

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

In the Matter of the Rate Appeal of  
Hilltop Good Samaritan Center

**ORDER ON DEPARTMENT'S  
MOTION IN LIMINE**

This contested case matter is pending before Administrative Law Judge Barbara L. Neilson. On June 1, 2000, the Department filed a Motion in Limine and supporting memorandum. On June 14, 2000, Hilltop Good Samaritan Center filed its response in opposition to the motion. Oral argument with respect to the motion was heard on June 20, 2000, at which time the record relating to the motion closed. Samuel D. Orbovich, Attorney at Law, Orbovich & Gartner, Suite 417, Hamm Building, 408 St. Peter Street, St. Paul, Minnesota 55102-1187, appeared on behalf of the Respondent, Hilltop Good Samaritan Center. Steven J. Lokensgard, Assistant Attorney General, Suite 900, 445 Minnesota Street, St. Paul, Minnesota 55101-2127, appeared on behalf of the Department of Human Services.

Based upon all of the files, records, and proceedings in this matter, and for the reasons set forth in the attached Memorandum, IT IS HEREBY ORDERED as follows:

1. The Department's Motion in Limine is DENIED. At the hearing in this matter, Hilltop Good Samaritan Center shall be permitted to address its assertion that the costs reported by Hilltop and disallowed by the Department should, in the alternative, be reclassified to the capitalized lease as effective interest rates and finance charges, and thereby be placed in the property cost category.

2. The discovery period in this matter shall be reopened to permit the parties to conduct additional discovery relating to Hilltop's assertion that the costs reported by Hilltop and disallowed by the Department should, in the alternative, be reclassified to the capitalized lease as effective interest rates and finance charges, and thereby be placed in the property cost category. All discovery shall be completed by September 19, 2000.

3. The hearing in this matter shall commence on Tuesday, October 24, 2000, at 9:30 a.m. in the courtrooms of the Office of Administrative Hearings. If this date is inconvenient for either party, counsel should contact the Administrative Law Judge as soon as possible to arrange a conference call to set a new hearing date.

Dated: July 19, 2000

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BARBARA L. NEILSON  
Administrative Law Judge

### MEMORANDUM

The primary issue in this contested case proceeding concerns the allowability of certain costs reported by Hilltop Good Samaritan Center ("Hilltop") that were reported as payments made in lieu of real estate taxes ("PILOT") on its cost report for the reporting year beginning October 1, 1996. On January 20, 2000, the Administrative Law Judge issued an Order on the parties' cross motions for summary disposition. In that Order, the Judge granted the Department's motion for summary disposition in part as to its argument that the governing statute requires that PILOT costs be disallowed to the extent that the costs exceed the amount that a for-profit facility would have paid to a city or township and county for fire, police, sanitation services, and road maintenance costs. The Judge concluded that the Department's two-step calculation was a logical and reasonable interpretation of the statute, and upheld the Department's view that providers could not avoid the statutory PILOT cost limitation by entering into their own agreement with local government concerning cost distribution. The Judge granted Hilltop's motion for summary disposition in part as to its argument that the Department was improperly attempting to apply an unpromulgated interpretive rule when it disallowed Hilltop's County PILOT costs based upon the lack of a PILOT agreement with the County or actual payment to the County. The parties' motions for summary disposition were otherwise denied. The Judge determined that genuine issues of material fact remained for hearing as to whether the City budget categories relating to "Debt Service" and "Capital Outlay" include costs attributable to fire, police, sanitation services, or road maintenance costs and whether Hilltop's PILOT costs should be adjusted accordingly. In the memorandum accompanying the Order, the Judge stated that "[a] hearing should be held to determine the amount of allowable costs in the Debt Service and Capital Outlay categories relating to the four services covered by the statute."<sup>1</sup>

A conference call with counsel for both parties and the Administrative Law Judge was held on February 11, 2000. During the call, counsel for Hilltop noted that, while the Judge had determined in her Order that Hilltop was not limited to the costs that it would have paid only to the City for certain services, the Order allowed a hearing only on the City budget categories relating to "Debt Service" and "Capital Outlay." Counsel for Hilltop said that he would like to introduce evidence at the hearing pertaining to whether the County budget category entitled "Capital Projects" contained costs relating to one of the statutory services. In response, counsel for the Department noted that the Department continued to believe that county costs should not be considered because Hilltop's agreement was only with the City. However, in order to make a more complete record, counsel for the Department agreed that such evidence should be considered. The Administrative Law Judge stated that she would allow the evidence to be introduced.

By mutual agreement of the parties, the hearing was held in abeyance in order to permit the parties an opportunity to engage in settlement discussions. After those discussions failed to resolve the matter, counsel for Hilltop indicated during a later status conference that he would seek to introduce evidence at the hearing to support his theory that the costs reported by Hilltop and disallowed by the Department should, in the alternative, be reclassified to the capitalized lease as effective interest rates and finance charges, and thereby be placed in the property cost category. The Department objected to the introduction of this evidence, and filed a motion in limine seeking to exclude it.

The Department contends that Hilltop should not be allowed at this stage in the proceedings to introduce evidence that would support a completely new legal theory. The Department maintains that such evidence is outside the scope of the hearing that the Administrative Law Judge ordered to be held. Pursuant to the Order on Cross Motions for Summary Disposition, that hearing was to be limited to the issue of whether certain budget categories of the City and County budgets included costs attributable to fire, police, sanitation services, or road maintenance costs, and whether Hilltop's PILOT costs should be adjusted accordingly. Hilltop's proposed evidence that the disallowed costs should be reclassified to the program cost category would, the Department contends, be irrelevant and outside the scope of that hearing. The Department further argues that it is too late in this proceeding to introduce new legal theories. In this regard, the Department emphasizes that the cost report at issue in this case was submitted over four years ago and that this contested case matter has been pending for approximately 19 months. The Department also complains that Hilltop did not advance its alternative legal theory in response to the Department's interrogatory requests and points out that, if Hilltop is permitted to assert its alternative theory, additional discovery may be necessary.

The Department contends that Hilltop reported the costs at issue in this appeal as payments in lieu of real estate taxes and cannot seek to report them in another cost category now. The Department argues that permitting Hilltop to raise the new theory would be akin to allowing Hilltop to amend its cost report long after the 14-month deadline specified in Rule 50.<sup>[2]</sup> That rule provision allows a facility to amend its cost report only if the reporting error is discovered within 14 months of the submission of the original cost report to be amended and prohibits facilities from changing an election between alternative methods of cost reporting.

In response, Hilltop argues that the reclassification of costs, as opposed to the total disallowance of costs, is a routine outcome of many audits and appeals and contends that the Department's Motion in Limine is contrary to Court of Appeals precedent, past Commissioner practice, the Order on Cross Motions issued by the Administrative Law Judge, and Rule 50. Hilltop asserts that there is already ample factual support for the reclassification requested by Hilltop and that it anticipates only producing additional expert opinion testimony analyzing the factual evidence and assessing the import and significance of the reclassification and its dollar impact.

Hilltop expects to offer no more than two witnesses to support its alternative theory. Hilltop argues that the Order of the Administrative Law Judge on the cross-motions did not exclude reclassification as an option to resolve this appeal. Hilltop stresses that the Administrative Law Judge permitted the Department in this proceeding to correct an error it believed occurred during the desk audit and, in essence, assert a new legal theory, and argues that it should be afforded the concomitant right to assert an alternative theory regarding the classification of the costs.

Hilltop emphasizes that the Court of Appeals held in *Sleepy Eye Care Center v. Commissioner of Human Services*<sup>[3]</sup> that the provision in Rule 50 requiring amendments to cost reports to be made within 14 months does not mandate that providers who are appealing disallowed costs seek to amend their cost reports and does not limit the evidence that may be presented during a contested case hearing. Hilltop further argues that the *Sleepy Eye* decision recognizes that the purpose of a rate appeal is to achieve the accurate and correct rate and that it would not serve any purpose for Hilltop to be required to raise the reclassification issue in a second contested case proceeding arising in a later rate year. Hilltop also contends that, in at least one case, the Commissioner of Human Services reached a reclassification issue even after an Administrative Law Judge issued his recommendation,<sup>[4]</sup> and that the Department has a long past practice of reclassifying costs from one category to another. Finally, Hilltop asserts that the issue presented in the case is broad enough to encompass whether the auditors should “allow, disallow or reclassify” costs. Although the provider reported the cost as a PILOT cost, Hilltop asserts that the Administrative Law Judge is not precluded from determining that the evidence and law support a better classification than the one originally selected by the provider.

The Administrative Law Judge has carefully weighed the parties’ competing arguments and concludes that it is appropriate to deny the Department’s motion in limine and permit Hilltop to introduce evidence at the hearing relating to the alternative classification of the costs at issue in this case. Although it obviously would have been preferable had Hilltop raised this alternative classification issue earlier in this proceeding, the Judge is persuaded that it is proper to permit Hilltop to raise the issue at this stage. The Court of Appeals ruled in *Sleepy Eye* that the rule requiring amendments to cost reports to be made within 14 months “does not require a provider who is appealing previously disallowed costs to request amendment of the cost report” and the rule “cannot be used to restrict the presentation of evidence during a contested case proceeding, which is governed by Minn. R. 1400.7300.”<sup>[5]</sup> Accordingly, it would not be appropriate to bar the presentation of this evidence based upon Minn. R. 9549.0041, subp. 14(A)(1).

Moreover, the Department in this proceeding as well as other proceedings has been allowed to assert a new legal theory as long as there is no prejudice and the other party is provided adequate notice. For example, in *St. Paul’s Church Home v. DHS*,<sup>[6]</sup> Judge Erickson concluded that “an inartful enunciation of the reasons for disallowances by an auditor should not foreclose DHS from changing the legal theory if the disallowance is proper as long as there is no prejudice and/or adequate notice to rebut

is afforded.” Similarly, in *Wedgewood Health Care Center v. DHS*,<sup>[7]</sup> the facility contended that the Department had changed the factual basis for its disallowance in its appeal determination. The Administrative Law Judge found that the determination provided notice to the facility of the basis for the disallowance and merely asserted a new or additional legal theory for the disallowance, and concluded that the facility had not made an adequate showing of lack of notice or prejudice. In addition, in the Order on Cross Motions issued in the present case, the Judge permitted the Department to rely on additional information it received during the appeals process from the City of Watkins to reduce the rate below the appealed desk audit amounts. The Judge noted:

It makes sense to permit the Department to seek during a contested case proceeding to correct an error that it believes occurred during the desk audit, rather than insisting that the Department be locked into defending the desk auditor’s conclusions. The Administrative Law Judge is obligated to review the arguments and make a recommendation to the Commissioner regarding the correct adjustment, so it is logical and necessary for the Judge to have the benefit of each party’s position on what that adjustment should be, even if their positions have changed over time.<sup>[8]</sup>

The reasoning in these cases applies equally to Hilltop’s request that the reclassification of costs be considered at the hearing in this matter.

During the oral argument, the Department acknowledged that, even if Hilltop were permitted to raise the additional theory, it would not significantly change the length of the hearing (which is still anticipated to take only one day). Although the Department complains that Hilltop should have raised the issue earlier in the proceeding, it has not alleged that it will suffer any prejudice if the issue is considered. Because the Department has received notice prior to the hearing of Hilltop’s additional argument and discovery will be reopened to permit additional discovery on the issue, it is unlikely that the Department will, in fact, be prejudiced by the presentation of evidence relating to Hilltop’s alternative theory. As was recognized in *Sleepy Eye*,<sup>[9]</sup> the goal in a rate appeal is to set an accurate and correct rate. In order to meet this goal, parties should be permitted to provide evidence at the hearing that an alternative classification of the costs at issue is arguably appropriate. Moreover, the Department made the same adjustment to Hilltop’s cost report in later years. It would not be consistent with judicial economy to require that the alternative theory urged by Hilltop await litigation in a later appeal involving the same underlying facts as the present case.

Accordingly, the Department’s Motion in Limine is denied. Hilltop will be permitted to provide evidence at the hearing relating to their position that the costs reported by Hilltop and disallowed by the Department should, in the alternative, be reclassified to the capitalized lease as effective interest rates and finance charges, and thereby be placed in the property cost category. If the selected hearing date is inconvenient for either party, a telephone conference call will be held to arrive at a new hearing date.

B.L.N.

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<sup>[1]</sup> Order on Cross Motions for Summary Disposition at 14.

<sup>[2]</sup> See Minn. R. 9549.0041, subp. 14(A)(1).

<sup>[3]</sup> 572 N.W.2d 766 (Minn. App. 1998).

<sup>[4]</sup> *In the Matter of the Rate Appeal of Midway Care Center, Inc., and Kelliher Care Center, Inc.*, OAH docket No. 8-1800-1169-2 (ALJ Report issued Nov. 5, 1999; Commissioner's Order issued Jan. 2, 2000).

<sup>[5]</sup> 572 N.W.2d 766, 771.

<sup>[6]</sup> OAH Docket No. 4-1800-1846-2 (recommended order issued March 3, 1988).

<sup>[7]</sup> OAH Docket No. 11-1800-9806-2 (recommended order issued Oct. 24, 1996).

<sup>[8]</sup> Order on Cross-Motions for Summary Disposition at 10.

<sup>[9]</sup> See 572 N.W.2d at 771.