

1800-2790-2

STATE OF MINNESOTA
OFFICE OF ADMINISTRATIVE HEARINGS

FOR THE MINNESOTA DEPARTMENT OF HUMAN SERVICES

In the Matter of the Contested Case of
REM-Bemidji, Inc., et al.,

ORDER

REGARDING INTERVENTION

V.

PETITION OF

ARRM

Minnesota Department of Human Services.

The above-captioned matter is pending before the undersigned Administrative Law Judge pursuant to a Notice of and Order for Hearing and Prehearing Conference dated September 28, 1988. John L. Kirwin, Assistant Attorney General, and Alison E. Colton, Special Assistant Attorney General, 520 Lafayette Road, Suite 200, St. Paul, Minnesota 55155, have appeared on behalf of the Minnesota Department of Human Services ("the Department"). Thomas Darling, Nancy R. Menzel, and Gregory R. Merz, Gray, Plant, Mooty, Mooty to Bennett, Attorneys at Law, 3400 City Center, 33 South Sixth Street, Minneapolis, Minnesota 55402, and Mary K. Martin, Mary Martin & Associates, 60 East Marie Avenue, Suite 204, West St. Paul, Minnesota 55118-5910, have appeared on behalf of REM-Bemidji, Inc., et al. ("REM" or "the REM Facilities"). Mary K. Martin has also appeared on behalf of the Association of Residential Resources in Minnesota ("ARRM"), whose Petition for Intervention in this matter is the subject of this Order. John W. Lundquist, Thompson & Lundquist, Ltd., Attorneys at Law, 2520 Park Avenue South, Minneapolis, Minnesota 55404, has appeared on behalf of a group of mentally retarded residents of REM facilities and their parents, guardians and next friends ("the REM Residents").

On April 9, 1990, during a status conference held in this case, ARRM filed

a petition to intervene as a party in this matter. The REM Facilities support the petition for intervention. The Department filed a memorandum opposing the petition on April 17, 1990. Oral argument concerning the petition was heard on April 26, 1990. /Additional argument and documentation was received from the Department on April 30, 1990, and from ARRM on May 3, 1990. ARRM also filed a supplemental affidavit on May 22, 1990.

Based on all the files, records and proceedings herein, and for the reasons set forth in the memorandum attached hereto,

IT IS HEREBY ORDERED:

1. The petition of ARRM to intervene as a party in this proceeding is DENIED.

2. ARRM will be permitted to file a written brief in the summary disposition proceeding and, if the issues presented in the summary disposition proceeding remain in the case, at the time of the ultimate hearing in this matter. The briefs shall not exceed fifteen pages in length. ARRM's brief in the summary disposition proceeding shall be filed and served by delivery on the Department on or before June 6, 1990, and the Department's reply brief shall be filed on or before June 20, 1990.

3. The briefs to be submitted by ARRM shall be limited to a discussion of questions of law relating to the owners' compensation, program directors' compensation, and central office cost issues. ARRM will not be permitted to raise new issues of fact absent petition and further order of the undersigned Administrative Law Judge.

Dated this 23rd day of May, 1990.

BARBARA L. NEILSON
Administrative Law Judge

MEMORANDUM

I. Introduction

At issue in this contested case proceeding are proposed cost adjustments made by the Department to the Medical Assistance rates of several REM Facilities following field audits of the REM Facilities' records for cost reporting years ending during 1981 through 1985. The case as a whole involves more than 45 distinct types of adjustments with respect to numerous intermediate care facilities for the mentally retarded ("ICFs/MR") that are operated by REM. The Department seeks an order affirming its adjustments and rates and recovery of the disallowed costs. The REM Facilities seek a determination that the adjustments and rates are improper.

In October of 1989, the Department filed a Motion for Partial Summary Disposition with respect to issues relating to owners' compensation, the program directors' compensation, and central office costs. The motion thus involves the three largest adjustments that were made in the field audits underlying the contested case proceeding. The REM Facilities have filed a memorandum in opposition to the motion, the Department and REM have filed reply memoranda, REM submitted an additional brief on May 15, 1990, and the Department is scheduled to submit an additional brief on May 23, 1990. The REM Residents also submitted a brief in opposition to the motion on May 16, 1990, and the Department's reply is due on May 23, 1990. Oral argument on the motion is scheduled for June 1, 1990.

On April 9, 1990, during a status conference held in this matter, counsel for ARRM filed a petition to intervene "as a party with all the rights of a party in the proceedings in this case, including in particular, the pending motion for summary disposition" brought by the Department. ARRM Petition at

2 . ARR M represents providers of community-based residential services for persons with developmental disabilities, and includes among its members a I 1 but approximately seven of the 310 to 320 organizations that operate ICFs/MR in Minnesota. ARR M alleges that many of its members have Medical Assistance rate appeals pending on issues that are similar to those involved in the REM-Bemidji case, and asserts that central office and top management disallowances and adjustments tend to be substantial in most of these cases. In addition, REM contends that "the Department's proposal to dismiss the REM-Bemidji case on a motion for summary judgment for lack of documentation has potentially profound and devastating ramifications for any person or organization that does business with the government." ARR M Petition at 2.

In support of its petition for intervention, ARR M argues that (I) the legal right of ARR M's members to receive adequate rates and payments under the Medical Assistance program will be affected by the outcome of this contested case due to the Department's position that the required documentation of certain costs is lacking and entire categories of costs may be disallowed as a result; (2) the legal right of ARR M's members to appeal a rate determination will be affected by this case because, if the Department prevails, it will seek to apply the outcome to every pending appeal without providing other ARR M members due process; (3) every provider's duty to keep adequate records and documentation will be affected by this case; (4) the REM Facilities cannot adequately represent the interests of every provider because "the specific issues to be litigated differ from case to case"; and (5) the rules allowing intervention are to be construed liberally.

In response, the Department argues that the petition for intervention must be denied because (1) the petition is untimely, no good cause has been offered for the delay, and the Department would be prejudiced by the tardy intervention; (2) the interests of ARR M and its members are adequately

represented by the REM Facilities; (3) ARRM would add additional unspecified issues and fact situations which would unduly complicate the case and prejudice the Department; and (4) ARRM has made no showing that the legal rights, duties or privileges of its members may be determined or affected by this case.

Minn. Rules pt. 1400.6200 governs intervention in contested case proceedings as a party. The conditions which must be satisfied in order to allow intervention are set forth in subparts I and 3:

Subpart 1. Petition. Any person not named in the notice of hearing who desires to intervene in a contested case as a party shall submit a timely petition to intervene to the judge and serve the petition upon all existing parties and the agency. Timeliness will be determined by the judge in each case based on circumstances at the time of filing. The petitioner shall show how the petitioner's legal rights, duties, or privileges may be determined or affected by the contested case: shall show how the petitioner may be directly affected by the outcome or that petitioner's participation is authorized by statute, rule, or court decision; shall set forth the grounds and

shall indicate petitioner's statutory right to intervene if one shall exist. The agency may, with the consent of the judge, and where good reason appears therefore, specify in the notice of and order for hearing or prehearing the final date upon which a petition for intervention may be submitted to the judge.

Subp. 3. Order. The Judge shall allow intervention upon a proper showing pursuant to subpart I unless the judge finds that the petitioner's interest is adequately represented by one or more parties participating in the case. An order allowing intervention shall specify the extent of participation permitted the intervenor and shall state judge's reasons. An intervenor may be allowed to:

- A. file a written brief without acquiring the status of a party;
- B. intervene as a party with all the rights of a party; or
- C. intervene as a party with all the rights of a party but limited to specific issues and to the means necessary to present and develop those issues .

Thus, pursuant to the rule, "[t]he persons who may intervene in an agency proceeding are those specified in the relevant statutes and agency rules, those who would be injured in fact by an adverse agency decision, and other persons with a direct interest in the proceeding." (G . Beck, L. Bakken & T. Muck, Minnesota Administrative Procedure 6.2.6, at 81 (1987). While "the contested case rule should be given a liberal and practical construction, intervention may be denied when the petitioner's interests are not directly affected by the contested case." Id. at 86.

The language of Minn. Rules pt. 1400.6200 differs from the language of the Minnesota Rules of Civil Procedure relating to intervention. Rules 24.01 and 24.02 of the Minnesota Rules of Civil Procedure allow intervention of right and permissive intervention, respectively. The contested case intervention rule does not give the Administrative Law Judge discretionary authority to allow permissive intervention where the petitioner does not make a proper showing under the rule. *Id.*, 6.2.4, at 78-79. Although Rule 24.01 of the Minnesota Rules of Civil Procedure does not precondition intervention of right upon a showing of how the petitioner's legal rights, duties, or privileges may be determined or affected by the case or a showing that the petitioner may be directly affected by the outcome of the case, it does, however, parallel the contested case intervention rule by requiring that the application for intervention be timely and by conditioning the right to intervene upon the absence of adequate representation by existing parties. Accordingly, "case law under rule 24.01 will be instructive in resolving some issues arising under the contested case rule." *Id.*, 6.2.1, at 75. In addition, because of the similarities between the state and federal civil rules relating to intervention of right, case law developed under Rule 24(a) of the Federal Rules

of Civil Procedure will a I so be helpful in deciding certain issues under Minn. Rules pt. 1400.6200.

The Minnesota Supreme Court discussed considerations applicable to intervention petitions in a case that involved an attempt to block the construction of an ICF/MR. In Costley v. Caromin House Inc. 313 N.W.2d 21 (Minn. 1981), the Court considered whether it was appropriate under the Minnesota Rules of Civil Procedure to allow prospective residents of an ICF/MR to intervene in an action brought by neighbors who wished to enjoin the construction of the facility. The Court found that the ICF/MR had an interest in constructing the group home as an investment, but had no ties to the locality in which the home was to be constructed and no duty to the prospective residents before they actually resided in the facility. Because the prospective residents had an interest in being able to live in the particular community in which the facility was to be constructed and this interest was not adequately represented by the ICF/MR, the Court concluded that the petition for intervention should have been granted. The Court noted that it has followed a policy of encouraging all legitimate interventions, and quoted with approval the following portion of Wright and Miller's treatise on Federal Practice and Procedure: "[I]f [the applicant's] interest is similar to, but not identical with that of one of the parties, a discriminating judgment is required on the circumstances of the particular case, but he ordinarily should be allowed to intervene unless it is clear that the party will provide adequate representation for the absentee." 7A C. Wright & A. Miller, Federal Practice & Procedure 1909, at 524 (1972).

III. Application of Intervention Standards to ARRM

ARRM's petition for intervention focuses solely upon the issues raised in the Department's motion for partial summary disposition, and makes no claim that ARRM members have an interest in the other issues involved in the REM-Bemidji case. Accordingly, the Administrative Law Judge views the question

presented for consideration to be whether ARRM should be allowed to intervene as a party in the motion for partial summary disposition and in the case as a whole with respect to the three major issues only.

A. Has ARRM shown that its members have the requisite interest-Di this case?

Minn. Rules pt. 1400.6200 requires a showing that the legal rights, duties, or privileges of the applicant for intervention may be determined or affected by the case as well as a showing that the applicant may be directly affected by the outcome or that the applicant's participation is authorized by statute, rule, or court decision. Because ARRM does not make an), claim that its participation is authorized by any statute, rule, or court decision, the consideration of the petition for intervention revolves around whether ARRM has shown that its members have the requisite interest in this case.

ARRM has demonstrated that a number of its members have appeals pending before the Department which involve disallowances made following field audits of the members' facilities. Certain of these appeals involve administrative salaries, top management costs, the reclassification of salaries from program cost categories to administrative cost categories, and the allocation of central office costs. These appeals thus involve cost categories and rule provisions that are also at issue in the REM-Bemidji case, and are the subject

of the Department's pending motion for partial summary disposition.

In its petition and argument with respect to the motion for intervention, ARRM provided only vague and generalized information with respect to the issues involved in its members' appeals. ARRM thus has not shown that the facts presented in its members' appeals are identical or even similar to those presented in the REM-Bemidji case and that the decision in the REM-Bemidji case will thereby have a direct impact upon the members. Indeed, rather than arguing that the pending appeals of its members raise the same specific questions as are involved in the REM-Bemidji case, ARRM contends that the facts and organizational structures of the facilities involved in these appeals differ from those involved in the REM-Bemidji case. For example, ARRM points out that some of these facilities are "Mom and Pop" facilities that are smaller in size than REM and are limited to a single location, some are unable to devote much time to administrative matters, and some are non-profit organizations that devote only a portion of their time to ICF/MR functions. ARRM emphasizes that top management issues "may come up in a number of different settings" and seeks to intervene in order to provide the Court with a "perspective on the number of variations that there are on the theme of what is top management in order to make a decision that is going to be good and useful in resolving these questions that have gone on for years and years. Transcript of Oral Argument at 32. In its petition, ARRM again underlines the fact that "the specific issues to be litigated differ from case to case, noting that:

For example, some central offices are located right in the facility; others, like REM, are in a completely separate location. Some organizations allocate central office costs from a separate 'central office' corporation; others, like REM, do not allocate from a central corporation. Some providers contract with a management organization to provide

services top-management services; others provide the services from within the corporation itself. Some top-management issues relate to the presence of particular documentation, while others relate to allocation of time and still others relate to whether the hourly rate of pay is necessary."

ARRM Petition at 7. Rather than arguing that the appeals of its members involve identical or similar issues of fact to those presented in the REM-Bemidji case, therefore, ARRM argues in essence that the appeals present different factual issues for decision. The Administrative Law Judge thus concludes that, to the extent that the appeals of ARRM members present different factual issues for decision, ARRM has not demonstrated that its members have the requisite interest in the outcome of the REM-Bemidji case so as to warrant intervention.

It is clear, however, that the appeals of ARRM's members may involve issues of law that are identical or at least similar to those presented by the REM-Bemidji case, and that the outcome of the REM-Bemidji case thus may affect the legal rights of ARRM members to receive rates and payment under the Medical Assistance Program as well as the duties of ARRM members to maintain certain records and documentation with respect to costs incurred. Decisions reached in the REM-Bemidji case obviously may establish general principles concerning the proper interpretation and applicability of the rule provisions that the Department may attempt to apply to the appeals of the ARRM members, and will

create precedent that other Administrative Law Judges, the Department, the Commissioner, and the courts may seek to apply in future contested cases. For example, the case could result in a ruling that the costs claimed by an ICF/MR are properly disallowed where the provider failed to maintain certain records or failed to provide records to the Department upon request. To the extent that the determinations of law in the REM-Bemidji case may in this fashion have precedential impact upon the appeals of ARRM members, ARRM has shown that its members' rights and duties may be affected by this proceeding and that its members may thus be directly affected by the decisions reached in the case. Therefore, ARRM has made a sufficient showing that its members have the requisite interest in the legal determinations that will be made in the REM-Bemidji case to satisfy the interest requirements contained in subpart 1 of Minn. Rules pt. 1400.6200.1/

B. Will the REM Facilities adequately represent the interests of ARRM members?

Pursuant to Minn. Rules pt. 1400.6200, subpt. 3, intervention is to be allowed upon a proper showing under subpart 1, "unless the judge finds that the petitioner's interest is adequately represented by one or more parties participating in the case." In their treatise, Wright and Miller state with respect to the analogous provision contained in Rule 24(a) of the Federal Rules of Civil Procedure:

I/ ARRM also argues that the Department's practice of holding appeals in abeyance pending the determination of a "test" case and then seeking to resolve the appeals without a hearing based upon the outcome of the case affects the legal right of ARRM members to appeal a rate determination and results in a denial of due process unless intervention is permitted. ARRM contends that the

Department has a duty to notify providers who have appeals pending in the subject areas encompassed by the REM-Bemidji case that their interests will be affected by the case and to invite them to intervene in the action. The Administrative Law Judge finds no basis on which to conclude that the Department has an obligation to invite intervention in such instances or that its refusal to invite intervention results in a denial of due process to other ICF/MR providers. ARRM did not provide any legal authority for its argument in this regard, and the Judge has been unable to locate any cases which provide support for ARRM's contentions. Even if the Department adheres to prior contested case decisions in arriving at the position it will take concerning the allowability of costs in pending appeals, other ICF/MR facilities obviously remain free to challenge the applicability and validity of these decisions. These providers retain their full right to refuse to settle with the Department, proceed to a contested case hearing, file exceptions with the Commissioner, and ultimately seek judicial review. Is ARRM acknowledges, a remedy in the form of an application for a writ of mandamus exists where there are undue delays in referring a matter for a contested case hearing. If the approach urged by ARRM were adopted, it would have the potential for causing great delays in the resolution of contested cases and excessive multiplication of the issues to be decided in such cases.

The most important factor in determining adequacy of representation is how the interest of the absentee compares with the interests of the present parties. If the interest of the absentee is not represented at all, or if all existing parties are adverse to him, then he is not adequately represented. If his interest is identical to that of one of the present parties, or if there is a party charged by law with representing his interest, then a compelling showing should be required to demonstrate why this representation is not adequate. Finally, if his interest is similar to, but not identical with, that of one of the parties, a discriminating judgment is required on the circumstances of the particular case, but he ordinarily should be allowed to intervene unless it is clear that the party will provide adequate representation for the absentee.

C. Wright & A. Miller, Federal Practice & Procedure 1909 (2d ed. 1986).

Cases arising under Rule 24(a) of the Federal Rules of Civil Procedure have held that there is a presumption of adequacy of representation when the petitioner for intervention has the same ultimate objective as a party to the action. See, e.g., *Bush v. Viterna*, 740 F.2d 350, 355 (5th Cir. 1984); *United Nuclear Corp. v. Cannon*, 696 F.2d 141, 144 (1st Cir. 1982). Factors that have been identified by the courts as supporting a finding of "adequate representation include evidence of collusion between the representative party and the opposing party, adversity of interest between the prospective intervenor and the representative party, and the failure of the representative party to fulfill its duty. See, e.g., *Bush v. Viterna*, 740 F.2d at 355; *Stadin v. Union Electric Co.*, 309 F.2d 912 (8th Cir. 1962), cert denied, 373 U.S. 915 (1963).

When the interests of the ARRM members and the REM Facilities are analyzed

under these standards, it is clear that the REM Facilities will adequately represent the interests of the ARRM members in the REM-Bemidji litigation. As discussed above, ARRM has established that the determination in the REM-Bemidji case of legal issues relating to the proper interpretation and application of various provisions of the reimbursement rules may affect the rights of ARRM members to receive reimbursement and the duties of ARRM members to maintain certain records and documentation. Both the REM Facilities and ARRM members have the same objective in the case--to resist the rule interpretations urged by the Department and avoid the establishment of adverse precedent. The interests of the ARRM members thus are identical to those of the REM Facilities, and they share the same ultimate objective 2/ Of course, REM has an additional (and more immediate and compelling) interest in the case because the case will determine the allowability of its costs.

2/ ARRM argues that REM cannot adequately represent the interests of its members because "[w]hile many of the adjustments made by [the Department] fall under the general heading of 'top management' or 'central office' costs, a closer legal analysis of those disallowances shows that the specific issues to be litigated differ from case to case." As discussed in part (A) above, ARRM has demonstrated that its members have the requisite interest in the REM-Bemidji case under the contested case intervention rule only with respect to the issues of law presented in the case. The REM-Bemidji case will not decide the differing factual issues presented in the ARRM members' appeals; those factual issues will have to await another day for resolution.

Kayanagh, 98 F. R. D. I 1 (D Tex. 1 982) (court denied intervention because the interest s of mentally retarded petitioner s in improving the conditions of institutions for the mentally retarded were adequately represented by the plaintiffs, but permitted them to file an amicus brief in order to further the petitioners' interest in making the court aware of any legal theories, facts, or factual interpretations that others failed to present).

ARRM's briefs should be limited to the discussion of questions of law relating to the owners' compensation, program directors' compensation, and central office cost issues. A page limit of fifteen pages will be imposed, and ARRM will not be permitted to raise new issues of fact in the absence of a petition and further order of the Administrative Law Judge. In addition, in order to avoid delaying the oral argument currently scheduled for June 1, the ARRM brief and the Department's reply will be submitted following the oral argument. If warranted, supplemental oral argument will be scheduled after the briefs are submitted.

B.L.N.