

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

In the Matter of the Rate Appeal of  
REM Facilities

RECOMMENDED ORDER  
REGARDING CROSS MOTIONS FOR  
SUMMARY DISPOSITION

The above-captioned matter is pending before Administrative Law Judge Barbara L. Neilson pursuant to a Notice of and Order for Hearing and Prehearing Conference issued by the Deputy Commissioner of the Minnesota Department of Human Services on January 11, 1996. The matter was indefinitely continued from November, 1996, to approximately April, 1998, pending the issuance of decisions by the Commissioner and the Minnesota Court of Appeals in a case involving an issue that was virtually identical to one of the issues in the case at bar. Following the issuance of the Court of Appeals' decision, the REM Facilities dropped their appeal of the cost-of-goods-sold issue.

Both parties have moved for summary disposition with respect to the remaining issue in this case. Oral argument was held concerning the motion, and the record closed on September 21, 1998, upon the receipt of additional information from the parties which was requested during oral argument.

Thomas Darling, Attorney at Law, Gray, Plant, Mooty, Mooty & Bennett, P.A., 3400 City Center, 33 South Sixth Street, Minneapolis, Minnesota 55402-3796, appeared on behalf of the REM Facilities. Steven J. Lokensgard, Assistant Attorney General, 445 Minnesota Street, Suite 900, St. Paul, Minnesota 55101-2127, appeared on behalf of the Department of Human Services (hereinafter referred to as the "Department" or "DHS").

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

IT IS HEREBY RESPECTFULLY RECOMMENDED that the Commissioner issue an Order granting the Department's Motion for Summary Disposition and denying the REM Facilities' Motion for Summary Disposition.

Dated: October 21, 1998

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BARBARA L. NEILSON  
Administrative Law Judge

## MEMORANDUM

The REM Facilities are intermediate care facilities for mentally retarded persons ("ICFs/MR"). As such, they provide residential care to mentally retarded persons who are eligible for care under Minnesota's Medical Assistance Program.<sup>[1]</sup> In order to obtain reimbursement of allowable costs incurred in providing care to residents of their ICFs/MR under the federal Medicaid Act<sup>[2]</sup> and the state's Medical Assistance Program,<sup>[3]</sup> REM must submit cost reports to the Department of Human Services for particular reporting years.

The reimbursement rates at issue in this case were set under Minn. R. 9553.0010 through 9553.0080, which is generally referred to as "Rule 53." Rule 53 rates are set on an annual basis and are based upon allowable costs incurred in the prior cost-reporting year, increased by an indexed inflation factor.<sup>[4]</sup> The Department conducts an annual "desk audit" review of a facility's cost report.<sup>[5]</sup> The Department is also authorized to conduct a more intense on-site "field audit" of a facility's books and records supporting its cost reports.<sup>[6]</sup> Field audits may encompass the four most recent annual cost reports for which desk audits have been completed and payment rates have been established.<sup>[7]</sup> After the Department has conducted either a desk audit or a field audit, the facility may appeal the findings if a successful appeal would result in a change to the facility's total payment rate.<sup>[8]</sup> Once an appeal is received, the Department must issue a written determination.<sup>[9]</sup> If the facility disagrees with the Department's determination, it may request a contested case hearing to determine the proper resolution of specified appeal items.<sup>[10]</sup>

Real estate and professional liability insurance costs that are incurred by an ICF/MR fall within the "special operating cost category" established in Rule 53. This category was devised "[i]n response to public comments requesting a separate cost category for operating costs over which facilities have no control and requesting special treatment of those costs to provide full reimbursement."<sup>[11]</sup> In contrast to the usual approach under Rule 53,<sup>[12]</sup> historical costs that fall within the special operating cost category are reported on the facility's annual cost report and adjusted by the costs to be incurred in the upcoming rate year.<sup>[13]</sup> The payment rate in that category thus is affected by costs that will be incurred during the rate year, rather than just historical costs. In practice, this means that (1) a facility would report by April 30, 1993, the actual cost incurred for real estate and professional liability insurance during 1992; (2) by June 30, 1993, the facility would submit a copy of the actual invoices for real estate and professional liability insurance for the upcoming year; and (3) the invoices would be used to adjust (usually upward) the special operating cost payment rate.<sup>[14]</sup>

Based upon the submissions of the parties and the oral argument regarding the cross-motions for summary disposition in this matter, the relevant facts appear to be as follows. The REM Facilities filed timely cost reports with DHS for the reporting year ending December 31, 1992. Along with their cost reports for each facility, REM included copies of its invoices for real estate and professional liability insurance for 1993. DHS conducted Rule 53 desk audits of the cost reports filed by the REM Facilities for the reporting year

ending December 31, 1992.<sup>[15]</sup> In the course of the desk audit, the DHS auditor compared the actual cost of real estate and professional liability insurance reported by REM on the cost reports for 1992 with the cost reflected in the invoices for 1992 that REM had previously sent to DHS.<sup>[16]</sup> The DHS auditor noticed that the numbers did not match for most of the REM Facilities.<sup>[17]</sup> On June 21, 1993, the auditor sent a letter to REM in which he asked why the previous year's invoices did not match the amounts that were reported on the cost report.<sup>[18]</sup> On July 30, 1993, REM replied that a dividend had been received in September, 1992, for real estate and professional liability insurance for each facility, and supplied DHS with a list of the dividends by facility. REM indicated that "[t]hese numbers were not available prior to the Rule 53 filing dates and should not be adjusted anywhere in the cost report according to 9553.0041 Subpart 16."<sup>[19]</sup> The list attached to the letter showed that, in September, 1992, twenty-seven REM Facilities had received real estate dividends ranging from \$28 to \$555 and professional liability dividends ranging from \$59 to \$359.<sup>[20]</sup>

After the DHS auditor received the information from REM concerning the insurance dividends, he decided that it was appropriate to treat the dividends as applicable credits which would offset costs claimed by REM in a particular category.<sup>[21]</sup> He subtracted the amount of the refund received by each facility from the invoiced cost for real estate and professional liability insurance submitted by REM for 1993, compared the adjusted invoice amount with the amounts reported on the cost report for the reporting year ending December 31, 1992, and, where the difference was deemed to be material, determined that adjustments should be made to two lines of the REM Facilities' cost reports.<sup>[22]</sup>

Each REM Facility appealed the findings of the desk auditor with respect to real estate and professional liability insurance.<sup>[23]</sup> REM indicated that the Department's adjustments were improper under Minn. R. 9553.0040, subp. 6, and Minn. R. 9553.0041, subp. 16.<sup>[24]</sup> The Department thereafter affirmed the desk audit determinations, and REM sought the present contested case hearing. The total amount being appealed by all of the REM Facilities is \$9,999.<sup>[25]</sup>

Both parties contend that they are entitled to summary disposition in this matter. Summary disposition is the administrative equivalent to summary judgment.<sup>[26]</sup> Summary judgment is appropriate where there is no genuine issue as to any material fact and the moving party is entitled to judgment as a matter of law.<sup>[27]</sup> The Office of Administrative Hearings has generally followed the summary judgment standards developed in judicial courts in considering motions for summary disposition regarding contested cases.<sup>[28]</sup>

It is well established that, in order to successfully resist a motion for summary judgment, the non-moving party must show that specific facts are in dispute which have a bearing on the outcome of the case.<sup>[29]</sup> The existence of a genuine issue of material fact must be established by the non-moving party by substantial evidence; general averments are not enough to meet the non-moving party's burden under Minn. R. Civ. P. 56.05.<sup>[30]</sup> Summary judgment may be entered against the party who has the burden of proof at the hearing if that party fails to make a sufficient showing of the existence of an essential

element of its case after adequate time to complete discovery.<sup>[31]</sup> To meet this burden, the party must offer “significant probative evidence” tending to support its claims. A mere showing that there is some “metaphysical doubt” as to material facts does not meet this burden.<sup>[32]</sup>

Both parties agree that there are no genuine issues of material fact in dispute. The primary issue, then, is a legal one: what treatment must be given to the 1992 insurance refunds under Rule 53? The Department argues that its auditor properly treated the insurance refund as an “applicable credit” under Rule 53 and deducted the amount of the refund from the cost of real estate and professional liability insurance for the REM Facilities. The Department asserts that it is appropriate to apply the refund to offset the cost of real estate and professional liability insurance for the purpose of establishing a special operating cost payment rate. The Department acknowledges that Rule 53 allows the cost of real estate and professional liability insurance to be adjusted to reflect the new cost for the upcoming rate year. The Department contends, however, that that fact does not relieve facilities of the responsibility to offset that cost with any applicable credits.

Although REM agrees that the insurance refund falls within the definition of an “applicable credit,” REM argues that the refund for the cost of insurance incurred in 1992 should not be applied to offset the invoiced cost of insurance in 1993. REM asserts that the Department improperly seeks to “require REM to apply a refund of amounts actually paid in the past, not against amounts actually paid in the past, but rather against the amounts REM expects to pay for insurance in the future rate year as shown on the invoices”<sup>[33]</sup> and argues that the proper application of Rule 53 prevents the Department from making the adjustments at issue in this case. The REM Facilities point out that they properly credited the insurance refund to the insurance cost portion of the relevant cost report and allege that they thereby used the refund to reduce the expenses of the facility, in accordance with the “applicable credits” portion of the Rule. REM contends that one consequence of the way in which Rule 53 treats insurance costs is that “expected costs (the invoiced amount) as of June 30, 1993, are used to the exclusion of more precise actual historical costs (the 1992 cost report amounts).”<sup>[34]</sup> REM argues that Rule 53 does not permit the use of anything other than the invoiced amount in calculating the rate. The REM Facilities thus contend that there is no support in Rule 53 for the Department’s view that actual insurance costs rather than invoiced costs must be used when setting the rate.

The special operating cost payment rate is one component of a facility’s total payment rate. As noted above, the special operating cost payment rate encompasses costs relating to real estate and professional liability insurance. Rule 53 specifies that “[t]he total allowable special operating costs . . . as adjusted by part 9553.0041, subpart 16, must be divided by the greater of resident days or 85 percent of licensed capacity days to compute the special operating cost payment rate.”<sup>[35]</sup> Minn. R. 9553.0041, subp. 16, in turn provides that “[t]he facility shall submit . . . a copy of the invoices for the real estate insurance and professional liability insurance for coverage during the rate year by June 30 each year. . . . The historical operating cost for the special operating costs during the reporting year must be shown on the cost report.”<sup>[36]</sup> Although this portion of Rule 53 thereby permits the cost of real estate and professional liability insurance to be adjusted to

reflect the actual cost of insurance during the rate year, it is important to consider Rule 53 as a whole in determining the proper treatment to be accorded the insurance refunds. Refunds of this type are explicitly discussed in the “applicable credit” portion of the rule. These rule provisions require that “applicable credits” be used to reduce the facility’s expenses. The term “applicable credit” is defined to mean “a receipt of funds . . . as a result of public grants, purchase discounts, allowances, rebates, refunds . . . or any other adjustment or income which reduce the costs claimed by the facility.”<sup>[37]</sup> It is undisputed that the insurance dividend received by REM constitutes a rebate or refund, and thus constitutes an “applicable credit” within the meaning of Rule 53. The parties do dispute, however, whether the 1992 dividend may properly be applied to reduce the cost of real estate and professional liability insurance for 1993.

Under the rules, applicable credits “must be used to offset or reduce the expenses of the facility to the extent that the cost to which the credits apply was claimed as a facility cost.”<sup>[38]</sup> It is reasonable to interpret the applicable credit provision to require that facilities that end up paying less than the invoiced amount report the refund as an applicable credit and have that amount deducted from the next year’s cost of insurance. Thus, it was appropriate for the Department to reduce the cost of REM’s real estate and professional liability insurance in the upcoming year by the amount of the refunds received by the REM Facilities. Under such an approach, the REM Facilities would continue to be fully compensated for the cost of their insurance, consistent with the major concern expressed by the ICF/MR industry when the special operating cost category was originally created. Although the special operating cost rule provisions were created as an exception for costs which were viewed as being outside the control of the facility and unable to be incorporated into the facility’s rate on an historical basis, Rule 53 taken as a whole does not reflect an intent to pay for expected costs while disregarding actual costs. Under the interpretation urged by the REM Facilities, the amount of the dividend received by the Facilities would never be captured by the Department and would simply result in a windfall to the Facilities. That interpretation would not be consistent with the overall intent of Rule 53 to reimburse facilities for their actual costs.

The Department correctly interpreted Rule 53 to require that the insurance refund received by REM be treated as an applicable credit and applied against the cost of insurance for the upcoming rate year. Therefore, the Administrative Law Judge recommends that summary disposition be entered for the Department in this case.

B.L.N.

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<sup>[1]</sup> See Responses of REM Facilities to Department’s Requests for Admissions to Requests 1 and 2 (attached to Department’s Memorandum in Support of Motion for Summary Disposition at DHS 30).

<sup>[2]</sup> 42 U.S.C. § 1396a.

<sup>[3]</sup> Minn. Stat. Ch. 256B.

<sup>[4]</sup> *Association of Residential Resources in Minnesota, Inc. v. Gomez*, 843 F. Supp. 1314, 1317-18 (D. Minn. 1994).

<sup>[5]</sup> Minn. R. 9553.0020, subp. 16 (1997).

<sup>[6]</sup> *Id.*, subp. 20.

<sup>[7]</sup> Minn. R. 9553.0041, subp. 11(B) (1997).

<sup>[8]</sup> Minn. Stat. § 256B.50, subd. 1 (1996); Minn. R. 9553.0080, subp. 1(A) (1997).

<sup>[9]</sup> Minn. Stat. § 256B.50, subd. 1h(b) (1996).

<sup>[10]</sup> *Id.*, subd. 1h(d).

<sup>[11]</sup> Report of the Administrative Law Judge in *In re the Proposed Adoption of Department of Human Services Rules Governing the Determination of Payment Rates for Intermediate Care Facilities for Persons with Mental Retardation*, No. HS-86-001-JL (October 31, 1985), at 49 (attached to Department's brief as DHS 26).

<sup>[12]</sup> As mentioned above, typically the payment rate for a particular category of costs is established based on costs incurred in the prior calendar year, adjusted by an inflation factor and other variables.

<sup>[13]</sup> See Minn. R. 9553.0051 and 9553.0041, subp. 16 (1997).

<sup>[14]</sup> Minn. R. 9553.0041, subps. 1 and 16 and 9553.0051; see also *Manual for Minnesota Rules Parts 9553.0010 to 9553.0080 at 14-15*, attached to DHS brief as DHS 23-24.

<sup>[15]</sup> Affidavit of Robert L. Cooke, ¶ 1 (attached to Department's Memorandum in Support of Motion for Summary Disposition).

<sup>[16]</sup> *Id.*, ¶ 4-5.

<sup>[17]</sup> *Id.*, ¶ 5 (and attached DHS 14).

<sup>[18]</sup> *Id.*, ¶ 6 (and attached DHS 15-16).

<sup>[19]</sup> *Id.*, ¶ 7 (and attached DHS 17-18).

<sup>[20]</sup> See DHS 18 (attached to Cooke Affidavit).

<sup>[21]</sup> Cooke Affidavit, ¶ 8.

<sup>[22]</sup> *Id.*, ¶¶ 8-11.

<sup>[23]</sup> *Id.*, ¶ 12 (and attached DHS 20).

<sup>[24]</sup> See DHS 21 (attached to Cooke Affidavit).

<sup>[25]</sup> *Id.*

<sup>[26]</sup> Minn. R. 1400.5500(K) (1997).

<sup>[27]</sup> *Sauter v. Sauter* <sup>70 N.W.2d 351, 353 (Minn. 1955); *Louwagie v. Witco Chemical Corp.*, 378 N.W.2d 63, 66 (Minn. App. 1985); Minn. R. Civ. P. 56.03.</sup>

<sup>[28]</sup> See Minn. R. 1400.6600 (1997).

[29] Hunt v. IBM Mid America Employees Federal Credit Union, 384 N.W.2d 853, 855 (Minn. 1986).

[30] *Id.*; *Murphy v. Country House, Inc.*, 307 Minn. 344, 351-52, 240 N.W. 2d 507, 512 (1976); *Carlisle v. City of Minneapolis*, 437 N.W.2d 712, 715 (Minn. App. 1988).

[31] *Id.*

[32] *Id.*

[33] REM's Reply Memorandum at 2.

[34] REM's Memorandum in Support of Motion for Summary Disposition at 2-3.

[35] Minn. R. 9553.0051 (1997).

[36] Minn. R. 9553.0041, subp. 16 (1997).

[37] Minn. R. 9553.0020, subp. 3 (1997).

[38] Minn. R. 9553.0035, subp. 4 (1997).