rule to the Attorney General, it shall give notice on the day of submission to all persons who requested that they be informed of the submission to the Attorney General.

Based upon all the testimony, exhibits and written comments, the Hearing Examiner makes the following:

## FINDINGS OF FACT

### Procedural Requirements

1. On October 30, 1980, the Board filed the following documents with the Chief Hearing Examiner:

(a) A copy of the proposed rules.
(b) The Order for Hearing.
(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, November 17, 1980, more than 30 days prior to hearing, a Notice of Hearing and a copy of the proposed rules were published at 5 State Register 771-775.

3. On November 18, 1980, more than 30 days prior to hearing, the Board mailed the Notice of Hearing to all persons and associations who had registered their names with the Board for the purpose of receiving such notice.

4. On November 26, 1980, the Board filed the following documents:

(a) The Notice of Hearing as mailed.
(b) The Agency's certification that its mailing list was accurate and complete.
(c) The Affidavit of Mailing the Notice to all persons on the Agency's list.
(d) The Statement of Need and Reasonableness.
(e) The names of Board 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.
(f) A copy of the State Register containing the proposed rules.
(g) An Affidavit of Additional Notice.
(h) All materials received following a Notice of Intent to Solicit Outside Opinion published at 5 State Register 591 on Monday, October 6, 1980.

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

5. The record remained open through Monday, January 12, 1981 for the receipt of written comments and statements, the period having been extended by order of the Hearing Examiner to 20 calendar days following the hearing.

6. The Board received no public comments to its published Notice of Intent to Solicit Outside Opinions (See, Finding 4(h)). However, it did receive comments in response to a July 1, 1980 letter mailed to interested parties and soliciting comments on the licensure of the adminstrators of hospitals with attached nursing homes. Those comments were made part of the record (Ex. A).

7. Joseph Hamilton, Esq., Hamilton and Phillip, P.A., 3944 IDS Center, Minneapolis, Minnesota, 55402, representing more than 37 individuals and facilities affected by the proposed rules, alleges that the Board committed a violation of Minn. Stat. § 15.0412, subd. 6 (1980), in proposing the rules and that they cannot, for that reason, be adopted. That subdivision provides:

> When an agency seeks to obtain information or opinions in preparing to propose the adoption, amendment, suspension, or repeal of a rule from sources outside of the agency, the agency shall publish notice of its action in the state register and shall afford all interested persons an opportunity to submit data or views on the subject of concern in writing or orally. Such notice and any written material received by the agency shall become a part of the hearing record to be submitted to the attorney general under subdivision 4.

Hamilton alleges that this provision was violated because the Board sought comments from the U. S. Department of Health and Human Services (HHS) on the question whether federal regulations require all state nursing home administrators to be licensed, sometime in May, 1980, or before, without publishing notice that it had sought such comments. On October 6, 1980, the Board did, however, publish its Notice of Intention to Obtain Information from Non-Agency Sources on rules for nursing home administrators and specifically pointed out that the subject matter to be addressed included the "adoption of new rules establishing requirements for licensure of persons who on April 15, 1980, were employed as administrators of hospital convalescent and nursing care units and who were registered with the State of Minnesota as hospital administrators." Hamilton's argument is that the published notice was not sufficient under § 15.0412, subd. 6, and that the Board was required to publish an additional or earlier notice when it sought comments from the Department of Health and Human Services. He stated:

> The Board may argue that it complied with the statute in question by its Notice which was published in the State Register on October 6, 1980. (Board's Exhibit B.) One need only compare the date of the HHS policy letter with the date the notice was published to realize that the Board did not comply with the procedural safeguard. It is clear from the use of the word "seeks" that Minn. Stat. § 15.0412, Subd. 6, requires the agency to publish notice, before it obtains information or opinions from sources outside of the agency. The Board did not do so. Instead, the Board published notice that it was going to go outside of the agency some four and one-half months after it had obtained the opinion of HHS. By that time, the dangers of noncompliance described by an authority on administrative law had already accrued.
>
> Dean Auerbach stated the purpose for the procedural safeguard set forth in Minn. Stat. § 15.0412, Subd. 6.
>
> > Its commendable purpose is to enlarge the scope of public participation in agency rulemaking in still another way. It was apparently believed that the process of agency consultation with affected interests prior to the public hearing required by MAPA might settle the agency's views and minimize the significance of the hearing. The solution sought was not to prohibit such consultations, which were useful because they could go far to resolve potential debilitating conflicts, but to try to bring the general public into the process of prehearing consultation. 63 Minn. L. Rev. 151, 171, 172 (1979) (Emphasis supplied).

The Hearing Examiner is not persuaded that the statutory provision was violated in this case. First, it is noted, that an agency is not required to seek

any outside information or opinions in preparing to propose the adoption or amendment of existing rules. The law merely requires them, if they do seek outside information from any source, to publish a notice so that it can receive comments from all sources. The obvious purpose of the statutory requirement is to get comments and information from all persons who might be affected and not merely to rely on one source of information or comment which might not give the agency the perspective it needs to propose rules founded on all the facts and circumstances. In this case, when the Board sought comments from HHS, those comments were not sought in the preparation of the proposal of rules but merely to determine whether it should propose new rules or rule amendments. Clearly, that contact should not have required publication since the Board was not at that time proposing any rules. It would be wholly impractical for an agency to publish a notice in the State Register every time a comment is sought or an inquiry is made if such comment or inquiry could or might conceivably result in an agency's subsequent decision to propose rules. Moreover, once the Board determined that it might be necessary to propose rules relating to the subject matter, public notice was given to all persons permitting them to submit comments on it. At that time, Hamilton and other persons similarly situated who objected to the need of the proposed rules or the need for the rules in the subject matter areas noted in the Notice had an adequate opportunity to present their arguments and rationale to the Board.

8. While the concerns expressed by Professor Auerbach with respect to this provision are legitimate ones, his remarks are not altogether applicable to the HHS solicitation. The inquiry made of HHS was not a consultation with "affected interests" in the usual sense of that term and the issues involved were not the kind that would normally generate much public interest as is evidenced by the lack of any public comments to the solicitation eventually published. Auerbach's remarks seem to mean that the Board should not consult with the hospitals, nursing homes and their licensed administrators without giving notice to the general public and not that routine inter-governmental correspondence could not take place before such public notice was given.

In the latter respect, the provision was violated when the Board solicited comments from interested persons (affected interests) on July 1, 1980 without publishing notice to the general public. That issue, while not addressed by Hamilton, must be resolved.

9. The statute itself is silent as to the precise time when the publication of the notice must be made, but it is reasonable to assume that such publication was meant to be a meaningful act and that all persons would be given equal notice of the solicitation and an equal opportunity to present comments. While "affected interests" no doubt have special expertise and helpful insights, comments and information, the Minnesota Administrative Procedure Act was not designed so that they would receive preferential treatment, notice or opportunities; and it was not designed to give them special influence with the agencies of the state. The July 1, 1980 solicitation mailed to select groups violated that principle of equality and the purposes expressed by Professor Auerbach. However, in this case, the violation was not so substantial as to invalidate the proceedings.

10. In City of Minneapolis v. Wurtele, 291 N.W. 2d 386, 391 (Minn. 1980), the Minnesota Supreme Court stated:

> We note at the outset that the law does not mandate in all cases strict and literal compliance with all procedural requirements. Technical defects in compliance which do not reflect bad faith, undermine the purpose of the procedures, or prejudice the rights of those intended to be protected by the procedures will not suffice to overturn governmental action, particularly where, as here, substantial commitments have been made. . . .

While the procedures involved in that case concerned eminent domain, it reflects the general rule that technical violation of notice requirements which do not result in actual prejudice do not invalidate a rule. 1 Cooper, State Administrative Law, p. 192 (1965). In the instant proceeding, the Board was not acting in bad faith, all parties had an opportunity to address all issues, and no prejudice to any parties was established. Furthermore, the only serious potential for prejudice resulted from the letter of July 1, 1980 and not from the HHS inquiry.

11. It is generally recognized that informal participation in the actual formulation of rules gives the participants much greater influence over the final result than non-participants would have. 1 Cooper, State Administrative Law, pp. 198-99 (1965). Consequently, conflicting interests must be fairly represented and uniformly notified of pre-formulation activities. On the other hand, Professor Davis has noted, with respect to the federal notice and comment procedure for rulemaking that:

> Communications of all sorts are the life of a notice and comment proceeding. The more the better. They should not be prohibited. They should be invited and encouraged. If commissioners and staff have time to talk with interested persons, they should do so as far as their time permits; of course they should try to do so fairly. All kinds of communications, including written materials, oral arguments at a proceeding, and informal consultations should be allowed to whatever extent practical considerations permit. Although a cutoff point for presentations is necessary, the only restriction required either by fairness or by the needs of judicial review is that the essence of all significant communications should go into the public record. [Italics present]

* * *

> The law of the future is unlikely to condemn ex parte contacts in the making of rules of general applicability, but it is likely to require that all significant communications be made a part of the public record.

1 Davis, Administrative Law Treatise, § 6:19 (2d Ed. 1979).

In sum, it is concluded that the HHS inquiry was not a violation of § 15.0412, subd. 6, but that the July 1, 1980 letter to "interested parties" was a technical violation thereof. However, since the latter violation was not shown to have been in bad faith or to have resulted in actual prejudice, the violation does not invalidate this proceeding or the rules proposed for adoption.

Statutory Authority

12. As authority for its proposed rules and rule amendments, the Board cited Minn. Stat. §§ 144A.20 and 144A.22 through 144A.24 (1978). The provisions cited provide in part as follows:

> (a) Section 144A.20, subd. 1:
>
> The board of examiners may issue licenses to qualified persons as nursing home administrators and shall establish qualification criteria for nursing home administrators. . . .

(b) Section 144A.22 provides:

The board of examiners shall . . . adopt rules to govern its proceedings.

(c) Section 144A.23 provides:

Except as provided in section 144A.04, subdivision 5, the board of examiners shall have exclusive authority to determine the qualifications, skill and fitness required of any person to serve as an administrator of a nursing home.

(d) Section 144A.24 provides:

The board of examiners shall: (a) Develop and enforce standards for nursing home administrator licensing, which standard shall be designed to assure that nursing home administrators will be individuals of good character who, by training or experience, are suitably qualified to serve as nursing home administrators.

These provisions generally authorize the rule amendments currently proposed by the Board in the area covered.

General Introduction

13. The amendments to Minn. Rule NHA 10 remove the masculine gender of the language used rendering it sexually neutral, renumber the section to 7 MCAR § 6.010 to be consistent with current citation and practice, repeal obsolete provisions no longer necessary and add waiver provisions for the licensing of some applicants. The substantive amendments to this Rule were the heart of this proceeding.

14. The amendments to Minn. Rule NHA 13 renumber it to 7 MCAR § 6.013 to be consistent with current citation practice and limit the practice of nursing home administrators to any endorsements contained on the license. The amendments to § 6.013 were not subject to adverse public comment and are necessary and reasonable in their entirety.

15. The proposed repeal of Minn. Rules NHA 22 and 23 pertaining to the charges against licensed nursing home administrators and hearings on those charges was withdrawn by the Board at the hearing because those sections had previously been repealed in 1978 (See, OAH Docket NHA-78-001-PE and 2 S.R. 2347). Consequently, this Report will not address them.

Section 6.010 A.

16. Section 6.010 A. deals with the requirements which must be met in order to qualify for a nursing home administrator's license. It is primarily a recodification of former provisions of NHA 10 with language changes to delete masculine gender. The proposed subparts and their predecessors are as follows:

| Proposed Citation | Former Citation |
|---|---|
| § 6.010 A.1. | NHA 10(a)(1) |
| " 2. | " (a)(2) |
| " 3. | " (e)(3) |
| " 4. | " (e)(4) |
| " 5. | " (e)(5) |
| " 6. | " (e)(6) |
| " 7. | " (b)(1) |
| " 8. | " (d) |

17. Only one adverse comment was made with respect to Part A. K. Craig Wildfang, Staff Counsel for the Minnesota Association of Health Care Facilities (MAHCF) objected to proposed subpart A.8. Originally, NHA 10(d) contained a grandfather clause exempting those licensed prior to July 1, 1978 from the

degree requirement set forth therein. The grandfathering language is deleted from A.8. and apparently would exclude 75% of the currently licensed nursing home administrators from qualifying for relicensure. The Board did not respond to Mr. Wildfang's suggested amendment to this Part restoring the grandfather clause and did not mention the reason for its deletion in its Statement of Need and Reasonableness (hereinafter the "Statement"). Since the Board did not indicate an intention or state reasons for eliminating the grandfathering feature that had always been a part of the Rule, this subpart A.8. must be amended to make it clear that the degree requirement does not apply to those nursng home administrators who were previously licensed. To correct that defect, the Board can simply add another sentence to the very end of the subpart as currently proposed to read as follows: "The degree and practicum requirements of this subpart do not apply to those individuals who have previously been licensed by the Board as nursing home administrators."

Without such an amendment to the Rule as proposed, it could not be deemed necessary or reasonable because the Board failed to present any facts or reasons why the grandfathering provisions should be eliminated at this time. Such an amendment to the proposed language is apparently consistent with the Board's intention and would not constitute a substantial change in the Rules for purposes of 9 MCAR § 2.111. Assuming Part A. is adopted as proposed by the Board, and that subpart A.8. is amended as recommended herein, the Hearing Examiner finds that part to be necessary and reasonable.

18. The Board proposes to repeal the provisions formerly found in NHA 10(b)(2), (3) and (5); NHA 10(c); and all of NHA 10(f). In its Statement regarding the repeals, Mr. Newberg stated:

> When the Board promulgated Minn. Rule NHA 10, it set up a time table during which the requirements for licensure would gradually become more stringent. By their terms, these sections of Rule 10 have now been superseded by other sections. Therefore, the Board feels that it is both prudent and reasonable to repeal these outdated sections. . . .

No one objected to the repealers proposed by the Board and the Hearing Examiner finds that the deletion of the obsolete language contained in the former rule as proposed by the Board is necessary and reasonable.

Section 6.010 B.

19. The proposed rules recodify former NHA 10(c) and (b)(4) as Parts B.1. and B.2., respectively. Such a renumbering is necessary, reasonable and appropriate. However, the internal citations in parts B.1. and B.2. are improper and incorrect because they do not cite to the Rule as recodified. Part B.1. references "NHA 10(a)(7) and 10(a)(8)" and part B.2. references "NHA 10(a)(7)." Those Parts, as recodified, should provide in their first lines as follows:

B.1. "The board shall waive Part A.7. and A.8. if . . . ."

B.2. "The board shall waive Part A.7. if . . . ."

This erroneous manner of citing to other parts of § 6.010 recurs in other Parts of the section as amended and should be corrected prior to adoption. Citations in the rule should be to § 6.010 and not to "NHA 10" and the subpart cited should be to those subparts as renumbered and relettered by the amendments. Thus, in Parts B.3. and B.4., the citation to NHA 10(a)(7) and 10(a)(8) is improper and should be either to § 6.010 A.7. and A.8. or merely to "Parts A.7. and A.8."

20. As implied in the preceding Finding, the word "may" in parts B.1. through B.5. must be deleted. The rule as written permits the Board to have unfettered discretion in granting or not granting waivers to the application qualifications set forth in the rule. Such discretion, without adopted guidelines, fails to make the law administered by the Board specific as required by Minn. Stat. § 15.0411, subd. 3 (1980), (defining a rule) and leaves the granting of variances or waivers of the requirements to the whim of the Board. Such discretion is impermissible and a violation of a substantive provision of law. To correct this defect in Part B., the word "may" must be replaced with the word "shall". If the Board does not want waivers to be granted as a matter of course when an applicant meets the requirements specified for the granting of such a waiver, it should have made the exercise of its discretion more specific and contingent upon other factors. Since it failed to do that, it may not make the granting of such waivers wholly discretionary where the applicant meets the conditions specified. Holmes v. New York City Housing Authority, 398 F.2d 262 (2d Cir., 1968).

The Legislature, itself, has noted the problems which can arise with variances to duly promulgated rules and in § 15.0412, subd. 1a (1980), which is not effective until August 1, 1981, it has required that agencies set forth procedures and standards by which variances shall be granted or denied. The need for such standards in the granting of waivers to applicants for nursing home administrators' licenses is no less compelling.

21. Part B.1. is ostensibly a mere recodification of former NHA 10(e); however, that is not the case. The former NHA 10(e) permitted a waiver of the two-year college requirement after 1975 (NHA 10(c)), or a BA degree after 1978 (NHA 10(d)), or the specified surrogate for persons who were full-time nursing home administrators in another state for two years. Since NHA 10(c) is being repealed, NHA 10(d) (recodified as Part A.8.) would normally be the only waiver available to persons licensed in other states. However, in addition to proposing a waiver of Part A.8., the new Part B.1. allows a waiver of the 300-hour practicum (formerly NHA 10(b)(1), recodified as A.7.) which was not previously available. The facts showing the reasonableness and necessity of this additional waiver for those licensed in another state for two years was not shown, and as to Part B.1., the waiver should, therefore, be limited to a waiver only of the degree or surrogate requirements found in Part A.8. Only by deleting this additional language can the defect be cured. This deletion may be inconsequential since waivers of the practicum are specifically provided for under Part B.2.

22. Part B.2. is a mere recodification of former NHA 10(b)(4) authorizing a waiver of the practicum requirements of Part A.7. (formerly NHA 10(b)(1)) for those who have served one year full time as an administrator or assistant administrator in a health care facility. Since this is a mere recodification, its need and reasonableness need not be established. See, 9 MCAR § 2.104 (1980 Ed.).

MAHCF did, however, suggest that proposed Part B.2. be clarified. They stated:

> Again, because of the re-numbering and the re-drafting, a result is achieved by this provisions (sic) which was not intended. The intention of the Board in retaining this language was to permit the Board to continue to waive the practicum requirement in cases

where the applicant has served at least one year as an administrator or assistant administrator. Under the new numbering, the practicum requirement is stated in two separate provisions, § 6.010.A.7. and A.8. The requirement is the same, i.e. 300 clock hours, and it is clear that the Board did not intent to impose two different practicum requirements. The problem is that the language of § 6.010.B.2. allows the Board to waive A.7. but not A.8. The result is that under a strict interpretation of the rules, it might be argued that the Board must require the practicum from all applicants because technically the Board cannot waive the practicum required under A.8.

Contrary to this suggestion, the Hearing Examiner notes that former Rule NHA 10 did provide for the practicum requirement in two separate provisions, i.e., NHA 10(b)(1) and NHA 10(d). Under the former NHA 10, only the requirement of 10(b)(1) could be waived by the Board for those persons who had completed one year as an administrator or an assistant administrator in a health care facility. Since the Board did not respond to this comment at the hearing or in its posthearing comments, it is impossible for the Hearing Examiner to determine their intention regarding the two different practicum requirements contained in the new rule and taken from the prior rule. Since the substance of the Rule is not changed by the recodification of this section, its need or reasonableness is, as was previously stated, beyond the scope of this Report. However, MAHCF's comments with respect to part B.2. should be examined by the Board to determine whether its intention is being correctly reflected in the rules. If MAHCF's statement of its intention is correct, the Hearing Examiner defers to MAHCF's suggested remedial language on page 3 of their January 12, 1981 comment. If either of those suggestions were adopted by the Board, they would not amount to a substantial change in the Rules as proposed under 9 MCAR § 2.111.

Section 6.010 B.3. and B.4.

23. Proposed Part B.3. contains all new material providing for waiver of the requirement of Parts A.7. and A.8. for those persons who, on April 15, 1980, were registered with the Commissioner of Health as hospital administrators and responsible for a convalescent and nursing care unit (C & NC) unit attached to the hospital and had been in that capacity for at least three years. Those individuals need not have completed the 300-clock hour requirement of Part A.7. or the degree requirement of Part A.8., or its surrogate, but the individual must pass the currently used written examination. Proposed Part B.4. contains a different waiver clause for those previously registered C&NC administrators who served in that capacity for less than three years. An understanding of this Part and the objections raised to it require some reiteration of the statutory terrain.

24. Prior to 1976, nursing homes, by definition excluded C&NC units attached to hospitals and such C&NC units were not separately licensed by the Minnesota Department of Health. Hospital administrators who were managing such units (hereinafter C&NC administrators) were not, therefore, required to be licensed as nursing home administrators since the units they administered were not themselves separately licensed. In 1976, however, nursing homes were redefined to include such C&NC units but C&NC administrators were "exempted" from licensure as nursing home administrators by Minn. Laws 1976, Ch. 173, § 4, subd. 5, codified as Minn. Stat. § 144A.04, subd. 5, so long as they were

registered by and met the criteria established by the Department of Health. In 1980, all that changed. Minn. Laws 1980, Chapter 567, § 2, repealed the licensing provisions of Chapter 144 pertaining to hospital administrators so that they were no longer registered by the Department of Health but the Legislature did not repeal § 144A.04, subd. 5, containing the "exemption."

25. In a six-page opinion issued on December 22, 1980, the day prior to the hearing scheduled in this matter, the Attorney General concluded that those hospital administrators licensed by the Department of Health on April 15, 1980, the day before the repealer of the hospital administrators registration law was effective, need not be licensed as nursing home administrators. The effect of this decision was that those hospital administrators registered with the Department of Health prior to April 16, 1980 would not be required to be licensed as nursing home administrators even if the hospital they administered contained a C&NC unit but that those hospital administrators administering a hospital with such a C&NC unit, who were not so registered on April 15, 1980, or before, would be required to obtain a nursing home administrator's license from the Board before becoming a C&NC administrator. The Attorney General's Opinion was challenged by several parties and its impact on the necessity, reasonableness and authority for Parts B.3. and B.4. was raised. The Attorney General's construction of the Legislature's repeal of the hospital administrators licensing law without repealing the "exemption" language of § 144A.04, subd. 5, was challenged by Joseph Hamilton, who argued that state law, as it currently exists, does not require C&NC administrators to be licensed as nursing home administrators. He said:

> At the outset, it is important to note that the Board can no longer point to state law as justifying the need for the proposed amendments. The Minnesota Attorney General ruled on December 19, 1980, that hospital administrators who met the registration requirements immediately prior to their repeal in 1980 and who also administer C & NC units continue to be exempt from the normal licensure requirements for nursing home administrators, by virtue of Minn. Stat. § 144A.04, subd. 5 (1978). In effect, these individuals are given special licenses to operate their C & NC units. . . .
>
> While we do not necessarily agree that the Attorney General's Opinion should have been limited only to hospital administrators who met the registration requirements when they were in force, the Opinion makes it clear that there are no problems under state law justifying the need for the proposed amendments.

The Attorney General, however, did not hold that no hospital administrators were required to be licensed as nursing home administrators. The Opinion merely held that the repeal of Minn. Stat. §§ 144.59 through 144.65 (the hospital administrators registration law) did not repeal by implication § 144A.04, subd. 5. The Opinion quite clearly held that those licensed before April 16, 1980 were not required by state law to demonstrate any further competence to be licensed as nursing home administrators but did not hold that those who subsequently became employed as hospital administrators of facilities with an attached C&NC unit were "exempt" from licensure by the Board. However, as to the latter group, it is true that no amendments to the rule are necessary since the Board has determined that they must meet all licensing requirements.

Since C&NC administrators once licensed by the Department of Health are exempt from licensing by the Board under state law, as construed by the Attorney

General, one would normally conclude that Parts B.3. and B.4., which waive certain licensure requirements for that group, are unnecessary, as Hamilton argued. Nonetheless, the Board has concluded that such a waiver is necessary because HHS has initially decided that such C&NC administrators must be licensed by the state under federal law. The Board further reasons that since a license is required under federal law that it should make such a license available, even if not required by state law. It further reasons that since any license issued by it would permit the C&NC administrator to administer any nursing home (and not just one attached to a hospital) that it is justified in imposing additional qualifications on such C&NC administrators and that the waiver provisions of Parts B.3. and B.4. are, therefore, necessary and reasonable.

The Hearing Examiner finds that it is unnecessary to determine the requirements of federal law vis-a-vis the licensure of C&NC administrators even though interested parties spent a great deal of time addressing that issue. The reason for that conclusion, as is discussed in greater detail later in this Report, is that all nursing home administrators, even those previously licensed (or registered) by the Department of Health, must be licensed by the Board under state law. Since such licensure is required under state law, Parts B.3. and B.4. may be necessary, albeit for reasons other than those expressed by the Board and the Attorney General.

26. MAHCF argued that the plain language of Ch. 567, § 2, requires all hospital administrators of C&NC units to become registered as nursing home administrators. Thus, Mr. Wildfang stated:

> The repeal of the hospital administrator registration program creates an impossibility with respect to the exemption from licensure for "registered hospital administrators" under § 144A.04, Subd. 5. Regardless of how one attempts to construe the repealer, it is clear that it is literally impossible to qualify for the exemption because after April 15, 1980, no one is a registered hospital administrator because the program has been abolished. Therefore, searching for legislative "intent" by applying various aids to statutory construction, is a meaningless exercise. The plain meaning rule, applied to the repealer and § 144A.04, requires that hospital administrators become licensed as nursing home administrators.

27. Section 144A.04, subd. 5, provides in pertinent part as follows:

> A nursing home which is located in a facility licensed as a hospital pursuant to §§ 144.50 to 144.56, may employ as its administrator the registered administrator of the hospital if the individual meets minimum education and long-term care experience criteria set by rule of the commissioner of health.

This provision has not been repealed even though hospital administrators are no longer regulated by the Commissioner of Health nor registered pursuant to his rules. As has been pointed out, Hamilton takes the position that this section requires no hospital administrators to be licensed as nursing home administrators, the Attorney General takes the position that this section requires only those hospital administrators who were not registered on April 15, 1980 to become registered as nursing home administrators and Mr. Wildfang takes the position, on behalf of MAHCF, that all hospital administrators of facilities with attached C&NC units must become licensed nursing home administrators.

28. The Hearing Examiner agrees with the construction urged by MAHCF not so much because of the various canons of construction cited by the parties but because of the effect and results which follow from the licensure of only some

hospital administrators or none at all. Taking all C&NC administrators as a group, it is unreasonable to conclude that only some of them are subject to disciplinary action by the Board and that improprieties justifying license revocation or suspension can be imposed only on that group which must be licensed but cannot be imposed on the other group, even if they engage in similar behavior. Furthermore, it is unreasonable to conclude that changing notions of the background necessary or the continuing education needed to maintain licensure status would only be enforceable against one group but not the other. Such disparate treatment precludes effective discipline or policy implementation and it is such an illogical and contradictory result that the Hearing Examiner must reject any conclusion that the Legislature intended it to occur. So long as any hospital administrators of the group relevant here are considered "exempt" from licensing by the Board, the anomalous results remain. Furthermore, the Hearing Examiner has grave doubts that the licensure, extraction of license fees, the imposition of discipline, or the imposition of continuing education requirements can be imposed on one group of individuals and not on another under basic notions of equal protection or that a scheme which differentiates between the two, especially as to licensure, discipline and continuing education, has a rational constitutional basis. For that reason, the Hearing Examiner has concluded, contrary to the Attorney General, that all hospital administrators who administer hospitals with attached C&NC units must be licensed by the Board since the repealer of the hospital administrators registration law. As will be discussed infra, such an approach renders the waiver provisions in Part B. more rational and reasonable.

29. Normally, a statute should not be construed to place an impossible burden on a party. However, that canon is not violated by construing § 144A.04, subd. 5, so as to preclude or render impossible the acquisition of an exemption from licensure because there is no burden which cannot be met, but merely a benefit or privilege which is no longer available. When the hospital administrator registration provisions were repealed, the Legislature knew that C&NC administrators would no longer be "registered" and would no longer be able to meet the qualifications adopted by the Department of Health. Fully cognizant of that inability, the Legislature failed to make any adjustments to it. The only logical inference that can be drawn from this state of affairs is that they no longer intended such C&NC administrators to be exempt from licensure, assuming that was, in fact, the original intention of the provision.

This conclusion, as was mentioned previously, becomes inescapable when one considers the obvious equal protection problems created by the construction adopted by the Attorney General. As a general rule, statutes are to be construed to avoid an unconstitutional result. However, the construction adopted by the Attorney General does not do so. The basic requirement of equal protection is that all parties in a class are to be treated equally unless there are reasonable grounds or a rational basis for treating them differently. Barker v. Nelson, 291 Minn. 310, 191 N.W.2d 185 (1971); 3 B Dunnell Minn. Digest 2d, Constitutional Law § 1.00 (3d Ed. 1979). This does not require that things different in fact be treated as though they are the same but that things that are the same be treated equally unless there are reasonable grounds for distinction. Those classes that are similarly situated must be afforded equal

rights and privileges and subject to the same sanctions, penalties and restrictions.

30. In this case, licensing only those C&NC administrators who were not registered with the Department of Health on April 15, 1980 has no reasonable basis and offends the equal protection clause. In licensing, as in other areas, classes for licensing must be based on reasonable and substantial grounds and the standards for licensing must be the same for subclasses defined. 51 A.L.R.2d, Licenses and Permits, §§ 28-30. That principle would be violated if only some C&NC administrators are licensed.

If all nursing home administrators constitute the proper class, there is now no reasonable basis for excluding C&NC administrators from the licensure requirements, license fees, continuing education requirements and standards of behavior applicable to the others. At one time, there were two separate state agencies dealing with these matters and the Legislature concluded that as to C&NC administrators, only one agency's requirements and sanctions should apply. That was not an unreasonable decision. However, now only one agency, the Board, has any power to license and regulate, and if some C&NC administrators are exempt, the others would be denied equal protection because there is no rational basis for concluding that nursing home administrators need continuing education but that C&NC administrators do not; that nursing home administrators should be subject to discipline or license fees, but that some C&NC administrators should not; or that there is a public interest in regulating nursing home administrators but none in regulating C&NC administrators.

31. Furthermore, even if it was concluded that C&NC administrators were an appropriate subclass, there is no rational basis for further classifying that subclass on the basis of those registered with the Department of Health prior to April 15, 1980, and those who were not so registered. There is no reason to suppose that the latter are the only C&NC administrators who should pay a license fee, need continuing education, or should be subject to disciplinary action. Thus, in Sweeney v. Cannon, 251 N.Y.S. 2d 146 (1964), the Court held that a statute requiring every attorney licensed and admitted to practice law on a certain date to file a certificate of registration and pay a $15 fee violated the equal protection clause because it unreasonably discriminated in favor of lawyers admitted after that date. Further, in State v. Luscher, 157 Minn. 192, 195 N. W. 914 (1923), the Court held that a law prescribing grounds on which license to practice dentistry may be revoked but excluding from its application persons lawfully practicing dentistry at the time of its enactment was an unconstitutional denial of equal protection where the time element (date of passage) had no relation to the object of the legislation.[1]

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[1] A classification to be constitutional must uniformly, without discrimination, apply to all who are similarly situated with respect to conditions or wants justifying the legislation, the distinctions between classes must be genuine and substantial, and the classes must be germane to the purposes of the law. 3B Dunnell Minn. Digest 2d, § 6.05 (3d ed. 1979). The law may not impose restrictions on one class that are not imposed on others who are similarly situated. City of St. Paul v. Dalsin, 245 Minn. 325, 71 N.W. 2d 855 (1955); Hortonville E. Assn. v. Hortonville J. School D., 66 Wis.2d 469, 225 N.W.2d 658 (1975). Thus, it has been held that a law may not require a prepublication comic book license from all publishers but exempt the comics published

(Continued on next page)

For these reasons, it is concluded that Minn. Stat. § 144A.04, subd. 5, must be construed to mean that C&NC administrators are not exempt from licensure. This construction creates no equal protection problems and is consistent with the general rule strictly construing exemptions from licensing statutes. See, 51 Am. Jur. 2d, Licenses & Permits § 36. It could be argued that the statute meant to exclude all C&NC administrators from licensure because all will meet the standards of the Department of Health (since there are no standards to meet), but such a construction of the statute offends the obvious policy reasons for requiring licensure of nursing home administrators, ignores the equal protection problems created, and fails to account for the requirement of "registration" by the Department of Health.

32. Parts B.3. and B.4. permit the waiver of some or all of the requirements of parts A.7. and A.8., depending on whether the nursing home administrator who applies for licensure has three or more years of experience as such an hospital administrator. These two waiver provisions are necessary and reasonable in their entirety and the reasonableness of imposing those qualifications that are not waivable was persuasively and fully set forth in the Board's Statement (p.4-7).

However, the Hearing Examiner concludes that some alternate suggestions are required in view of his conclusion that all C&NC administrators must be licensed, and in view of the Board's remarks. These suggestions are made because of the distinction that obviously exists between previously registered hospital administrators who have managed hospitals with attached C&NC units and need to be licensed as such, those C&NC administrators never registered by the Department of Health, and those hospital administrators who desire to administer nursing homes that are not C&NC units attached to hospitals. With respect to C&NC administrators who were registered with the Department of Health on or before April 15, 1980, the Hearing Examiner recommends that the Board license those individuals as nursing home administrators without any further qualifications or restrictions. However, consistent with the Board's own rules, licenses granted to such administrators should be accompanied by an endorsement which limits them to the administration of nursing homes attached to hospitals; and that all C&NC administrators who were so registered be given a license to administer any nursing home, without endorsement, only pursuant to Parts B.3. and B.4. All other C&NC administrators should be licensed without endorsement and only if they meet all licensing criteria.

33. This permits the immediate licensing of those hospital administrators found competent by the Legislature on or before April 15, 1980, and is consistent with the Legislative inference that those individuals need no further

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by newspapers. Adams v. Hinkle, 51 W.2d 763, 322 P.2d 844 (1958). In addition, where classification is based on a time element which bears no relationship to the result or object of the legislation, it will not be upheld. State v. Donovan, 218 Minn. 606, 16 N.W.2d 899 (1944). In this case, the classification of C&NC administrators into those who were or were not registered with the Department of Health prior to April 16, 1980, bears no relationship to the purposes of the nursing home license laws as the Board's rules pertaining to licensure, discipline and continuing education.

training or qualifications to manage C&NC units attached to the hospitals they administer. It is also consistent with the Attorney General's Opinion (p. 3.) discussing the unlikelihood of a legislative intention to disqualify all C&NC administrators from being employed in their present position until they have demonstrated their competence to administer those units. Those C&NC administrators who were not so registered, would, of course, have to meet all the qualifications of the Board. This subjects all nursing home administrators to disciplinary action by the Board and the continuing education requirements adopted.

In addition, requiring the licensure of all C&NC administrators would overcome the pertinent objections to Parts B.3. and B.4. which were raised by the Minnesota Hospital Assocation and the Minnesota Association of Homes for the Aging (MHA/MAHA). They challenge Parts B.3. and B.4. as unreasonable because, if some administrators of C&NC units are, under § 144A.04, subd. 5, exempt from licensure requirements of the Board, it is inconsistent for the Board to impose affirmative licensing obligations upon them as is done in Parts B.3 and B.4. The Board has sidestepped this issue by alleging that its licensing rules are not rules that must be complied with but merely a certification procedure that the Board makes available to individuals who do not have to be licensed under state law but who must be licensed under federal law. The Hearing Examiner rejects that line of reasoning. Although the Board alleged that it has no authority to enforce its rules, Minn. Stat. § 214.11 (1980) gives to any licensing Board authority to bring an action in its own name to restrain any unauthorized practice or violation or threatened violation of any rule which such Board is empowered to regulate or enforce.

34. If all C&NC administrators are required to be licensed, there is no question that Parts B.3. and B.4. are necessary and authorized. However, if only some C&NC administrators are required to be licensed, and those who were once registered with the Department of Health are exempt, then the rules as proposed do raise legitimate issues as to whether they are authorized or necessary. Thus, MHA/MAHA stated:

> . . . [T]he Attorney General has ruled that hospital administrators who were permitted by Minn. Stat. § 144A.04, subd. 5, to administer C&NC units prior to the repeal of Minn. Stat. §§ 144.59 to 144.65 through registration with the Commissioner of Health may continue to administer a C&NC unit attached to a hospital without obtaining a nursing home administrator's license. Since there is no requirement under state laws interpreted by the Attorney General that such persons be licensed as nursing home administrators, the waiver provisions of proposed rule 7 MCAR § 6.010 B.3. and 4. are unnecessary. Further, these provisions, which impose additional requirements upon such persons (e.g., passing the currently used written examination and in some instances requiring that certain educational courses be taken), appear to be materially inconsistent with State law as interpreted by the Minnesota Attorney General and therefore not within the authority of the Board to adopt.
>
> Based on the Attorney General's Opinion that under Minnesota law, administrators of C&NC units who were registered with the Commissioner of Health prior to the repeal of Minn. Stat. §§ 144.59 to 144.65 need not be licensed as nursing home administrators, MHA/MAHA questions the authority of the Board to adopt 7 MCAR § 6.010 B.3. and 4.

Since C&NC administrators once registered with the Department of Health are not exempt from licensure by § 144A.04, subd. 5, and since the Board has authority

to adopt licensing standards for the C&NC administrators who are not so registered, there is no inconsistency between state law and Parts B.3. and B.4. as alleged by MHA/MAHA. Furthermore, since all C&NC administrators must be licensed by the Board under State law as it currently exists, the proposed rule is clearly authorized and necessary

35. Federal authorities from the U. S. Department of Health and Human Services (HHS) and the Minnesota Department of Health, itself, have taken the position, initially, at least, that all C&NC administrators must be licensed and that a failure to obtain such licensure will jeopardize federal funding to the facilities administered by them and result in other sanctions. If it is true, as the Board and the Attorney General initially determined, that C&NC administrators who were previously registered are exempt from licensure, the mere fact that such licensure is required by Federal law would not authorize the Board to issue licenses to them, and in so doing, to impose additional requirements for licensure as a condition to issuance of the license. However, since those C&NC administrators are not, in fact, exempt from licensure under State law, the Board has authority and an obligation to license them and may impose additional requirements upon those individuals as a condition to licensure.

36. Since the Board is required to license all C&NC administrators, it may wish to re-examine its rules, especially Parts B.3. and B.4. to determine whether those Parts correctly reflect their objectives. This Report does put the licensing rules in a different perspective, and because of the Board's Statement regarding its concerns and its objectives, it is recommended, as was previously stated, that it permit previously registered C&NC administrators to acquire an endorsed license and exempt them from further licensing qualification requirements (entitling them to what one party described as a "limited license"). The rule should state that all C&NC administrators who were previously registered by the Department of Health on or before April 15, 1980, shall be entitled to a nursing home administrator's license without meeting additional requirements but that any such license would be "limited" and would contain an endorsement limiting their practice to C&NC facilities connected to a hospital; in effect, grandfathering them as C&NC administrators.

In this way, the Board could license previously registered C&NC administrators without licensing them to administer any nursing home. Apparently, the additional licensing qualifications were imposed on such C&NC administrators only because they could, under an unlimited license, administer any nursing home. Since an endorsed license would preclude that, the Hearing Examiner believes the endorsed license approach would accomplish the Board's objective and protect against its concerns. Also, it would permit C&NC administrators to continue in their current positions without meeting additional qualifications as the Board believes the legislature intended.

All C&NC administrators who were not so registered on April 15, 1980, or who wish to practice outside their endorsements would be entitled to licensure without endorsement but only pursuant to the rules as proposed by the Board (Parts B.3. and B.4.) and would be required to meet the additional qualifications in the rule as it is currently proposed.

This implements the apparent legislative intent not to require registered C&NC administrators to demonstrate their competence to administer those units and the apparent intent not to disqualify those individuals from their current

positions. It also brings all administrators under Board disciplinary rules and continuing education requirements so that uniformity and effective implementation of Board policy is promoted and requires all subsequent C&NC administrators to meet Board requirements and all C&NC administrators who wish to become administrators of other than C&NC units attached to a hospital to establish their competency by meeting the minimum criteria adopted by the Board.

37. To implement this recommendation, Part B. should be amended by adding a new subpart B.6. to read as follows:

> The Board shall waive the requirements of part A.7. and A.8. for any applicant who, on April 15, 1980, was registered with the Commissioner of Health as a hospital administrator without the applicant passing the currently used written examination and even if the administrator had not served in that capacity for the two or three-year periods specified in Parts B.3. and B.4. or had not taken the additional courses specified in Part B.4. but any such license shall be endorsed to restrict the licensee to the administration of C&NC units attached to a hospital.

This would effectively limit Parts B.3. and B.4. to C&NC administrators who wish to be licensed without endorsement and would not be a substantial change under 9 MCAR § 2.111. Without a provision of this nature, the current rules impose qualification standards on C&NC administrators previously registered with the Department of Health that are inconsistent with the Board's construction of legislative intent.

Nonetheless, the Board may reasonably impose additional qualifications upon C&NC administrators, even those previously registered with the Department of Health, and is not required to adopt an "endorsed license" approach as suggested in this Report. The endorsed license is suggested only as a means of resolving legislative intent, as found by the Board, with their expressed concerns and is deemed appropriate in view of the conclusions made in this Report.

38. Joseph Hamilton challenged the necessity of the rules in a lengthy posthearing comment. His basic challenge is that federal law does not require C&NC administrators to be licensed but only requires such licensing in the event it is required by state law, that the Board has prematurely proposed the rules under consideration and that C&NC units and their administrators should not be licensed under state law as the Department of Health and the Board require. Hamilton's arguments are premised on the assumption that state law does not require C&NC administrators to be licensed and that the Board is proposing licensure of those individuals merely to preclude deficiency judgments against various hospital facilities throughout the state by HHS, which has initially and erroneously determined that the licensure of those individuals is required. However, since the Hearing Examiner has determined that all C&NC administrators must become licensed under state law, the status of federal regulations requiring such registration is not determinative of the need for the rules as proposed.

In addition, since the Board has no control over the Department of Health which has licensed C&NC units as nursing homes, the Board must license administrators of such units. Whether the Department of Health has improperly licensed those units does not invalidate the Board's proposed rules or render them unnecessary or unauthorized. The Board must defer to the requirements of

other departments and their interpretation of state law when such interpretation is based on a reasonable construction of the laws under which they operate. Until the determination of the Department of Health requiring C&NC units to be licensed as nursing homes is changed by the Legislature or the courts, the Board must defer to the Department of Health's construction of the laws it administers. Minn. Stat. § 144A.01, subd. 5, defines nursing home as "a facility or that part of a facility which provides nursing care to five or more persons." Minn. Stat. § 144A.02, provides that "No facility shall be used as a nursing home to provide nursing care unless the facility has been licensed as a nursing home." Minn. Stat. § 144A.18 provides that "No person shall act as a nursing home administrator or purport to be a nursing home administrator unless he is licensed by the board of examiners for nursing home administrators. And Minn. Stat. § 144A.24(a) requires the Board to develop and enforce standards for nursing home administrator licensing. Given these statutory provisions, it cannot be said that nursing homes should not be licensed or that the Department of Health's imposition of a license requirement on C&NC units is inconsistent with existing law. In fact, the plain language of the provisions indicate that C&NC units must be licensed as nursing homes as the Department of Health has concluded. Consequently, any previously adopted rules of the Department of Health which do not require licensing of such units must be considered to have been superseded by state law.

39. Part B.5. was subject to no adverse comments, is consistent with the requirements of Minn. Stat. § 144A.20 subd. 2 (1980), and is necessary and reasonable in its entirety.

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

## CONCLUSIONS

1. That the Board of Examiners for Nursing Home Administrators gave proper notice of the hearing in this matter.

2. That the Board has fulfilled the procedural requirements of Minn. Stat. § 15.0412, subd. 4-4f (1980) and all other procedural requirements of law or rule.

3. That the Board has demonstrated its statutory authority to adopt the proposed rules and has fulfilled all other substantive requirements of law or rule within the meaning of Minn. Stat. §§ 15.0412, subd. 4e and 15.052, subd. 3(4)(i) and (ii) (1980), except as noted at Finding 20; and that the Board's conclusion that some C&NC administrators are exempt from licensure under state law is erroneous as is stated in Finding 31 and elsewhere in this Report.

4. That the Board has documented the need for and reasonableness of its proposed rules with an affirmative presentation of facts in the record within the meaning of Minn. Stat. § 15.0412, subd. 4c (1980), except as noted at Finding 21.

5. That the amendments and additions to the proposed rules which were suggested by the Board after publication of the proposed rules in the State Register do not result in rules which are substantially different from the proposed rules as published in the State Register within the meaning of Minn. Stat. § 15.0412, subd. 4d (1980) and 9 MCAR §§ 2.110 A. and 2.111 (1980 Ed.).

6. That the Hearing Examiner has suggested action to correct the defects cited in Conclusions 3 and 4 as noted at Findings 20 and 21.

7. That due to Conclusions 3 and 4, this Report has been submitted to the Chief Hearing Examiner for his approval pursuant to Minn. Stat. § 15.0412, subd. 4d (1980).

8. That any Findings which might properly be termed Conclusions and any Conclusions which might properly be termed Findings are hereby adopted as such.

9. That a finding or conclusion of need and reasonableness in regard to any particular rule subsection does not preclude and should not discourage the Board from further modification of the proposed rules based upon an examination of the public comments, provided that no substantial change is made from the proposed rules as originally published, and provided that the rule finally adopted is based upon facts appearing in this rule hearing record.

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

## RECOMMENDATION

It is hereby recommended that the proposed rules be adopted except where specifically otherwise noted above, and as amended as suggested herein.

Dated this 19th day of February, 1981.

JON L. LUNDE
Hearing Examiner

NHA-81-002-JL

STATE OF MINNESOTA
OFFICE OF ADMINISTRATIVE HEARINGS

FOR THE BOARD OF EXAMINERS FOR NURSING HOME ADMINISTRATORS

In the Matter of Proposed Amendments to Minn. Rules NHA 10 and 13 Providing for Waiver of Certain Licensure Requirements and in the Matter of the Proposed Repeal of Minn. Rules NHA 22 and 23 and Portions of Minn. Rule NHA 10.

REPORT OF THE HEARING EXAMINER

The above-entitled matter came on for hearing before Jon L. Lunde, duly appointed Hearing Examiner, on Tuesday, December 23, 1980, at 9:30 a.m. in the Department of Health Building, Room 105, 717 Delaware Street S.E., Minneapolis, Minnesota, 55414, pursuant to an Order for Hearing dated October 31, 1980. This was a rulemaking proceeding conducted pursuant to Minn. Stat. Chapter 15, to determine whether the Board of Examiners for Nursing Home Administrators (the "Board") has authority to adopt the rules proposed and whether they are necessary and reasonable and may be adopted.

Joanne M. Ogata, Special Assistant Attorney General, 136 University Park Plaza Building, 2829 University Avenue S.E., St. Paul, Minnesota, 55414, appeared as counsel for the Board. Also appearing on behalf of the Board was Phillip C. Newberg, its Executive Secretary and only witness.

Approximately 15 persons attended the hearing and 13 of them signed the hearing register. The hearing continued throughout the morning and until all persons present had an opportunity to be heard. After the hearing, but before the expiration of the 20-day comment period, three public comments and one Board comment were submitted to the Hearing Examiner, as well as a copy of correspondence from the Board to the Regional Office of the U. S. Department of Health and Human Services. The Chief Hearing Examiner extended the due date for this Report from February 11, 1981 to February 19, 1981, at the request of the Hearing Examiner.

The Board of Examiners for Nursing Home Administrators must wait at least five working days before taking any final action on the rules; during that period, this Report must be made available to all interested persons upon request.

Pursuant to the provisions of Minn. Stat. § 15.0412, subd. 4d (1980), this Report has been submitted to the Chief Hearing Examiner for his approval. If the Chief Hearing Examiner approves the findings of this Report, he will advise the Board of actions which will correct the defects and the Board may not adopt the rule until the Chief Hearing Examiner determines that the defects have been corrected. However, in those instances where the Chief Hearing Examiner identifies defects which relate to the issues of need or reasonableness, the Board may either adopt the Hearing Examiner's recommendations to cure the defects or, in the alternative, if the Board does not elect to adopt the recommendations, it may submit the proposed rule to the Legislative Commission to Review Administrative Rules for the Commission's advice and comment. Provisions relating to this submission to the Commission may be found in Minn. Stat. § 15.0412, subd. 4d (1980).

If the Board elects to adopt the recommendations of the Hearing Examiner and makes no other changes and the Chief Hearing Examiner determines that the defects have been corrected, then the Board shall submit the rule to the Attorney General for review of form and legality. If the Board makes changes in the rule other than those recommended by the Hearing Examiner, then it shall submit the rule, with the complete record, to the Chief Hearing Examiner for a review of the changes before adopting it and submitting it to the Attorney General. Procedures relating to this subsequent review by the Chief Hearing Examiner are set forth in Minn. Stat. § 15.0412, subd. 4e (1980).

When the Board submits the rule to the Attorney General, it shall give notice on the day of submission to all persons who requested that they be informed of the submission to the Attorney General.

Based upon all the testimony, exhibits and written comments, the Hearing Examiner makes the following:

## FINDINGS OF FACT

### Procedural Requirements

1. On October 30, 1980, the Board filed the following documents with the Chief Hearing Examiner:

(a) A copy of the proposed rules.
(b) The Order for Hearing.
(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, November 17, 1980, more than 30 days prior to hearing, a Notice of Hearing and a copy of the proposed rules were published at 5 State Register 771-775.

3. On November 18, 1980, more than 30 days prior to hearing, the Board mailed the Notice of Hearing to all persons and associations who had registered their names with the Board for the purpose of receiving such notice.

4. On November 26, 1980, the Board filed the following documents:

(a) The Notice of Hearing as mailed.
(b) The Agency's certification that its mailing list was accurate and complete.
(c) The Affidavit of Mailing the Notice to all persons on the Agency's list.
(d) The Statement of Need and Reasonableness.
(e) The names of Board 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.
(f) A copy of the State Register containing the proposed rules.
(g) An Affidavit of Additional Notice.
(h) All materials received following a Notice of Intent to Solicit Outside Opinion published at 5 State Register 591 on Monday, October 6, 1980.

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

5. The record remained open through Monday, January 12, 1981 for the receipt of written comments and statements, the period having been extended by order of the Hearing Examiner to 20 calendar days following the hearing.

6. The Board received no public comments to its published Notice of Intent to Solicit Outside Opinions (See, Finding 4(h)). However, it did receive comments in response to a July 1, 1980 letter mailed to interested parties and soliciting comments on the licensure of the adminstrators of hospitals with attached nursing homes. Those comments were made part of the record (Ex. A).

7. Joseph Hamilton, Esq., Hamilton and Phillip, P.A., 3944 IDS Center, Minneapolis, Minnesota, 55402, representing more than 37 individuals and facilities affected by the proposed rules, alleges that the Board committed a violation of Minn. Stat. § 15.0412, subd. 6 (1980), in proposing the rules and that they cannot, for that reason, be adopted. That subdivision provides:

> When an agency seeks to obtain information or opinions in preparing to propose the adoption, amendment, suspension, or repeal of a rule from sources outside of the agency, the agency shall publish notice of its action in the state register and shall afford all interested persons an opportunity to submit data or views on the subject of concern in writing or orally. Such notice and any written material received by the agency shall become a part of the hearing record to be submitted to the attorney general under subdivision 4.

Hamilton alleges that this provision was violated because the Board sought comments from the U. S. Department of Health and Human Services (HHS) on the question whether federal regulations require all state nursing home administrators to be licensed, sometime in May, 1980, or before, without publishing notice that it had sought such comments. On October 6, 1980, the Board did, however, publish its Notice of Intention to Obtain Information from Non-Agency Sources on rules for nursing home administrators and specifically pointed out that the subject matter to be addressed included the "adoption of new rules establishing requirements for licensure of persons who on April 15, 1980, were employed as administrators of hospital convalescent and nursing care units and who were registered with the State of Minnesota as hospital administrators." Hamilton's argument is that the published notice was not sufficient under § 15.0412, subd. 6, and that the Board was required to publish an additional or earlier notice when it sought comments from the Department of Health and Human Services. He stated:

> The Board may argue that it complied with the statute in question by its Notice which was published in the State Register on October 6, 1980. (Board's Exhibit B.) One need only compare the date of the HHS policy letter with the date the notice was published to realize that the Board did not comply with the procedural safeguard. It is clear from the use of the word "seeks" that Minn. Stat. § 15.0412, Subd. 6, requires the agency to publish notice, before it obtains information or opinions from sources outside of the agency. The Board did not do so. Instead, the Board published notice that it was going to go outside of the agency some four and one-half months after it had obtained the opinion of HHS. By that time, the dangers of noncompliance described by an authority on administrative law had already accrued.
>
> Dean Auerbach stated the purpose for the procedural safeguard set forth in Minn. Stat. § 15.0412, Subd. 6.
>
> > Its commendable purpose is to enlarge the scope of public participation in agency rulemaking in still another way. It was apparently believed that the process of agency consultation with affected interests prior to the public hearing required by MAPA might settle the agency's views and minimize the significance of the hearing. The solution sought was not to prohibit such consultations, which were useful because they could go far to resolve potential debilitating conflicts, but to try to bring the general public into the process of prehearing consultation. 63 Minn. L. Rev. 151, 171, 172 (1979) (Emphasis supplied).

The Hearing Examiner is not persuaded that the statutory provision was violated in this case. First, it is noted, that an agency is not required to seek

any outside information or opinions in preparing to propose the adoption or amendment of existing rules. The law merely requires them, if they do seek outside information from any source, to publish a notice so that it can receive comments from all sources. The obvious purpose of the statutory requirement is to get comments and information from all persons who might be affected and not merely to rely on one source of information or comment which might not give the agency the perspective it needs to propose rules founded on all the facts and circumstances. In this case, when the Board sought comments from HHS, those comments were not sought in the preparation of the proposal of rules but merely to determine whether it should propose new rules or rule amendments. Clearly, that contact should not have required publication since the Board was not at that time proposing any rules. It would be wholly impractical for an agency to publish a notice in the State Register every time a comment is sought or an inquiry is made if such comment or inquiry could or might conceivably result in an agency's subsequent decision to propose rules. Moreover, once the Board determined that it might be necessary to propose rules relating to the subject matter, public notice was given to all persons permitting them to submit comments on it. At that time, Hamilton and other persons similarly situated who objected to the need of the proposed rules or the need for the rules in the subject matter areas noted in the Notice had an adequate opportunity to present their arguments and rationale to the Board.

8. While the concerns expressed by Professor Auerbach with respect to this provision are legitimate ones, his remarks are not altogether applicable to the HHS solicitation. The inquiry made of HHS was not a consultation with "affected interests" in the usual sense of that term and the issues involved were not the kind that would normally generate much public interest as is evidenced by the lack of any public comments to the solicitation eventually published. Auerbach's remarks seem to mean that the Board should not consult with the hospitals, nursing homes and their licensed administrators without giving notice to the general public and not that routine inter-governmental correspondence could not take place before such public notice was given.

In the latter respect, the provision was violated when the Board solicited comments from interested persons (affected interests) on July 1, 1980 without publishing notice to the general public. That issue, while not addressed by Hamilton, must be resolved.

9. The statute itself is silent as to the precise time when the publication of the notice must be made, but it is reasonable to assume that such publication was meant to be a meaningful act and that all persons would be given equal notice of the solicitation and an equal opportunity to present comments. While "affected interests" no doubt have special expertise and helpful insights, comments and information, the Minnesota Administrative Procedure Act was not designed so that they would receive preferential treatment, notice or opportunities; and it was not designed to give them special influence with the agencies of the state. The July 1, 1980 solicitation mailed to select groups violated that principle of equality and the purposes expressed by Professor Auerbach. However, in this case, the violation was not so substantial as to invalidate the proceedings.

10. In City of Minneapolis v. Wurtele, 291 N.W. 2d 386, 391 (Minn. 1980), the Minnesota Supreme Court stated:

> We note at the outset that the law does not mandate in all cases strict and literal compliance with all procedural requirements. Technical defects in compliance which do not reflect bad faith, undermine the purpose of the procedures, or prejudice the rights of those intended to be protected by the procedures will not suffice to overturn governmental action, particularly where, as here, substantial commitments have been made. . . .

While the procedures involved in that case concerned eminent domain, it reflects the general rule that technical violation of notice requirements which do not result in actual prejudice do not invalidate a rule. 1 Cooper, State Administrative Law, p. 192 (1965). In the instant proceeding, the Board was not acting in bad faith, all parties had an opportunity to address all issues, and no prejudice to any parties was established. Furthermore, the only serious potential for prejudice resulted from the letter of July 1, 1980 and not from the HHS inquiry.

11. It is generally recognized that informal participation in the actual formulation of rules gives the participants much greater influence over the final result than non-participants would have. 1 Cooper, State Administrative Law, pp. 198-99 (1965). Consequently, conflicting interests must be fairly represented and uniformly notified of pre-formulation activities. On the other hand, Professor Davis has noted, with respect to the federal notice and comment procedure for rulemaking that:

> Communications of all sorts are the life of a notice and comment proceeding. The more the better. They should not be prohibited. They should be invited and encouraged. If commissioners and staff have time to talk with interested persons, they should do so as far as their time permits; of course they should try to do so fairly. All kinds of communications, including written materials, oral arguments at a proceeding, and informal consultations should be allowed to whatever extent practical considerations permit. Although a cutoff point for presentations is necessary, the only restriction required either by fairness or by the needs of judicial review is that the essence of all significant communications should go into the public record. [Italics present]

* * *

> The law of the future is unlikely to condemn ex parte contacts in the making of rules of general applicability, but it is likely to require that all significant communications be made a part of the public record.

1 Davis, Administrative Law Treatise, § 6:19 (2d Ed. 1979).

In sum, it is concluded that the HHS inquiry was not a violation of § 15.0412, subd. 6, but that the July 1, 1980 letter to "interested parties" was a technical violation thereof. However, since the latter violation was not shown to have been in bad faith or to have resulted in actual prejudice, the violation does not invalidate this proceeding or the rules proposed for adoption.

Statutory Authority

12. As authority for its proposed rules and rule amendments, the Board cited Minn. Stat. §§ 144A.20 and 144A.22 through 144A.24 (1978). The provisions cited provide in part as follows:

> (a) Section 144A.20, subd. 1:
>
> The board of examiners may issue licenses to qualified persons as nursing home administrators and shall establish qualification criteria for nursing home administrators. . . .

(b) Section 144A.22 provides:

The board of examiners shall . . . adopt rules to govern its proceedings.

(c) Section 144A.23 provides:

Except as provided in section 144A.04, subdivision 5, the board of examiners shall have exclusive authority to determine the qualifications, skill and fitness required of any person to serve as an administrator of a nursing home.

(d) Section 144A.24 provides:

The board of examiners shall: (a) Develop and enforce standards for nursing home administrator licensing, which standard shall be designed to assure that nursing home administrators will be individuals of good character who, by training or experience, are suitably qualified to serve as nursing home administrators.

These provisions generally authorize the rule amendments currently proposed by the Board in the area covered.

General Introduction

13. The amendments to Minn. Rule NHA 10 remove the masculine gender of the language used rendering it sexually neutral, renumber the section to 7 MCAR § 6.010 to be consistent with current citation and practice, repeal obsolete provisions no longer necessary and add waiver provisions for the licensing of some applicants. The substantive amendments to this Rule were the heart of this proceeding.

14. The amendments to Minn. Rule NHA 13 renumber it to 7 MCAR § 6.013 to be consistent with current citation practice and limit the practice of nursing home administrators to any endorsements contained on the license. The amendments to § 6.013 were not subject to adverse public comment and are necessary and reasonable in their entirety.

15. The proposed repeal of Minn. Rules NHA 22 and 23 pertaining to the charges against licensed nursing home administrators and hearings on those charges was withdrawn by the Board at the hearing because those sections had previously been repealed in 1978 (See, OAH Docket NHA-78-001-PE and 2 S.R. 2347). Consequently, this Report will not address them.

Section 6.010 A.

16. Section 6.010 A. deals with the requirements which must be met in order to qualify for a nursing home administrator's license. It is primarily a recodification of former provisions of NHA 10 with language changes to delete masculine gender. The proposed subparts and their predecessors are as follows:

| Proposed Citation | Former Citation |
|---|---|
| § 6.010 A.1. | NHA 10(a)(1) |
| " 2. | " (a)(2) |
| " 3. | " (e)(3) |
| " 4. | " (e)(4) |
| " 5. | " (e)(5) |
| " 6. | " (e)(6) |
| " 7. | " (b)(1) |
| " 8. | " (d) |

17. Only one adverse comment was made with respect to Part A. K. Craig Wildfang, Staff Counsel for the Minnesota Association of Health Care Facilities (MAHCF) objected to proposed subpart A.8. Originally, NHA 10(d) contained a grandfather clause exempting those licensed prior to July 1, 1978 from the

degree requirement set forth therein. The grandfathering language is deleted from A.8. and apparently would exclude 75% of the currently licensed nursing home administrators from qualifying for relicensure. The Board did not respond to Mr. Wildfang's suggested amendment to this Part restoring the grandfather clause and did not mention the reason for its deletion in its Statement of Need and Reasonableness (hereinafter the "Statement"). Since the Board did not indicate an intention or state reasons for eliminating the grandfathering feature that had always been a part of the Rule, this subpart A.8. must be amended to make it clear that the degree requirement does not apply to those nursng home administrators who were previously licensed. To correct that defect, the Board can simply add another sentence to the very end of the subpart as currently proposed to read as follows: "The degree and practicum requirements of this subpart do not apply to those individuals who have previously been licensed by the Board as nursing home administrators." similar language added p. 2. see FoF 2

Without such an amendment to the Rule as proposed, it could not be deemed necessary or reasonable because the Board failed to present any facts or reasons why the grandfathering provisions should be eliminated at this time. Such an amendment to the proposed language is apparently consistent with the Board's intention and would not constitute a substantial change in the Rules for purposes of 9 MCAR § 2.111. Assuming Part A. is adopted as proposed by the Board, and that subpart A.8. is amended as recommended herein, the Hearing Examiner finds that part to be necessary and reasonable.

18. The Board proposes to repeal the provisions formerly found in NHA 10(b)(2), (3) and (5); NHA 10(c); and all of NHA 10(f). In its Statement regarding the repeals, Mr. Newberg stated:

> When the Board promulgated Minn. Rule NHA 10, it set up a time table during which the requirements for licensure would gradually become more stringent. By their terms, these sections of Rule 10 have now been superseded by other sections. Therefore, the Board feels that it is both prudent and reasonable to repeal these outdated sections. . . .

No one objected to the repealers proposed by the Board and the Hearing Examiner finds that the deletion of the obsolete language contained in the former rule as proposed by the Board is necessary and reasonable.

Section 6.010 B.

19. The proposed rules recodify former NHA 10(e) and (b)(4) as Parts B.1. and B.2., respectively. Such a renumbering is necessary, reasonable and appropriate. However, the internal citations in parts B.1. and B.2. are improper and incorrect because they do not cite to the Rule as recodified. Part B.1. references "NHA 10(a)(7) and 10(a)(8)" and part B.2. references "NHA 10(a)(7)." Those Parts, as recodified, should provide in their first lines as follows: changed p. 2, 3

B.1. "The board shall waive Part A.7. and A.8. if . . . ."

B.2. "The board shall waive Part A.7. if . . . ."

This erroneous manner of citing to other parts of § 6.010 recurs in other Parts of the section as amended and should be corrected prior to adoption. Citations in the rule should be to § 6.010 and not to "NHA 10" and the subpart cited should be to those subparts as renumbered and relettered by the amendments. Thus, in Parts B.3. and B.4., the citation to NHA 10(a)(7) and 10(a)(8) is improper and should be either to § 6.010 A.7. and A.8. or merely to "Parts A.7. and A.8."

20. As implied in the preceding Finding, the word "may" in parts B.1. through B.5. must be deleted. The rule as written permits the Board to have unfettered discretion in granting or not granting waivers to the application qualifications set forth in the rule. Such discretion, without adopted guidelines, fails to make the law administered by the Board specific as required by Minn. Stat. § 15.0411, subd. 3 (1980), (defining a rule) and leaves the granting of variances or waivers of the requirements to the whim of the Board. Such discretion is impermissible and a violation of a substantive provision of law. To correct this defect in Part B., the word "may" must be replaced with the word "shall". If the Board does not want waivers to be granted as a matter of course when an applicant meets the requirements specified for the granting of such a waiver, it should have made the exercise of its discretion more specific and contingent upon other factors. Since it failed to do that, it may not make the granting of such waivers wholly discretionary where the applicant meets the conditions specified. Holmes v. New York City Housing Authority, 398 F.2d 262 (2d Cir., 1968).

The Legislature, itself, has noted the problems which can arise with variances to duly promulgated rules and in § 15.0412, subd. 1a (1980), which is not effective until August 1, 1981, it has required that agencies set forth procedures and standards by which variances shall be granted or denied. The need for such standards in the granting of waivers to applicants for nursing home administrators' licenses is no less compelling.

21. Part B.1. is ostensibly a mere recodification of former NHA 10(e); however, that is not the case. The former NHA 10(e) permitted a waiver of the two-year college requirement after 1975 (NHA 10(c)), or a BA degree after 1978 (NHA 10(d)), or the specified surrogate for persons who were full-time nursing home administrators in another state for two years. Since NHA 10(c) is being repealed, NHA 10(d) (recodified as Part A.8.) would normally be the only waiver available to persons licensed in other states. However, in addition to proposing a waiver of Part A.8., the new Part B.1. allows a waiver of the 300-hour practicum (formerly NHA 10(b)(1), recodified as A.7.) which was not previously available. The facts showing the reasonableness and necessity of this additional waiver for those licensed in another state for two years was not shown, and as to Part B.1., the waiver should, therefore, be limited to a waiver only of the degree or surrogate requirements found in Part A.8. Only by deleting this additional language can the defect be cured. This deletion may be inconsequential since waivers of the practicum are specifically provided for under Part B.2.

22. Part B.2. is a mere recodification of former NHA 10(b)(4) authorizing a waiver of the practicum requirements of Part A.7. (formerly NHA 10(b)(1)) for those who have served one year full time as an administrator or assistant administrator in a health care facility. Since this is a mere recodification, its need and reasonableness need not be established. See, 9 MCAR § 2.104 (1980 Ed.).

MAHCP did, however, suggest that proposed Part B.2. be clarified. They stated:

> Again, because of the re-numbering and the re-drafting, a result is achieved by this provisions (sic) which was not intended. The intention of the Board in retaining this language was to permit the Board to continue to waive the practicum requirement in cases

where the applicant has served at least one year as an administrator or assistant administrator. Under the new numbering, the practicum requirement is stated in two separate provisions, § 6.010.A.7. and A.8. The requirement is the same, i.e. 300 clock hours, and it is clear that the Board did not intent to impose two different practicum requirements. The problem is that the language of § 6.010.B.2. allows the Board to waive A.7. but not A.8. The result is that under a strict interpretation of the rules, it might be argued that the Board must require the practicum from all applicants because technically the Board cannot waive the practicum required under A.8.

Contrary to this suggestion, the Hearing Examiner notes that former Rule NHA 10 did provide for the practicum requirement in two separate provisions, i.e., NHA 10(b)(1) and NHA 10(d). Under the former NHA 10, only the requirement of 10(b)(1) could be waived by the Board for those persons who had completed one year as an administrator or an assistant administrator in a health care facility. Since the Board did not respond to this comment at the hearing or in its posthearing comments, it is impossible for the Hearing Examiner to determine their intention regarding the two different practicum requirements contained in the new rule and taken from the prior rule. Since the substance of the Rule is not changed by the recodification of this section, its need or reasonableness is, as was previously stated, beyond the scope of this Report. However, MAHCF's comments with respect to part B.2. should be examined by the Board to determine whether its intention is being correctly reflected in the rules. If MAHCF's statement of its intention is correct, the Hearing Examiner defers to MAHCF's suggested remedial language on page 3 of their January 12, 1981 comment. If either of those suggestions were adopted by the Board, they would not amount to a substantial change in the Rules as proposed under 9 MCAR § 2.111. see F&F 3

Section 6.010 B.3. and B.4.

23. Proposed Part B.3. contains all new material providing for waiver of the requirement of Parts A.7. and A.8. for those persons who, on April 15, 1980, were registered with the Commissioner of Health as hospital administrators and responsible for a convalescent and nursing care unit (C & NC) unit attached to the hospital and had been in that capacity for at least three years. Those individuals need not have completed the 300-clock hour requirement of Part A.7. or the degree requirement of Part A.8., or its surrogate, but the individual must pass the currently used written examination. Proposed Part B.4. contains a different waiver clause for those previously registered C&NC administrators who served in that capacity for less than three years. An understanding of this Part and the objections raised to it require some reiteration of the statutory terrain.

24. Prior to 1976, nursing homes, by definition excluded C&NC units attached to hospitals and such C&NC units were not separately licensed by the Minnesota Department of Health. Hospital administrators who were managing such units (hereinafter C&NC administrators) were not, therefore, required to be licensed as nursing home administrators since the units they administered were not themselves separately licensed. In 1976, however, nursing homes were redefined to include such C&NC units but C&NC administrators were "exempted" from licensure as nursing home administrators by Minn. Laws 1976, Ch. 173, § 4, subd. 5, codified as Minn. Stat. § 144A.04, subd. 5, so long as they were

registered by and met the criteria established by the Department of Health. In 1980, all that changed. Minn. Laws 1980, Chapter 567, § 2, repealed the licensing provisions of Chapter 144 pertaining to hospital administrators so that they were no longer registered by the Department of Health but the Legislature did not repeal § 144A.04, subd. 5, containing the "exemption."

25. In a six-page opinion issued on December 22, 1980, the day prior to the hearing scheduled in this matter, the Attorney General concluded that those hospital administrators licensed by the Department of Health on April 15, 1980, the day before the repealer of the hospital administrators registration law was effective, need not be licensed as nursing home administrators. The effect of this decision was that those hospital administrators registered with the Department of Health prior to April 16, 1980 would not be required to be licensed as nursing home administrators even if the hospital they administered contained a C&NC unit but that those hospital administrators administering a hospital with such a C&NC unit, who were not so registered on April 15, 1980, or before, would be required to obtain a nursing home administrator's license from the Board before becoming a C&NC administrator. The Attorney General's Opinion was challenged by several parties and its impact on the necessity, reasonableness and authority for Parts B.3. and B.4. was raised. The Attorney General's construction of the Legislature's repeal of the hospital administrators licensing law without repealing the "exemption" language of § 144A.04, subd. 5, was challenged by Joseph Hamilton, who argued that state law, as it currently exists, does not require C&NC administrators to be licensed as nursing home administrators. He said:

> At the outset, it is important to note that the Board can no longer point to state law as justifying the need for the proposed amendments. The Minnesota Attorney General ruled on December 19, 1980, that hospital administrators who met the registration requirements immediately prior to their repeal in 1980 and who also administer C & NC units continue to be exempt from the normal licensure requirements for nursing home administrators, by virtue of Minn. Stat. § 144A.04, subd. 5 (1978). In effect, these individuals are given special licenses to operate their C & NC units. . . .
>
> While we do not necessarily agree that the Attorney General's Opinion should have been limited only to hospital administrators who met the registration requirements when they were in force, the Opinion makes it clear that there are no problems under state law justifying the need for the proposed amendments.

The Attorney General, however, did not hold that no hospital administrators were required to be licensed as nursing home administrators. The Opinion merely held that the repeal of Minn. Stat. §§ 144.59 through 144.65 (the hospital administrators registration law) did not repeal by implication § 144A.04, subd. 5. The Opinion quite clearly held that those licensed before April 16, 1980 were not required by state law to demonstrate any further competence to be licensed as nursing home administrators but did not hold that those who subsequently became employed as hospital administrators of facilities with an attached C&NC unit were "exempt" from licensure by the Board. However, as to the latter group, it is true that no amendments to the rule are necessary since the Board has determined that they must meet all licensing requirements.

Since C&NC administrators once licensed by the Department of Health are exempt from licensing by the Board under state law, as construed by the Attorney

General, one would normally conclude that Parts B.3. and B.4., which waive certain licensure requirements for that group, are unnecessary, as Hamilton argued. Nonetheless, the Board has concluded that such a waiver is necessary because HHS has initially decided that such C&NC administrators must be licensed by the state under federal law. The Board further reasons that since a license is required under federal law that it should make such a license available, even if not required by state law. It further reasons that since any license issued by it would permit the C&NC administrator to administer any nursing home (and not just one attached to a hospital) that it is justified in imposing additional qualifications on such C&NC administrators and that the waiver provisions of Parts B.3. and B.4. are, therefore, necessary and reasonable.

The Hearing Examiner finds that it is unnecessary to determine the requirements of federal law vis-a-vis the licensure of C&NC administrators even though interested parties spent a great deal of time addressing that issue. The reason for that conclusion, as is discussed in greater detail later in this Report, is that all nursing home administrators, even those previously licensed (or registered) by the Department of Health, must be licensed by the Board under state law. Since such licensure is required under state law, Parts B.3. and B.4. may be necessary, albeit for reasons other than those expressed by the Board and the Attorney General.

26. MAHCF argued that the plain language of Ch. 567, § 2, requires all hospital administrators of C&NC units to become registered as nursing home administrators. Thus, Mr. Wildfang stated:

> The repeal of the hospital administrator registration program creates an impossibility with respect to the exemption from licensure for "registered hospital administrators" under § 144A.04, Subd. 5. Regardless of how one attempts to construe the repealer, it is clear that it is literally impossible to qualify for the exemption because after April 15, 1980, no one is a registered hospital administrator because the program has been abolished. Therefore, searching for legislative "intent" by applying various aids to statutory construction, is a meaningless exercise. The plain meaning rule, applied to the repealer and § 144A.04, requires that hospital administrators become licensed as nursing home administrators.

27. Section 144A.04, subd. 5, provides in pertinent part as follows:

> A nursing home which is located in a facility licensed as a hospital pursuant to §§ 144.50 to 144.56, may employ as its administrator the registered administrator of the hospital if the individual meets minimum education and long-term care experience criteria set by rule of the commissioner of health.

This provision has not been repealed even though hospital administrators are no longer regulated by the Commissioner of Health nor registered pursuant to his rules. As has been pointed out, Hamilton takes the position that this section requires no hospital administrators to be licensed as nursing home administrators, the Attorney General takes the position that this section requires only those hospital administrators who were not registered on April 15, 1980 to become registered as nursing home administrators and Mr. Wildfang takes the position, on behalf of MAHCF, that all hospital administrators of facilities with attached C&NC units must become licensed nursing home administrators.

28. The Hearing Examiner agrees with the construction urged by MAHCF not so much because of the various canons of construction cited by the parties but because of the effect and results which follow from the licensure of only some

hospital administrators or none at all. Taking all C&NC administrators as a group, it is unreasonable to conclude that only some of them are subject to disciplinary action by the Board and that improprieties justifying license revocation or suspension can be imposed only on that group which must be licensed but cannot be imposed on the other group, even if they engage in similar behavior. Furthermore, it is unreasonable to conclude that changing notions of the background necessary or the continuing education needed to maintain licensure status would only be enforceable against one group but not the other. Such disparate treatment precludes effective discipline or policy implementation and it is such an illogical and contradictory result that the Hearing Examiner must reject any conclusion that the Legislature intended it to occur. So long as any hospital administrators of the group relevant here are considered "exempt" from licensing by the Board, the anomalous results remain. Furthermore, the Hearing Examiner has grave doubts that the licensure, extraction of license fees, the imposition of discipline, or the imposition of continuing education requirements can be imposed on one group of individuals and not on another under basic notions of equal protection or that a scheme which differentiates between the two, especially as to licensure, discipline and continuing education, has a rational constitutional basis. For that reason, the Hearing Examiner has concluded, contrary to the Attorney General, that all hospital administrators who administer hospitals with attached C&NC units must be licensed by the Board since the repealer of the hospital administrators registration law. As will be discussed infra, such an approach renders the waiver provisions in Part B. more rational and reasonable.

29. Normally, a statute should not be construed to place an impossible burden on a party. However, that canon is not violated by construing § 144A.04, subd. 5, so as to preclude or render impossible the acquisition of an exemption from licensure because there is no burden which cannot be met, but merely a benefit or privilege which is no longer available. When the hospital administrator registration provisions were repealed, the Legislature knew that C&NC administrators would no longer be "registered" and would no longer be able to meet the qualifications adopted by the Department of Health. Fully cognizant of that inability, the Legislature failed to make any adjustments to it. The only logical inference that can be drawn from this state of affairs is that they no longer intended such C&NC administrators to be exempt from licensure, assuming that was, in fact, the original intention of the provision.

This conclusion, as was mentioned previously, becomes inescapable when one considers the obvious equal protection problems created by the construction adopted by the Attorney General. As a general rule, statutes are to be construed to avoid an unconstitutional result. However, the construction adopted by the Attorney General does not do so. The basic requirement of equal protection is that all parties in a class are to be treated equally unless there are reasonable grounds or a rational basis for treating them differently. Barker v. Nelson, 291 Minn. 310, 191 N.W.2d 185 (1971); 3 B Dunnell Minn. Digest 2d, Constitutional Law § 1.00 (3d Ed. 1979). This does not require that things different in fact be treated as though they are the same but that things that are the same be treated equally unless there are reasonable grounds for distinction. Those classes that are similarly situated must be afforded equal

rights and privileges and subject to the same sanctions, penalties and restrictions.

30. In this case, licensing only those C&NC administrators who were not registered with the Department of Health on April 15, 1980 has no reasonable basis and offends the equal protection clause. In licensing, as in other areas, classes for licensing must be based on reasonable and substantial grounds and the standards for licensing must be the same for subclasses defined. 51 A.L.R.2d, Licenses and Permits, §§ 28-30. That principle would be violated if only some C&NC administrators are licensed.

If all nursing home administrators constitute the proper class, there is now no reasonable basis for excluding C&NC administrators from the licensure requirements, license fees, continuing education requirements and standards of behavior applicable to the others. At one time, there were two separate state agencies dealing with these matters and the Legislature concluded that as to C&NC administrators, only one agency's requirements and sanctions should apply. That was not an unreasonable decision. However, now only one agency, the Board, has any power to license and regulate, and if some C&NC administrators are exempt, the others would be denied equal protection because there is no rational basis for concluding that nursing home administrators need continuing education but that C&NC administrators do not; that nursing home administrators should be subject to discipline or license fees, but that some C&NC administrators should not; or that there is a public interest in regulating nursing home administrators but none in regulating C&NC administrators.

31. Furthermore, even if it was concluded that C&NC administrators were an appropriate subclass, there is no rational basis for further classifying that subclass on the basis of those registered with the Department of Health prior to April 15, 1980, and those who were not so registered. There is no reason to suppose that the latter are the only C&NC administrators who should pay a license fee, need continuing education, or should be subject to disciplinary action. Thus, in Sweeney v. Cannon, 251 N.Y.S. 2d 146 (1964), the Court held that a statute requiring every attorney licensed and admitted to practice law on a certain date to file a certificate of registration and pay a $15 fee violated the equal protection clause because it unreasonably discriminated in favor of lawyers admitted after that date. Further, in State v. Luscher, 157 Minn. 192, 195 N. W. 914 (1923), the Court held that a law prescribing grounds on which license to practice dentistry may be revoked but excluding from its application persons lawfully practicing dentistry at the time of its enactment was an unconstitutional denial of equal protection where the time element (date of passage) had no relation to the object of the legislation.[1]

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[1] A classification to be constitutional must uniformly, without discrimination, apply to all who are similarly situated with respect to conditions or wants justifying the legislation, the distinctions between classes must be genuine and substantial, and the classes must be germane to the purposes of the law. 3B Dunnell Minn. Digest 2d, § 6.05 (3d ed. 1979). The law may not impose restrictions on one class that are not imposed on others who are similarly situated. City of St. Paul v. Dalsin, 245 Minn. 325, 71 N.W. 2d 855 (1955); Hortonville E. Assn. v. Hortonville J. School D., 66 Wis.2d 469, 225 N.W.2d 658 (1975). Thus, it has been held that a law may not require a prepublication comic book license from all publishers but exempt the comics published

(Continued on next page)

For these reasons, it is concluded that Minn. Stat. § 144A.04, subd. 5, must be construed to mean that C&NC administrators are not exempt from licensure. This construction creates no equal protection problems and is consistent with the general rule strictly construing exemptions from licensing statutes. See, 51 Am. Jur. 2d, Licenses & Permits § 36. It could be argued that the statute meant to exclude all C&NC administrators from licensure because all will meet the standards of the Department of Health (since there are no standards to meet), but such a construction of the statute offends the obvious policy reasons for requiring licensure of nursing home administrators, ignores the equal protection problems created, and fails to account for the requirement of "registration" by the Department of Health.

32. Parts B.3. and B.4. permit the waiver of some or all of the requirements of parts A.7. and A.8., depending on whether the nursing home administrator who applies for licensure has three or more years of experience as such an hospital administrator. These two waiver provisions are necessary and reasonable in their entirety and the reasonableness of imposing those qualifications that are not waivable was persuasively and fully set forth in the Board's Statement (p.4-7).

However, the Hearing Examiner concludes that some alternate suggestions are required in view of his conclusion that all C&NC administrators must be licensed, and in view of the Board's remarks. These suggestions are made because of the distinction that obviously exists between previously registered hospital administrators who have managed hospitals with attached C&NC units and need to be licensed as such, those C&NC administrators never registered by the Department of Health, and those hospital administrators who desire to administer nursing homes that are not C&NC units attached to hospitals. With respect to C&NC administrators who were registered with the Department of Health on or before April 15, 1980, the Hearing Examiner recommends that the Board license those individuals as nursing home administrators without any further qualifications or restrictions. However, consistent with the Board's own rules, licenses granted to such administrators should be accompanied by an endorsement which limits them to the administration of nursing homes attached to hospitals; and that all C&NC administrators who were so registered be given a license to administer any nursing home, without endorsement, only pursuant to Parts B.3. and B.4. All other C&NC administrators should be licensed without endorsement and only if they meet all licensing criteria.

33. This permits the immediate licensing of those hospital administrators found competent by the Legislature on or before April 15, 1980, and is consistent with the Legislative inference that those individuals need no further

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(Cont. from previous page)

by newspapers. Adams v. Hinkle, 51 W.2d 763, 322 P.2d 844 (1958). In addition, where classification is based on a time element which bears no relationship to the result or object of the legislation, it will not be upheld. State v. Donovan, 218 Minn. 606, 16 N.W.2d 899 (1944). In this case, the classification of C&NC administrators into those who were or were not registered with the Department of Health prior to April 16, 1980, bears no relationship to the purposes of the nursing home license laws as the Board's rules pertaining to licensure, discipline and continuing education.

training or qualifications to manage C&NC units attached to the hospitals they administer. It is also consistent with the Attorney General's Opinion (p. 3.) discussing the unlikelihood of a legislative intention to disqualify all C&NC administrators from being employed in their present position until they have demonstrated their competence to administer those units. Those C&NC administrators who were not so registered, would, of course, have to meet all the qualifications of the Board. This subjects all nursing home administrators to disciplinary action by the Board and the continuing education requirements adopted.

In addition, requiring the licensure of all C&NC administrators would overcome the pertinent objections to Parts B.3. and B.4. which were raised by the Minnesota Hospital Assocation and the Minnesota Association of Homes for the Aging (MHA/MAHA). They challenge Parts B.3. and B.4. as unreasonable because, if some administrators of C&NC units are, under § 144A.04, subd. 5, exempt from licensure requirements of the Board, it is inconsistent for the Board to impose affirmative licensing obligations upon them as is done in Parts B.3 and B.4. The Board has sidestepped this issue by alleging that its licensing rules are not rules that must be complied with but merely a certification procedure that the Board makes available to individuals who do not have to be licensed under state law but who must be licensed under federal law. The Hearing Examiner rejects that line of reasoning. Although the Board alleged that it has no authority to enforce its rules, Minn. Stat. § 214.11 (1980) gives to any licensing Board authority to bring an action in its own name to restrain any unauthorized practice or violation or threatened violation of any rule which such Board is empowered to regulate or enforce.

34. If all C&NC administrators are required to be licensed, there is no question that Parts B.3. and B.4. are necessary and authorized. However, if only some C&NC administrators are required to be licensed, and those who were once registered with the Department of Health are exempt, then the rules as proposed do raise legitimate issues as to whether they are authorized or necessary. Thus, MHA/MAHA stated:

> . . . [T]he Attorney General has ruled that hospital administrators who were permitted by Minn. Stat. § 144A.04, subd. 5, to administer C&NC units prior to the repeal of Minn. Stat. §§ 144.59 to 144.65 through registration with the Commissioner of Health may continue to administer a C&NC unit attached to a hospital without obtaining a nursing home administrator's license. Since there is no requirement under state laws interpreted by the Attorney General that such persons be licensed as nursing home administrators, the waiver provisions of proposed rule 7 MCAR § 6.010 B.3. and 4. are unnecessary. Further, these provisions, which impose additional requirements upon such persons (e.g., passing the currently used written examination and in some instances requiring that certain educational courses be taken), appear to be materially inconsistent with State law as interpreted by the Minnesota Attorney General and therefore not within the authority of the Board to adopt.
>
> Based on the Attorney General's Opinion that under Minnesota law, administrators of C&NC units who were registered with the Commissioner of Health prior to the repeal of Minn. Stat. §§ 144.59 to 144.65 need not be licensed as nursing home administrators, MHA/MAHA questions the authority of the Board to adopt 7 MCAR § 6.010 B.3. and 4.

Since C&NC administrators once registered with the Department of Health are not exempt from licensure by § 144A.04, subd. 5, and since the Board has authority

to adopt licensing standards for the C&NC administrators who are not so registered, there is no inconsistency between state law and Parts B.3. and B.4. as alleged by MHA/MAHA. Furthermore, since all C&NC administrators must be licensed by the Board under State law as it currently exists, the proposed rule is clearly authorized and necessary

35. Federal authorities from the U. S. Department of Health and Human Services (HHS) and the Minnesota Department of Health, itself, have taken the position, initially, at least, that all C&NC administrators must be licensed and that a failure to obtain such licensure will jeopardize federal funding to the facilities administered by them and result in other sanctions. If it is true, as the Board and the Attorney General initially determined, that C&NC administrators who were previously registered are exempt from licensure, the mere fact that such licensure is required by Federal law would not authorize the Board to issue licenses to them, and in so doing, to impose additional requirements for licensure as a condition to issuance of the license. However, since those C&NC administrators are not, in fact, exempt from licensure under State law, the Board has authority and an obligation to license them and may impose additional requirements upon those individuals as a condition to licensure.

36. Since the Board is required to license all C&NC administrators, it may wish to re-examine its rules, especially Parts B.3. and B.4. to determine whether those Parts correctly reflect their objectives. This Report does put the licensing rules in a different perspective, and because of the Board's Statement regarding its concerns and its objectives, it is recommended, as was previously stated, that it permit previously registered C&NC administrators to acquire an endorsed license and exempt them from further licensing qualification requirements (entitling them to what one party described as a "limited license"). The rule should state that all C&NC administrators who were previously registered by the Department of Health on or before April 15, 1980, shall be entitled to a nursing home administrator's license without meeting additional requirements but that any such license would be "limited" and would contain an endorsement limiting their practice to C&NC facilities connected to a hospital; in effect, grandfathering them as C&NC administrators.

In this way, the Board could license previously registered C&NC administrators without licensing them to administer any nursing home. Apparently, the additional licensing qualifications were imposed on such C&NC administrators only because they could, under an unlimited license, administer any nursing home. Since an endorsed license would preclude that, the Hearing Examiner believes the endorsed license approach would accomplish the Board's objective and protect against its concerns. Also, it would permit C&NC administrators to continue in their current positions without meeting additional qualifications as the Board believes the legislature intended.

All C&NC administrators who were not so registered on April 15, 1980, or who wish to practice outside their endorsements would be entitled to licensure without endorsement but only pursuant to the rules as proposed by the Board (Parts B.3. and B.4.) and would be required to meet the additional qualifications in the rule as it is currently proposed.

This implements the apparent legislative intent not to require registered C&NC administrators to demonstrate their competence to administer those units and the apparent intent not to disqualify those individuals from their current

positions. It also brings all administrators under Board disciplinary rules and continuing education requirements so that uniformity and effective implementation of Board policy is promoted and requires all subsequent C&NC administrators to meet Board requirements and all C&NC administrators who wish to become administrators of other than C&NC units attached to a hospital to establish their competency by meeting the minimum criteria adopted by the Board.

37. To implement this recommendation, Part B. should be amended by adding a new subpart B.6. to read as follows:

> The Board shall waive the requirements of part A.7. and A.8. for any applicant who, on April 15, 1980, was registered with the Commissioner of Health as a hospital administrator without the applicant passing the currently used written examination and even if the administrator had not served in that capacity for the two or three-year periods specified in Parts B.3. and B.4. or had not taken the additional courses specified in Part B.4. but any such license shall be endorsed to restrict the licensee to the administration of C&NC units attached to a hospital.

see need language added p.3

This would effectively limit Parts B.3. and B.4. to C&NC administrators who wish to be licensed without endorsement and would not be a substantial change under 9 MCAR § 2.111. Without a provision of this nature, the current rules impose qualification standards on C&NC administrators previously registered with the Department of Health that are inconsistent with the Board's construction of legislative intent.

Nonetheless, the Board may reasonably impose additional qualifications upon C&NC administrators, even those previously registered with the Department of Health, and is not required to adopt an "endorsed license" approach as suggested in this Report. The endorsed license is suggested only as a means of resolving legislative intent, as found by the Board, with their expressed concerns and is deemed appropriate in view of the conclusions made in this Report.

38. Joseph Hamilton challenged the necessity of the rules in a lengthy posthearing comment. His basic challenge is that federal law does not require C&NC administrators to be licensed but only requires such licensing in the event it is required by state law, that the Board has prematurely proposed the rules under consideration and that C&NC units and their administrators should not be licensed under state law as the Department of Health and the Board require. Hamilton's arguments are premised on the assumption that state law does not require C&NC administrators to be licensed and that the Board is proposing licensure of those individuals merely to preclude deficiency judgments against various hospital facilities throughout the state by HHS, which has initially and erroneously determined that the licensure of those individuals is required. However, since the Hearing Examiner has determined that all C&NC administrators must become licensed under state law, the status of federal regulations requiring such registration is not determinative of the need for the rules as proposed.

In addition, since the Board has no control over the Department of Health which has licensed C&NC units as nursing homes, the Board must license administrators of such units. Whether the Department of Health has improperly licensed those units does not invalidate the Board's proposed rules or render them unnecessary or unauthorized. The Board must defer to the requirements of

other departments and their interpretation of state law when such interpretation is based on a reasonable construction of the laws under which they operate. Until the determination of the Department of Health requiring C&NC units to be licensed as nursing homes is changed by the Legislature or the courts, the Board must defer to the Department of Health's construction of the laws it administers. Minn. Stat. § 144A.01, subd. 5, defines nursing home as "a facility or that part of a facility which provides nursing care to five or more persons." Minn. Stat. § 144A.02, provides that "No facility shall be used as a nursing home to provide nursing care unless the facility has been licensed as a nursing home." Minn. Stat. § 144A.18 provides that "No person shall act as a nursing home administrator or purport to be a nursing home administrator unless he is licensed by the board of examiners for nursing home administrators. And Minn. Stat. § 144A.24(a) requires the Board to develop and enforce standards for nursing home administrator licensing. Given these statutory provisions, it cannot be said that nursing homes should not be licensed or that the Department of Health's imposition of a license requirement on C&NC units is inconsistent with existing law. In fact, the plain language of the provisions indicate that C&NC units must be licensed as nursing homes as the Department of Health has concluded. Consequently, any previously adopted rules of the Department of Health which do not require licensing of such units must be considered to have been superseded by state law.

39. Part B.5. was subject to no adverse comments, is consistent with the requirements of Minn. Stat. § 144A.20 subd. 2 (1980), and is necessary and reasonable in its entirety.

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

## CONCLUSIONS

1. That the Board of Examiners for Nursing Home Administrators gave proper notice of the hearing in this matter.

2. That the Board has fulfilled the procedural requirements of Minn. Stat. § 15.0412, subd. 4-4f (1980) and all other procedural requirements of law or rule.

3. That the Board has demonstrated its statutory authority to adopt the proposed rules and has fulfilled all other substantive requirements of law or rule within the meaning of Minn. Stat. §§ 15.0412, subd. 4e and 15.052, subd. 3(4)(i) and (ii) (1980), except as noted at Finding 20; and that the Board's conclusion that some C&NC administrators are exempt from licensure under state law is erroneous as is stated in Finding 31 and elsewhere in this Report.

4. That the Board has documented the need for and reasonableness of its proposed rules with an affirmative presentation of facts in the record within the meaning of Minn. Stat. § 15.0412, subd. 4c (1980), except as noted at Finding 21.

5. That the amendments and additions to the proposed rules which were suggested by the Board after publication of the proposed rules in the State Register do not result in rules which are substantially different from the proposed rules as published in the State Register within the meaning of Minn. Stat. § 15.0412, subd. 4d (1980) and 9 MCAR §§ 2.110 A. and 2.111 (1980 Ed.).

6. That the Hearing Examiner has suggested action to correct the defects cited in Conclusions 3 and 4 as noted at Findings 20 and 21.

7. That due to Conclusions 3 and 4, this Report has been submitted to the Chief Hearing Examiner for his approval pursuant to Minn. Stat. § 15.0412, subd. 4d (1980).

8. That any Findings which might properly be termed Conclusions and any Conclusions which might properly be termed Findings are hereby adopted as such.

9. That a finding or conclusion of need and reasonableness in regard to any particular rule subsection does not preclude and should not discourage the Board from further modification of the proposed rules based upon an examination of the public comments, provided that no substantial change is made from the proposed rules as originally published, and provided that the rule finally adopted is based upon facts appearing in this rule hearing record.

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

RECOMMENDATION

It is hereby recommended that the proposed rules be adopted except where specifically otherwise noted above, and as amended as suggested herein.

Dated this 19th day of February, 1981.

JON L. LUNDE
Hearing Examiner

# PROPOSED RULES

Pursuant to Minn. Laws of 1980, § 15.0412, subd. 4h, an agency may propose to adopt, amend, suspend or repeal rules without first holding a public hearing, as long as the agency determines that the rules will be noncontroversial in nature. The agency must first publish a notice of intent to adopt rules without a public hearing, together with the proposed rules, in the *State Register*. The notice must advise the public:

1. that they have 30 days in which to submit comment on the proposed rules;
2. that no public hearing will be held unless seven or more persons make a written request for a hearing within the 30-day comment period;
3. of the manner in which persons shall request a hearing on the proposed rules;

and

4. that the rule may be modified if modifications are supported by the data and views submitted.

If, during the 30-day comment period, seven or more persons submit to the agency a written request for a hearing of the proposed rules, the agency must proceed under the provisions of § 15.0412, subds. 4 through 4g, which state that if an agency decides to hold a public hearing, it must publish in the *State Register* a notice of its intent to do so. This notice must appear at least 30 days prior to the date set for the hearing, along with the full text of the proposed rules. (If the agency has followed the provisions of subd. 4h and has already published the proposed rules, a citation to the prior publication may be substituted for republication.)

Pursuant to Minn. Stat. § 15.0412, subd. 5, when a statute, federal law or court order to adopt, suspend or repeal a rule does not allow time for the usual rulemaking process, temporary rules may be proposed. Proposed temporary rules are published in the *State Register*, and for at least 30 days thereafter, interested persons may submit data and views in writing to the proposing agency.

## Board of Examiners for Nursing Home Administrators

### Proposed Amendments to Rules Providing for Waiver of Certain Licensure Requirements; Proposed Repeal of Rules NHA 22 and 23

#### Notice of Hearing

A public hearing concerning the proposed amendments to NHA 10 and 13 (to be codified as 7 MCAR §§ 6.010 and 6.013) and the proposed repeal of NHA 22 and 23 and portions of NHA 10 will be held in Room 105, Minnesota Department of Health Building, 717 Delaware Street Southeast, Minneapolis, Minnesota, on Tuesday, December 23, 1980, commencing at 9:30 a.m. The proposed amendments and repeals may be modified as a result of the hearing process. Therefore, if you are affected in any manner by the proposed amendments and repeals 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, Hearing Examiner, Room 300, 1745 University Avenue, St. Paul, Minnesota 55104, telephone: (612) 296-5938, either before the hearing or within five (5) 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 twenty (20) calendar days. All such statements will be entered into and become part of the record. For those wishing to submit written statements or exhibits, it is requested that at least two (2) copies be furnished. In addition, it is suggested, to save time and avoid duplication, that those persons, organizations, or associations having a common viewpoint or interest in these proceedings join together where possible and present a single statement in behalf of such interests. The rule hearing procedure is governed by Minn. Stat. §§ 15.0411-15.0417, and 15.052, and by 9 MCAR §§ 2.101-2.113 (Minnesota Code of Agency Rules). If you have any questions about the procedure, call or write the hearing examiner.

Notice is hereby given that twenty-five (25) days prior to the hearing, a Statement of Need and Reasonableness will be available for review at the agency and at the Office of Administrative Hearings. This Statement of Need and Reasonableness will include a summary of all of the evidence and argument which the agency anticipates presenting at the hearing justifying both the need for and the reasonableness of the proposed rules. However, additional evidence may be submitted in response to questions raised by interested persons. You are therefore urged to both review the Statement of Need and Reasonableness before the hearing and to attend the hearing. Copies of the Statement of Need and Reasonableness may be obtained from the Office of Administrative Hearings at a minimal charge.

The agency's authority to amend NHA 10 and 13 and to repeal NHA 22 and 23 is contained in Minn. Stat. §§ 144A.20, 144A.22, 144A.23 and 144A.24 (1978).

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

If adopted, the proposed amendments would allow the board to waive certain licensure requirements for any applicant who, on April 15, 1980, was registered with the Commissioner of Health as a hospital administrator and who was on that date administratively responsible for a convalescent and nursing care unit attached to the hospital. The proposed amendments would also allow the board to waive certain licensure requirements and issue a restricted license to a person administering a nursing home operated in accordance with The Church of Christ, Scientist. It is also proposed that NHA 22 and 23 and portions of NHA 10 be repealed.

A copy of the proposed amendments is attached to this Notice of Hearing. Additional copies will be available at the door on the date of the hearing or may be obtained by writing to Phillip C. Newberg, Executive Secretary, Minnesota Board of Examiners for Nursing Home Administrators, 717 Delaware Street Southeast, Minneapolis, Minnesota 55414.

Notice: 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 (5) 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 (5) days after he or she commences lobbying. A lobbyist is defined in Minn. Stat. § 10A.01, subd. 11 (Supp. 1979) as any individual:

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

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

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

October 31, 1980

Phillip C. Newberg
Executive Secretary

## Amendments as Proposed

7 MCAR § 6.010 ~~NHA 10~~ Requirements.

A.~~(a)~~ No license shall be issued to a person as a nursing home administrator unless the individual:

1.~~(1) He~~ is at least 18 years of age.

2.~~(2) He~~ is of sound physical and mental health.

3.~~(3) He~~ is of good moral character and otherwise suitable.

4.~~(4) He~~ has furnished satisfactory evidence, as required by the board, that he/she possesses the general administrative abilities needed to satisfactorily administer a nursing home and possesses the ability to relate the administration of a nursing home to the physical, psychological, spiritual, emotional and social needs of patients and to create a compassionate and helpful environment.

5.~~(5) He~~ has paid all license and examination fees as established by the board.

6.~~(6) He~~ has achieved a passing score, to be reasonably established by the board, on all required examinations, unless otherwise hereinafter provided.

7.~~(1) Satisfactory completion of~~ has satisfactorily completed a board approved practicum course in long term care administration of a minimum of 300 clock hours under the guidance of a licensed nursing home administrator preceptor and the supervision of a faculty person coordinating the course at the college or university offering the course.

8.~~(d) After July 1, 1978, no initial license shall be issued unless the applicant~~ has a Baccalaureate degree (or a higher degree) from an accredited institution. If this degree ~~(or a higher degree)~~ is not in health care administration with courses in long term care, the degree must include at least one course in each of the following areas: management, long term care programs, gerontology, issues in health care, medical terminology, business or health care law, accounting or fiscal management, and a practicum experience of a minimum of 300 clock hours in a long term care facility.

~~(b) Any applicant for licensure as a nursing home administrator shall submit evidence, satisfactory to the board, that he has met the following minimum educational requirements:~~

~~(2) Satisfactory completion of a minimum of one college level course of at least six qtr. credit hours or four semester hours in long term care in the area of the applicant's greatest need as determined by the board.~~

~~(3) The board may waive NHA 10(b)(1) and/or NHA 10(b)(2) if the applicant holds either a Baccalaureate or Master's degree in Health Care Administration from an accredited institution if the degree includes courses of a minimum of six qtr. credit hours or four semester hours in long term care.~~

~~(5) The board may waive NHA 10(b)(2) if the applicant submits satisfactory evidence of having actively served full time (40 hrs. per week) as a licensed nursing home administrator in another state for a minimum period of one year.~~

~~(c) After July 1, 1975, no initial license shall be issued unless the applicant has completed at least two years of college from an accredited institution or has an Associate of Arts degree from an accredited institution. If this does not include or the applicant does not have a minimum of six qtr. credit hours or four semester hours in long term health care and a practicum experience of a minimum of 300 clock hours in a long term care facility, he or she must complete such courses in addition to the above educational requirements.~~

~~(f) The board may waive NHA 10(d) for all applicants whose application for licensure is received in the board office on or before June 30, 1978, but who have not met all licensure requirements as of that date, if:~~

~~(1) the application for licensure is fully completed with all required supporting data provided;~~

~~(2) application fee has been paid;~~

~~(3) the applicant has either:~~

~~(aa) written the required examination; or~~

~~(bb) has completed, is in the process of completing, or has made timely and final application to take all the educational courses required by NHA 10(e); and~~

~~(4) Satisfactorily writes the required examination and completes all educational courses required by NHA 10(e) by June 15, 1979.~~

B. Waiver provisions.

1.~~(e)~~ The board may waive ~~NHA 10(e) or~~ NHA 10~~(d)~~(a)(7) and 10(a)(8) if the applicant submits satisfactory evidence of having actively served full time (40 hrs. per week) as a licensed nursing home administrator in another state for a minimum period of two continuous years and meets all other licensure requirements.

2.~~(1)~~ The board may waive NHA 10~~(b)(1)~~(a)(7) if the applicant submits evidence of having completed satisfactorily one year full time as an administrator or in an assistant administrator position in a health care facility.

3. The board may waive the requirements of NHA 10(a)(7) and 10(a)(8) for any applicant who, on April 15, 1980, was registered with the Commissioner of Health as a hospital administrator and who was administratively responsible on April 15, 1980, for a convalescent and nursing care (C&NC) unit attached to a hospital and had served in that capacity for a period of three (3) or more years. Any applicant applying for licensure pursuant to this rule shall be required to pass the currently used written examination.

4. The board may waive all, except the following, requirements of NHA 10(a)(7) and 10(a)(8) for any applicant who, on April 15, 1980, was registered with the Commissioner of Health as a hospital administrator and who was administratively responsible on April 15, 1980, for a convalescent and nursing care (C&NC) unit attached to a hospital and had served in that capacity for a period of less than three (3) years:

a. Long term care programs.

b. Gerontology.

Any applicant applying for licensure pursuant to this rule shall be required to pass the currently used written examination.

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

5. The board may waive any provision of its rules requiring a demonstration of medical knowledge which is contrary to the religious beliefs of the Church of Christ, Scientist for any applicant who seeks to obtain a license restricted to administering a nursing home operated exclusively in accordance with the teachings of the Church of Christ, Scientist. Any license issued pursuant to this section shall be endorsed to restrict the license to administering such institutions.

7 MCAR § 6.013 ~~NHA 13~~ License—Issuance.

A.~~(a)~~ An applicant for license as a nursing home administrator who has complied with the requirements of the licensing law and the standards provided herein and has passed the examinations, shall be issued a license on a form provided for that purpose by the board, certifying that such applicant has met the requirements of the laws, rules and regulations entitling him to serve, act and practice, and otherwise hold himself out as a duly licensed nursing home administrator subject to any endorsements on the license. Any license issued by the board shall be under the hand and seal of the chairperson and secretary of the board.

~~NHA 22 Charges~~

~~(a) Any person, or association, or the board, or any member thereof, may prefer charges against any licensee or temporary licensee;~~

~~(1) Such charges shall be in writing and signed by the complainant and shall be submitted to the board. The board shall provide a copy of the charges to the party being charged.~~

~~(b) The board, or any person or persons appointed by it for the said purpose, may hold a preliminary hearing to determine if a formal hearing on the charges is necessary.~~

~~(1) The board may dismiss the charges and take no action thereon, by formal hearing or otherwise, in which event the charges and the order dismissing the charges shall be filed by the board.~~

~~(c) If the board or the person or persons appointed by it, decide that the charges shall be heard, the board shall designate a hearing officer who is not a member of or an employee of the board to examine the charges and set a time and place for the hearing.~~

~~(1) A copy of the charges, together with a notice of the time and place of the hearing, shall be served on the accused at least (30) days before the date fixed for the hearing.~~

~~(2) Where personal service cannot be effected and such fact is certified, on oath by any person duly authorized to make legal service, the board shall cause to be published twice in each of three successive weeks, a notice of the hearing in a newspaper published in the county in which the accused was last known to practice, and on/or before the date of the first publication a copy of the charges and of such notice shall be mailed to the accused at his last known address.~~

~~(3) When publication of the notice is necessary, the date of the hearing shall be not less than thirty (30) days after the last day of the publication of the notice.~~

~~(d) On the conclusion of the hearing and based upon the findings and conclusions of the hearing officer, the board may revoke the license of the accused or suspend such license for a fixed period, or reprimand, or dismiss the charges.~~

~~(1) An order or suspension made by the board may contain such a provision as to reinstatement of the license as the board shall direct.~~

~~(2) The board, in its discretion may direct a rehearing or take additional evidence, and may rescind or affirm the prior determination after such hearing, but nothing in this paragraph shall preclude appropriate relief under and pursuant to the Laws of Minnesota provided for the review and of the administrative determination by the courts of the state.~~

~~NHA 23 Conduct of Hearing~~

~~(a) At any hearing conducted pursuant to these rules, any party to the proceedings may appear personally and with counsel and shall be given the opportunity to produce evidence and witnesses and to cross examine witnesses.~~

~~(b) At any formal hearing conducted pursuant to these rules, if a party shall appear without counsel; the board or person designated as hearing officer shall advise such party of his rights to be represented by counsel; and that if he desires to proceed without counsel, that he may call witnesses, cross-examine witnesses, and produce evidence in his behalf.~~

~~(c) Appearance shall be noted on the official record of hearing.~~

~~(d) The hearing officer may in his discretion, grant adjournments on the request of any party in the proceedings provided than an adjournment shall not be for an indefinite period of time, but shall be set for a day certain.~~

~~(e) The board or the hearing officer may grant a temporary postponement of the proceedings upon application of any party in advance of the hearing date. Such request shall be submitted to the board in writing five (5) days prior to the date~~

~~set for hearing and shall specify the reason for such request. In considering an application for postponement of a hearing the board or hearing officer, shall consider whether the purpose of the hearing will be affected or defeated by the granting of such postponement.~~

~~(f) The conduct of the hearing shall not be strictly bound by the rules of evidence, but the determination and recommendation of the hearing officer shall be founded upon sufficient legal basis to do substantial justice.~~

~~(g) Upon the conclusion of the hearing, the board shall take such action upon the written findings and conclusion of the hearing officer as it deems proper, and shall execute an order in writing carrying such findings and conclusions into effect.~~

~~The record of the hearing shall be available only to the board, complainant, the accused, or his attorney.~~

# ADOPTED RULES

The adoption of a rule becomes effective after the requirements of Minn. Stat. § 15.0412, subd. 4, have been met and five working days after the rule is published in the *State Register*, unless a later date is required by statutes or specified in the rule.

If an adopted rule is identical to its proposed form as previously published, a notice of adoption and a citation to its previous *State Register* publication will be printed.

If an adopted rule differs from its proposed form, language which has been deleted will be printed with strike outs and new language will be underlined, and the rule's previous *State Register* publication will be cited.

A temporary rule becomes effective upon the approval of the Attorney General as specified in Minn. Stat. § 15.0412, subd. 5. Notice of his decision will be published as soon as practicable, and the adopted temporary rule will be published in the manner provided for adopted rules under subd. 4.

## Department of Health
## Health Systems Division

### Adopted Rules for Changes in the Rules for Hospital Rate Review

The rules proposed and published at *State Register*, Volume 4, Number 46, pages 1804-1807, May 19, 1980 (4 S.R. 1804) are adopted as proposed, with the following amendments:

#### Amendments as Adopted

7 MCAR § 1.505 B. 2. Basis. The single percentage figure established by the Commissioner of Health shall be the algebraic sum of the following percentages:

a. An estimate of the forthcoming annual rate of change in the average total cost of all goods and services to hospitals. This estimate shall be determined by summing the weighted change in price of each of the natural expense classifications described in 7 MCAR § 1.474 A.2.f. The weights shall be the proportionate contributions of each of these natural expense classifications to hospitals' total cost. The estimate shall explicitly recognize the expected overall level of price change in the state's economy and shall be derived from expected annual changes in the Consumer and/or Producer Price Indices and/or relevant components of the Consumer and/or Producer Price and/or other similar economic indices published by ~~the Bureau~~ an agency of ~~Labor Statistics, United States Department of Commerce~~ the Federal or State Goverment.

b. An estimate of the rate of change in the dollar value of the forthcoming annual statewide ~~rate of~~ change in:

(1) the average mix of patients utilizing hospitals, and

(2) the average intensity of services received by patients during hospital stays or visits as is consistent with the delivery of medical care which is of generally accepted quality and efficiency. The estimate shall not be less than zero nor more than .036.

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

STATE OF MINNESOTA

BOARD OF EXAMINERS FOR NURSING HOME ADMINISTRATORS

In the Matter of the Proposed Amendments to Minn. Rules NHA 10 and 13 Providing for Waiver of Certain Licensure Requirements and in the Matter of the Proposed Repeal of Minn. Rules 22 and 23 and Portions of Minn. Rules 10

NOTICE OF SUBMISSION TO THE ATTORNEY GENERAL

Pursuant to your request and in accordance with Minnesota Statutes, section 15.0412:

PLEASE TAKE NOTICE that the above-captioned rules have been submitted to the Office of the Attorney General on this date, May 6, 1981, for review as to form and legality. Pursuant to 1 MCAR § 1.206C, the Attorney General will not approve the rules for at least ten (10) calendar days after receipt to allow any person or association time to comment on the legality of the rules, after which that office will complete its review. If you desire to comment on the legality of the above-captioned rules, you should direct your comments to the Office of the Attorney General, G-25 State Administration Building, 50 Sherburne Avenue, Saint Paul, Minnesota 55155, telephone (612) 296-7030. Please note that the above-cited rule of the Attorney General also provides that a copy of any written comments submitted to the Attorney General must be submitted simultaneously to this agency.

If you are interested in determining what changes, if any, were made in the proposed rules after the hearing and before submission to the Attorney General, you may contact Phillip C. Newberg, Executive Secretary, Board of Examiners for Nursing Home Administrators, Minnesota Department of Health Building, 717 Delaware Street Southeast, Minneapolis, Minnesota 55414, telephone: (612) 296-5406.

STATE OF MINNESOTA )
) ss.
COUNTY OF HENNEPIN )

Dorothy E. Nelson, being first duly sworn upon oath, deposes and says:

That at the City of Minneapolis, county and state aforementioned, on the 6th day of May, 1981, she served the attached Notice of Submission to the Attorney General by depositing in the United States mail at said city, a true and correct copy thereof, properly enveloped, with first class postage prepaid, and addressed to:

The persons who requested notification on the attached rule hearing register.

Dorothy E. Nelson

Subscribed and sworn to before me
this 6th day of May, 1981.

Alice D. Hummer

ALICE D. HUMMER
Notary Public, Ramsey Co. Minn.
My Commission Expires
Nov. 18, 1981

If you wish to be notified when the Hearing Examiner's Report is available, please put your name and address on one of the envelopes supplied.

RULE HEARING REGISTER

PLEASE PRINT CLEARLY

| NAME | REPRESENTING | COMPLETE ADDRESS | TELEPHONE | CHECK HERE IF YOU WISH TO MAKE A STATEMENT AT THE HEARING | CHECK HERE IF YOU WISH TO BE NOTIFIED BY THE AGENCY WHEN THE HEARING RECORD HAS BEEN SUBMITTED TO THE ATTORNEY GENERAL |
|---|---|---|---|---|---|
| K. Craig Wildfang | Minn. Ass'n. of Health Care Facilities | 2850 Metro Dr. Suite 429 Mpls 55420 | 854-2844 | ✓ | ✓ |
| R. W. Schlicht | Am. College of N. H. Adm | 611 W. MAIN ST Belle 56011 PLAINE | 873-2215 | ✓ | ✓ |
| Timothy J. Samuelson | Self | 1696 Marshall Ave. St. Paul, Mn. 55104 | 644-4851 | ✓ | ✓ |
| Sharon Sill | MAHA | Box 14679 Mpls 55414 | 331-5571 | | ✓ |
| Steve Rogness | MAHA | Box 14679 Mpls 55414 | 331-5571 | | ✓ |
| Margo S. Struthers | MAHA / MHA | Moss, Flaherty, 2350 IDS, Mpls 55410 | 339-8551 | ✓ | ✓ |
| John J Bowden | Hamilton & Philipp | 3944 IDS Tower, Mpls | 338-4200 | ✓ | ✓ |
| Joe Hamilton | do | do | do | ✓ | ✓ |
| Norman Kaye | Virginia Regional Med Ctr | RT #1 Box 3134 Britt 55710 | 218-741-5190 | ✓ | ✓ |
| Norman P. Peterson | N.W. Hospital Services | 120 LaBree Ave T.R. Falls | 218-681-4240 | | ✓ |
| David E Mullier | Pleasant Manor Nursing Home | 27 Broad Ave Faribault Mn | 507-334-2036 | | ✓ |
| Joanne Sutherton | Delano Healthcare Center | 433 C.L. 30 Delano Mn | 612-479-2987 | | ✓ |
| RW Gunn | ISPHA U of MN | Suite 336, 2829 Univ Ave SE Mpls 55414 | 612 376-1544 | | ✓ |
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STATEMENT OF COMPLIANCE WITH

MANUAL OF RULE MAKING PROCEDURES

I, Special Assistant Attorney General Joanne M. Ogata, do hereby declare that I have examined the proposed rules relating to proposed amendments to Minn. Rules NHA 10 and 13 and all related documents and that, based on my examination and my personal familiarity with the applicable procedures, the Administrative Procedure Act, the rules of the Office of Administrative Hearings, and the rules of the Attorney General have been followed.

Dated: May 6, 1981

JOANNE M. OGATA
Special Assistant
Attorney General

STATE OF MINNESOTA

COUNTY OF HENNEPIN

BEFORE THE MINNESOTA

BOARD OF EXAMINERS FOR
NURSING HOME ADMINISTRATORS

In the Matter of Proposed Amendments to Minn. Rules NHA 10 and 13 Providing For Waiver of Certain Licensure Requirements and in the Matter of the Proposed Repeal of Minn. Rules NHA 22 and 23 and Portions of Minn. Rule NHA 10

STATEMENT OF NEED
AND REASONABLENESS

The Minnesota Board of Examiners for Nursing Home Administrators (hereinafter "Board"), pursuant to Minn. Stat. § 15.0412, subd. 4 (1978), as amended by Minn. Laws 1980, ch. 615, § 6, hereby affirmatively presents facts establishing the need for and reasonableness of amending the above-captioned rules.

I.

STATUTORY AUTHORITY FOR PROPOSED AMENDMENTS TO MINN. RULES NHA 10 AND 13 PROVIDING FOR WAIVER OF CERTAIN LICENSURE REQUIREMENTS AND FOR PROPOSED REPEAL OF MINN. RULES NHA 22 AND 23 AND PORTIONS OF MINN. RULE NHA 10.

Pursuant to Minn. Stat. § 144A.20 (1978), no person shall be issued a nursing home administrator's license unless he or she has satisfactorily met standards set by the Board, which standards shall be designed to assure that nursing home administrators will be individuals who, by training or experience, are qualified to serve as nursing home administrators. The Board's statutory authority for adopting, amending, or repealing rules relating to qualifications for licensure, issuing of licenses and revoking or taking other disciplinary action against such licenses is contained in Minn. Stat. §§ 144A.20 and 144A.22-144A.24 (1978). Those statutes state, in relevant part, that:

> The board of examiners may issue licenses to qualified persons as nursing home administrators, and shall establish qualification criteria for nursing home administrators . . .

Minn. Stat. § 144A.20 (1978)

> The board of examiners shall . . . adopt rules to govern its proceedings.

Minn. Stat. § 144A.22.

> Except as provided in section 144A.04, subdivision 5, the board of examiners shall have exclusive authority to determine the qualifications, skill and fitness required of any person to serve as an administrator of a nursing home.

Minn. Stat. § 144A.23.

> The board of examiners shall: (a) Develop and enforce standards for nursing home administrator licensing, which standards shall be designed to assure that nursing home administrators will be individuals of good character who, by training or experience, are suitably qualified to serve as nursing home administrators.

Minn. Stat. § 144A.24.

II.

NEED FOR AND REASONABLENESS OF PROPOSED AMENDMENTS TO MINN. RULES NHA 10 AND 13 PROVIDING FOR WAIVER OF CERTAIN LICENSURE REQUIREMENTS.

a. Proposed New Rules Minn. Rule 10(b)(3) And 10(b)(4).

The fundamental purpose of these rules is to create a mechanism by which the Board can waive certain educational licensure requirements for hospital administrators who, on April 15, 1980, were managing convalescent and nursing care units (hereinafter "C & NC" units) attached to a hospital. The need for these proposed new rules may be gleaned from a brief history of the licensure status of nursing homes, hospitals and their respective administrators.

Prior to 1976, the relevant state statute defined "nursing home" as "any institution or facility licensed as such under sections 144.50-144.56 by the state board of health." (Emphasis added.) At that time, C & NC units were not separately licensed as nursing homes; therefore, the administrators of such units were not required to be licensed as nursing home administrators.[1/] During the 1976 legislative session, the laws relating to nursing homes and hospitals were substantially changed.[2/] The term "nursing home" was redefined to include C & NC units.[3/] By redefining the term "nursing home" the Legislature must have

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1/ See Op. Atty. Gen. 904 (April 7, 1972).

2/ See Minn. Laws 1976, ch. 173.

3/ Minn. Stat. § 144A.01 (1978) reads, in relevant part, that the term "nursing home" means "a facility or that part of a facility which provides nursing care to five or more persons."

contemplated that registered hospital administrators who were not also licensed as nursing home administrators would become disqualified to administer the C & NC units within their hospitals. This was apparently viewed as an undesirable result because the Legislature enacted Minn. Stat. § 144A.04, subd. 5 (1978) which granted registered hospital administrators an exemption from having to obtain a nursing home administrator's license.[4/]

During the 1980 legislative session the Legislature repealed the hospital administrators registration law contained in Minn. Stat. §§ 144.59-144.65 (1978). After this repeal, several persons contacted the Board to inquire whether or not the exemption in Minn. Stat. § 144A.04, subd. 5 (1978) remained in effect. The questions were premised on the fact that the exemption literally applies only to a "registered administrator of the hospital if the individual meets minimum education and long-term care experience set by rule of the commissioner of health." (Emphasis added.) Thus, if construed strictly, no one can possibly qualify for the exemption at the present time since the registration statutes and rules have been repealed.

In addition to the potential problems under state law, the federal authorities have indicated that administrators of C & NC units attached to hospitals must become licensed as nursing home administrators as a precondition for obtaining federal medical assistance monies. A facility's eligibility to be reimbursed with federal monies for the care of patients who qualify for medical assistance is dependent upon a facility's complying with numerous federal regulations. Nursing homes are either certified as skilled nursing facilities or intermediate care facilities. On May 20, 1980, the Principal Program Representative for Minnesota in the Health Care Financing Administration section of the Department of Health and Human Services sent a letter to the executive secretary of the Board informing him that because Minnesota has a licensure law for nursing home administrators, the hospital administrators who operate licensed

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4/ That statute reads, in relevant part, that "a nursing home which is located in a facility licensed as a hospital pursuant to sections 144.50 to 144.56 may employ as its administrator the registered administrator of the hospital if the individual meets minimum education and long-term care experience set by rule of the commissioner of health.

C & NC units must now take appropriate action to become licensed. Similarly, on June 10, 1980, the chief of the Survey and Compliance Section of the Health Systems Division of the Minnesota Department of Health sent a letter to hospital administrators informing them, in relevant part, that:

> This letter is to advise you that a nursing home or a long-term care facility certified as a skilled or intermediate care facility must be administered by an appropriately licensed nursing home administrator. Effective immediately, a state licensing correction order MHD 45(a)(2) and a federal certification deficiency under 442.303 for an intermediate care facility and 405.1101 for a skilled nursing facility will be issued at the time of the next site visit if the facility is in noncompliance with this requirement.

Copies of these letters are incorporated herein and attached to this Statement of Need and Reasonableness as Exhibits A and B. Thus, even if state law is construed as not requiring an administrator of a C & NC unit to obtain licensure as a nursing home administrator, the federal authorities have indicated that nursing home administrator licensure is a precondition for federal funds. If a home is decertified, the patients receiving medical assistance will have to be uprooted and transferred to another home. Thus, there is a need to propose new rules to provide a mechanism to allow for the prompt licensing of hospital administators who operate C & NC units, provided that those persons can demonstrate that they are qualified to properly operate a nursing home.

Proposed Minn. Rule NHA 10(b)(3) reads:

> The Board may waive all the requirements of NHA 10(a)(7) and NHA 10(a)(8) for any applicant who, on April 15, 1980, was registered with the Commissioner of Health as a hospital administrator and who was administratively responsible on April 15, 1980, for a convalescent and nursing care (C & NC) unit attached to a hospital and had served in that capacity for a period of three (3) or more years. Any applicant applying for licensure pursuant to this rule shall be required to pass the currently used written examination.

This rule would allow the Board to waive the requirements of Minn. Rules NHA 10(a)(7) and 10(a)(8) which currently require all applicants to demonstrate satisfactory completion of a Board approved 300-hour practicum course in long-term care administration and completion of either a degree in health care administration with courses in long-term care or completion of a baccaleureate degree which must include courses in seven designated areas. The waiver of these requirements for the specified group of hospital administrators is reasonable because it is felt that three or more years experience in administering a

C & NC unit is roughly equivalent to the completion of the academic work specified in Minn. Rules NHA 10(a)(7) and 10(a)(8).

The current licensure position of hospital administrators administering C & NC units is a unique one. Normally, persons seeking licensure have not had any experience as the person with chief administrative responsibilities in a nursing home. Accordingly, the Board's rules require a heavy emphasis on academic and supervised experience to help ensure that these applicants will be qualified to meet the responsibilities of a chief administrator once licensed. However, unlike the applicant who is a recent graduate of an academic program, most of the hospital administrators who were registered with the Commissioner of Health on April 15, 1980, and who were administratively responsible for C & NC units have several years of experience in administering these units. Thus, their current situation is more closely akin to those applicants who applied for licensure when the Board was first created. At that time the Board utilized a scale which gave points for experience, education or professional activities. Anyone who "scored" a minimum number of points on the scale was allowed to sit for the exam.

This same rationale, which gives credit to a person's employment experience as well as his or her academic experience, also applies to the current situation. A person who has had sufficient experience to deal with, and learn from, a broad range of problems should not be expected to enroll in classes designed to teach students how to deal with those same problems which the experienced person has already encountered. Obviously, there is no magic formula which can be utilized to determine when experience should be considered equivalent to academic work. From the experience of members of the Board, most of whom have significant experience in the area, it was determined that one is most likely to have obtained a broad range of experience only after several years of experience. It was, therefore, determined that three years would be set as the cut-off date for waiver of NHA 10(b)(7) and 10(b)(8). By that time, the hospital administrators should have acquired by experience the information which they otherwise would have been exposed to and instructed in on an academic level.

Moreover, to ensure that these applicants do possess the requisite knowledge needed to effectively administer a nursing home, proposed Minn. Rule NHA 10(b)(3) specifies that these applicants will be required to successfully pass all

currently required written examinations to prove their knowledge. It is reasonable to require all applicants to demonstrate by examination their knowledge of administration as well as their understanding of state and federal statutes and rules which regulate nursing homes. As a further assurance of competency, it might also be noted that, once licensed, these administrators will also have to regularly obtain classroom credits to comply with the continuing education requirements of Minn. Rule NHA 16.

Proposed Minn. Rule NHA 10(b)(4) reads:

> The Board may waive all except the following requirements of NHA 10(a)(7) and 10(a)(8) for any applicant who, on April 15, 1980, was registered with the Commissioner of Health as a hospital administrator and who was administratively responsible on April 15, 1980, for a convalescent and nursing (C & NC) unit attached to a hospital and had served in that capacity for a period of less than three (3) years:
>
> a. Long-term Care Program
>
> b. Gerontology.
>
> Any applicant applying for licensure pursuant to this rule shall be required to pass the currently used written examination.

This rule provides for waiver of most of the requirements of NHA 10(a)(7) and 10(a)(8) for registered hospital administrators with less than three (3) years of experience in administering a C & NC unit. These administrators will be required to demonstrate successful completion of a course in gerontology, as well as long-term care before they will be allowed to sit for the licensure examination. This is a reasonable rule because hospital administrators who have administered C & NC units for less than three years have most likely not had the range of experience which could be deemed to be the equivalent of the academic courses specified in Minn. Rule NHA 10(a)(8). In the opinion of the Board, some of whom have experience as both hospital administrators and nursing home administrators, it takes time to recognize and appreciate from an administrative viewpoint the difference between acute and long-term care patients. Therefore, it is reasonable to require academic study in the two specified areas. Gerontology courses deal specifically with the study of aging and the problems of aged people. The course in long-term care programs is generally viewed as a sequel course to gerontology and, as such, provides specific information and potential solutions to the issues raised in the gerontology course. These courses will help insure that a

hospital administrator is familiar with the unique needs and requirements of long-term care patients, as opposed to the oftentimes different needs and requirements of patients in an acute care setting.

As in the case of proposed Minn. Rule NHA 10(b)(3), these applicants will also be required to successfully pass all the currently required written examinations to demonstrate their knowledge of administration and applicable state and federal laws.

In sum, proposed rules NHA 10(b)(3) and 10(b)(4) will allow the Board to waive certain academic requirements for persons who have demonstrated by their experience that they ought to be allowed to sit for the licensure examination.

b. Proposed New Rule Minn. Rule NHA 10(b)(5) And Proposed Amendment To Minn. Rule NHA 13.

The fundamental purpose of this rule is to create a mechanism by which the Board may waive any requirement of medical knowledge which is contrary to the religious beliefs of an applicant who seeks to obtain a license restricted to administering a nursing home operated exclusively in accordance with the teachings of the Church of Christ, Scientist. This rule is needed in order to comply with Minn. Stat. § 144A.20, subd. 2 (1978) which reads:

> Notwithstanding any law to the contrary, no person desiring to be licensed to administer a nursing home operated exclusively in accordance with the teachings of the body known as the Church of Christ, Scientist, shall be required to demonstrate proficiency in any medical technique or meet any medical educational qualification or medical standard which is not in accord with the type of remedial care and treatment provided in a nursing home operated exclusively in accordance with the teachings of that body.

To date, the Board has no rules which would allow it to make exceptions for Christian Scientists who want to be exempted from certain licensure requirements. Minn. Laws 1980, ch. 615, § 3 allows agencies to grant variances to a rule but states that "before an agency grants a variance, it shall have promulgated rules setting forth procedures and standards by which variances shall be granted and denied." Thus, promulgation of NHA 10(b)(5) is necessary to comply with Minn. Stat. § 144A.20, subd. 2 (1978).

The proposed amendment to Minn. Rule NHA 13 would make it clear that any license issued pursuant to Minn. Rule 10(b)(5) will be restricted to the administration of a nursing home operated exclusively in accordance with the

teachings of the Church of Christ, Scientist.

III.

NEED FOR AND REASONABLENESS OF THE PROPOSED REPEAL OF MINN. RULES NHA 22 AND 23 AND PORTIONS OF MINN. RULE NHA 10.

Minn. Rules NHA 22 and 23 set forth the procedures to be used by the Board in receiving and processing complaints against licensed nursing home administrators. These rules were promulgated prior to the enactment of Minn. Stat. § 214.10 (1978) in 1976. That statute sets forth uniform procedures to be used by all health related licensing boards in receiving and investigating complaints. Because Minn. Stat. § 214.10 (1978) and the Minnesota Administrative Procedures Act (Minn. Stat. ch. 15) now govern the Board's procedures in this area, it is reasonable to repeal Minn. Rules NHA 22 and 23. Rules which have been superseded by other statutes but have not been formally repealed only serve as a source of confusion for licensees and their attorneys. No public interest would be served by leaving outdated rules on the books. Therefore, it is eminently reasonable that these rules be repealed.

Similarly, the Board is proposing that Minn. Rule NHA 10 be reorganized and that Minn. Rule NHA 10(b)(2), (b)(3), (b)(5),[5/] c and f be repealed. When the Board promulgated Minn. Rule NHA 10 it set up a timetable during which the requirements for licensure would gradually become more stringent. By their terms, these sections of Rule 10 have now been superseded by other sections. Therefore, the Board feels it is both prudent and reasonable to repeal these outdated sections and to reorganize the rule to provide for greater clarity of meaning.

Dated: November 25, 1980

BEFORE THE MINNESOTA
BOARD OF EXAMINERS FOR
NURSING HOME ADMINISTRATORS

Phillip C Newberg

PHILLIP C. NEWBERG
Executive Secretary

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5/ The Board is not proposing the repeal of Minn. Rule NHA 10(b)(4). At a Board meeting held on June 30, 1980, the Board expressed its intent that although the remaining portions of Minn. Rule NHA 10(b) had been superseded by other sections, the Board never intended that Minn. Rule 10(b)(4) be repealed. Indeed, the Board has granted and continues to grant waivers pursuant to this rule.

DEPARTMENT OF HEALTH AND HUMAN SERVICES

REGION V
175 W. Jackson Boulevard
CHICAGO, ILLINOIS 60604

HEALTH CARE FINANCING
ADMINISTRATION

May 20, 1980




Mr. Philip C. Newberg
Executive Director
Minnesota State Board of
Examiners for Nursing Home
Administrators
717 Delaware Street, S.E.
Minneapolis, Minnesota 55414

Dear Mr. Newberg:

I appreciate the opportunity to address the problem caused by the abolishment of your hospital administrator registration program.

The problem is not addressed in the law or regulation. Therefore, we are herein developing the policy to accomodate this unique situation. To begin, the law defines administrator as follows:

405.1101 Definitions.

(a) Administrator of skilled nursing facility. A person who:

(1) Is licensed as required by State law: or

(2) If the State does not have a Medicaid program, and has no licensure requirement, is a high school graduate (or equivalent), has completed courses in administration or management approved by the appropriate State agency, and has 3 years of supervisory management experience in a skilled nursing facility or related health program: or

(3) If the administrator of a hospital in which there is a hospital-based distinct-part skilled nursing facility, in a State that does not license skilled nursing facility administrators, meets the requirements of 405.1021(f).

My reading of the law indicates that because your State has a licensure law for nursing home administrators the seventy-five individuals affected must take appropriate action to become licensed. This should be done as soon as possible.

EXHIBIT A

A reasonable approach to this emergency situation is indicated in the Chapter IV - Health Care Financing Administration, Department of Health, Education, and Welfare, Part 431 Subpart N. State Programs for Licensing Nursing Home Administrators. The law says:

431.710 Provisional licenses.

To fill a position of nursing home administrator that unexpectedly becomes vacant, the agency or board may issue one provisional license, for a single period not to exceed 6 months. The license may be issued to a person who does not meet all of the licensing requirements established under 431.707 but who -

(a) Is of good character and otherwise suitable; and

(b) Meets any other standards established for provisional licensure by the agency or board.

Specific reference is made to the six month provisional licensure as being reasonable in the State of Minnesota's case.

In summary: Each affected individual must become licensed by you. The steps required are dependent upon the inadequacies identified through your evaluation of the affected individuals.

This response was developed in consultation with Mr. Robert J. Jevec, Division of Long Term Care and Mr. John Powell, Division of Hospital Services of the Health Care Financing Administration Office in Baltimore, Maryland and establishes national policy with respect to similar issues.

If you have any further questions please contact me at 312/886-5209.

Yours very truly,

Colle Hunt

Colle Hunt, L.N.H.A.
Principal Program Representative
Minnesota
Program Review Branch

minnesota department of health
717 s.e. delaware st. minneapolis 55440
(612) 296-5221

June 10, 1980

Dear Administrator:

In a letter dated May 5, 1980, you were advised by George R. Pettersen, M.D., Commissioner of Health, of the termination of the Hospital Administrator Registration Program. In that letter Dr. Pettersen also informed you that for those hospital administrators also having responsibility for long term care facilities contact would be made with you regarding compliance with applicable state and federal laws for licensed nursing home administrators.

This letter is to advise you that a nursing home or a long term care facility certified as a skilled or intermediate care facility must be administered by an appropriately licensed nursing home administrator. Effective immediately, a state licensing correction order MHD 45 (a)(2) and a federal certification deficiency under 442.303 for an intermediate care facility and 405.1101 for a skilled nursing facility will be issued at the time of the next site visit if the facility is in non-compliance with this requirement.

During the interval of time granted for the correction of this deficiency contact should be made with Mr. Phillip C. Newberg, Executive Director, Board of Examiners for Nursing Home Administrators. That Board will determine what action would be required by you to become qualified as a nursing home administrator if you intend to continue assuming the responsibility as administrator of the long term care facility. Mr. Newberg can be reached at (612) 296-5406.

If you have any questions please feel free to contact me at (612) 296-5420.

Sincerely yours,

Clarice Seufert, Chief
Survey and Compliance Section
Health Systems Division

CS:sc
cc: Janet G. Brodahl, Director, Health Systems Division
Phillip C. Newberg, Executive Director, Minnesota Board of Examiners for Nursing Home Administrators
James Green, Executive Vice President, Minnesota Association of Health Care Facilities
Stephen Rogness, Executive Director, Minnesota Hospital Association
Mara Mellum, Vice President for Planning & Regulation, Minnesota Hospital Association
Larry Cohen, Executive Director, Minnesota Residential Care Facilities

EXHIBIT B

an equal opportunity employer

CERTIFICATE OF BOARD'S

RESOLUTION ADOPTING RULES

I, Michael M. Gibson, do hereby certify that I am a member and the President of the Board of Examiners for Nursing Home Administrators, a board duly authorized under the laws of the State of Minnesota, and that the following is a true, complete, and correct copy of a resolution adopted at a meeting of the Board of Examiners for Nursing Home Administrators, duly and properly called and held on the 9th day of April, 1981, that a quorum was present at said meeting, that a majority of those present voted for the resolution, and that said resolution is set forth in the minutes of said meeting and has not been rescinded or modified.

> RESOLVED, that the amendments to 7 MCAR §§ 6.010 and 6.013 (Minn. Rules NHA 10 and 13), providing for waiver of certain licensure requirements and amendments, repeal and reorganization of certain sections, are found to be reasonable, necessary and supported by the evidence contained in the record and are hereby approved and adopted, pursuant to authority vested in us by Minnesota Statutes §§ 144A.20 and 144A.22–144A.24 and that Phillip C. Newberg, the Executive Secretary of the Board of Examiners for Nursing Home Administrators, be and hereby is authorized to sign an order adopting these rules and further is authorized to perform the necessary acts to provide that these rules shall have the force and effect of law.

BE IT FURTHER RESOLVED that the Findings of Fact and Conclusions of the Board be and hereby are adopted.

BE IT FURTHER RESOLVED that should any provision of these rules be subject to disapproval by subsequent reviewers, Phillip C. Newberg, Executive Secretary, may amend the Board's Findings and Conclusions, and Order of Adoption to delete the offending provision(s) without further action of the Board.

IN WITNESS WHEREOF, I have hereunto subscribed my name this 9th day of April, 1981.

Michael M Gibson

MICHAEL M. GIBSON
President

Board of Examiners for Nursing
Home Administrators

David E Meillier

DAVID E. MEILLIER
Secretary-Treasurer

Board of Examiners for Nursing
Home Administrators

NHA-81-002-JL

STATE OF MINNESOTA
OFFICE OF ADMINISTRATIVE HEARINGS

FOR THE BOARD OF EXAMINERS FOR NUSRING HOME ADMINISTRATORS

IN THE MATTER OF PROPOSED AMENDMENTS TO MINN. RULES NHA 10 AND 13 PROVIDING FOR WAIVER OF CERTAIN LICENSURE REQUIREMENTS AND IN THE MATTER OF THE PROPOSED REPEAL OF MINN. RULES NHA 22 AND 23 AND PORTIONS OF MINN. RULE NHA 10.

ORDER OF THE CHIEF HEARING EXAMINER

WHEREAS, a hearing was held on December 23, 1980, before Jon L. Lunde, a Hearing Examiner of the State Office of Administrative Hearings, on the above-entitled matter in compliance with Minn. Stat. § 15.0412, subd. 4; and

WHEREAS, the Report of Hearing Examiner made pursuant to Minn. Stat. § 15.052, subd. 3, was issued to the Board of Examiners for Nursing Home Administrators and;

WHEREAS, the Board of Examiners for Nursing Home Administrators has now determined to adopt rules pursuant to Minn. Stat. § 15.0412, subd. 4-4f; and

WHEREAS, the Board of Examiners for Nursing Home Administrators has submitted said rules to the Chief Hearing Examiner for review pursuant to Minn. Stat. §§ 15.0412, subd. 4e and 15.052, subd. 4, and 9 MCAR § 2.111; and

WHEREAS, the Chief Hearing Examiner finds that the final proposed rules are not substantially different from those proposed at the public hearing.

NOW, THEREFORE, upon receipt of this Order, the Board of Examiners for Nursing Home Administrators has the responsibility of submitting the complete hearing record and the rules as adopted by the Board of Examiners for Nursing Home Administrators to the Attorney General and to publish in the State Register, all pursuant to Minn. Stat. § 15.0412, subd. 4e and 4f.

Dated: May 1, 1981.

DUANE R. HARVES
Chief Hearing Examiner

NHA-81-002-JL

STATE OF MINNESOTA
OFFICE OF ADMINISTRATIVE HEARINGS

FOR THE BOARD OF EXAMINERS FOR NURSING HOME ADMINISTRATORS

In the Matter of Proposed Amendments to Minn. Rules NHA 10 and 13 Providing for Waiver of Certain Licensure Requirements and in the Matter of the Proposed Repeal of Minn. Rules NHA 22 and 23 and Portions of Minn. Rule NHA 10.

REPORT OF THE CHIEF HEARING EXAMINER

The above-entitled matter came on for review by the Chief Hearing Examiner pursuant to the provisions of Minn. Stat. § 15.0412, subd. 4d (1980) which provides in part:

> If the [hearing examiner's] report contains a finding that the proposed rule is substantially different from that which was proposed at the public hearing, or that the agency has not met the requirements of section 15.0412, subdivisions 4 through 4f, it shall be submitted to the chief hearing examiner for approval. If the chief hearing examiner approves the finding of the hearing examiner, he shall advise the agency of actions which will correct the defects, and the agency shall not adopt the rule until the chief hearing examiner determines that the defects have been corrected. If the chief hearing examiner determines that the need for and reasonableness of the rule has not been established pursuant to subdivision 4, clause (c), and if the agency does not elect to follow the suggested actions of the hearing examiner to correct that defect, then the agency shall submit the proposed rule to the legislative commission to review administrative rules for the commission's advice and comment. The agency shall not proceed to adopt the rule until it has received and considered the advice of the commission; provided, that the agency is not required to delay adoption longer than 30 days after the commission's receipt of the agency's submission.

Based upon a review of the record in this proceeding, the Chief Hearing Examiner hereby approves the Report of the Hearing Examiner in all respects and specifically as to any finding of substantial change or of failure to comply with Minn. Stat. § 15.0412, subd. 4-4f (1980) or of failure to establish need for and reasonableness of the proposed rule.

In order to correct the defects enumerated by the Hearing Examiner, the agency shall either take the action recommended by the Hearing Examiner or reconvene the rule hearing if appropriate. If the agency chooses to reconvene the rule hearing, it shall do so as if it is initiating a new rule hearing, complying with all substantive and procedural requirements imposed on the agency by law or rule.

If the agency chooses to take the action recommended by the Hearing Examiner, it shall, prior to submitting the rules to the Attorney General for review, submit to the Chief Hearing Examiner a copy of the rules as initially published in the State Register, a copy of the rules as proposed for final adoption in the form required by the State Register for final publication, and a copy of the agency's Findings of Fact and Order Adopting Rules. The Chief Hearing Examiner will then make a determination as to whether the defect in regard to substantial change and the requirements of Minn. Stat. § 15.0412, subd. 4-4f (1980) have been corrected.

Should the agency make changes in the rules other than those recommended by the Hearing Examiner, it shall also, prior to submitting the rule to the Attorney General, submit the complete record to the Chief Hearing Examiner for a review in regard to substantial changes.

Dated: February 24, , 1981.

DUANE R. HAIVES
Chief Hearing Examiner

STATE OF MINNESOTA

COUNTY OF HENNEPIN

BEFORE THE MINNESOTA

BOARD OF EXAMINERS FOR
NURSING HOME ADMINISTRATORS

In the Matter of Proposed Amendments to Minn. Rules NHA 10 and 13 Providing for Waiver of Certain Licensure Requirements and in the Matter of the Proposed Repeal of Minn. Rules NHA 22 and 23 and Portions of Minn. Rule NHA 10

CERTIFICATE

I hereby certify that the 28 names and addresses and 1 page list for the Minnesota Board of Examiners for Nursing Home Administrators (hereinafter "Board of Examiners") all of which are attached and made a part hereof, constitute the complete lists of persons, associations, and other interested groups who as of 10:00 o'clock a.m., this 18th day of November, 1980, have requested, pursuant to Minn. Laws 1980, ch. 615, § 6, that their names be placed on file with the Board of Examiners for the purpose of receiving notice of public hearing on proposed rules and amendments thereto on the subject captioned above.

BOARD OF EXAMINERS FOR
NURSING HOME ADMINISTRATORS

Phillip C Newberg

PHILLIP C. NEWBERG
Executive Secretary

STATE OF MINNESOTA )
) ss.
COUNTY OF HENNEPIN)

In the Matter of Proposed Amendments to Minn. Rules NHA 10 and 13 Providing for Waiver of Certain Licensure Requirements and in the Matter of the Proposed Repeal of Minn. Rules NHA 22 and 23 and Portions of Minn. Rule NHA 10

AFFIDAVIT OF MAILING TO PERSONS WHO HAVE REGISTERED WITH AGENCY FOR PURPOSE OF RECEIVING NOTICE OF RULE HEARINGS

Dorothy E. Nelson, being first duly sworn, deposes and says:

That on the 18th day of November, 1980, at the City of Minneapolis, County of Hennepin, State of Minnesota, she served the attached Notice of Hearing by depositing in the United States mail at said City of Minneapolis, a true and correct copy thereof, properly enveloped, with postage prepaid, to all persons and associations who registered with the Board of Examiners for Nursing Home Administrators for the purpose of receiving Notices of Rule Hearings. Such persons and associations and their addresses are listed on Exhibit A, which is attached and made a part hereof.

Dorothy E. Nelson

Subscribed and sworn to before me this 18th day of November, 1980.

Alice D. Hummer

ALICE D. HUMMER
Notary Public, Ramsey Co. Minn.
My Commission Expires
Nov. 18, 1981

RULE MAKING HEARING NOTIFICATIONS 11/18/80

Estelle F. Collymore
217 Birnamwood Drive
Burnsville, Mn.
55337

Broeker,Hartfeld,Hedges and Grant
2850 Metro Drive (#800)
Bloomington, Mn.
55420

Conrad M. Fredin
Attorney at Law
811 First National Bank
Duluth, Mn. 55802

Eva Jane Larson, M.D.
5137 N. Alameda St.
St. Paul, Mn. 55112

Lynn R. Gruber
Minn. Medical Association
2221 Univ. Ave., S.E. (400)
Minneapolis, Mn. 55414

Minn. Board of Optometr
Executive Secretary
717 Delaware Street, S.
Minneapolis, Mn. 55440

Irving A. West
535 S. Lexington Pkwy.
St. Paul, Mn. 55123

Phillips Legislative Serv.
459 Rice Street
St. Paul, Mn. 55103

Thomas M. Polt
Attorney at Law
McCarthy Building
Eyota, Mn. 55934

Omar Schmidt
6458 Westchester Circle
Golden Valley, Mn.
55427

Pamela Parker
Minn. Board on Aging
204 Metro Square Bldg.
St. Paul, Mn. 55101

Executive Secretary
Mn. Board of Psychology
717 Delaware St., S.E.(
Minneapolis, Mn. 55414

Irving Peterson
2900 Crestview Drive
St. Anthony, Mn.
55418

M.S. Schumacher
News Assistant
Minneapolis Tribune
425 Portland Avenue
Minneapolis, Mn. 55488

Minnesota Board of Nurs
717 Delaware Street, S.
Minneapolis, Mn. 55414

Janet Brodahl
5210 Villa Way
Edina, Mn. 55436

Peter S. Popovich
314 Minnesota Bldg.
St. Paul, Mn. 55101

Board of Pharmacy (#35
717 Delaware Street,S.E
Minneapolis, Mn. 55414

Henry Streich
2353 Youngman Ave. (502)
St. Paul, Mn. 55116

Rick Carter
Mn. Assoc./Health Care FAc.
2850 Metro Drive (#429)
Minneapolis, Mn. 55420

R.J. Lavell, Dep. Comm.
Dept. Veterans Affairs
Veterans Service Bldg.
St. Paul, Mn. 55155

James M. Albers
Cook County North Shore Hospital
Grand Marais, Mn. 55604

Bonnie Bannanno
Room 300
1745 University Avenue
St. Paul, Mn. 55140

Jerome Franke, Attorney
1233 W. County Road "B"
Roseville, Mn. 55113

James G. Anderson
Rochester Methodist Hosp.
201 W. Center St.
Rochester, Mn. 55901

Minn. Assoc.Health Care Facilities
2850 Metro Drive (431)
Bloomington, Mn. 55420

Minn. Assoc./Homes Agin
P.O. Box 14679
Minneapolis, Mn. 55414

Steve Rogness
Minn. Hosp. Association
P.O. Box 14679
Minneapolis, Mn. 55414

CERTIFICATE OF BOARD OF EXAMINERS FOR
NURSING HOME ADMINISTRATORS

AUTHORIZING RESOLUTION

I, Phillip C. Newberg, do hereby certify that I am the Executive Secretary of the Minnesota Board of Examiners for Nursing Home Administrators, a board duly authorized under the laws of the State of Minnesota, and that the following is a true, complete, and correct copy of a resolution adopted at a meeting of the Board duly and properly called and held on the 22nd day of July, 1980, that a quorum was present at said meeting; that a majority of those present voted for the resolution and that said resolution is set forth in the minutes of said meeting:

> RESOLVED, that Phillip C. Newberg, Executive Secretary of the Minnesota Board of Examiners for Nursing Home Administrators, be and he hereby is granted the authority and directed to call a hearing for the purpose of promulgating rules of the Board of Examiners for Nursing Home Administrators relating to licensure of administrators of hospitals with convalescent and nursing care units, as well as perform any and all acts incidental thereto, including but without being limited thereto, signing an Order for Hearing and Notice of Hearing as well as acting as or appointing a residing officer for all hearings.

I do hereby further certify that the following is a true, complete and correct copy of an amendment to the above resolution adopted at a meeting of the Board duly and properly called and held on the 23rd day of September, 1980, that a quorum was present at said meeting; that a majority of those present voted for the amendment and that said amendment is set forth in the minutes of said meeting and has not been rescinded or modified:

> RESOLVED, that Phillip C. Newberg, Executive Secretary of the Minnesota Board of Examiners for Nursing Home Administrators, be and he hereby is granted the authority and directed to call a hearing for the purpose of promulgating rules of the Board of Examiners for Nursing Home Administrators relating to the licensure of administrators of hospitals with convalescent and nursing care units, and amending and reorganizing other rules including, but not limited to, repealing NHA 22 and 23, repealing portions of NHA 10 and amending NHA 10 and 13 to provide for a restricted license for persons administering nursing homes operated in accordance with The Church of Christ, Scientist, as well as perform any and all acts incidental thereto, including but without being limited thereto, signing an Order for Hearing and Notice of Hearing as well as acting as or appointing a residing officer for all hearings.

IN WITNESS WHEREOF, I have hereunto subscribed my name this 31 day of October, 1980.

STATE OF MINNESOTA

BOARD OF EXAMINERS FOR
NURSING HOME ADMINISTRATORS

Phillip C Newberg

PHILLIP C. NEWBERG
Executive Secretary

STATE OF MINNESOTA

COUNTY OF HENNEPIN

BEFORE THE MINNESOTA

BOARD OF EXAMINERS FOR
NURSING HOME ADMINISTRATORS

In the Matter of Proposed Amendments to Minn. Rules NHA 10 and 13 Providing for Waiver of Certain Licensure Requirements and in the Matter of the Proposed Repeal of Minn. Rules NHA 22 and 23 and Portions of Minn. Rule NHA 10

NOTICE OF HEARING

A public hearing concerning the proposed amendments to Minn. Rules NHA 10 and 13 (to be codified as 7 MCAR §§ 6.010 and 6.013) and the proposed repeal of Minn. Rules NHA 22 and 23 and portions of Minn. Rule NHA 10 will be held in Room 105, Minnesota Department of Health Building, 717 Delaware Street Southeast, Minneapolis, Minnesota, on Tuesday, December 23, 1980, commencing at 9:30 AM. The proposed amendments and repeals may be modified as a result of the hearing process. Therefore, if you are affected in any manner by the proposed amendments and repeals 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, Hearing Examiner, Room 300, 1745 University Avenue, St. Paul, Minnesota 55104, telephone: (612) 296-5938, either before the hearing or within five (5) 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 twenty (20) calendar days. All such statements will be entered into and become part of the record. For those wishing to submit written statements or exhibits, it is requested that at least two (2) copies be furnished. In

addition, it is suggested, to save time and avoid duplication, that those persons, organizations, or associations having a common viewpoint or interest in these proceedings join together where possible and present a single statement in behalf of such interests. The rule hearing procedure is governed by Minn. Stat. §§ 15.0411-15.0417, and 15.052, and by 9 MCAR §§ 2.101-2.113 (Minnesota Code of Agency Rules). If you have any questions about the procedure, call or write the Hearing Examiner.

Notice is hereby given that twenty-five (25) days prior to the hearing, a Statement of Need and Reasonableness will be available for review at the agency and at the Office of Administrative Hearings. This Statement of Need and Reasonableness will include a summary of all of the evidence and argument which the agency anticipates presenting at the hearing justifying both the need for and the reasonableness of the proposed rules. However, additional evidence may be submitted in response to questions raised by interested persons. You are therefore urged to both review the Statement of Need and Reasonableness before the hearing and to attend the hearing. Copies of the Statement of Need and Reasonableness may be obtained from the Office of Administrative Hearings at a minimal charge.

The agency's authority to amend Minn. Rules NHA 10 and 13 and to repeal Minn. Rules NHA 22 and 23 is contained in Minn. Stat. §§ 144A.20, 144A.22, 144A.23 and 144A.24 (1978).

If adopted, the proposed amendments would allow the Board to waive certain licensure requirements for any applicant who, on April 15, 1980, was registered with the Commissioner of Health as a hospital administrator and who was on that date administratively responsible for a convalescent and nursing care unit attached to the hospital. The proposed amendments would also allow the Board to waive certain licensure requirements and issue a restricted license to a person administering a nursing home operated in accordance with The Church of Christ, Scientist. It is also proposed that NHA 22 and 23 and portions of NHA 10 be repealed.

A copy of the proposed amendments is attached to this Notice of Hearing. Additional copies will be available at the door on the date of the hearing or may be obtained by writing to Phillip C. Newberg, Executive Secretary,

Minnesota Board of Examiners for Nursing Home Administrators, 717 Delaware Street Southeast, Minneapolis, Minnesota 55414.

NOTICE: Any person may request notifiction 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 (5) 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 (5) days after he or she commences lobbying. A lobbyist is defined in Minn. Stat. § 10A.01, subd. 11 (Supp. 1979) 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 memberhip 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 that $250, not including his own traveling expenses and membership dues, in any year for the purpose of attempting to influence legislative or administrative action by communicating or urging others to communicate with public officials.

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

Dated: October 31, 1980

STATE OF MINNESOTA

BOARD OF EXAMINERS FOR
NURSING HOME ADMINISTRATORS

Phillip C. Newberg

PHILLIP C. NEWBERG
Executive Secretary

STATE OF MINNESOTA

COUNTY OF MINNESOTA

BEFORE THE MINNESOTA

BOARD OF EXAMINERS FOR
NURSING HOME ADMINISTRATORS

In the Matter of Proposed Amendments to Minn. Rules NHA 10 and 13 Providing for Waiver of Certain Licensure Requirements and in the Matter of the Proposed Repeal of Minn. Rules NHA 22 and 23 and Portions of Minn. Rule NHA 10

ORDER FOR HEARING

To effectively implement Minn. Stat. §§ 144A.20, 144A.22, 144A.23 and 144A.24 (1978), the Minnesota State Board of Examiners for Nursing Home Administrators deems it necessary to consider amendments to Minn. Rules NHA 10 and 13 (to be codified as 7 MCAR §§ 6.010 and 6.013) and a repeal of Minn. Rules NHA 22 and 23 captioned above pursuant to the authority vested in it by Minn. Stat. §§ 144A.20, 144A.22, 144A.23 and 144A.24 (1978).

NOW, THEREFORE, IT IS ORDERED this 31st day of October, 1980, that a public hearing on the proposed amendments to Minn. Rules NHA 10 and 13 and the proposed repeal of Minn. Rules NHA 22 and 23 and portions of Minn. Rule NHA 10 captioned above be held in Room 105, Minnesota Department of Health Building, 717 Delaware Street Southeast, Minneapolis, Minnesota, on Tuesday, December 23, 1980, commencing at 9:30 AM, and continuing until all persons or representatives of associations or other interested groups have had an opportunity to be heard.

IT IS FURTHER ORDERED that notice of said hearing be published in the State Register and be given to all persons or representatives of associations or

other interested groups who have registered their names for that purpose with the Board of Examiners for Nursing Home Administrators and to all persons who are presently members of the Minnesota Legislature.

Dated: October 31, 1980

STATE OF MINNESOTA

BOARD OF EXAMINERS FOR
NURSING HOME ADMINISTRATORS

Phillip C Newberg

PHILLIP C. NEWBERG
Executive Secretary

# Board of Examiners for Nursing Home Administrators

## Notice of Intent to Obtain Information From Nonagency Sources on Rules for Nursing Home Administrators

Notice is hereby given, pursuant to the provisions of Minn. Stat. § 15.0412, subd. 6 (1978), that the Minnesota Board of Examiners for Nursing Home Administrators (hereinafter "board"), will propose the adoption of new rules and the amendment and revision of existing rules.

All interested parties desiring to submit data or views relating to the proposed adoption, amendment or revision of the rules related to the subject matters noted below should address their comments (either written or oral) to Mr. Phillip C. Newberg, in care of the Board, Room 340, 717 Delaware Street Southeast, Minneapolis, Minnesota 55440, telephone: (612) 296-5406. Material and comments submitted for consideration should be pertinent to the matter at hand. Any material received by the board pursuant to this notice will become part of the hearing record of any formal hearing held to promulgate rules.

The subject matters to be addressed pursuant to this notice include: repeal of board rules relating to qualifications for licensure for applicants applying prior to July 1, 1978, and adoption of new rules establishing requirements for licensure of persons who on April 15, 1980, were employed as administrators of hospital convalescent and nursing care units and who were registered with the State of Minnesota as hospital administrators.

Any materials submitted shall be reviewed and considered by the board during the preparation of the proposed rules. In accordance with the provisions of the Administrative Procedures Act, notice of the public hearing on the proposed rules shall be published in the *State Register* and mailed to all interested parties who are registered with the board on the date that the notice is mailed. In addition, the notice will be mailed to all persons who had registered with the Secretary of State's Office prior to July 31, 1980.

Under the provisions of Minn. Stat. § 10A.01, subd. 11 (1978), any individual representing persons or associations attempting to influence administrative action, such as the promulgation of these proposed rules, must register with the Ethical Practices Board as a lobbyist within five days of the commencement of such activity by the individual. The Ethical Practices Board is located at Room 401, State Office Building, St. Paul, Minnesota 55155.

September 24, 1980

Phillip C. Newberg
Executive Secretary