

STATE OF MINNESOTA  
OFFICE OF ADMINISTRATIVE HEARINGS

FOR THE BOARD OF MEDICAL PRACTICE

In the Matter of the Proposed Amendment  
to Rules Relating to Annual Physician  
License Fees, Minn. R. Part 5600.2500.

**REPORT OF THE  
ADMINISTRATIVE LAW JUDGE**

The above-entitled matter came on for hearing before Administrative Law Judge Allan W. Klein on January 22, 2000, in Minneapolis.

This Report is part of a rulemaking procedure held pursuant to Minn. Stat. §§ 14.131 to 14.20 (1996) to hear public comment, to determine whether the Minnesota Board of Medical Practice (hereinafter "the Board") has fulfilled all relevant substantive and procedural requirements of law, and whether the proposed rule is needed and reasonable.

Nathan W. Hart, Assistant Attorney General, appeared on behalf of the Board. Robert Leach, Executive Director, and William Marczewski, Medical Regulations Analyst, Minnesota Board of Medical Practice, testified on behalf of the Board. Dave Birckelbaw, Practice Manager, Shared Resource Management, Inc., testified regarding the Board's proposed computer and information systems upgrade. John Van Etta, President, and Christina F. Rich, Director of Health Law, Minnesota Medical Association (hereinafter "the MMA"), testified on behalf of the MMA.

Only three members of the public attended the hearing in Minneapolis. The hearing continued until all interested persons, groups or associations had an opportunity to be heard concerning the proposed rule.

The record remained open until January 31, 2000 for the submission of written comments. The Board filed a written comment, with attachments, on January 31, 2000, but did not elect to make any changes to the proposed rule. Pursuant to Minn. Stat. §14.15, subd. 1, time was then allowed for the filing of responsive comments by the Board or other interested parties. Both the Board and MMA filed additional comments. The record of this rulemaking was closed for all purposes on February 7, 2000.

**NOTICE**

Pursuant to Minn. Stat. § 14.15 subd. 2, the Board of Medical Practice must wait at least five working days before taking any final action on the rule; during that period, this Report must be made available to all interested persons upon request. The Board may then adopt a final rule or modify or withdraw its proposed rule. If the Board makes changes in the rule other than those recommended in this report, the Board must submit the rule with the complete hearing record to the Chief Administrative Law Judge for a review of the changes prior to final adoption. Upon adoption of the final rule, the Board must submit it to the Revisor of Statutes for a review of the form of the rule. The Board must also give notice to all persons who requested to be informed when the rule is adopted and filed with the Secretary of State.

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

## **FINDINGS OF FACT**

### **Procedural Requirements**

#### **A. Notice of Intent to Adopt Rules Without a Public Hearing.**

1. On April 7, 1999, the Board filed a Request for Review and Approval of Notice Plan with the Chief Administrative Law Judge, pursuant to Minn. Stat. § 14.22. The Board included with this Request the following documents as required under Minnesota Rules, part 1400.2060. subpart 2, item B:

- The proposed rule.
- A draft of the Statement of Need and Reasonableness (SONAR) under part 1400.2070, containing the Board's Notice Plan
- The proposed Notice of Intent to Adopt Rules without a Public Hearing under part 1400.2080.
- An explanation of why the Board believed its Notice Plan complied with Minn. Stat. §14.101.

2. This Notice Plan was approved on April 12, 1999.

3. On April 20 and April 26, 1999, the Board mailed a Notice of Intent to Adopt Rules Without a Hearing to all physicians licensed by the Board and to all persons on the Board's rulemaking mailing list. The Notice included a description of the proposed amendment of Minnesota Rules 1400.2500(B) to increase the physician annual license fee from \$168 to \$192.

4. On April 20, 1999, the Board placed information regarding the Notice of Intent to Adopt Rules without a Hearing on their web site and with the MinnesotaLink media listing service.

5. On May 3, 1999, a copy of the Notice of Intent to Adopt Rules without a Hearing was published in the State Register at 23 S.R. 2110.

6. The Notice indicated that the period for public comment would run from May 3, 1999 to June 9, 1999. As of June 9, 1999, the Board had received 75 requests for a public hearing on the proposed rule.

7. The Board then held two public meetings in order to provide additional information and solicit additional public comment on the proposed rule. On July 16, 1999, a mailing was sent to each of the 75 persons who had requested a public hearing notifying them of an educational meeting on the proposed rule scheduled for July 22, 1999. Three persons attended this meeting. A second mailing was sent on August 20, 1999 to each of the 75 persons who had requested a public hearing on the proposed rule and notifying them of additional educational meetings on the proposed rule scheduled for September 15 and 16, 1999. Only one person attended these meetings.

8. On September 22, 1999, the Board sent a letter to all persons who had requested a hearing on the proposed rule asking them to confirm or withdraw their request for the hearing. Twenty-five persons confirmed their prior requests for a public hearing.

## **B. Notice of Hearing**

9. On November 3, 1999, the Board filed a Request for Review and Approval of Notice of Public Hearing and an Additional Notice Plan, including an Addendum to the Statement of Need and Reasonableness, with the Chief Administrative Law Judge as required under Minn. Rules § 1400.2080, subp. 5.

10. The Additional Notice Plan was approved on November 9, 1999.

11. On November 23, 1999, the Board mailed the Notice of Hearing to all persons on the Board's rulemaking mailing list and to each of the 75 persons who had requested a public hearing on the proposed rule. The Board also placed information regarding the Notice of Hearing on their web site.

12. On November 29, 1999, a copy of the Notice of Hearing was published in the State Register at 24 S.R. 760.

### C. Public Hearing

13. At the public hearing on the proposed rule, held on January 22, 2000 at the offices of the Board, the Board placed the following additional documents into the record:

(a) Certificate of the Board of Medical Practice – Authorizing Resolution dated November 14, 1998;

(b) The request for comments published in the State Register;

(c) Certificate of mailing the request for comments to persons on the Board's rulemaking mailing list;

(d) The proposed fee rule, including the Revisor's approval dated March 23, 1999;

(e) A copy of the letter dated April 12, 1999, from Administrative Law Judge Allan W. Klein, approving the Additional Notice Plan and the letter dated April 7, 1999, requesting approval of the Additional Notice Plan;

(f) The Statement of Need and Reasonableness dated April 15, 1999 and the Addendum to the Statement of Need and Reasonableness dated November 3, 1999;

(g) Certificate of mailing the Statement of Need and Reasonableness to the Legislative Reference Library and copy of the transmittal letter;

(h) Certificate of mailing to Chairs of Legislative Oversight Committees;

(i) Certificate of Giving Notice Pursuant to the Approved Notice Plan of April 12, 1999 and attachments:

- Press release to MinnesotaLink;
- Article on Board web page about fee rule;
- Notice of Intent to Adopt Rules as mailed and the Board rulemaking list and diskette listing the 15233 physicians who were mailed the Notice of Intent to Adopt Rules.

(j) Notice of Intent to Adopt Rules as mailed and a copy as published in the State Register on May 3, 1999;

(k) Certificate of mailings on July 16, 1999 and August 20, 1999 of notice of educational meetings on the fee rule, mailed to the 75 persons requesting a hearing on the rule;

(l) Certificate of mailing on September 22, 1999 of a letter to the 75 persons requesting a hearing asking them to confirm or withdraw their request for a hearing;

(m) Letter dated November 9, 1999, from Administrative Law Judge Allan W. Klein, approving the Additional Notice Plan regarding the hearing on the fee rule;

(n) Certificate of Giving Notice Pursuant to Notice Plan approved on November 9, 1999, and attachments:

- Updated article on fee rule posted on the Board's web page;
- Notice of Hearing as mailed;
- Board rulemaking mailing list;
- List of 75 persons requesting a hearing.

(o) Notice of Hearing as published in the State Register on November 29, 1999;

- (p) Letters from persons requesting a hearing;
- (q) Letters from persons commenting on the fee rule but not asking for a hearing;
- (r) 12 withdrawal forms from persons requesting to withdraw their hearing request;
- (s) 25 confirmation forms from persons confirming their requests for a hearing;
- (t) Letter dated December 6, 1999, from Patrick Stoy, M.D., responding to the Notice of Hearing;
- (u) Letter dated January 13, 2000, to Christina Rich, legal counsel, Minnesota Medical Association, providing additional information on the Board's computer project with an attached document explaining the reasons, timeliness, and implementation plan for the proposed computer project.

14. These documents became part of the public record and were available for inspection at the Office of Administrative Hearings.

15. Three members of the public testified at the hearing on January 22, 2000. In addition, a letter, with attachments, from Rodd Johnson of Rapid Application Deployment, Inc., dated January 21, 2000 regarding the Board's computer initiative was made part of the record.

16. At the close of the hearing, the Administrative Law Judge set the period for the submission of additional written comments to extend through January 31, 2000, and the period for submissions of written replies to these comments to extend through February 7, 2000, pursuant to Minn. Stat. § 14.15, subd. 1.

17. During the initial comment period, the following documents were received by the Office of Administrative Hearings and made a part of the record:

- Letter from George Dawson, M.D., to Administrative Law Judge Allan W. Klein dated January 23, 2000;
- Letter from William Marczewski, Medical Regulations Analyst for the Board, to Administrative Law Judge Allan W. Klein, dated January 28, 2000 with attachments regarding the Board's financial projections;
- Letter from Robert Leach, Executive Director for the Board, to Administrative Law Judge Allan W. Klein, dated January 28, 2000 with an attachment regarding the Board's computer initiative;
- Letter from Dave Birckelbaw from Shared Resource Management, Inc. to Administrative Law Judge Allan W. Klein, dated January 28, 2000 regarding the Board's computer initiative; and
- Letter from Mila Bocalbos, D.O., to Administrative Law Judge Allan W. Klein, dated June 9, 1999 expressing opposition to the proposed fee rule.

18. During the period for responsive comments, the following documents were received by the Office of Administrative Hearings and made part of the record:

- Letter from Paul S. Sanders, M.D., MMA CEO, and Christina F. Rich, MMA Director of Health Law, to Administrative Law Judge Allan W. Klein, dated February 2, 2000;
- Letter from Robert Leach, Executive Director of the Board, to Administrative Law Judge Allan W. Klein, dated February 7, 2000;
- Letter from Dave Birckelbaw, Practice Manager for Shared Resource Management, Inc., to Administrative Law Judge Allan W. Klein, dated February 7, 2000.

19. The record on this matter closed for all purposes on February 7, 2000.

### **Standard of Review**

20. In a rulemaking proceeding, an administrative law judge must determine whether the agency has established the need for and reasonableness of the proposed rule by an affirmative presentation of facts.<sup>[1]</sup> An agency need not always support a rule with adjudicative or trial-type facts. It may rely on what are called “legislative facts” — that is, general facts concerning questions of law, policy, and discretion. The agency may also rely on interpretations of statutes and on stated policy preferences.<sup>[2]</sup> Here, the Board prepared a SONAR setting out a number of facts, and policy preferences to support the proposed rules. It also supplemented information in the SONAR with information presented at the rule hearing.

21. Inquiry into whether a rule is reasonable focuses on whether the agency has demonstrated that it has a rational basis, as opposed to being arbitrary. Minnesota law equates an unreasonable rule with an arbitrary rule.<sup>[3]</sup> Agency action is arbitrary or unreasonable when it takes place without considering surrounding facts and circumstances or disregards them.<sup>[4]</sup> On the other hand, a rule is generally considered reasonable if it is rationally related to the end that the governing statute seeks to achieve.<sup>[5]</sup>

22. The Minnesota Supreme Court has defined an agency’s burden in adopting rules as having to “explain on what evidence it is relying and how the evidence connects rationally with the agency’s choice of action to be taken.”<sup>[6]</sup> An agency is entitled to make choices between different approaches as long as its choice is rational. Generally, it is not proper for an administrative law judge to determine which policy alternative might present the “best” approach, since making a judgment like that invades the policy-making discretion of the agency. Similarly, where an agency has engaged in a balancing process, such as weighing competing demands for limited resources, the Administrative Law Judge will not substitute his own balancing for that chosen by the Agency. Rather, the question for an administrative law judge is whether the agency’s balancing is one that a rational person could have made.<sup>[7]</sup>

23. In addition to ascertaining whether proposed rules are necessary and reasonable, an administrative law judge must make other decisions — namely, whether the agency complied with the rule adoption procedure; whether the rule grants undue discretion to the agency; whether the agency has statutory authority to adopt the rule;

whether the rule is unconstitutional or illegal; whether the proposed language is not a rule.<sup>[8]</sup>

24. When an agency makes changes to proposed rules after it publishes them in the State Register, an administrative law judge must determine if the new language is substantially different from what the agency originally proposed.<sup>[9]</sup> The legislature has established standards for determining if the new language is substantially different.<sup>[10]</sup> In this case, there was no change in the Board's proposal, so that issue need not be addressed.

### **Nature of the Proposed Rule**

25. This rulemaking proceeding involves amending the Board's existing rule relating to the licensing fees. Minnesota Rules, 5600.2500(B) sets the physician annual licensing fee at \$168. The Board proposes to amend this rule to set the physician annual licensing fee at \$192.

### **Statutory Authority and Requirements**

26. Minn. Stat. § 147.01 and § 214.06 (1998) authorize the Board to promulgate rules to establish and amend fees to cover their operational costs and the costs for administering statutorily-mandated programs. The Board has statutory authority to amend Minnesota Rules, 5600.2500(B).

27. Minn. Stat. § 16A.1285, subd. 2 mandates that the Board set the charges for its services, including fees, at a level such that these charges neither significantly over-recovers nor under-recovers the costs, including overhead costs, involved in providing the services. Thus, by statute, the Board's overall revenues, the major portion of which comes from the physician's annual licensing fee, must roughly equal the overall costs the Board projects for providing its administrative, licensure and complaint review services.

28. Minn. Stat. § 16A.1285, subd. 5 requires the Board to submit any proposed charges for licensure to the Commissioner of Finance for review and comment. The Commissioner's recommendation on the proposed charge must be included in the SONAR.

### **Cost and Alternative Assessments in SONAR**

29. Minn. Stat. § 14.131, subps. (1) – (6) provides that state agencies proposing rules must identify classes of persons affected by the rule, including those incurring costs and those reaping benefits; the probable effect upon state agencies and state revenues; whether less costly or intrusive means exist for achieving the rule's goals; what alternatives were considered and the reasons why any such alternatives

were not chosen; the cost that will be incurred complying with the rule; and differences between the proposed rules and existing federal regulations.

In the SONAR, the Board addressed each of these requirements. The Administrative Law Judge finds that the Board complied with these requirements of the statute.

### **Performance Based Regulation**

30. Minn. Stat. § 14.131 also requires the Board to describe how, in developing this rule, it considered and implemented the legislative policy supporting performance-based regulatory systems set forth in § 14.002.

Minn. Stat. § 14.002 directs all agencies, whenever feasible, to develop rules that emphasize superior achievement in meeting the agencies' regulatory objectives and a maximum flexibility for the regulated public in meeting those goals. The Board claims that this fee increase is necessary in order to allow the Board to continue to provide the administrative, licensure and complaint review services it is required to provide under the statutes. The Board also anticipates several ways in which the increased revenues from the fee increase may assist the Board in improving its level of services to the regulated public. For example, this increased revenue may result in increased information being made available through the Board's web page and mailings, or quicker responses to inquiries from the regulated public and more timely investigations of complaints regarding members of the regulated public. The Administrative Law Judge believes the Board has adequately shown that its focus in proposing this fee increase was to provide superior achievement of the Board's mandated objectives.

### **History**

31. The Board is charged with the responsibility of promulgating rules setting the licensing fees for physicians and other regulated health care professionals. Additionally, the Board, pursuant to Minn. Stat. § 16A.1285, must generate revenues in an amount roughly equal to the costs of the services the Board is required to provide.

32. The physicians' annual licensing fee was set at the current amount of \$168 in 1992.

33. The Board, in proposing to increase this fee by \$24 to \$192, has cited a number of factors that have resulted in rising costs for the Board since 1992. These factors include:

(a) an increase in the number of physicians licensed by the Board from 14,408 in 1992 to 15,185 in 1998;

(b) an increase in the number of contested case hearings filed involving physicians, from three cases in progress in 1992 to 20 cases in progress in 1998. This increase was due largely to the fact the law was changed in 1996, placing a seven-year statute of limitations on the Board for filing a contested case. This led to the Board filing

a large number of contested cases in 1996 and 1997 in order to preserve those cases under the new statute of limitations. The costs of these contested case hearings, not including the associated cost for investigative and legal services paid to the Attorney General's Office, rose from \$147,880 in 1996 to \$288,000 in 1997;

(c) an increase in the costs for investigative and legal services paid to the Attorney General's Office from \$1,000,000 annually in 1995 to \$1,416,000 annually beginning in 1996;

(d) the addition since 1992 of three new programs to be administered by the Board. The Board is now statutorily required to administer the Health Professional Services Program, the Minnesota Department of Health HIV/HBV Monitoring Program, and the Administrative Services Unit, in addition to its existing duties.

(e) a need to upgrade and expand the Board's computer systems in order to increase the Board's efficiency in providing existing services and to offer new services consistent with its statutory objectives. The Board claims that an upgrade of the computer system will result in better statistical/data collection, standardization of documents, increased data storage capacity, coordinated information accessibility among Licensure, Complaint Review and Administrative staff, and improved processing of files. The upgrade will also allow the Board to expand its web site to provide more information to the regulated and general public. The Board has projected the costs of the upgrade of the computer system at an average of \$290,000 per year over the next four years;

(f) an increase in the number of options the Board may utilize in processing the roughly 2000 complaints it has received per year since 1992. The Board claims that the expansion of options for processing these complaints -- for example, Corrective Action Agreements and Medical Coordinator Conferences -- has increased the work of the Board's staff in processing these complaints. However, no specific cost increase has been identified with this increase in complaint processing options;

(g) an increase in the cost of living since 1992 which has resulted in an increased cost for providing necessary services.

34. Considering these factors, the Board prepared its budget for FY 2000, projecting its total expenditures for FY2000 at \$3,978,500. Of this amount, \$1,416,000 was projected to cover the costs paid to the Attorney General's Office for investigative and legal services. Because physicians account for roughly 94% of these costs, the Board projected \$1,331,000 of this amount as being related to services provided to physicians. The remainder of the Board's costs were projected at \$2,562,500. Because physicians make up roughly 80% of the Board's regulated public, the Board projected \$2,050,000 of these costs as being related to services provided to physicians. In total, the Board projected that \$3,381,000 of its projected FY200 budget was related to costs involving physicians.

35. The Board also prepared its projected revenues for FY 2000. Based on the current physician annual licensing fee of \$168, the Board projected revenues derived from physicians at \$3,014,000. Compared to the projected budget of \$3,381,000 for services involving physicians, this represented a projected shortage of \$361,000. Using the increased fee amount of \$192, the projected revenues derived

from physicians would amount to \$3,385,600; compared with the projected budget, this would result in a \$4,600 projected surplus.

36. The Board submitted its budget and revenue projections, including its request to increase the annual physicians' licensing fee to \$192, to the Department of Finance on January 8, 1999.

37. By letter dated January 21, 1999, the Department of Finance reviewed and approved the Board's budget and revenue projections, and its request to increase the physician licensing fee to \$192.

38. The Board's budget was then submitted to the legislature for review. Public hearings before the legislative oversight committees were held where legislators, and presumably the public, were allowed to question the Board regarding its proposed budget. The legislature then approved the Board's budget.

39. The Board's budget included a "computer initiative" component -- the projected costs of upgrading the Board's computer systems. Legislators did question the Board about this project and did approve it as part of the Board's budget. This information regarding the computer project was also reviewed by the Minnesota Office of Technology.

40. The Board then began the process of amending Minnesota Rules 5600.2500(B) to reflect the increase in the fee to \$192. Through the process of its Notice to Adopt Rules without a Public Hearing and the eventual Notice of Public Hearing, the Board has solicited and received public comment on the proposed rule.

### **Public Comment and the Board's Response**

41. The public comment received has come almost entirely from the MMA and individual physicians. They have unanimously opposed the \$24 increase in the fee. These physicians collectively indicated their belief that the Board has not shown the need or reasonableness of this fee increase. The comment on specifically how the Board has failed to make this showing varied, but there were several consistent themes.

42. The strongest opposition was raised regarding the cost projected for the computer initiative. Public comment indicated that the \$293,000 the Board projected per annum for the computer project accounted for \$12 of the \$24 increase. Most of the physicians who commented on the computer project indicated they did not believe the upgrade in computer systems should cost that much or was that necessary given the projected costs. They were particularly opposed to the computer project given the fact that the Board's budget projection for the project was expected to be 50% to 100% higher than the actual costs to implement the upgrade. Public comment on this issue questioned how the Board could justify this part of the fee increase based on one estimate for a project that had not been open for bid and was likely to cost significantly less. There was also a reaction in the public comment to indications from the Board's

consultant that contracts for projects for state agencies have to be bid differently because of the state budget process. Specifically, public comments rejected a perception that the Board needed to “overbid” the project costs initially to safeguard against the possibility that the legislature may reduce funding at a later stage in the development of the project. MMA officials specifically indicated their belief that the Board should use the same approach for the development and budgeting of this project as is used in private industry.

The Board, in response, stressed that the projected costs are based on an estimate by the consultant and openly acknowledged that the project has not yet been let out for bid and, consequently, has not produced the type of financial scrutiny and potential cost-savings a competitive bidding process can produce. The Board also reiterated that the state budget process required the Board to develop an estimate of the project costs in order to secure approval of these costs in their budget requests, which is required *before* they can legally let the project out for competitive bidding. As stated by the Board’s Executive Director in his written reply to the public comment on this issue:

“If the Board had sent out preliminary bids on the computer project at that time at the beginning of the rule making process, the Department of Finance would have questioned the Board about how it would cover such a cost within its present budget, since the legislature had not approved the Board’s budget for the next biennium at that time. Also, the legislature would have questioned the Board why it was putting out a proposal for bidding purposes when the legislature had not decided if funding for the computer project was appropriate. The Office of Technology must approve any Request for Proposal (bid) and thus would have questioned the Board seeking approval of a Request for Proposal that is intended to be for information-gathering purposes only.

With using ‘preliminary bid’ information, the problem is that a fee amount may be set lower based on a ‘preliminary estimate’. Later after the fee rule is finally approved, when the actual bidding occurs, the price estimate may be higher, since the Board could not hold a vendor to a ‘preliminary bid’. . . . Relying on an underestimated project cost will cause the Board to spend more money in the future to make-up for the under-estimation and take away from the existing resources as well as extend the time for completing the project.”

The Board also noted that this computer project was reviewed by both the Minnesota Office of Technology and the legislature and that both the legislature and the Department of Finance approved the costs associated with this project included in the Board’s FY2000 budget request.

43. The Administrative Law Judge concludes that the Board has justified that its proposed expenditures for the computer upgrade project are both needed and reasonable. This is based upon the detailed documentation in the record, both from the Board and from its consultant. Physicians should note the discussion in Finding 45, below, relating to the protections which are available to them to avoid being overcharged if the computer project can be accomplished for less than the budgeted amount.

44. Public comment also indicated a belief that fees, once increased, are seldom reduced. The point was raised that this fee increase may produce a surplus of funds for the Board should the actual costs of the computer project be less than projected and that these funds, once obtained, would not be returned or wisely used by the Board.

In response to this comment, the Board has reiterated its position that, should the computer project eventually cost less than estimated and should this result in the fee increase creating a surplus of funding for the Board, Minn. Stat. § 16A.1285 would require the Board to reduce fees in order to prevent the Board from significantly over recovering its costs. Additionally, the Board's funding equation will continue to be reviewed by the Department of Finance and the legislature as part of the budgeting process. Therefore, the Board will have to continue to justify, in a public forum, their future funding formula and expenditure requests and continue to satisfy these oversight bodies that they are complying with Minn. Stat. § 16A.1285.

45. The Administrative Law Judge agrees with the Board that the statute does offer meaningful protections against overcharging. It is evident from the detail which the Board had to supply to the Department of Finance that the Department does not just rubber-stamp the Board's desired fee. Instead, the Department requires detail, and actually reviews it in some depth. The Department's role provides a meaningful protection to physicians against excessive fees.

46. Another significant portion of the public comment on the proposed fee increase centered on the costs for investigative and legal fees the Board projected to pay to the Attorney General's Office for their work on the contested case hearings brought by the Board. Members of the public stated that the Board was paying the Attorney General's Office at the rate of \$82/hour for legal services and \$57/hour for investigative and legal assistant services, which they felt was an "exorbitant rate". Public comment also balked at the overall costs projected to be paid to the Attorney General's Office (\$1,416,000/yr) as excessive. Members of the public expressed their opinion that the Board could reduce these costs by bringing their legal services in-house. They also expressed their belief that it was inappropriate for physicians to be required to "partially fund" the Attorney General's Office through their licensing fees. Finally, public comment indicated a belief that it was inappropriate for the Board to require physicians to fund the Board's effort to process complaints filed against physicians, stating that this function was of dubious benefit to physicians.

The Board responded that the Attorney General's Office is required by statute to provide these legal and investigative services to the Board, that the Board is required by statute to pay for these services out of their budget. The Executive Director testified at the public hearing that the Board had approached the Attorney General's Office about the possibility of bringing some of those legal services in-house, but this proposal was rejected. In light of this, the Board claimed it had no discretion in these expenditures for legal and investigative services. The Board also argued that effective complaint investigation and monitoring provides a direct benefit to regulated physicians and the profession as a whole.

47. The Administrative Law Judge finds that the Board has accurately stated the statutory relationship between it and the Attorney General's Office. The legislature has determined that agencies will pay for the services provided to them, and has also determined that the Attorney General's Office must provide those services. In addition, the Administrative Law Judge finds that there is a need for the enforcement work provided by the Board, and that it is appropriate for physicians to fund it.

48. A portion of the public comment related to the perceived unfairness of applying this fee increase to physicians alone and not to any of the other regulated professions under the authority of the Board. These members of the public felt it was unfair for the Board to increase the licensing fees only for physicians to cover costs for such items as the computer upgrade, the Attorney General's Office costs, and the cost-of-living increase for the general operational costs. These members of the public pointed out that physicians were the only ones facing a fee increase to offset these higher costs.

A close review of the Board's presentation shows that they segregated the FY2000 budget expenditures related to services provided to physicians from their total FY2000 budget expenditures. Thus, the Board's total FY2000 budget request was for \$3,978,500 but only \$3,381,000 was needed to provide services for physicians. The Board then used this later figure of the "physician-related" costs in determining the fees they needed to charge physicians to cover these specific costs. Their projected revenues from physicians, including the increased fee, totals \$3,385,000 and is intended to cover the \$3,381,000 the Board projected as costs for physician-related services. Therefore, the fee increase, although applied only to physicians, does not require physicians to fund services provided to other professions.

Additionally, the Board pointed out that the physician annual licensing fee was last raised in 1992 and that each of the other professions regulated by the Board have had fee increases since 1992.

49. The Administrative Law Judge finds that the Board has made a reasonable justification for its allocations among various regulated groups, and that there is no evidence to suggest that physicians are subsidizing any other group.

50. Finally, a public comment argued the fee increase was unreasonable in light of the fact that physicians in Minnesota already pay a high cost for regulation of their profession, particularly in light of the rising professional costs physicians already face from other sources. The comment pointed out that Minnesota already has the tenth highest licensing fee nationwide (based on the annual fee of \$168). Many physicians also face rising costs related to practicing in their profession, from rising educational costs and educational loan payments, to increases in insurance premiums, to higher pass through costs such as staffing and overhead.

In response, the Board stated that simple comparisons with the fees charged in other States is not accurate since those other States may provide a different level of services and also may partially fund their services from general tax revenues. As for the general objection to increased fees in light of other rising costs, the Board requested an increase in this fee in part due to its own rising costs. The Board also notes that the increased fees should result in an increase in the level of services provided to physicians.

51. The Administrative Law Judge finds that the Board has adequately responded to the concerns raised in Finding 50, and that the Board has more than adequately justified the proposed fee increase.

Based upon all of the files, records and proceedings herein, the Administrative Law Judge makes the following:

### **CONCLUSIONS**

1. That the Board gave proper notice of the hearing in this matter.
2. That the Board has fulfilled the procedural requirements of Minn. Stat. §§ 14.14 and 14.22, and all other requirements of law or rule.
3. That the Board has documented its statutory authority to adopt the proposed rules, and has fulfilled all other substantive requirements of law or rule within the meaning of Minn. Stat. §§ 14.05, subd. 1, 14.15 subd. 3 and 14.50(I) and (ii).
4. That the Board has demonstrated the need for and the reasonableness of the proposed rules by an affirmative presentation of the facts in the record within the meaning of Minn. Stat. §§ 14.14, subd. 4 and 14.50(iii).
5. That a finding or conclusion of need and reasonableness in regard to any particular rule subsection does not preclude and should not discourage the Board from further modification of the rules based upon an examination of the public comments, provided that the rule finally adopted is based upon facts in this rule hearing record.

Based upon the foregoing Conclusions, the Administrative Law Judge made the following:

## RECOMMENDATION

IT IS HEREBY RESPECTFULLY RECOMMENDED that the proposed rule amendment be adopted.

Dated this 8<sup>th</sup> day of March, 2000.

s/ Allan W. Klein

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ALLAN W. KLEIN

Administrative Law Judge

Reported: Tape Recorded, No Transcript

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<sup>[1]</sup> Minn. Stat. § 14.14, subd. 2, and Minn. Rule 1400.2100.

<sup>[2]</sup> *Manufactured Housing Institute v. Pettersen*, 347 N.W.2d 238, 244 (Minn. 1984); *Mammenga v. Department of Human Services*, 442 N.W.2d 786 (Minn. 1989).

<sup>[3]</sup> *In re Hanson*, 275 N.W.2d 790 (Minn. 1978); *Hurley v. Chaffee*, 231 Minn. 362, 367, 43 N.W.2d 281, 284 (1950).

<sup>[4]</sup> *Greenhill v. Bailey*, 519 F.2d 5, 10 (8<sup>th</sup> Cir. 1975).

<sup>[5]</sup> *Mammenga v. Department of Human Services*, 442 N.W.2d 786, 789-90 (Minn. 1989); *Broen Memorial Home v. Minnesota Department of Human Services*, 364 N.W.2d 436, 444 (Minn. Ct. App. 1985).

<sup>[6]</sup> *Manufactured Housing Institute, supra*, 347 N.W.2d at 244.

<sup>[7]</sup> *Federal Security Administrator v. Quaker Oats Company*, 318 U.S. 2, 233 (1943).

<sup>[8]</sup> Minn. Rule 1400.2100.

<sup>[9]</sup> Minn. Stat. § 14.15, subd. 3.

<sup>[10]</sup> Minn. Stat. § 14.05, subd. 2.