

CASE NO. A05-0873

State of Minnesota
In Supreme Court

IN THE MATTER OF THE RATE APPEAL OF
BENEDICTINE HEALTH CENTER,

Appellant,

vs.

MINNESOTA DEPARTMENT OF HUMAN SERVICES,

Respondent.

**APPELLANT BENEDICTINE HEALTH CENTER'S
BRIEF AND APPENDIX**

MICHAEL A. HATCH
Minnesota Attorney General
ERICA S. SULLIVAN
Assistant Attorney General
Attorney Registration No. 0288056
445 Minnesota Street
Suite 900
Saint Paul, Minnesota 55101-2180
(651) 296-1427
Fax: (651) 296-7438

Attorneys for Respondent
Department of Human Service

ORBOVICH & GARTNER
CHARTERED
SAMUEL D. ORBOVICH
Attorney Registration No. 137017
THOMAS L. SKORCZESKI
Attorney Registration No. 178305
408 Saint Peter Street
Suite 417
Saint Paul, Minnesota 55102-1187
(651) 224-5074
Fax: (651) 224-4697

Attorneys for Appellant
Benedictine Health Center

TABLE OF CONTENTS

	<u>Page</u>
TABLE OF AUTHORITIES	ii
LEGAL ISSUES	1
STATEMENT OF CASE	2
I. Procedural History	2
II. Scope of Review	4
STATEMENT OF FACTS	4
ARGUMENT	12
I. THE COURT OF APPEALS ERRED WHEN IT DETERMINED THAT IT COULD LOOK TO A SINGLE, UNDEFINED WORD IN A GENERAL PROVISION OF MEDICAL ASSISTANCE RATE-SETTING RULE 50 TO OVERRULE THE EXPRESS, PROPERLY PROMULGATED LANGUAGE OF THE RULE.	12
A. The Court of Appeals Erred by Relying on its Interpretation Of Two Ordinary, Dictionary Definitions to Ignore The Plain Language of a Properly Promulgated Rule.	12
B. The United States Supreme Court’s Caution Against Finding Elephants In Mouseholes is Even More Relevant For Minnesota Courts Because of the Rigor of Minnesota’s Administrative Procedure Act.	16
C. The Court of Appeals’ Single-Word Interpretation Produces a Result That Was Not Intended by the Legislature	19
II. THE COURT OF APPEALS ERRED WHEN IT DETERMINED THAT THE DEPARTMENT’S DISTINCTION BETWEEN COMMERCIAL INSURANCE AND SELF-INSURED GROUP HEALTH PLANS DID NOT VIOLATE BENEDICTINE’S CONSTITUTIONAL RIGHT TO EQUAL PROTECTION	21
CONCLUSION	27

TABLE OF AUTHORITIES

	<u>Page</u>
FEDERAL CONSTITUTIONAL PROVISIONS	
United States Constitution, Amendment XIV	2, 22
United States Constitution, Amendment XI	5
STATE CONSTITUTIONAL PROVISIONS	
Constitution of the State of Minnesota, Article 1, § 2	2, 22
FEDERAL STATUTES	
29 USC § 1002(33)	7, 15, 16, 23
29 USC § 1003	7, 23
29 USC § 1103(a)	16
29 USC § 1103(c)(1)	16
29 USC § 1144	23
STATE STATUTES	
Minn. Stat. § 14.02	1, 17
Minn. Stat. § 14.05, subd. 1	12, 17
Minn. Stat. §§ 14.48 - 14.56	11
Minn. Stat. § 14.63	11
Minn. Stat. § 14.69	4, 7
Minn. Stat. ch 60A <i>et seq.</i>	15, 16
Minn. Stat. § 144A.15	26
Minn. Stat. § 256B.0641	5

Minn. Stat. § 256B.41 - .50 2

Minn. Stat. § 256B.431, subd. 22 1, 8, 9, 20, 21, 22, 24

Minn. Stat. § 256B.434 3, 9, 10

Minn. Stat. § 256B.50, subd. 1 2, 10

Minn. Stat. § 645.16 13

STATE RULES

Minn. R. 9549.0010 - 9549.0080 2

Minn. R. 9549.0020, subpt. 4 24, 25

Minn. R. 9549.0020, subpt. 25 15

Minn. R. 9549.0035, subpt. 2 24, 25

Minn. R. 9549.0035, subpt. 8 18-19

Minn. R. 9549.0040, subpt. 8.D 3, 5, 8, 13, 15

Minn. R. Evid. 201 7

UNITED STATES SUPREME COURT CASES

FDA et al. v. Brown & Williamson, 529 U.S.120 (2000) 14, 16

MCI v ATT, 512 U.S. 218 (1994) 14, 17, 20

NLRB v. Bell Aerospace Co., 416 U.S. 267 (1974) 17

Schweiker v Wilson, 450 U.S. 221 (1981) 2, 20, 24

Whitman v. Am. Trucking Ass'ns, 531 U.S. 457 (2001) 1, 7, 14, 15, 16, 28-29

OTHER FEDERAL CASES

ABA, et al v FTC, 430 F.3d 457 (DC Cir. 2005) 1, 15

Cabell v Markham, 148 F.2d 737 (2nd Cir. 1945) 20

Farmland Indus., Inc. v. Frazier-Parrott Commodities,
111 F.3d 588 (8th Cir. 1997) 13

In re Four Seasons Care Center,
119 B.R. 681 (Bankruptcy D.C. Minn. 1990) 5-6

Quarles Petroleum Co. v. United States, 551 F.2d 1201 (Ct.Cl. 1977) 13

Trimble v. Asarco, 232 F.3d 946 (8th Cir. 2000) 13

MINNESOTA CASES

Green Giant Co v. Comm’r of Revenue,
534 NW2d 710 (Minn. 1995) 20

Hibbing Educ. Ass’n v. Public Employment Relations Bd.,
369 N.W.2d 527 (Minn. 1985) 4

In re St. Otto’s Home v. Minn. Dep’t of Human Servs.,
437 N.W.2d 35 (Minn. 1989) 1, 12, 19, 28

Johnson Bros. Wholesale Liquor Co. v. Novak,
295 N.W.2d 238 (Minn. 1980) 17

Mapleton Community Home, Inc v. Minn. Dept of Human Services,
391 N.W.2d 798 (Minn. 1986) 18

Metropolitan Rehab. Serv. v. Westberg, 386 N.W. 2d 698 (Minn. 1986) 2, 24

Minnesota-Dakotas Retail Hardware Assn v. State, 279 N.W.2d 360
(Minn. 1979) 18

New London Nursing Home, Inc v. Lindeman, 382 N.W.2d 868
(Minn. Ct. App. 1986) 2, 26

State v. Behl, 564 N.W.2d 560 (Minn. 1997) 4

State v. Brooks, 604 N.W.2d 345 (Minn. 2000) 4

Vlahos v. R & I Constr. of Bloomington, Inc.,
676 N.W.2d 672 (Minn. 2004) 4

Wallace v. Commissioner of Taxation,
184 N.W.2d at 588 (Minn. 1971) 20

White Bear Lake Care Center, Inc. v. Minn. Dept. of Pub. Welfare,
319 N.W.2d 7 (Minn. 1982) 1, 12, 17, 19, 27-28

SECONDARY SOURCES

George A. Beck, *Minnesota Administrative Procedure* (2d ed. 1998) 17

LEGAL ISSUES

I. Whether a Court May Interpret a Single, Undefined Word in a General Provision of a Properly Promulgated Rule to Overturn the Specific Language of the Rule.

A. The Minnesota Court of Appeals applied two dictionary definitions of the word “incur” to hold that the general language of Minnesota nursing home rate-setting Rule 50 prevents the Department of Human Services from paying certain costs of self-insured group health insurance, even though a different, express section of the rule recognizes the cost of group health insurance.

B. The most apposite statutes and cases are:

1. *Whitman v. Am. Trucking Ass'ns*, 531 U.S. 457 (2001).
2. *ABA, et. al v. FTC*, 430 F.3d 457 (DC Cir. 2005).
3. *White Bear Lake Care Center, Inc. v. Minn Dept of Pub Welfare*, 319 N.W.2d 7 (Minn. 1982).
4. *In re St. Otto's Home v. Minn. Dep't of Human Servs.*, 437 N.W.2d 35 (Minn. 1989).
5. Minn. Stat. § 14.02.
6. Minn. Stat. § 256B.431, subd. 22

II. Whether the State of Minnesota Has a Rational Basis to Treat Self-insuring Nursing Homes Differently from Nursing Homes That Purchase Commercial Insurance, When Group Health Insurance Is Recognized as an Allowable Cost.

A. The Minnesota Court of Appeals concluded that the State of Minnesota has an interest in reimbursing nursing homes only for costs incurred for commercial

insurance. The Court determined costs paid to commercial insurers are not recoverable by the insured.

B. The most apposite statutes and cases are:

1. United States Constitution, Amendment XIV.
2. Constitution of the State of Minnesota, Article 1, § 2.
3. *Schweiker v. Wilson*, 450 U.S. 221 (1981).
4. *New London Nursing Home, Inc. v Lindeman*, 382 N.W.2d 868 (Minn. Ct. App. 1986).
5. *Metropolitan Rehab. Serv v Westberg*, 386 N.W. 2d 698 (Minn. 1986).

STATEMENT OF THE CASE

I. Procedural History

This is a nursing home rate setting appeal under Minnesota Medical Assistance program Rule 50.¹ The Minnesota Department of Human Services (“DHS” or the “Department”) conducted an on-site field audit of costs reported by Benedictine Health Center (“Benedictine”). That audit disallowed costs pertaining to a self-insured group health program for Benedictine’s employees. Pursuant to Minn. Stat. § 256B.50, subd. 1c, a contested case proceeding was held before Administrative Law Judge (“ALJ”) Bruce H. Johnson². ALJ Johnson recommended that the rate adjustments be affirmed and

¹Rule 50 is the popular name of Minn. R. 9549.0010 - .0080 and Minn. Stat. § 256B.41 - .50.

²The contested case was submitted to ALJ Johnson on cross-motions for summary disposition based on affidavits, deposition transcripts and documentary evidence.

Dennis W. Erickson, representative of the Commissioner of Human Services (the “Commissioner”), adopted that recommendation. Representative Erickson remanded the matter to ALJ Johnson to determine the proper amount of Benedictine’s total repayment to DHS. On remand, ALJ Johnson recommended that the Department’s calculation, including a new rate adjustment imposed for the first time in the course of the contested case hearing, be accepted. Representative Erickson adopted that recommendation and the Commissioner’s final determination was affirmed by the Minnesota Court of Appeals.

The Minnesota Court of Appeals interpreted the single word “incur,” which is used in a general provision of Rule 50, to partition the allowable cost category of “group health and dental insurance” between self-insured plans and commercial insurance.³ Minn. R. 9549.0040, subpt. 8.D; App. 81. The Court of Appeals upheld the rate disallowance by defining the word “incur,” despite the ALJ’s acknowledgment that DHS’s auditors relied on an unpromulgated policy memorialized in a supervisor’s memorandum to DHS staff. Unless reversed, the Court of Appeals’ interpretation of the single word “incur” will result in DHS collecting a retroactive rate payback from Benedictine Health Center of over a million dollars, for all years impacted by this appeal⁴.

³This interpretation imposed a distinction not expressly articulated in Rule 50. Even the ALJ who imposed the interpretation found: “Rule 50 does not differentiate between commercial group health insurance and self-insurance.” App. 64.

⁴The total fiscal impact of this appeal involves not only the adjustments made to rates paid in the two rate years presently under appeal, but also the impact on those adjustments on every subsequent rate year. As required by Minn. Stat. § 256B.434, every rate year since July 1, 1997 relies on the appealed cost reports for its calculation.

II. Scope of Review

There are no material issues of disputed fact, so this case was decided on cross motions for summary disposition. Under Minn. Stat. § 14.69, this Court may affirm, reverse, or modify the Commissioner's Order or remand this matter if Benedictine's substantial rights have been prejudiced because the administrative findings, inferences, conclusions or decisions violate constitutional provisions, exceed statutory authority or jurisdiction of DHS, or are made upon unlawful procedure, are unsupported by substantial evidence in view of the entire record as submitted, arbitrary or capricious or are affected by other error of law. Minn. Stat. § 14.69.

Appellate Courts review matters of statutory or regulatory interpretation by agencies *de novo*. *Vlahos v. R & I Constr. of Bloomington, Inc.*, 676 N.W.2d 672, 679 (Minn. 2004); *State v. Behl*, 564 N.W.2d 560 (Minn. 1997)(citing *Hibbing Educ. Ass'n v. Public Employment Relations Bd.*, 369 N.W.2d 527, 529 (Minn. 1985)). Benedictine's constitutional issue also presents a question of law, which this Court reviews *de novo*. *State v. Brooks*, 604 N.W.2d 345, 348 (Minn. 2000); *State v. Behl* at 566.

STATEMENT OF FACTS

Benedictine Health Center is a 120-bed, non-profit nursing home located in Duluth, Minnesota and a member of Benedictine Health Services. During the periods at issue in this proceeding, Benedictine participated in the Minnesota Medical Assistance ("MA") program under the payment system known as Rule 50. App. 10. Rule 50 operates by establishing payment rates based on a nursing home's reported historical costs. App. 63. Pursuant to Rule 50, Benedictine filed annual reports of its costs, App.

67, and DHS conducted desk and field audits of those cost reports to verify that the costs reported could be recognized for MA rate-setting purposes. App. 11.

According to Minn. R. 9549.0040, subpt. 8.D, DHS must allow the costs of providing “group health and dental insurance” when setting a nursing home’s Rule 50 rates. Despite the fact that Benedictine provided group health insurance for its employees through a self-insured plan, the Commissioner of Human Services concluded that only a relatively small part of Benedictine’s payments for that insurance should be recognized under Rule 50.

Benedictine’s Self-Insured Group Health Insurance Program

The Commissioner claimed that, because Benedictine chose to self insure its group health insurance program, it did not “incur” group health insurance costs for its employees.⁵ That conclusion was wrong because it was contrary to clear language in the rate-setting rule that recognizes the costs of providing group health insurance, and because it validated setting rates by relying upon an unpromulgated rule. That erroneous decision allows DHS to collect well over one million dollars from Benedictine. DHS will retroactively reduce the rates paid Benedictine, not only in the 1995 and 1996 rate years under appeal in this proceeding, but also in the nine (soon to be ten) subsequent rate years that are calculated from those rates. App. 86, ¶ 7.⁶

⁵Except for payments from the Plan Account to resolve employees’ claims.

⁶DHS is authorized to collect paybacks through lump sum offsets from current MA payments and the payback obligation attaches to the property if sold as a nursing home. Minn. Stat. § 256B.0641. Minnesota nursing homes cannot delay or stay collection of Rule 50 rate paybacks by filing bankruptcy because the State enjoys a defense to federal court actions under the Eleventh Amendment to the United States Constitution. *See, In re*

Benedictine's self-insurance program began in January 1994. Independent actuaries calculated amounts to be deposited into a dedicated bank account (the "Plan Account") to pay employees' medical claims as they came due. After Benedictine paid its assessments into the Plan Account, an independent third-party administrator processed and paid employee and dependent claims from the account. App.66.

A related entity, Benedictine Health Services ("BHS"), established the Plan Account expressly to pay claims under this self-insured plan in which Benedictine, and other Benedictine entities participated. App. 66. When the Plan Account was established, three BHS officers were also identified as authorized signers on the account, but the Plan Account was specifically designated solely for payment of Plan expenses. Any use of the Plan Account for purposes other than payment of claims against the Plan would have violated not only the contractual obligations of the Plan and BHS' fiduciary obligations toward its insured employees but also the formally adopted policies of BHS. App. 66; Affidavit of Diane K. Krueger, September 27, 2002, Ex. B; Second Affidavit of Thomas L. Skorczeski, Ex. 6, pp. 1-2. DHS did not find, nor did it allege, that Benedictine violated the plan policies or that it raided Plan Assets for improper uses.

Application of ERISA

In its Order granting review, this Court asked the parties to address specifically whether the Employment Retirement Income Security Act of 1974 ("ERISA") applied to Benedictine's self-insured group health plan. Benedictine's self-insured group health plan falls within the "Church Plan" exception of Section 3(33) of Title I of ERISA,

Four Seasons Care Center, 119 B.R. 681 (Bankruptcy D.C. Minn. 1990).

29 USC §1002 (33). As such, “Church Plans” are specifically exempted from the requirements of ERISA, unless the plan affirmatively elects to be covered by those requirements. 29 USC § 1003(b)(2). Benedictine has not made such an election⁷.

Benedictine’s Disputed Self-Insurance Costs

Benedictine incurred three kinds of costs to provide this partially self-insured health benefit for its employees: Benedictine made regular payments into the Plan Account as determined by the independent actuaries, it paid its share of the cost of providing the independent plan administrator and it paid its share of premiums to purchase commercial stop-loss insurance to cover claims that exceeded the fiscal abilities of the self-funded plan. App. 66.

Benedictine claimed all three types as expenses of its group health insurance program. App. 67. DHS allowed the last two of these costs, but refused to recognize the actual cost of Benedictine’s payments into the Plan Account. Instead, DHS recognized

⁷The record below did not expressly indicate whether Benedictine’s self-insurance program fell within the Church Plan exception of ERISA. In response to the Court’s inquiry on this topic, counsel confirmed the plan’s ERISA status. *See*, App. 84. Benedictine expects no dispute over this status, so this Court may take judicial notice that Benedictine participates in a Church Plan within the meaning of ERISA Section 3(33) and the Internal Revenue Code. If DHS has reason to dispute this fact, it should state its basis in the Respondent’s Brief. *See*, Minn. Rule of Evidence 201. If this Court determines that it cannot dispose of the present appeal by applying the principles of *Whitman v. Am. Trucking Ass’ns*, or if it needs a more complete record regarding Benedictine’s Church Plan, then, under Minn. Stat. § 14.69, this Court is authorized to remand the matter for additional fact finding relating to Benedictine’s ERISA status.

the amount the independent third-party administrator paid **out of** the Plan Account as benefits for Benedictine's employees. App. 11, 67⁸.

The plain language of Rule 50 recognizes group health insurance as an allowable cost and it does not distinguish between commercial insurance and self-insurance. Minn. R. 9549.0040, subpt. 8.D; App. 64. By comparison, the legislature handled workers compensation insurance differently. The statutes draw an express distinction between the allowability of the costs of commercial workers compensation insurance and self-insurance programs. Minn. Stat. § 256B.431, subd. 22. App. 75. Yet the legislature enacted no similar distinction for self-insured group health insurance programs, and the Department never promulgated a rule adopting similar distinctions on the allowability of self-insured medical benefit programs under Rule 50⁹. App. 64. Instead, an internal DHS memorandum memorialized the Department's unpromulgated policy. The authors of that memo hijacked some of the statutory workers compensation criteria and applied them to the self-insured group health insurance costs at issue in this case. App. 64-65, 82.

⁸This approach relegates Benedictine's plan of self-insurance into a program that simply pays medical claims as they arise. This is merely paying for risks after they occur, not insuring against possible risks. As explained in Section I.C, below, the Minnesota legislature recognized that the essence of a self-insurance plan must include the funding and accumulation of plan reserves to cover the cost of claims. To be consistent, DHS should disallow commercial insurance premium payments that exceed claims paid in any single year as nonallowable overexpenditures.

⁹Although the workers compensation self-insurance provision imposes a series of requirements on an acceptable plan, Minn. Stat. § 256B.431, subd. 22 (b)(4) and (5), none of those requirements limit allowable costs to actual claims paid. In fact, subd. 22, (b)(5)(ii) contemplates that a self-insured workers compensation insurance plan may accumulate reserves because it describes how a distribution of such excess reserves should be reported.

DHS does not accuse Benedictine of excessive spending on its self-insurance program. Neither the Commissioner nor the Court of Appeals identified any substantive grounds to disallow Benedictine's payments into its Plan Account:

- There was no evidence or finding that Benedictine paid an exaggerated amount into the Plan Account.
- There was no evidence or finding that Benedictine paid amounts into the Plan Account that were not ordinary or had any improper motives in ascertaining how much to pay into the Plan Account.
- There was no evidence or finding that Benedictine attempted to maximize its payments into the Plan Account to maximize Rule 50 operating rates or was careless or negligent in determining how much should be paid into the Plan Account.

*See, Findings of Fact, App. 66-67; see, also, TaBelle deposition at 39 - 41 (First Skorczeski Aff., Ex. 1)*¹⁰. The Commissioner found no evidentiary basis, other than the Department's unpromulgated rule, to disallow Benedictine's reported costs of its self-funded group health insurance program.

The Impact of Minnesota's Alternative Payment System

A change in Minnesota's nursing home rate-setting process amplified the effect of the Department's erroneous rate adjustment for Benedictine. Effective July 1, 1997, Benedictine entered Minnesota's contractual Alternative Payment System, Minn. Stat. § 256B.434 ("APS"). App. 86, ¶ 6. As a matter of law, the rates paid under any year

¹⁰In addition, contrary to the conclusion of the Court of Appeals that Benedictine obtained a benefit by making deposits into the Plan Account, App. 16, the Department's deposition witness conceded what the Court of Appeals overlooked: If Benedictine made inappropriate, exaggerated payments into the Plan Account, that practice would reduce the limited funds available, and earmarked by Rule 50, for other routine operations. TaBelle deposition 41:22 - 42:1 (First Skorczeski Aff., Ex. 1).

governed by APS are derived from the facility's last Rule 50 rate. Minn. Stat. § 256B.434, subd. 4 (b), (c). That means that the Department's retroactive audit adjustments to Benedictine's base year cost report cause rate reductions that ripple forward into every subsequent APS rate year, because all APS rates are calculated from Benedictine's Rule 50 base year rates. App. 86, ¶¶ 7, 8.

Benedictine's subsequent MA rates were not based on insurance costs in those subsequent years. Since the Department's disputed rate adjustment was made **after** Benedictine entered APS, Benedictine never had any opportunity to mitigate its cost disallowance by switching to a commercial policy and reporting the full premium cost, which would comply with the Department's restrictive unpromulgated policy. For Benedictine, the effect of the Department's erroneous, one-word interpretative rate adjustment is repeated every rate year since July 1, 1997, and will continue to be repeated until the legislature adopts a new rate setting system that does not rely on APS base year costs.

Benedictine's Appeal

Benedictine filed a timely appeal of the Department's adjustment, pursuant to Minn. Stat. § 256B.50, subd. 1b. Pursuant to Minn. Stat. § 256B.50, subd. 1c, the Commissioner issued an "Appeal Determination" that affirmed the disallowance. That Appeal Determination also announced, for the first time, that DHS believed its field auditors erred in their calculations, and expressly threatened that if Benedictine pursued an appeal an even larger adjustment would be taken. App. 11-12. Benedictine was not deterred from appealing.

The Commissioner initiated a contested case hearing under the Minnesota Administrative Procedure Act. Minn. Stat. §§ 14.48 - 14.56. The Commissioner's representative affirmed the recommendation of the ALJ upholding the DHS adjustments and, in an Order dated August 4, 2003, ordering the appeal remanded to the ALJ to establish the exact amount of Benedictine's reported costs to be disallowed, if the parties were unable to agree on that figure. App. 51.

The parties did not agree and the Commissioner ordered the appeal back to the Administrative Law Judge. App. 50. In a Recommendation dated November 19, 2004, App. 34, the ALJ accepted the Department's calculations and disallowed additional costs reported by Benedictine that had never been disallowed by any DHS rate-setter or auditor. The Commissioner's representative accepted the Recommendation of the ALJ in an Order received by Appellant's counsel on April 7, 2005, App. 25.

On May 6, 2005, Benedictine obtained a Writ of Certiorari to challenge the Commissioner's final determination in the Minnesota Court of Appeals pursuant to Minn. Stat. § 14.63. App. 21. In an unpublished decision filed January 31, 2006, the Court of Appeals agreed with the Commissioner's interpretation of a single undefined word, "incur." That one-word interpretation trumped Rule 50's specific language that DHS must include group health insurance among allowable costs for rate-setting purposes. App. 9.

ARGUMENT

I. THE COURT OF APPEALS ERRED WHEN IT DETERMINED THAT IT COULD LOOK TO A SINGLE, UNDEFINED WORD IN A GENERAL PROVISION OF MEDICAL ASSISTANCE RATE-SETTING RULE 50 TO OVERRULE THE EXPRESS, PROPERLY PROMULGATED LANGUAGE OF THE RULE.

The decision of the Court of Appeals affirming the Commissioner's final Order creates a loophole in this Court's long-established doctrine that rules must be adopted in accordance with the rule making requirements of the Minnesota Administrative Procedure Act. *White Bear Lake Care Center, Inc. v. Minn. Dept. of Pub. Welfare*, 319 N.W.2d 7, 9 (Minn. 1982); *see, also, In re St. Otto's Home v. Minn. Dep't of Human Servs.*, 437 N.W.2d 35 (Minn. 1989) The Court of Appeals cited Minn. Stat. § 14.05, subd. 1, which requires Minnesota agencies to promulgate rules in order to attain the effect of law. App. 13. Nonetheless, the Court accepted and adopted an interpretation which vitiates the longstanding prohibition against enforcing unpromulgated rules. Under the Court of Appeals' analysis, any agency may avoid Minnesota's statutorily-mandated rule making process by construing a single, undefined word to effectuate a new and unintended result.

A. The Court of Appeals Erred by Relying on its Interpretation Of Two Ordinary, Dictionary Definitions to Ignore The Plain Language of a Properly Promulgated Rule.

The Court of Appeals erred by resorting to two dictionaries to interpret the single word "incur" and thereby change the meaning of the properly promulgated rule which would otherwise recognize the cost of Benedictine's group health insurance for Rule 50 rate-setting purposes.

The Court's legal analysis constitutes reversible error. The letter of the law may not be disregarded under the pretext of pursuing its spirit. Minn. Stat. § 645.16. The authors of Rule 50 identified the cost of providing group health insurance as an allowable cost. The Rule classifies these costs to a designated cost category. Minn. R. 9549.0040, subpt. 8, D. The Rule does not distinguish between commercial insurance or self insurance when deciding which costs are allowable. Neither does the Rule split costs of self-insured group health plans into allowable and nonallowable categories. Despite the language of its own Rule, the Department of Human Services distributed an internal policy that enforced those distinctions to Benedictine's prejudice. App. 64-65, 82.

Rather than overturn the Department's memorandum because it is an invalid, unpromulgated rule, the Court of Appeals skirted that analysis by focusing on the word "incur" to rationalize DHS's disallowance. Although there is no question that Benedictine actually made the payments into its self-insurance Plan Account, the Court of Appeals held Benedictine did not really "incur" the cost of those payments unless they were used by the Plan to pay claims.¹¹

¹¹Using a dictionary out of context may cause a result markedly different from proper legal analysis and construction. Federal courts have confirmed that a party can "incur" a cost before it is actually paid. *Farmland Indus., Inc v. Frazier-Parrott Commodities*, 111 F.3d 588, 591 (8th Cir. 1997); *Quarles Petroleum Co. v. United States*, 551 F.2d 1201 (Ct.Cl. 1977). This is not a case like *Trimble v. Asarco*, 232 F.3d 946 (8th Cir. 2000) in which that court determined costs had not been incurred because the claimant was under no obligation to ever pay the costs claimed. In this case, Benedictine's Plan Account payments had to be spent on medical claims. Any other use of the Plan Account would have violated the contract with the plan administrator and the policies of Benedictine Health Services. Second Affidavit of Thomas L. Skorczeski, Ex. 8.

The United States Supreme Court has explicitly rejected regulatory interpretations that alter the scope of a rule or law by attributing a new meaning to a single word or short phrase, and this Court should apply this same guidance to Minnesota agencies. In *Whitman v Am Trucking Assn's*, 531 US 457 (2001), the Court refused to obligate the federal Environmental Protection Agency to assess “costs of implementation” when setting National Ambient Air Quality Standards. The Court refused to construe that obligation from minor phrases, when the language of the statute did not explicitly impose such a requirement. Citing Supreme Court precedent that similarly rejected out-of-context statutory interpretations and eschewed standard dictionary definitions, Justice Antonin Scalia summarized *Whitman's* formal analysis by succinctly explaining, “[Congress] does not . . . hide elephants in mouseholes.” *Whitman*, 531 US at 468, *construing, FDA et al. v. Brown & Williamson*, 529 U.S.120 (2000)(FDA could not rely on a new interpretation of statutory language to regulate tobacco, where it had consistently interpreted the same statutes as not supplying such authority and where Congress had a long history of passing legislation permitting tobacco sales and use); *MCI v. ATT*, 512 U.S. 218 (1994)(FCC could not interpret its statutory authority to “modify” requirements it enforced as authority to make fundamental changes to its regulatory system).

The *Whitman* analysis is gaining judicial favor. The Court of Appeals for the D.C. Circuit applied the *Whitman* analysis to overturn the FTC’s attempt to regulate the practice of law. The Court reversed an FTC ruling that law firms were included within the meaning of the phrase “other entities” in a law prohibiting debt collector misconduct.

ABA, et. al v. FTC, 430 F.3d 457 (DC Cir. 2005). The Court was offended by a federal agency's attempt to bootstrap jurisdiction over an issue historically reserved for state regulation, the practice of law.

In similar fashion, DHS is bootstrapping itself to impose restrictions on federally exempted Church Plans and their Plans' Assets. If Congress chose to regulate Church Plans, it could do so by closing ERISA's Section 3(33) exemption. Or, if the State of Minnesota had grounds to terminate Benedictine's Church Plan, then its proper authority to enforce such a sanction would be through the Minnesota Commissioner of Commerce under Minn. Stat. ch 60A *et seq.* But this Court should not allow DHS to use standard dictionaries to prop itself up into regulating Church Plans, via a one-word, rate-setting interpretation.

In this case, both the Court of Appeals and the Commissioner interpret the word "incur," found in Rule 50's general definition of historical operating costs. Minn. R. 9549.0020, subpt. 25 ("allowable operating costs incurred by the nursing facility during the reporting year . . .") This interpretation distinguishes between two kinds of group health insurance, yet both are otherwise allowable under Minn. R. 9549.0040, subpt. 8 D. This interpretation imposes a distinction on the allowability of group health insurance costs that was never included in Rule 50. As explained in section I.C, below, that interpretation is inconsistent with the expectation of the Minnesota legislature. Applying *Whitman*, if Rule 50 specifically allows the costs of group health insurance, then the Court of Appeals should not find a *disallowing* elephant rejecting Church Plans in the *incurred* mousehole. The Court of Appeals inappropriately relied on a dictionary

definition of one, undefined word in a general provision of Rule 50 to parse a specific, properly-promulgated Rule that recognizes costs of group health insurance programs as allowable costs.

The Court inquired whether, under ERISA, Benedictine would be found to have incurred those costs.¹² ERISA provides that all assets of an employee benefit plan are held in trust, 29 USC § 1103(a), and, in general, “the assets of a plan shall never inure to the benefit of any employer and shall be held for the exclusive purposes of providing benefits to participants in the plan and their beneficiaries and defraying reasonable expenses of administering the plan.” 29 USC § 1103(c)(1). If under ERISA, once Benedictine made a payment into the plan, that payment could only have been used for the benefit of the plan participants. Even under the Court of Appeals’ dictionary definitions, the expense would have been incurred¹³.

B. The United States Supreme Court’s Caution Against Finding Elephants In Mouseholes is Even More Relevant For Minnesota Courts Because of the Rigor of Minnesota’s Administrative Procedure Act.

The Supreme Court’s warnings against looking for elephants in mouseholes stopped improvident interpretation by federal administrative agencies. *Whitman*, 531 US at 468(EPA), *construing, FDA et al. v. Brown & Williamson*, 529 U.S.120 (2000)(FDA);

¹²As explained in the Statement of Facts, above, as a Section 3(33) Church Plan, Benedictine’s self insured group health insurance program is not subject to ERISA. The State of Minnesota has enacted no law that expressly allows employers to raid the assets of self-insured Church Plans, or to use those assets for other imprudent purposes. *See*, Minn. Stat. ch. 60A *et seq.*

¹³The record below reveals that Benedictine’s contract with the Plan’s Third Party Administrator contemplated that the Plan would abide by ERISA, if it applied. Affidavit of Diane K. Krueger, September 27, 2002, Ex. B.

MCI v. ATT, 512 U.S. 218 (1994)(FCC). The federal Administrative Procedure Act allows its agencies to follow interpretation because they are “not precluded from announcing new principles in an adjudicative proceeding and . . . the choice between rulemaking and adjudication lies in the first instance within the [agency’s] discretion.” *NLRB v. Bell Aerospace Co.*, 416 U.S. 267, 294 (1974). But Minnesota has granted less leniency to its agencies. See, George A. Beck, *Minnesota Administrative Procedure*, § 16.3, fn 15 (2d ed. 1998). The Minnesota legislature has a very broad statutory definition of a rule, which has been strictly enforced by the judiciary. See, e.g., *White Bear Lake Care Center, Inc. v. Minn. Dept. of Pub. Welfare*, 319 N.W.2d 7 (Minn. 1982). To be valid, the rules of an administrative agency must be promulgated according to the processes established by the legislature, unless they fall within specific exceptions to that requirement.

A rule is defined to include “every agency statement of general applicability and future effect . . . adopted to implement or make specific the law enforced or administered by it.” Minn. Stat. § 14.02, subd. 4. App. 74. At the time DHS disallowed Benedictine’s reported cost of payments to the Plan Account, rules were required to be adopted in accordance with the rulemaking requirements of the Minnesota Administrative Procedure Act. Minn. Stat. § 14.05, subd 1; *White Bear Lake Care Center, Inc. v. Minn. Dept. of Pub. Welfare*, 319 N.W.2d 7, 9 (Minn. 1982). If not, the rule is invalid and unenforceable. *Johnson Bros. Wholesale Liquor Co. v. Novak*, 295 N.W.2d 238, 242-23 (Minn. 1980).

Neither the promulgated rules of the Department of Human Services nor the statutory direction of Ch. 256B authorize DHS to measure Benedictine's cost of providing group health insurance by the cost of claims paid, rather than by the cost of Benedictine's payments into the Plan's Assets. The Court of Appeals erred by failing to reject the Department's creation of such a rule without that statutory authority.

In this case, the Court of Appeals' interpretation of the single word "incur" ratified the Department's use of its unpromulgated policy to interpret one provision of Rule 50, the requirement that allowable costs must be incurred for goods or services actually provided, to "make specific the law enforced or administered by the agency . . ."

Minnesota-Dakotas Retail Hardware Assn v State, 279 N.W.2d 360, 364 (Minn. 1979). Such action is an interpretive rule that is valid only if it is promulgated in accordance with the Minnesota Administrative Procedure Act. *But see, Mapleton Community Home, Inc v Minn. Dept. of Human Services*, 391 N.W.2d 798, 801 (Minn. 1986) (agency decision which mathematically translates words of rule in the only manner reasonable is not invalid).

The Commissioner's one-word interpretation emanated from a post-hoc rationalization by the Administrative Law Judge, because DHS audit staff did not base its massive rate adjustment on that legal theory. Audit staff merely followed an internal DHS memorandum describing an informal, unpromulgated policy on how to treat self-funded group health insurance programs differently from commercial group health insurance programs.¹⁴ Those criteria are not included expressly in Minn. R. 9549.0035,

¹⁴ TaBelle deposition 14:8 - 16 (First Skorczeski Aff., Ex. 1).

subpt. 8.C.¹⁵ App. 77. DHS conceded its informal criteria made its promulgated cost-setting principles of Minn. R. 9549.0035, subpt. 8.C more specific,¹⁶ and those criteria were intended to be applied to any nursing home reporting costs associated with self-funded health insurance programs.¹⁷

The Court of Appeals erred by allowing the Department to find the elephant of “disallowing Church Plan self insurance” in the mousehole of the word “incur.” Its order encourages DHS, and other state agencies, to exploit an interpretation loophole to this Court’s *White Bear Lake* precedent by rationalizing away the Department’s effort to take a million dollar retroactive rate adjustment whose sole authority rests in a written, unpromulgated internal memorandum. This one-word interpretation approach scuttles the certainty and finality provided in rate setting by this Court’s decision in *In re St. Otto’s Home v. Minn. Dep’t of Human Servs.*, 437 N.W.2d 35 (Minn. 1989) (DHS cannot pull the rug out from under a provider by a new interpretation of its rate-setting rules.) The Court of Appeals’ decision must be reversed.

C. The Court of Appeals’ Single-Word Interpretation Produces a Result That Was Not Intended by the Legislature.

As explained above, despite the plain language of Rule 50 that recognizes group health insurance as an allowable cost, the Court of Appeals relied on its own interpretation of two dictionaries to conclude that Benedictine had not actually “incurred”

¹⁵ TaBelle deposition 15:15 - 17 (First Skorczeski Aff., Ex. 1).

¹⁶ TaBelle deposition 18:9 - 13 (First Skorczeski Aff., Ex. 1).

¹⁷ TaBelle deposition 17:14 - 23 (First Skorczeski Aff., Ex. 1).

the costs it reported for payments to its Plan Account. “Dictionaries can be useful aides in statutory definition, but they are no substitute for close analysis of what words mean as used in a particular context.” *MCI v. ATT*, 512 U.S. 218 , 240-241 (1994) (*dissenting opinion of J. Stevens, citing Justice Learned Hand in Cabell v. Markham*, 148 F2d 737, 739 (2nd Cir. 1945)).

In 1993, the Minnesota legislature specifically recognized that self insurance was an acceptable mechanism of providing group health insurance for nursing home employees. In Minn. Stat. § 256B.431, subd. 22 (e), the legislature provided an optional mechanism that self-insuring nursing homes could use to allocate certain group health insurance costs. That law demonstrates that the legislature recognized the value of self insurance to provide group health insurance and that it endorsed such activity. It demonstrates that the legislature intervened into Rule 50’s rate setting process to add the requirements it believed were necessary to report self insured group health insurance costs properly. That intervention did not invest DHS with the authority to discriminate among a nursing home’s costs of self insurance.

Courts may not add a provision to law which was either deliberately omitted or unintentionally overlooked by the legislature. *See, Green Giant Co. v. Comm’r of Revenue*, 534 NW2d 710, 712 (Minn. 1995); *Wallace v. Commissioner of Taxation*, 184 N.W.2d at 588, 594 (Minn. 1971). In this case, the legislature specifically addressed the issue of reporting costs of self insured group health insurance and it did not limit allowable costs to the costs of claims actually paid. The Court of Appeals erred by inserting such a provision via interpretation.

Comparing Minn. Stat. § 256B.431, subd. 22 (e) (group health insurance) to subd. 22 (d) (workers compensation insurance) shows that the legislature understood the principle of self insurance better than the Commissioner of Human Services. Although both the Court of Appeals and the Commissioner believed that payments into the Plan Account did not represent costs incurred by Benedictine, the legislature understood that the very concept of self insurance requires the existence of plan reserves to pay claims. *See*, Minn. Stat. § 256B.431, subd. 22 (d)(4)(ii) and (iii). In fact, directly contrary to the conclusions of the Court of Appeals and the Commissioner, the legislature recognized that self-insurance reserves would include Medical Assistance funds. Minn. Stat. § 256B.431, subd. 22 (d)(5)(i)(if the facility ceases to operate, the *Medical Assistance share of self insured plan reserves* remaining after a settle up must be returned to the state).

The Court of Appeals' reliance on a single word to circumvent a properly promulgated rule must be reversed because, in this case, it produces a result that is contrary to the law, as evidenced by the plain language of Rule 50, and to the expectations of the Minnesota legislature in Minn. Stat. § 256B.431, subd. 22 (d)(4) and (5).

II. THE COURT OF APPEALS ERRED WHEN IT DETERMINED THAT THE DEPARTMENT'S DISTINCTION BETWEEN COMMERCIAL INSURANCE AND SELF-INSURED GROUP HEALTH PLANS DID NOT VIOLATE BENEDICTINE'S CONSTITUTIONAL RIGHT TO EQUAL PROTECTION.

Benedictine and a nursing home that makes premium payments to a commercial health insurance are similarly situated for Rule 50 rate-setting purposes. Benedictine

enjoys a constitutional right to equal protection of the laws, protected by the Fourteenth Amendment of the United States Constitution and Article 1, § 2 of the Constitution of the State of Minnesota. The Court of Appeals incorrectly found that Benedictine's right to equal protection was not implicated by the Commissioner's disallowance of a portion of the costs of its self-insured group health insurance program because it was not similarly situated to nursing homes that purchased commercial group health insurance. App. 17.

That conclusion was based on the Court's observation that, if all Benedictine's payments into the Plan Account were not spent on employee health claims in the same year, some of that Plan Account money would remain available to pay claims in the next year¹⁸. App. 17. As explained in Section I.C, above, the Minnesota legislature recognized that such plan reserves are an essential element of a self insurance program. It is factually correct that, at the end of any given reporting year, unspent Plan Account funds remained available to pay claims in a subsequent year. In fact, at one point, Benedictine enjoyed a "premium holiday" because its actuary determined the Plan Account held sufficient funds to meet projected claims. App. 67.

This distinction only represents a true difference if the record reveals that DHS examined premiums paid to commercial insurers and determined that purchasers of commercial insurance do not benefit from reduced premiums because prior-year losses were less severe than anticipated. It does not. Rather than rely on this assumed distinction to disallow a portion of Benedictine's self insurance costs, the Department

¹⁸The Court also pointed out that interest on the Plan Account went to Benedictine's benefit. App. 6. But such interest could be used only to pay claims against the Plan. Affidavit of Diane K. Krueger, September 27, 2002, Ex. B, p.3

should have applauded Benedictine for participating in a group health insurance program that provided an opportunity to share the benefit of favorable claims activity with DHS, by reducing subsequent year expenses.

This Court asked whether, under ERISA, self-insured and commercially insured employee health plans are similarly situated for purposes of Benedictine's claim. As explained in the Statement of Facts, above, Benedictine's plan exists pursuant to the federal Section 3 (33) Church Plan exception to ERISA. As a general principle, ERISA treats ERISA-covered self-insured employee health plans and commercially-insured employee health plans differently.

When Congress enacted ERISA, it preempted state laws relating to all employee benefit plans, including employer-provided health insurance. 29 USC § 1003 (a). Congress allowed states to continue to regulate insurance. 29 USC § 1144(a). However, Congress limited that state authority to regulate insurance by providing that employee benefit plans may not "be deemed to be an insurance company or other insurer . . . or to be engaged in the business of insurance . . ." 29 USC § 1144(b)(2)(B). That means that the entire ERISA preemption scheme is based on a Congressional determination that employee benefit plans, and the commercial insurance companies that may insure such plans, are not similarly situated. Commercial insurance plans are subject to state regulation while self-insured employee benefit plans are subject to federal ERISA law. That distinction is not dispositive of this appeal, however, because Rule 50 draws no distinction between ERISA plans, Church Plans or commercial insurers, and because Benedictine's Section 3(33) Church Plan is not subject to ERISA.

The Court of Appeals applied the traditional equal protection rational basis test to assess whether the Department's differential treatment of self insured nursing homes is permissible. "[T]he pertinent inquiry is whether the classification employed . . . advances legitimate legislative goals in a rational fashion." *Schweiker v. Wilson*, 450 U.S. 221, 234 (1981); *Metropolitan Rehab. Serv. v Westberg*, 386 N.W. 2d 698, 701 (Minn. 1986). The Court of Appeals determined that DHS has a rational basis to protect a state interest in reimbursing facilities only for costs that are unrecoverable in any form. App. 17.

The explicit language of Rule 50 does not support that ruling. The Minnesota legislature explicitly recognized that when a nursing home ends a self-insured workers compensation insurance program, the state must recover any medical assistance funds included in the plan reserves. Minn. Stat. § 256B.431, subd. 22(d). Similarly, Rule 50 also recognizes the concept of an "Applicable Credit", which is an expense reduction that reduces the costs claimed by a nursing facility. Minn. R. 9549.0020, subpt. 4. Such credits "must be used to offset or reduce the expenses of the nursing facility to the extent that the cost to which the credits apply was claimed as a nursing facility cost." Minn. R. 9549.0035, subpt. 2. App. 77. If an ERISA-exempt Church Plan attained an Applicable Credit, in whatever form, it would reduce the allowable expense according to the terms of Minn. R. 9549.0035, subpt. 2. For Rule 50 purposes, all credits are offset, regardless whether they are commercial insurance credits or Church Plan credits. For example, if a commercially insured nursing home switched policies mid-year and received a premium

refund from its first insurer, the appropriate Rule 50 rate-setting treatment of that refund would be to offset other costs as an Applicable Credit.

The Court of Appeals erred in finding the state has an interest in reimbursing nursing homes “only for costs that are unrecoverable in any form.” App. 17. In fact, this analysis bruises one of the basic tenets of Rule 50. Rule 50 contemplates that any type of incurred cost may later be recoverable, and handles those recoveries by requiring facilities report “Applicable Credits..” Minn. R. 9549.0035, subpt. 2. Reporting Applicable Credits reduces MA expenditures¹⁹.

The Department could have promulgated a rule to prevent paying more for self insurance than for comparable commercial insurance, to encourage comparison shopping when evaluating self insurance. But it did not. It could have promulgated a rule limiting reimbursement to a self insurance plan account once plan reserves reached some defined multiple of anticipated claims or of uninsured claims, to discourage treating the Plan Account as an investment vehicle. It did not do that either. Either of those approaches might have protected a legitimate state interest by trying to eliminate questionable motivations to select self insured group health insurance.

Instead, the Department simply decided that it would not pay for the costs of maintaining the reserves the legislature recognized are central to the operation of a bona fide self-insured group health insurance Church Plan. Under the Department’s

¹⁹For example, if a Rule 50 provider purchases an item and mails in a rebate form, the recoverable cost should be treated as an Applicable Credit reducing any amount claimed by the provider. Plan Assets previously paid and claimed by a Rule 50 provider that are refunded to the nursing home by the Plan fit the definition of Applicable Credits. Minn. R. 9549.0020, subpt 4.

unpromulgated policy, nursing homes are not reimbursed for the actual costs of providing self insurance. Instead, they are reimbursed for the costs of paying their employees' medical claims as they arise. This unequal treatment fails to recognize the inherent public policy that employers who self insure should be encouraged to maintain sufficient Plan Assets. Otherwise, one insolvent nursing home could shift the burden of meeting the unfunded obligations owed to insured employees to the State of Minnesota under the involuntary receivership laws of Minn. Stat. § 144A.15, subd. 3. That law, among other requirements, obligates the State's receiver to pay "all valid obligations of the nursing home . . ."

In *New London Nursing Home, Inc. v. Lindeman*, 382 N.W.2d 868 (Minn. Ct. App. 1986), the Court emphasized that, to survive equal protection scrutiny:

[T]he classification must be reasonable, not arbitrary, and must rest upon some ground of difference having a fair and substantial relation to the object of the legislation, so that all persons similarly circumstanced shall be treated alike.

Id. at 871.

That is exactly where the Department's unpromulgated policy falls short. Once Benedictine announced to its employees that it was providing a group health insurance policy, it became obligated to make its designated payments into the Plan Account to maintain its employees' coverage. During the two years under appeal in this proceeding, DHS determined that Benedictine paid more into its Plan Account than the Plan Account paid out in its employees' claims. The Court of Appeals recognized that money was not refunded to Benedictine so, for the years under appeal, the Department's action simply

requires Benedictine to refund to DHS money that would have contributed to the profit of a commercial insurer, and been recognized as an allowable cost, if Benedictine had simply purchased commercial insurance. This unpromulgated policy treats nursing homes that incur costs by paying premiums for commercial group health insurance differently from nursing homes that incur costs by funding self-insured group health insurance programs.

The Department's unpromulgated policy of disallowing the cost of Benedictine's actual payments to the Plan Account deprived Benedictine of equal protection under the laws and must be reversed. Particularly in a case where the Department testified that it had no basis to disallow the cost of Benedictine's payments to the Plan Account under its general cost principles²⁰, the disallowance was clearly not rationally related to any legitimate interest of the State.

The Court of Appeals' decision affirming the disallowance of Benedictine's actual costs of providing a self-insured group health insurance program, strictly because it was a self-insured program, violated Benedictine's right to equal treatment under the law and should be reversed.

CONCLUSION

This case presents the Court with the opportunity to complete a trilogy of cases that establish the boundaries for impermissible agency rate-setting through interpretation. In 1982, this Court established that the Department of Human Services may not set payment rates by enforcing an unpromulgated, invalid rule. *White Bear Lake Care*

²⁰ TaBelle deposition at 39 - 41 (First Skorczeski Aff., Ex. 1).

Center v. DPW, 319 N.W.2d 7 (Minn. 1982). Seven years later the Court explained that DHS may not rely on an otherwise permissible interpretation of its own rules that is unreasonable under the circumstances or unfair. *In re St. Otto's Home v. Minn. Dep't of Human Servs*, 437 N.W.2d 35 (Minn. 1989). Applying the *Whitman* analysis to this case will put all Minnesota agencies on notice that they cannot avoid their obligations under the Minnesota Administrative Procedure Act by relying on the interpretation of a single word or phrase to defeat the properly promulgated language of a rule.

In this case, the Commissioner of Human Services determined that Benedictine Health Center should repay well over a million dollars, received over the course of ten years, because he determined Benedictine had not incurred the cost of payments everyone agrees it made to provide group health insurance coverage for its employees. The Court of Appeals accepted that conclusion by relying on two dictionaries to define the word "incur" and concluding that the dictionary definitions of that single word in the general cost provisions of Rule 50 supersede Rule language that makes group health insurance an allowable cost.

Whitman teaches that agencies may not expand their authority by relying on expansive interpretations of general words or phrases. This Court should be even more cautious of such activity, because Minnesota's Administrative Procedure Act, and the precedent of this Court, impose stricter requirements on state agencies than the federal law applied by the United States Supreme Court in *Whitman*.

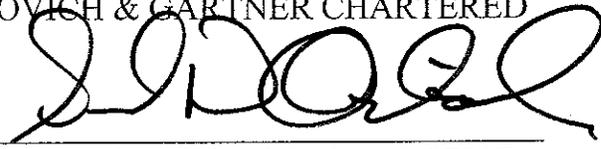
Benedictine Health Center respectfully requests this Court to reverse the decision of the Minnesota Court of Appeals because it improperly relied on an interpretation of a

single, undefined word in a general provision of Rule 50 to disallow costs that were made allowable by the specific language of that Rule. The Court of Appeals also erred when it concluded that Benedictine's right to equal protection under the law was not violated by the Commissioner's decision to pay for commercial insurance but not for self insurance, because the state interest it identified as furthered by that decision was factually incorrect.

For these reasons and all the reasons set out in the record of this proceeding, Benedictine Health Center respectfully requests that this Court reverse the decision of the Court of Appeals and direct the Commissioner of Human Services to allow Benedictine's costs of providing self-insured group health insurance as reported.

Dated: May 18, 2006

ORBOVICH & GARTNER CHARTERED

By: 

Samuel D. Orbovich, Atty #137017

Thomas L. Skorczeski, Atty #178305.

408 St. Peter Street, Suite 417

St. Paul, MN 55102

Telephone: (651) 224-5074

Facsimile: (651) 224-4697

**ATTORNEYS FOR APPELLANT
BENEDICTINE HEALTH CENTER**

The appendix to this brief is not available for online viewing as specified in the *Minnesota Rules of Public Access to the Records of the Judicial Branch*, Rule 8, Subd. 2(e)(2) (with amendments effective July 1, 2007).