

STATE OF MINNESOTA
OFFICE OF ADMINISTRATIVE HEARINGS
FOR THE MINNESOTA DEPARTMENT OF HUMAN SERVICES

In the Matter of the Rate Appeal of Surf
and Sand Nursing Home, Inc.,
Appellant,

**ORDER DENYING RESPONDENT'S
MOTION TO CERTIFY**

vs.

Minnesota Department of Human
Services,
Respondent.

On June 21, 1996, Administrative Law Judge Phyllis A. Reha denied the Appellant's motion for summary disposition in the above-captioned matter. On August 5, 1996, the Minnesota Department of Human Services (Department) submitted a motion to certify a question of law to the Commissioner of Human Services. Surf and Sand Nursing Home, Inc., Appellant in this matter, opposed this motion.

Peter B. Hofrenning, Assistant Attorney General, 445 Minnesota Street, Suite 900, St. Paul, Minnesota 55101-2127, represents DHS. Bernard C. Buchanan, President of Surf and Sand, Inc., 1910 Pheasant Drive, Harlingen, Texas 78550, (temporary local address: 9927 Carvell Circle South, Bloomington, MN 55438-1921) represents Appellant. The record on this motion closed on August 14, upon receipt of the Appellant's Memorandum in Opposition of Motion for Certification.

Based upon all of the files, records, and proceedings herein, and for the reasons set forth in the Memorandum attached hereto,

IT IS HEREBY ORDERED THAT:

- (1) That the Respondent's Motion to Certify is DENIED.

Dated this _____ day of August, 1996.

PHYLLIS A. REHA
Administrative Law Judge

MEMORANDUM

The Department has moved to certify to the Commissioner the issue of whether summary disposition should have been granted in this matter. Department Memorandum, at 1. Appellant responds that there was no error made in finding genuine issues of material fact remain for hearing and opposes the motion to certify. Minn. Rules pt. 1400.7600 sets out the six factors to be weighed in determining whether a motion should be certified. Those factors are:

- (A) Whether the motion involves a controlling issue of law over which there is a difference of opinion.
- (B) Whether the ultimate termination of the hearing would be materially advanced.
- (C) Whether the time expended between the motion to certify and the ultimate determination would prejudice the prevailing party.
- (D) Whether to delay the ultimate determination to after the hearing would render the matter moot or render the agency ruling meaningless.
- (E) Whether developing a full record is necessary and would avoid remanding the matter.
- (F) Whether the issue to be certified is solely within the expertise of the agency.

Minn. Rules pt. 1400.7600.

The Department relies upon two factors in advancing its motion to certify. The Department asserts that there is a controlling issue of law that determines this matter. [Minn. Rules pt. 1400.7600(A)]. It further argues that the ultimate determination of this proceeding would be advanced by certifying this motion. [Minn. Rules pt. 1400.7600(B)] Minn. Rules pt. 9549.0030, subp. 3 is cited as controlling by the Department. That rule states:

When a person other than top management personnel has multiple duties, the person's salary cost must be allocated to the cost categories on the basis of time distribution records that show actual time spent or an accurate estimate of time spent on various activities. In a nursing facility of 60 or fewer beds, part of the salary or salaries of top management personnel may be allocated to other cost categories to the extent justified in time distribution records which show the actual time spent, or an accurate estimate of time spent on various activities. A nursing facility that chooses to estimate time spent must use a statistically valid method. Persons who serve in a dual capacity, including those who have only nominal top management responsibilities, shall directly identify their salaries to the appropriate cost categories. The salary of any person

having more than nominal top management responsibilities must not be allocated.

Minn. Rules pt. 9549.0030, subp. 3

The Department maintains that this rule means a facility must use a “statistically valid method” and failure to do so renders the costs under the rule allowable only as general and administrative costs. Department Memorandum, at 4. Appellant argues that the Department’s argument relating to “validated time studies” or “sadistically valid estimates” is a “red herring”, since estimates by employees have previously been accepted by the Department in other nursing home rate appeals as sufficient time distribution records; and Appellant will introduce the testimony of the two employees whose salaries are at issue to support the claimed allocation of costs for the years at issue in this proceeding. Appellant’s Memorandum, at 2.

The history and wording of Minn. Rules pt. 9549.0030, subp. 3, was analyzed in the June, 21, 1996 Summary Disposition Order. To summarize that analysis, the rule was found to be needed and reasonable, as amended, because the rule did **not** impose a strict requirement of statistical studies for estimated costs. Rather, such a statistical study was a way for a provider to be certain of obtaining reimbursement for its allocated salary cost. In addition to the rule analysis, the Judge pointed out that the information offered by Appellant, (i.e., covering all of the employees whose salaries are allocated and covering all of the time for which reimbursement is sought for those salaries) may have been a “statistically valid method” to estimate the allocation of duties and costs claimed under that allocation. The Department has not offered any rule language, manual entry, guideline, or competent testimony to indicate that the use of all the employees and all of the time for which costs are claimed does not constitute a “statistically valid method” under Minn. Rules pt. 9549.0030, subp. 3. Absent such language or evidence there is no basis upon which to conclude, prior to a hearing, that Appellant’s estimate does not meet the standards for allowability.

There is no dispute as to what rule applies in this matter. There is a dispute as to whether the information offered to support the costs claimed under the rule is adequate. This is an issue of fact which can only be determined after a hearing and is not suitable for certification to the Commissioner.

The Department asserted that, since Appellant was found in the June 21, 1996 Order to have failed to meet burden of proof, the Department is entitled to summary disposition. Department Memorandum, at 4-5. The Department’s argument overlooks the procedural posture of this matter and the nature of that Order. The matter was before the Judge on Appellant’s motion for summary disposition. In order to obtain summary disposition, the Appellant needed to prove by affidavits that its position was correct as a matter of law and no genuine issues remained for hearing. What Appellant actually demonstrated was that genuine issues of material fact **did** remain for hearing. Appellant’s failure to meet the burden of proof was solely for the purpose of the summary disposition motion, not for any other purpose. There is no further conclusion that can be drawn from the burden of proof finding.

The Department argues that the ultimate termination of this proceeding will be advanced by certification. The parties are scheduled for hearing in this matter on September 4th, 1996. The hearing is expected to last less than 4 hours. No other prehearing activity remains to be completed. If the Commissioner were to agree with the Judge's analysis of the applicable rule part at issue, there would be a substantial delay in the ultimate determination of this hearing, arising from the need to reschedule the hearing. The Department indicates that it would be much more likely to settle this matter if the Commissioner concludes that the estimates meet the rule requirements. Department Memorandum, at 4. The Appellant has complained about the Department's failure to settle this matter. The Judge cannot speculate as to whether this matter is more likely to be resolved by settlement under one interpretation of the rule or another. However, it is clear that Certification is not likely to substantially reduce the time before an ultimate decision is made in this matter.

While the parties have not argued all of the factors to determine if an issue should be certified, the Judge notes that none of the remaining factors have been met: 1) there is no prejudice to the Department arising from conducting the hearing before final decision [Minn. Rules pt. 1400.7800(C)]; 2) the short delay in the ultimate determination until after a hearing will not render the matter moot or render the agency ruling meaningless [Minn. Rules pt. 1400.7800(D)]; 3) by first conducting an evidentiary hearing, the record will be fully developed and there is less likelihood that the matter will be remanded [Minn. Rules pt. 1400.7800(E)]; 4) if the language of the rule was so technical that only the Department had the expertise and experience to understand it, and the rule interpretation was one of long standing, perhaps one could conclude that the issue to be certified was solely within the expertise of the agency. (See, Resident v. Noot, 305 N.W. 2d 311, 312 (Minn. 1981). Here, however, the rule under scrutiny does not meet those criteria. The agency's interpretation is not of long standing and the rule part's language is not technical. The issue of this motion does not fall solely within the expertise of the Department [Minn. Rules pt. 1400.7800(F)]. Since none of the factors for certification support the Department's motion, that motion is denied

The parties are advised that the hearing will commence on Wednesday, September 4th, 1996 at 10:00 a.m. at the Office of Administrative Hearings in Minneapolis.

P.A.R.

August 27, 1996

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RE: In the Matter of the Rate Appeal of Surf and Sand Nursing Home, Inc.,
Appellant vs. Minnesota Department of Human Services, Respondent;
OAH Docket No. 9-1800-10087-2

Dear Mr. Hofrenning and Mr. Buchanan:

Enclosed and served upon you is the Administrative Law Judge's Order Denying
Respondent's Motion to Certify in the above-entitled matter.

Sincerely,

PHYLLIS A. REHA
Administrative Law Judge

Telephone: 612/341-7602

PAR:lr

Enclosure