

STATE OF MINNESOTA
OFFICE OF ADMINISTRATIVE HEARINGS

FOR THE MINNESOTA DEPARTMENT OF HEALTH

In the Matter of the Proposed
Adoption of Department of Health
JUDGE
Rules Governing the Licensing of
Home Care Providers, Minnesota
Rules, Chapter 4668, and Establishing
License Fees, Chapter 4669

REPORT OF THE
ADMINISTRATIVE LAW

The above-entitled matter came on for hearing before Administrative Law Judge Peter C. Erickson on August 28, 29 and 30, 1991 , in the Minnesota Department of Health Building, 717 Delaware Street Southeast, Minneapolis, Minnesota. This Report is part of a rulemaking proceeding pursuant to Minn. Stat. 14.131 to 14.20, to determine whether the Department of Health has fulfilled all relevant, substantive and procedural requirements of law, to determine whether the proposed rules are needed and reasonable, to determine whether the Department has statutory authority to adopt the proposed rules, and to determine whether or not the proposed rules, if modified, are substantially different from the rules as originally proposed.

Members of the agency panel appearing at the hearing included: Mary Absolon, Assistant Director, Division of Health Resources; Cecelia Weible, Chief of the Section of Information and Analysis, Division of Health Resources; David Siegel , Rules and Policy Analyst, Division of Health Resources; Claudia Miller, Tuberculosis Control Section, Division of Disease Prevention and Control; and Mary Stanislav, Special Assistant Attorney General, representing the Department. Approximately 100 persons attended the hearing on one or more days. The hearing continued until all interested groups and/or persons had had an opportunity to comment concerning the proposed rules. The Judge received and read over 125 written submissions and watched a videotape of testimony given by several recipients of home care services.

The Commissioner of the Minnesota Department of Health 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. 14.15, subd. 3 and 4, this Report has been submitted to the Chief Administrative Law Judge for his approval. If the Chief Administrative Law Judge approves the adverse findings of this Report, he will advise the Commissioner of actions which will correct the defects and the Commissioner may not adopt the rule until the Chief Administrative Law Judge determines that the defects have been corrected.

However, in those instances where the Chief Administrative Law Judge identifies

defects which relate to the issues of need or reasonableness, the Commissioner may either adopt the Chief Administrative Law Judge's suggested actions to cure the defects or, in the alternative, if the Commissioner does not elect to adopt the suggested actions, she must submit the proposed rule to the Legislative Commission to Review Administrative Rules for the Commission's advice and comment.

If the Commissioner elects to adopt the suggested actions of the Chief Administrative Law Judge and makes no other changes and the Chief Administrative Law Judge determines that the defects have been corrected, then the Commissioner may proceed to adopt the rule and submit it to the Revisor of Statutes for a review of the form. If the Commissioner makes changes in the rule other than those suggested by the Administrative Law Judge and the Chief Administrative Law Judge, then she shall submit the rule, with the complete record, to the Chief Administrative Law Judge for a review of the changes before adopting it and submitting it to the Revisor of Statutes.

When the Commissioner files the rule with the Secretary of State, she shall give notice on the day of filing to all persons who requested that they be informed of the filing.

Based upon all the testimony, exhibits and written comments, the Administrative Law Judge makes the following:

FINDINGS OF FACT

Procedural Requirements

1. On May 17, 1991, the Department filed the following documents with the Chief Administrative Law Judge:

- (a) A copy of the proposed rules certified by the Revisor of Statutes.
- (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.
- (e) The Statement of Need and Reasonableness.
- (f) A Statement of Additional Notice.

2. On June 24, 1991, a Notice of Hearing and a copy of the proposed rules were published at 15 State Register pp. 2668-2698.

3. On June 10 through 12, 1991, the Department mailed the Notice of Hearing to all persons and associations who had registered their names with the Department for the purpose of receiving such notice.

4. On July 15, 1991, the Department filed the following documents with the Administrative Law Judge:

- (a) The Notice of Hearing as mailed.
- (b) The Agency's certification that its mailing list was accurate and complete.

- (c) The Affidavit of Hailing the Notice to all persons on the Agency's list,
- (d) An Affidavit of Additional Notice
- (e) The names of Department personnel who will represent the Agency at the hearing together with the names of any other witnesses solicited by the Agency to appear on its behalf .
- (f) A copy of the State Register containing the proposed rules.
- (g) All materials received following a Notice of Intent to Solicit Outside Opinion published at 12 State Register p. 2105 on March 21, 1988, and a copy of the Notice.

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 period for submission of written comment and statements remained open through September 19, 1991, the period having been extended by order of the Administrative Law Judge to 20 calendar days following the hearing. The record closed on September 24, 1991, the third business day following the close of the comment period.

6. Pursuant to Minn. Stat. 14.11, subd. 1, the Department submitted a fiscal note which states that local units of government will incur costs of \$310,436.00 in the first year of rule implementation and \$143,428.00 in the second year. Additionally, the Department states in its fiscal note that the proposed rules will have no effect on state spending. The fiscal note shows a rule-by-rule analysis which itemizes the new cost for local units of government.

7. Pursuant to Minn. Stat. 14.115, the Department considered each of the methods for reducing the impact of the proposed rules on small businesses as contained in subdivision 2 of that section. That consideration is fully set forth in pages 160 through 169 of the Statement of Need and Reasonableness. The Department has determined that the rules as proposed cannot be rewritten to impose less of a burden on small businesses and still accomplish the purposes set forth in Minn. Stat. 144A.43 to 144A.49.

8. Pursuant to Minn. Stat. 144.122, the proposed rules prescribe fees for different levels of licensure for home care providers. The proposed fee structure was approved by the Minnesota Department of Finance on May 13, 1991. (Page 174 of the SONAR). The Department has projected and budgeted costs for implementing the proposed rules in fiscal years 1992 and 1993 of \$325,000.00 in each year. The Department estimates that the total revenue which will be received from all licensure fees will total approximately \$321,000.00 in each of the fiscal years of 1992 and 1993.

Statutory Authority

9. Pursuant to Minn. Stat. 144A.45, subd. 1, the Commissioner of Health is mandated to "adopt rules for the regulation of home care providers pursuant to sections 144A.43 to 144A.49." That subdivision goes on to require that rules be promulgated in certain specific subject areas to ensure compliance with the referenced statutory provisions. Except as modified below, the Department has demonstrated its general statutory authority to adopt the proposed rules herein.

Nature of the Proposed Rules

10. The proposed rules, Chapters 4668 and 4669, establish standards and set fees for licensed home care providers, including hospice programs, and set additional requirements determined to be necessary to ensure the health, safety, well-being and appropriate treatment of persons who receive home care services. The development of these rules began in 1983 when the Commissioner of Health appointed a Home Health Care Task Force to identify and examine issues associated with the provision of home health services. This task force examined the historical development of home health services and identified issues and actions taken by other states and organizations in solving home health care problems. It addressed regulatory concerns, financial concerns, system development, and recommended a registration system for home care providers. In 1987, Minn. Stat. 144A.43 to 144A.49, the Home Care Licensure Law, was enacted by the Minnesota Legislature. This new law expanded regulated services to include those that were non-medical in nature as well as home health care services already regulated on the federal level by Medicare. The law further required the registration of home care providers, including hospice programs, and the adoption of rules to license those providers. Included in the statute were provisions that proscribed the employment of individuals by providers if that individual had been convicted of a crime that relates to home care services.

Modifications Made to the Proposed, Rules by the Department

11. This finding will set forth all of the modifications to the proposed rules made by the Department subsequent to the publication of the rules in the State Register. This lengthy finding is included for the benefit of all persons who commented in opposition to any of the proposed rule language. If changes were made in response to comments, they are set forth below. This Finding will not duplicate initially proposed rule language which has been retained in the modified version. The modifications made are:

4668.0003 DEFINITIONS.

Subp. 12. Home health aide tasks. "Home health aide tasks" means those tasks specified allowed in part 4668.0100, subpart. 1.

4668.0008 SERVICES INCLUDED IN AND EXCLUDED FROM LICENSURE.

Subp. 2. Determination of direct services. As defined in . . .
or
employees of the provider,

or through contractor, if the factors listed below
indicate that the business is ultimately responsible for the performance of
the home care service by the contractor. Factors that shall be considered
in
determining whether a business that contracts for home care
services also provides home care services directly include whether the
business:

Subp. 4. Determination of regularly engaged. As used in Minnesota Statutes..... (A. through 0. remain the same.)

None of the factors listed in items A to D is solely determinative and

Subp. 13. Contract services. If a licensee contract; for a home care service with a business that is not subject to licensure under this chapter. it-must require. in the contract, that the business comply with this chapter and Minnesota statutes. sections 144A.43 to 144B.48.

4668.0009 EXEMPTIONS FOR REGULATED PROGRAMS

Subp. 3. Procedures. To be exempted under this part..... The commissioner may shall require the provider to provide whatever information is necessary to determine comparability of the regulations.

Subp. 6. Review of exemption. After receiving the notice the exemption may shall be revoked, effective upon the commissioner notifying the provider of the revocation.

4668.0012 LICENSURE.

Subp. 5. New license. A license shall be issued..... except-as provided-in-subpart 63-a A I license is effective for one year after the date the license is issued.

Subp. 6. Subpart deleted in its entirety and subsequent subparts renumbered accordingly.

Subp. 7 License application.

(6)
background information forms. as required by part 4668.0025. Subpart 3, _item A;

Subp. 9 8. Notification of changes in information. The licensee shall notify the commissioner in writing within ten working days after any change in the information required to be provided by subparts 7 6 and 8 7, except for the information required by subpart f, item f. Subitem (4) and except for services reported under subpart 7 6, item A. subitem (10), that are discontinued for less than 90 days.

Subp. 12 11. Denial of License.

C. the applicant is disqualified under part 4668.0020.0023 subpart 2

D. the applicant or an owner or managerial official has refused to provide a release for access to criminal information, in-required-by part or

Subp. 14.12. Change of classification. A licensee may change to a different class of license under subpart 3, by submitting a new application under subpart 7 6 and meeting all applicable requirements of this chapter. An application under this subpart shall be accompanied by the fee provided by subpart 19 18.

Subp. 14 13. License renewals. Except as provided in subpart IS 14 or 16 15, a licensee will be renewed for a period of one year if the licensee satisfies items A to C.

A-te-C The licensee must:

A. submit an application for renewal on forms provided by the commissioner at least 30 days before expiration of the license, or-in-the case-of -a the-DepartmeRt-ef as-required-by and

B . submit the renewal fee, in the amount provided by subpart 19 18; and

C. comply with this chapter and Minnesota Statutes, sections 144A.43 to 144A.48.

Subp. 46 14. Conditional license. If a licensee is not in full compliance with this chapter and Minnesota Statutes , sections 144A. 43 to 144A.48, at the time of expiration of its license, and the violations do not warrant denial of renewal of the license, the commissioner may shall issue a license for a limited period conditioned on the licensee achieving full compliance within the term of the license or the term of any correction orders.

Subp. 16 15. Suspension, revocation, or denial of renewal of license

J. refuses to provide a criminal record release, if required by part 4668.0025, subpart 4. item G.; or

4668.0016 WAIVERS AND VARIANCES

Subp. 2. Criteria for waiver or variance. Upon application of a licensee, the commissioner may ahall waive or vary any provision of this chapter, except for those provisions relating to criminal disqualification part parts 4668.0020 to 4668.0029, and to the home care bill of rights, part

4668.0030, if the commissioner finds that:

Subp. 9. Revocation or denial of renewal. The commissioner
way shall
revoke or deny renewal of a waiver or variance if:

4668.0020 CRIMINAL DISQUALIFICATIONS OF APPLICANTS, LICENSEES AND
STAFF.

The following, Rules 4668.0020 through 4668.0029, replace
subparts I
through 18 which have been deleted.

4668.0020 PURPOSE. (ALL NOW MATERIAL THROUGH 4668.0029)

The purpose of parts 4668.0020 to 4668.0029 is to establish procedures and standards for background studies of individuals affiliated with providers subject to licensure under Minnesota Statutes, chapter 144A. 43 to 144A. 48 , under authority of Minnesota Statutes, section 144A.46, subdivision 5. Parts 4668.0020 to 4668.0029 are not intended to govern personnel decisions of employer except that personnel decisions may be affected if an individual has a disqualification under part 4668.0027.

4668.0021 APPLICABILITY.

Parts 4668.0020 to 4668.0029 apply to all providers subject to licensure under Minnesota Statutes, Sections 144A.43 to 144A.48, except those exempted under part 4668.0009.

4668.0022 DEFINITIONS.

Subpart 1. Scope. As used in parts 4668.0020 to 4668.0029, the following terms have the meanings given them in this part.

Subp. 2. Criminal background study. "Criminal background study" means the investigation conducted by the commissioner to determine whether a subject is disqualified from direct contact with persons served by a licensee.

Subp. 3. Subject. "Subject" means an individual of whom a criminal background study is required.

4668.0023 CRIMINAL DISQUALIFICATION OF LICENSEES AND EMPLOYEES.

Subpart I. Criminal disqualification of licensees. Except as provided by part 4668.0027, subpart 2, no license will be issued to an applicant for a license if the applicant or an owner or managerial official of the applicant has ever been convicted of a crime listed in part 4668.0027, subpart 1, or a comparable crime in another jurisdiction, or refuses to provide the release required by part 4668.0025, subpart 4, item G.

Subp. 2. Criminal disqualification of prospective and current employees and contractors. Except as provided by 4668.0027, subpart 2, no licensee may employ or contract for, in a position that requires direct contact with clients in their residences, or that requires the supervision of direct care workers, any person whom the licensee knows has ever been convicted of a crime listed in part 4668.0027, subpart 1, or a comparable crime in another jurisdiction, or who refuses to provide the release required by part 4668.0025, subpart 4, item G.

Subp. 3. Direct contact prohibited. A licensee shall not allow a subject who is disqualified by the commissioner to have direct contact with clients receiving home care services from the licensee unless the conditions in item A or B are met.

A. The licensee has:

(1) received notice from the commissioner that the subject may be allowed direct contact pending reconsideration;

(2) obtained documentation that the subject will submit or has submitted a timely request for reconsideration; and

(3) documented compliance with requirements in the commissioner's notice, as provided by part 4668.0026, subpart 4.

B. The licensee has received notice from the commissioner that the subject's disqualification has been set aside under part 4668.0028.

Subp. 4. Exception. Pending the results of the study required by part 4668.0026, subpart 1, the licensee may allow the subject to have direct contact with clients.

4668.0024 INDIVIDUALS WHO MUST BE STUDIED.

A criminal background study of the following persons must be conducted:

A. individual applicants for a license ;

B. owners and managerial officials of an applicant;

C. current employees, contractors, or employees of contractors of licensees who have direct contact with persons being served by the licensee including volunteers if the volunteers are not directly supervised;

D. applicants for employment.

"Directly supervised" means that an individual listed in item A or B is within sight or hearing of a volunteer to the extent that the individual listed in item A or B is capable at all times of intervening to protect the health and safety of the persons served by the program who have direct contact with the volunteer.

4668.0025 RESPONSIBILITIES OF LICENSEE.

Subpart 1. General. A licensee must require every individual identified in part 4668.0024 to complete the criminal background information form prescribed by the commissioner.

Subp. 2. Disclosure. A licensee shall require each subject to sign
a
statement disclosing all crimes, except for minor traffic violations, of
which
the person has been convicted in any jurisdiction outside the state of
Minnesota, or stating that the person has never been convicted of a crime,
other than minor traffic violations outside the state of Minnesota.

Subp . 3 Form submission. A licensee must submit each completed

criminal background information form to the commissioners

A. before initial licensure and with every license renewal application; and

B. before a subject first has direct contact with clients served by the licensee.

Subp. 4. Required information. The criminal background information form must include the following information for each subject:

A. the subject's first, middle, and last name and all other names by which the individual has been known;

B. current home address, city, county, and state of residence;

C. states and counties of residence for the past five years;

D. date of birth;

E. sex;

F. driver's license number or state identification number; and

G. a release statement signed by the subject authorizing the Minnesota Bureau of Criminal Apprehension to provide the commissioner a history of criminal convictions.

H. a statement disclosing crimes in jurisdictions outside the state of Minnesota, including"

(1) the nature of the crime;

(2) the jurisdiction in which the person was convicted;

(3) the date of conviction;

(4) the penalty imposed, including conditions of probation or conditional release and time periods of the penalty;

(5) the name and address of the probation or parole agent, if any; and

(6) the date of release from incarceration, if applicable.

Subp. 5. Record retention. Each subject's personnel file must contain the most recent notice issued by the commissioner under part 4668.0026, subpart 4. If the current notice is more than 12 months old, the subject's personnel file must also include documentation that the licensee has made a timely application for a criminal background study as required by this part.

4668.0026 RESPONSIBILITIES OF COMMISSIONER.

Subpart 1. Determination of disqualification. The commissioner shall conduct a criminal background study of all subjects, evaluate the results of the study, and determine whether a subject is disqualified under part 4668.0027.

Subp. 2. Review of records. In conducting the criminal background study, the commissioner shall review conviction records of the Minnesota Bureau of Criminal Apprehension in which the last date of discharge from the criminal justice system is less than 15 years, and any convictions committed in another jurisdiction as disclosed in the criminal background information form;

Subp. 3. Notice by commissioner to subject. Within 15 working days after receipt of the criminal background information form, the commissioner shall notify the subject in writing of the results of the criminal background study or that additional time is needed to complete the study. If the study indicates a subject is disqualified, the notice shall state:

A. the reason for disqualification and either:

(1) have attached a copy of the records relied upon by the commissioner or

(2) state how to obtain the records relied upon by the commissioner;

B. the procedures for requesting the commissioner to reconsider the disqualification; and

C. the factors to be considered by the commissioner under part 4668.0028 in the decision whether to set aside the disqualification.

Subp. 4. Notice by commissioner to licensee. Within 15 working days after receipt of the criminal background study form, the commissioner shall notify the licensee that:

A. the subject is not disqualified;

B. more time is needed to complete the study; or

C. the study indicates the subject is disqualified, and

(1) the subject has 30 days from receipt of the notice to request reconsideration of the disqualification and that the commissioner's decision will be issued within 15 working days after receipt of a request; and

(2) the licensee may allow the subject to have direct contact with clients pending reconsideration if:

(a) the subject timely submits a request for reconsideration; and

(b) the licensee takes actions specified by the commissioner to reduce the risk of harm to persons receiving services

If the commissioner determines a subject who is disqualified presents a risk of imminent danger to persons receiving services from the program, the commissioner shall notify the licensee to immediately prohibit the subject from direct contact with clients receiving services from the program.

Subp. 5. Disclosure of information; conditions. The commissioner shall not disclose the nature of the disqualification to the licensee unless:

- A. the subject consents to disclosure in writing; or
- B. other law authorizes disclosure to the licensee.

Subp. 6. Record retention. The commissioner shall maintain records of each study.

Subp. 7. Contract for criminal background studies. The commissioner may contract with another Minnesota agency to conduct the criminal background studies, except that the commissioner shall make all final determinations of disqualification and rehabilitation.

4668.0027 DISQUALIFICATION STANDARDS.

Subpart I. Disqualifications. The following crimes, or comparable crimes in jurisdictions other than Minnesota, related to the provision of home care services disqualify persons for licensure or employment, except as provided by subparts 2 and 3:

A. crimes against homicide and suicide under Minnesota Statutes, sections 609.185, 609.19, 609.195, 609.20, 609.205, 609.21, and 609.215:

B. crimes against the person under Minnesota Statutes, sections 609.221, 609.222, 609.223, 609.2231, 609.224, 609.228, 609.23, 609.231, 609.235, 609.24, 609.245, 609.25, and 609.255;

C. crimes against unborn children under Minnesota Statutes, sections 609.2661, 609.2662, 609.2663, 609.2664, 609.2665, 609.267, 609.2671, 609.2672, and 609.268;

D. crimes of compulsion under Minnesota Statutes, sections 609.27, 609.275, and 609.28;

E. sex crimes under Minnesota Statutes, sections 609.322, 609.323, 609.324, 609.33, 609.342, 609.343, 609.344, 609.345, and 609.352;

F. crimes against the family under Minnesota Statutes, sections 609.377 and 609.378;

G. crimes affecting a public officer or employee under Minnesota Statutes, sections 609.465 and 609.466;

H. crimes of theft and related crimes under Minnesota Statutes, sections 609 . 52 , 609 . 525, 609 .53, 609 .54 , and 609 . 551 ;

I. crimes of damage or trespass to property under Minnesota Statutes, sections 609.561, 609.562, 609.563, 609.582, 609.595, and 609.611;

J . cr i me s of pub I ic misconduct or nu isance under Minne sot a Statutes, sections 609.687 and 609.713;

K. the crime of indecent exposure under Minnesota Statutes, section 6 1 7 2 3 1

L, the crime of failure to report the maltreatment of minors under Minnesota Statutes, section 626. 556, subdivisi on 6;

M. the crime of failure to report the maltreatment of vulnerable adults under Minnesota Statutes, section 626.557, subdivision 7;

N. the crime of abuse or neglect of a vulnerable adult, under Minnesota Statutes, section 626.557, subdivision 19;

O. crimes related to prohibited drugs under Minnesota Statutes, chapter 152.

Subp. 2. Rehabilitation. Except as provided by subpart 3, a I icen se that otherwise would have been denied under part 4668.0023, subpart 1, will be granted if the person or persons who have been convicted of crimes listed in subpart 1 meets all of the requirements of items A to D. Except as provided by subpart 3, a subject who is disqualified from employment with a licensee under part 4668.0023, subpart 2, may be employed if the person meets all of the requirements of items A to D.

A. The commissioner determines that the circumstances or social conditions surrounding the commission of the crime sufficiently mitigate the risk of employing the person;

B. (1) The person has not been convicted of a crime listed in subpart 1, or a comparable crime in another jurisdiction, for the two years before the date of application for the license or for employment.

(2) If on probation, parole, or other conditional release, the person submits a report from the person's probation or parole agent that provides evidence that the person is rehabilitated and is fit to perform the duties of the person's position.

(3) The person has not been incarcerated in jail or prison for

the two years before the date of application for the license or for employment.

(4) If, as a condition of the person's probation, conditional release, or sentence, the person had been ordered by the court to participate in a program for the treatment of chemical dependency, psychological disorders, or other behavioral problems, the person completed the program in compliance with the condition.

Subp . 3. Exceptions to rehabilitation. Subpart 2 does not apply in the case of a crime of homicide or aiding suicide under Minnesota Statutes, sections 609.185 to 609.215, committed in connection with the provision of health care or home care services,

4668.0028 RECONSIDERATION OF DISQUALIFICATION.

Subpart 1. Application for reconsideration. Within 30 days after receiving notice of disqualification, a subject may request in writing that the commissioner reconsider the disqualification. The subject must submit information showing:

- A. the information the commissioner relied upon is incorrect; or
- B. the subject meets the rehabilitation criteria in part 4668.0027, subpart 2.

Subp. 2. Extension. The subject may request additional time, not to exceed 30 days, to obtain the information in subpart 1 upon showing the information cannot be obtained within 30 days.

Subp. 3. Decision by commissioner. The commissioner shall set aside the disqualification if the commissioner determines that:

- A. the information relied upon in making the determination of disqualification is incorrect; or
- B. the subject is rehabilitated under part 4668.0027, subpart 2.

Subp. 4. Notice of commissioner's decision. Within 15 working days after receipt of a request for reconsideration, the commissioner shall notify the subject and the licensee in writing:

- A. whether the disqualification has been set aside; or
- B. if a time extension has been granted under subpart 2, that the commissioner's decision will be issued within 15 working days after the extension date.

Subp. 5. Finality of decision. Except as provided in subpart 6, the commissioner's decision on a reconsideration request is the final administrative agency action and is not subject to further review by the commissioner.

4668.0029 CHARGES,

Licensees shall be charged a fee of \$6.00 for each criminal background study conducted. The Commissioner shall maintain an account system to bill licensees periodically for charges accrued.

4668.0035 HANDLING OF CLIENTS' FINANCES AND PROPERTY

Subpart 1. Powers-of-attorney. A licensee may not accept powers-of-attorney from clients for any purpose, and may not accept appointments as guardians or conservators of clients, unless the licensee maintains a clear Organizational Separation between the home care service and the program that accepts guardianship or conservatorship appointments, This subpart does not apply to licensees that are Minnesota counties or other units of government.

Subp. 2. Handling clients' finances. A licensee may assist clients with household budgeting, including paying bills and purchasing household goods but may not otherwise manage a client's property. A licensee must provide clients with receipts for or document all transactions and purchases paid with the clients' funds, and must maintain records of all such transactions.

4668.0040 COMPLAINT PROCEDURE.

Subp. 2. Informing clients.

D. the right to complain to the Minnesota Department of Health, Office of Health Facility complaints; and

4668.0060 ADMINISTRATION.

Subpart 1. Referrals. The licensee shall notify another home care provider, inpatient facility, or other health care practitioner or provider to whom the licensee refers transfers a client, of any contagious disease to which the client is known to have been exposed or which the client is known to have contracted.

Subp. 5. Scheduled appointments for nonessential services

C. notify the client that the appointment will not be kept, and schedule a new appointment or arrange for some other reasonable alternative acceptable to the client.

Subp. 6. Scheduled appointments for essential services. If, for medical or safety reasons, a service to be provided must be completed at the scheduled time, and the licensee, contractor, or employee of a licensee is unable, for any reason, to keep the scheduled appointment, the licensee shall make

arrangements to complete the service through a contract with another provider or through other reasonable means.

4668.0065 INFECTION CONTROL.

Subp. 1. Tuberculosis Screening

C. if the person has had a positive reaction to a Mantoux test more than two years before working in a position involving direct client contact, the person must provide documentation of a negative chest x-ray taken within the previous 12 months; or

D. - if the person has - had a postti ye-react ion to A Ion toy; teat. the person must complete or be taking teberculosis preventive therapy.

4668.0070 PERSONNEL RECORDS.

svbpart 1. Scope. This part applies to all licensees except class-C licensees.

Subp. A Z. Personnel records. The licensee must maintain . . .

Subsequent subparts have been renumbered accordingly.

4668.0075 ORIENTATION TO HOME CARE REQUIREMENTS.

Subp. 2. Content.

G. resources in the community to which clients may be referred, including medical and dental practitioners, health and social service providers, and other related service pcoviders.and-precudures for Making referrals-

4668.0080 QUALIFICATIONS OF PROFESSIONAL PERSONNEL.

subp. 5. Physical Therapy. A person who provides physiCal therapy a\$ an employee or contractor of a licensee Must be registered a\$ a physical therapist with the State Board of Medical examiners, under Minnesota statutes, sections 148.65 to,148.78.

4668.0100 HOME HEALTH AIDE TASKS.

Subpart 1. Home health aide tasks. For a Class A, C Dr_ D lilen5ee_ A registered nurse_may delegate medical or nursing Seryices or a therapist may assign therapy seryices only to a person who satisfies the requirements of subpart 5.

These delegated or assigned tasks as set forth In this part include home care tide ta5ks as let forth in part 4668.0110 , Class A or D lioensees providing home care aide-tasks must sytisfy the training and supervision requirements of this part- and not part 4668.0110.

Subp. 1. A. through H. have been deleted.

Subp. 2. Assistance-with-aAdministration of medications. A person who satisfies the requirements of subpart 5 may administer medications, whether oral, suppository, eye drops, ear drops, inhalant, topical, or administered through a gastrostomy tube, if:

A. (not modified)

B. in the case of pro re nata medications, the administration of the medication is reported to a registered nurse within the 24 hours before- the after Its administration;

C. the person is instructed by a registered nurse in the procedures to administer the medications to each client.

D. a registered nurse specifies, in writing, and decepted documents in the clients' records, the procedures to administer jig medications; and

E. (not modified)

Subp. 3. Limitations on assistance with administering medications. A person who administers medications under subpart 2 may not inject medications into veins, muscle, or skin.

Subp. 4. Performance of routine procedures. A person who satisfies the requirements of subpart 5 may perform delegated medical or nursing and assigned therapy procedures other than those contained in the training topics listed in part 4668.0130, subpart 2, items t to N, if:

Subp, 6. In-service training Rd demonstration of competence

A. For each 12 months of employment, each person who performs home health aide tasks shall;

(1) complete . . . required by part 4668.0065, subpart 3; and obtained from the licensee or another source.

C.

if t person has not performed home health aide tasks for a continuous period of 24 coneCutiy months, to a registered nurse competence in the kills listed in part 4168.0130. subpart 3, item A-subitem (1),

Subp. 8. Initiation of home health aide tasks. When home health aide

tasks are initiated, a registered nurse or therapist shall orient the first all persons who is re to perform home health aide tasks to the client at-the and to the tasks to be performed. Additional persens

ManRer ether- haR-at

Subp. 9.

A. within 14 day\$
after
initiation of home health aide tasks; and

8 . every 14 days thereafter or more frequently if indicated by a clinical assessment for home care tasks described in subparts 2 to 4, or

C. every 60 days thereafter. or more frequently if indicated by a clinical assessment for home care tasks other than those described in subparts 2 to 4.

If monitored by a licensed practical nurse, a person must be supervised at the residence by a registered nurse at least every other supervisory visit, and the licensed practical nurse

4668.0110 HOME CARE AIDES TASKS.

Subpart I. For Class B, C or E licensee, only a person who . . .

A. planning and preparing modified diets, . . . ;

Subp. 3. Documentation. Class A, Class B and class D licensees

Subp. 4. In-service training. - - -

A. For each 12 months of employment, including that required by part 4668.0065, subpart 3, obtained from the licensee or another source.

B. (not modified)

C. (deleted in its entirety)

Subp. 5. Class I Supervision. A class A licensee must have a registered nurse supervise or a licensed practical nurse monitor a person who provides home care aide tasks Under this part no less than the following schedule:

A. within 14 days after initiation of home care aide tasks; and

B. every 60 days thereafter, or more frequently if indicated by clinical

If monitored by a licensed practical nurse, a person must be supervised at the residence by a registered nurse at least every other supervisory visit, and the licensed practical nurse must be under the supervision of a registered

nurse. according to Minnesota Statutes, section 148.171 to 148.285.

subp. 6. Class Visits. A Class E licensee must visit the resident and observe the provision of home care services every 60 days after initiation of home care aide tasks to verify that the work is being performed adequately and to identify problems.

4668.0140 SERVICE AGREEMENTS-

Subp. 1. Service agreements. No later than the second visit to a client, . . . must be AR WrittAg documented.

Subp. 2. Contents of service agreement.

D. fee, for services;

Subp. 3. Exceptions for class C and Class t. Class C licensees need not comply with subpart 2, items B, C, and E, subitems (2) Ind (5). Class E licensee5 need not comply xi th subpart 2,, item subitem (5)

4668.0160 CLIENT RECORDS.

Subp. 2. Security. against-loss, URAUtherized-use, The I i c ensee s ha II establish written procedures to control use and removal of client records from the prov I der s' off ices and for security in client residence5 and to establish criteria for release of Information

Subp. 6. Content of client record. . . .

D notes summarizing each contract with the client in the client's residence, signed by each individual

F. . . .

Class C aRd-Class-e licensees need only include the information required by items A, 6, and E. C I a55 E licensees need on Ty I nc I ude the I nformat I on required by items A. 8, Q. and L.

4668.0180 CLASS A PROVIDER, PROFESSIONAL HOME CARE AGENCY.

Subp. 10. Equivalent requirements for certified providers. A class A license that is certified..... with the following items if_ the Medicare certifocation-it based on compliance with the federal conditions of -partici-patign. and bAsed on survey and-enforcement,by the Minnesota Department of Health A5 i,ent for the U.So Department of Health and Human Services. or an equvtlent state agency of a State bordering Minnesota.

4668.0210 CLASS D PROVIDER, HOSPICE PROGRAM.

Subp. 23. Equivalent requirements for certified providers. A c I ass D

licensee that is certified..... need not comply with subparts I
to 10, 12,
13, 16 to 18, 21, and 22, if the Medicare certification is based on
compliance
with two federal conditions of participation. and talld of sUryey and
enforcement by the Minnesota Department of Health a\$ agent for the U.\$.
Department of Health and Human Service\$, or an equivalent State
agency of I
state bordering Minnesota.

4668.0218 INFORMATION AND REFERRAL SERVICES.

The commissioner may hall request from licensees

4668.0220 SURVEYS AND INVESTIGATIONS.

Subpart 1. Surveys. Except as provided in subpart 3 or 10, the commissioner may survey each applicant or licensee before issuing a new license or renewing an existing license. An appl i Cap t for a licenle that i a certified for Medicare and medical a,5istance shall be surveyed at the time of its next Certification survey. Applicants and licensees

4668.0230 FINES FOR UNCORRECTED VIOLATIONS.

Subp. 4. Schedule of fines for violations of rules

A. part 4668.0008, subpart 13. \$300;

[subsequent items have all been relettered accordingly.]

H. part 4668.0020 0023, subpart 3 2, \$300 \$500;

I. part 4668.0020 0023, subpart 4 3, \$500;

J. part 4668.0020 0025, subpart 9 5, \$300 \$50;

[subparts J through 0 have been deleted]

II NN. part 4668.0070, subpart A 2, \$50;

jj 00. part 4668.0070, subpart 2 3, \$50;

kk PP. part 4668.0070, subpart 3 4, \$50;

\$5. Part 4668.0080. subpart S. \$30Q0

GGG. part 4668.0110_ subpart 5. \$35Q;

HHH. part -4668.0110. subgart 6. \$3501

III. pact 4668.0120, subpart 2, \$501

4669.0030 PROCEDURE FOR PAYING LICENSE FEE.

Subp. 2. Verification of revenues. Under a Circumstance listed in item

A or B, the commissioner may hall require

A. the commissioner has received information that a revenue report may be inaccurate; or

D . the provider has been randomly selected for compliance verification,

4669.0050 FEE SCHEDULE.

Subp. 1. Fees for classes A, B, and D

L. for revenues no more than \$250,000, \$500; and

M. for class D providers with annual revenues greater than \$25,000 and no more than \$100,000. \$350; and

N. for class D providers

EFFECTIVE DATE. These rules, except for parts 4668.0020 to 4668.0029; 4668.0100, subpart 5; 4668.0110, subpart 2; and 4668.0130, are effective 90 days after adoption. Parts, 4668.0020 to 4668.0029 are effective 180 days after adoption. Parts 4668.0100, subpart 5; 4668.0110, subpart 2; and 4668.0130, are effective one year after adoption.

12. Finding 11 above shows clearly that many substantive changes to the rules have been made by the Department. Almost all of these modifications were contained in the Department's 20-day submission received on September 19, 1991. (The only modifications made at the hearing are those contained at Minn. Rules pts. 4668.0180, subp. 10; 4668.0210, subp. 23; and 4669.0050, subp. 1.M.) Consequently, members of the affected public who did not come in during the three working-day response period to examine what the Department had submitted have not had a chance to comment concerning the extensive modifications. Although most of the modifications set forth above were made in response to objections and/or suggestions made at the hearing or in written comments, the Judge has concluded that these modifications constitute a substantial change to the rules as a whole. Many of the modifications remedy "problems" in the proposed rules and result in rules which will quite probably be much more palatable to the affected public. However, many of these changes are significant and raise new issues which the public has a right to comment on before adoption. See, Minn. Rule 1400.1100, subp. 2. Some of these are:

A. A new subpart 13 has been added to Rule 4668.0008 which requires that licensees include provisions in contracts with businesses not subject to licensure which mandate compliance with these rules and Minn. Stat. 144A.43 to 144A.48. Obviously, if a business is not subject to licensure under these rules, they may be entitled to a valid exemption or be subject to the

regulatory standards of another state agency. See, Minn. Stat.
144A.46,

subd. 4. Consequently, this mandatory contract language rule requires more explanation from the Department and the affected "licensee-contractors" deserve a chance to comment on its implementation.

B. As proposed, Rule 4668.0012, subp. 6 provided for a special exemption for the licensure of county social service agencies. This exemption allowed for a single license for all county home care services or for two or

more licenses for separate county agencies that each provide home care services. This county license was effective for two years and not subject to annual relicensure and renewal fees as are all other licensed home care providers. The Department has modified the proposed rules by deleting the county social service agency exemption, thus requiring annual license renewal and renewal fees for county agencies. Although, pursuant to the modification, counties will be treated like every other non-public home care provider, county agencies had the belief that they would be given a preferred status under the proposed rules. To take this exemption away, without any notice or opportunity for the counties to comment, constitutes a substantial change. Additionally, the annual renewal process with the payment of a renewal fee could significantly affect the fiscal note prepared pursuant to Minn. Stat. 14.11, subd. I. Pursuant to that statutory provision, counties are entitled to know whether this change in the proposed rule will result in greater expenditures than indicated in the initial estimate.

C. The criminal disqualification standards have been completely rewritten and now consist of ten separate rules rather than just one as initially proposed. The new rule shifts the burden for criminal disqualification to the Commissioner with respect to all applicants, current employees, and applicants for employment with licensed providers. The rule as proposed placed the burden on either the Commissioner or the licensee to obtain a criminal history if either had "reasonable cause to believe that an employee or prospective employee had not disclosed a conviction of crimes. In addition, the rule mandates that licensees pay a fee of \$6.00 for each criminal background study conducted by the Commissioner. The new rule requires that a criminal background study be done on every applicant and person having direct contact with the recipients of services. The rule as proposed only required criminal background studies if there was "reasonable cause to believe" that a study was needed. This rule(s) generated the greatest amount of oral testimony and written comments on the proposed rules. The new requirements and specifically the new fees imposed are subjects which require notice and an opportunity for the affected public to comment.

I
Becklund Home Health Care, Inc. did review the modifications during the three working-day response period and commented on the new fee requirement as

follows:

According to the Department of Health memo dated September 19, 1991 the licensee is financially responsible for a criminal search on every employee and/or applicant for employment. Although I agree with the philosophy of the criminal check, the burden of \$6.00 per criminal search being imposed upon the agency is staggering. During the past year our agency has had an average of 160 applicants per month. Coupled with the 1,200 active employees, our agency's accumulated fee for the criminal background study would be approximately \$18,000 per year. This financial burden and a major disincentive to do business . . .

D . Other modifications which would invite public comment are: the deletion of specific home health aide tasks contained in Rule 4668.0100, subp. 1: the new standard for persons to qualify to perform home health aide tasks if they have not been so employed for the previous 24 months (4668.0100, subp. 6C.); and the new supervisory requirements for home care aides (new subparts 5 and 6 of 4668.0110). Several proposed rules which provided discretionary authority for the Commissioner to act have now been made mandatory and new criteria added.

Discussion of the Rules as Proposed

13, The Judge will not go through a rule-by-rule analysis of the modified rules concerning issues of need, reasonableness and statutory authority. However, there are several areas which merit discussion at this time and should be further examined by the Department prior to further proceedings:

A. Many persons commented concerning the extensive and detailed regulation of the home care industry which is being proposed by the Department of Health. In an effort to eliminate at least some detail, the Minnesota Legislature provided in Minn. Stat. 144A.46, subd. 4 that "in the exercise of the authority granted under sections 144A.43 to 144A.49, the Commissioner shall not duplicate or replace standards and requirements imposed under another state regulatory program." In addition, the statute provides that "for home care providers certified under the Medicare program, the state standards must not be inconsistent with the Medicare standards for Medicare services." However, despite that statutory directive, proposed Rule 4668.009, subp. 2 provides that "a provider that is regulated by a state regulatory program other than that administered under this chapter, is exempt from licensure under this chapter if the Commissioner determines that the other program's regulatory standards and enforcement mechanisms are substantially the same as or exceed the requirements of this chapter." The statute is clear, however, that the Commissioner shall not "replace standards and requirements" of another state program. If the Legislature had intended that the Commissioner of Health promulgate standards which would replace the standards of other regulatory programs which were not at least "substantially the same" as these proposed rules, the statute would be written differently. State Senator Linda Berglin commented on this issue as follows:

(Letter to the Commissioner of Health, submitted into this record.)

I am writing to express my concern about the department's proposed home care licensure rules and to ask you to consider making significant revisions to reduce the regulatory burden the rules will create for home care providers. In its current form, the rule will have a chilling effect on the development of needed home-based services for disabled and frail elderly persons. It will impose unnecessary regulatory burdens on providers,

particularly those who work independently or provide services through a church or neighborhood program, It will also drive up the cost of home care at a time when affordable alternatives to nursing home care are

essential to enable the state to continue to afford and maintain a comprehensive long-term care system.

During committee deliberations on the home care licensure bill prior to its passage in 1987, much attention was given to the concern that a new licensure system would impose excessive regulatory burdens on home providers, thereby discouraging needed growth in the home care system and driving up costs. The Legislature chose to design a licensure system that would involve minimal governmental intervention and regulation. Our goal was to give the Department of Health the power to monitor the home care system and respond to problems as they arise, but to avoid imposing significant prescriptive standards and compliance requirements, particularly on individual providers. Many legislators agreed to support the bill only after we made significant revisions to prevent overregulation and excessive governmental intervention.

The proposed rule goes far beyond the type of regulatory system envisioned by the Legislature. For example, the Legislature specifically included language prohibiting the Commissioner from duplicating or replacing requirements imposed by another state program. The legislative intent behind this language was to prevent the Department from substituting its judgment for that of another state agency. If another state agency already regulates the conduct and qualifications of a provider group, the Legislature intended that the Department would not pass judgment on the adequacy or appropriateness of the other program but would at most impose only minimal additional requirements that would be supplemental or complementary to the requirements of the other program. However, the proposed home care rule exempts providers regulated under other state programs only "if the commissioner determines that the other program's regulatory standards and enforcement mechanisms are substantially the same as or exceed" the Department of Health's requirements. This gives the Commissioner the authority to establish the very kind of multiple regulation that the Legislature intended to prevent.

B. A second major concern was raised by families who contract for respite care services to provide for the care of children with developmental disabilities who reside at home. These commentators object to the licensure of respite care providers because of the extra cost and inflexibility that would be inherent in the new rules. Arc Minnesota, an advocacy organization representing people with developmental disabilities and their families, commented:

The requirements in 4668.0100, subp. 5, relating to "qualifications for persons who perform home health aid

tasks" could potentially restrict existing arrangements where families of children with developmental disabilities who are living in the parental home, purchase respite services directly using state, county, or personal funds.

As a regular function respite providers for people with developmental disabilities may assist in several activities defined as "home health aide tasks" in 4668.0100, subp. 1E. This includes bathing, oral hygiene, dressing, toileting, feeding, laundry, and housekeeping.

Provision of respite services for families has been successful using informal arrangements that allow families to determine the level of supervision and training of the respite provider which they are comfortable with, and which satisfies the individual needs of the family member with a developmental disability. Policymakers have recognized and encouraged this development in service delivery,

Arc Minnesota supports allowing families to continue arranging respite services using informal arrangements if desired. Arc would oppose having these services regulated by the home care licensing requirements because the proposed rules would unnecessarily restrict the flexibility of families to choose respite providers and would increase the costs to families of accessing respite services. This would result in a potential loss or reduction of respite services for many families.

Legal Advocacy for Persons with Developmental Disabilities voiced the same concerns:

He are concerned about the impact of the home care licensing rules on respite care services purchased by families who have children with developmental disabilities living at home with them. Some families purchase respite services directly using a state grant (Family Support Grant, Minn. Stat. 252.32, Subd. 1a). Other families use county funds or their own funds. The services purchased are primarily supervision. However, because the child has a developmental disability, the supervision may include a variety of tasks described in the rule as home health care, home care aid or home management tasks. For example, it is fairly common for a person providing respite care to be involved in assisting the child with a bowel or bladder training program (4668.0100, Subp. 1E), giving the child a bath (4668.0100, Subp. 1H), assisting the child with dressing, tooth brushing and hair care (4668.0110, Subp. 1E), as well as laundry and housekeeping (4668.0120, Subp. 1).

Consequently , we are concerned t hat respite care services which have often been informal arrangements would now come under the home care licensing requirements and thus be unavailable in certain areas of the state or financially out of range for families to obtain. Such a negative result makes the proposed rules unreasonable.

Both of the above-organizations suggested that the Department consider the following amendatory language:

4668.0008. Subp. 13. Exclusion of, re5pite tare provided in a family home. An individual who provides res[ite care for a client who lives with a family Member of members need pot to licensed under this chapter if the family member is informed of the opportunity to use licensed home are agency services by the county providing information, Case management or financial assistance to the family,

4668.0003, Subp. 46. Respite Care means short-term supervision, assistance and care provided to a client due to the temporary absence or need for relief of the ;I client's family, foster fami ly or primary caregiver,

C. The third major concern which will be discussed is both a legislative and rulemaking issue, but is deserving of discussion at this time. Minn. Stat. 144A.43, subd. 4 defines the term "home care provider" for purposes of licensure and these rules but specifically exempts "an individual or agency that only provides chore, housekeeping, or child care services which do not involve the provision of home care services." Subp. 3 of that section defines, in part, home care services as:

(8) home management services when provided to a person who is unable to perform these activities due to illness, disability, or physical condition. Home management services include at least two of the following services: housekeeping, meal preparation, laundry, shopping, and other similar services.

It is not clear that the Legislature intended to provide an exemption for "chore services" only as long as those services were limited to one service. However, that is the reading of the statute that is embodied in the proposed rules.

Convincing testimony was given at the hearing from representatives of .chore"-type home management services, primarily for the elderly, stating the opinion that licensure and yearly fees will reduce or eliminate the availability of services for a very needy segment of the population who require those services in order to remain in an independent living environment. These chore service agencies perform at least housekeeping, laundry and/or shopping services for clients but perform no hands-on health care functions. If licensure is required, with annual renewal fees, these types of housecleaning

services would no longer be economically feasible for elderly individuals. Several written comments voiced these same concerns and all contend that the Legislature never really intended to include "chore" programs under the home care umbrella.

D. Two last concerns contained In the record which deserve consideration are:

1. Although the p.r.n. medication administration rule has been modified to permit notification after the medication is given, does this rule require notification of the administration of a cold tablet to a mentally competent quadraplegic who cannot put the tablet in his/her own mouth?

2. Whether a standard of ambulation, by itself, is a reasonable criteria to distinguish between the need for either a home care or home health aide?

E. With respect to the remainder of the proposed rules, the Department has demonstrated the need for and reasonablenss of each provision with an affirmative presentation of facts. However, this does not suggest that there are not other issues raised in the record which deserve consideration by the Department. The entire hearing record will be returned to the Commissioner of Health along with this Report for further action.

Based upon the foregoing Findings of Fact, the Administrative Law Judge makes the following:

CONCLUSIONS

1. That the Department gave proper notice of the hearing in this matter.

2. That the Department has fulfilled the procedural requirements of Minn. Stat. 14.14, subds. 1, 1a and 14.14, subd. 2, and all other procedural requirements of law or rule.

3. That the amendments and additions to the proposed rules which were suggested by the Department after publication of the proposed rules in the State Register result in rules which are substantially different from the proposed rules as published in the State Register within the meaning of Minn. Stat. 14.15, subd. 3, and Minn. Rule 1400.1000, subp. 1 and 1400.1100.

4. The Department can either commence a new rulemaking proceeding with the modified rules or publish the modifications with an abbreviated notice scheduling a new hearing date to take testimony on the modifications. If the second alternative is chosen, a notice of the reconvened hearing with the

proposed modifications shall be sent to everyone on the Department's mailing list. The entire record in this proceeding will be incorporated into the reconvened hearing record. The Department is encouraged to make further modifications before republication as it determines necessary based upon a review of the record herein.

5. That due to Conclusion 3, this Report has been submitted to the Chief Administrative Law Judge for his approval pursuant to Minn. Stat. 14.15, subd. 3.

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

Based upon the foregoing Conclusions, the Administrative Law Judge makes the following

RECOMMENDATION

It is hereby recommended that the proposed rules not be adopted at this time.

Dated this day of October, 1991.

PETER C. ERICKSON
Administrative Law Judge