

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

In the Matter of the Contested Case of
Venture Group Homes, Inc., v. Minnesota
Department of Human Services.

RECOMMENDED ORDER ON
MOTION FOR SUMMARY
DISPOSITION

On August 1, 1995, after the parties had a reasonable opportunity to undertake discovery, the Department of Human Services (DHS) filed a motion for summary disposition. Venture Group Homes, Inc. (Venture) contested the motion. Both parties submitted written arguments, and oral arguments on the motion were heard on October 26, 1995, when the record closed.

Based upon all the files, records and proceedings herein, and for the reasons set forth in the accompanying Memorandum, the Administrative Law Judge recommends that the Commissioner issue the following Order.

IT IS HEREBY ORDERED:

1. The Department's August 1, 1995 Motion for Summary Disposition with respect to all disallowed costs on the field audit covering the reporting years ending December 31, 1986, 1987, 1988 and 1989, except costs relating to the 1988 Chevrolet van and the Stratton's home telephone, should be and hereby is GRANTED.

2. The Department's Motion for Summary Disposition with respect to the costs of the Stratton's home telephone during the reporting years ending December 31, 1986, 1987, 1988 and 1989 involves a genuine issue of material fact; therefore, it should be and hereby is DENIED.

3. The Department's Motion for Summary Disposition with respect to the costs of a 1988 Chevrolet Astro van during the reporting years ending December 31, 1988 and 1989 involves no genuine issues of material fact, but those costs are allowable. Therefore, the Department's motion to disallow them should be and hereby is DENIED and summary judgment on that issue in favor of Venture Group Homes, Inc. is hereby GRANTED.

4. Under Minn. Rules pt. 9553.0035, subp. 5A, costs may be documented under subitem (5) only if they are the kind of costs that cannot, by their nature, be documented under subitem (3) or (4).

5. On a DHS motion for summary disposition in a case relating to the allowable costs of an ICF/MR, the ICF/MR must establish a genuine issue of material fact with evidence which is sufficient to withstand a directed verdict; Venture failed to meet that burden with respect to costs other than the motor vehicle and telephone costs in dispute.

6. Minn. Stat. § 256B.48, subd. 3a cannot be considered or applied to this case under Minn. Stat. § 645.21, and even if it could, it should not be applied because the records allegedly lost were lost due to Venture's carelessness.

7. Apart from the three issues addressed above, Venture has failed to show that any other issues are before the Administrative Law Judge in this proceeding.

Dated this 12th day of January, 1995

JON L. LUNDE
Administrative Law Judge

Reported: Taped

MEMORANDUM

I.

At all times relevant to this proceeding, Venture Group Homes, Inc. (Venture) was a six-bed Intermediate Care Facility for the Mentally Retarded (ICF/MR) situated at 414 North Diamond Lake Road in the City of Minneapolis. Venture began operating in 1982. It was owned and operated by Nancy Stratton and her husband, James. Ms. Stratton (Stratton) was the facility's administrator.^[1]

DHS reimburses Intermediate Care Facilities for the Mentally Retarded (ICFs/MR) for the care provided to medical assistance recipients pursuant to Minn. Rules pts. 9553.0010 - 9553.0080 (Rule 53) and Minn. Stat. § 256B.501 et seq. Under governing statutes and rules, reimbursement for services and costs is based on a provider's historical costs. A provider's reimbursement each "rate year" is based on its allowable costs during a previous cost-reporting year increased by an indexed inflation factor based on the consumer price index. Minn. Stat. § 256B.501, subd. 3 (1994). ICFs/MR participating in Medical Assistance (MA) program must file annual cost reports showing the costs incurred during the reporting year. Minn. Rules pt. 9553.0041, subp. 1 (1993). These cost reports are subject to an annual "desk-audit" review. During the desk audit process, a provider's tentative per diem reimbursement rate for the upcoming rate year is established.

DHS periodically conducts a field audit of each provider's cost reports, books and records and reviews the provider's desk audit rates. On September 11, 1990, Margaret Brotherton, a DHS health care auditor responsible for the desk and field audits of ICFs/MR, began a field audit of Venture's cost reports for the reporting years ending December 31, 1986, 1987, 1988, and 1989. The audit was completed on November 29, 1990. Affidavit of Margaret Brotherton dated July 27, 1995, DHS Appendix at 46. Brotherton's audit took longer than the typical field audit because much of the available

documentation did not have account numbers or check numbers and Venture's records were not separated by year or vendor as is the practice of other ICFs/MR. Id. at 46.

As a result of the audit, DHS disallowed costs which were not properly documented, costs relating to a Chevrolet van, and costs relating to the Stratton's telephone at home. During Brotherton's audit, she twice sampled some general ledger entries for supporting documentation. Both times she found that a number of invoices were missing. Consequently, she was directed to examine each item on Venture's general ledger for supporting documentation. Id. at 47. For hundreds of costs, Brotherton found that Venture's only documentation consisted of canceled checks. Stratton alleged that some documents were lost when she and her husband changed residences in 1990. Id. Nevertheless, DHS refused to allow any costs which were not documented with paid invoices or the equivalent.

During the field audit Brotherton also reviewed the mileage logs of two vehicles: a Dodge van and a newer, Chevrolet van. The Dodge van was leased by Venture in 1982 and purchased three years later -- on June 15, 1985. DHS App. at 50, 52. The Chevrolet van was purchased new on June 13, 1988. Id. at 52. Brotherton understood that the Dodge van was garaged at the facility and used by facility staff for facility duties. Therefore, costs related to the Dodge van were allowed at field audit. However, costs relating to the Chevrolet van were not allowed. Venture submitted some mileage logs for the Chevrolet van but it did not appear to Brotherton that the logs had been made contemporaneously with usage. Most of the miles traveled in the Chevrolet van were or appeared to be between Stratton's residence and the facility, but the logs did not indicate any personal usage. DHS App. at 48.

During her field audit Brotherton concluded that the costs of a telephone at the Strattons' residence was not a normal and ordinary cost related to patient care but a nonallowable personal expense. DHS App. at 48-49. Stratton informed Brotherton that she used her home as an office for the facility, but Brotherton felt that there was enough space in the facility for an office.

Brotherton's field audit report was issued on April 5, 1991. Attachment C; DHS App. at 58. On May 31, 1991 Venture appealed from the field audit report. Attachment D; DHS App. at 58. After Venture's appeal from the field audit report was submitted, DHS was sued by the Association of Retarded Residents in Minnesota (ARRM) and others. The suit was related to the Department's administration of Rule 53 and involved some issues Venture had raised in its desk and field audit appeals. On May 8, 1992 a partial settlement of the ARRM litigation was reached. DHS App. at 58. The partial settlement lead to the resolution of a number of issues raised by Venture when it filed its appeal from the 1991 field audit determination. On April 6, 1993 a partial settlement agreement with Venture was executed. Attachment F; DHS App. at 58. Subsequently on September 27, 1993, DHS issued a Determination of Long Term Care Rate Appeal deciding Venture's May 31, 1991 field audit appeal and three desk audits appeals. Attachment G. On October 26, 1993 Venture requested a contested case on DHS's Determination of its field audit appeal. Exhibit H.

The Department has moved for summary judgment. Its motion covers three types of costs: (1) costs allegedly lacking adequate documentation, (2) costs related to the Chevrolet van and (3) costs of telephone service to the Stratton's home. Motions for summary disposition can be made and decided in contested case proceedings. Minn. Rules, pts. 1400.5500K and 1400.6600 (1993). Generally speaking, the standards for summary disposition in contested cases mirror the standards for summary judgment under Rule 56, Minn.R.Civ.P. Id. Under the civil rules, summary judgment is appropriate when there are no genuine issues of material fact and either party is entitled to a judgment as a matter of law. Rule 56.03.

On motion for summary judgment, the moving party has the burden of proof and must demonstrate that no genuine issue of material fact exists. Thiele v. Stich, 425 N.W.2d 580 (Minn. 1988); Koelln v. Nexus Residential Treatment Facility, 494 N.W.2d 914 (Minn. Ct. App. 1993). For that reason, the facts are viewed in a fashion most favorable to the nonmoving party and all doubts and inferences are resolved against the moving party. Hopkins by La Fontaine v. Empire Life & Marine Insurance Co., 474 N.W.2d 209 (Minn. Ct. App. 1991).

The moving party's burden of establishing the absence of a factual issue is slight when a nonmoving party has the burden of proof at trial. The moving party is not required to produce evidence showing the absence of material fact issues. It can meet its burden by "showing" or "pointing out" that there is an absence of evidence to support the nonmoving party's case. Celotex Corp. v. Catrett, 477 U.S. 316, 325, 106 S. Ct. 2548, 2554, 91 L. Ed 2d 265 (1986). To avoid a motion for summary judgment a nonmoving party with the burden of proof at trial cannot rely on pleadings alone but must produce specific facts which establish a genuine, material-fact issue. Krogness v. Best Buy Co. Inc., 524 N.W.2d 282 (Minn. Ct. App. 1994). Likewise, the nonmoving party cannot rely on general statements of fact. Matter of Assessment Issued to Leisure Hills Health Care Center on Mar. 2, 1992, 518 N.W.2d 71 (Minn. Ct. App. 1994).

The United States Supreme Court has stated that summary judgment must be entered

after adequate time for discovery and upon motion, against the party who fails to make a sufficient showing to establish the existence of an essential element to that party's case, and on which that party will bear the burden of proof at trial. In such a situation, there can be no "general issue as to any material fact," since a complete failure of proof concerning an essential element of the nonmoving party's case necessarily renders all other facts immaterial.

Carlisle v. City of Minneapolis, 437 N.W.2d 712, 715 (Minn. Ct. App. 1989), citing Celotex Corp v. Catrett, *supra*, 477 U.S. at 322-23, 106 S.Ct. at 2552-53.

There is no genuine fact issue unless there is sufficient evidence favoring the nonmoving party to justify a verdict for the nonmoving party. That is, the evidence supporting the nonmoving party with the burden of proof must be evidence on which a reasonable person could base a judgment for the nonmoving party. Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 106 S. Ct. 2505, 91 L. Ed. 2d 202 (1986). The

standard is essentially the same as that for a directed verdict: that there is only one reasonable conclusion on the facts presented. Id.

III.

DHS is authorized to conduct field audits of cost reports under Minn. Rules pt. 9553.0041, subp. 11 (1991). Field audits may cover the four most recent cost reports for which desk audits have been completed and payment rates have been established. Id., Item B.

The audit must be an independent review of the cost report. During the audit, all documents relating to costs claimed must be made available. Id. Among other things, the auditor must decide if costs are allowable (9553.0035, subp. 1 (1986)); ordinary, necessary and related to resident care (9553.0035, subp. 15); and properly classified by cost category (9553.0040). To ensure that costs claimed are allowable, facilities are required to keep “adequate documentation” of their costs. Minn. Rules pt. 9553.0035 subp. 5A (1986 Sup, No. 2). That rule has always stated that adequate documentation must:

- (1) be maintained in orderly, well-organized files;

* * *

- (3) include a paid invoice or copy of a paid invoice with date of purchase, vendor name and address, purchaser name and delivery address, listing of items or services purchased, cost of items purchased, account number to which the cost is posted, and a breakdown of any allocation of costs between accounts or facilities. If any of the information to be listed on the invoice is not available, the provider shall document their good faith attempt to obtain the information;

* * *

- (5) if a cost or revenue item is not documented under subitem (3) or (4), a facility must document the amount, source, and purpose of the item in its books and ledgers following generally accepted accounting principles and in a manner providing an audit trail; and

- (6) be retained by the facility to support the five most recent annual cost reports submitted to the Commissioner. . . .

Minn. Rules pt. 9553.0035, subp. 5 (1986 Sup. No. 2).

As a result of the field audit, DHS disallowed about \$32,622.00 in costs. Since the time of Venture’s original appeal, several issues have been resolved. Costs of about \$28,000.00 remain in dispute. Most of them relate to inadequate documentation. DHS allowed costs supported by paid invoices or their equivalent; i.e. costs documented with a canceled check and a receipt containing the information required of invoices. However DHS disallowed the following costs:

Category One: Any cost on Venture’s general ledger which was not of a kind typically supportable by a paid invoice was disallowed if Venture

failed to provide any documentation which would provide an audit trail for the cost. (Cost disallowed under subp. 5A (5).)

Category Two: Any cost reported on Venture's general ledger which contained only a reference to a check number was disallowed even if Venture provided a copy of the canceled check. (Cost disallowed per subp. 5A (3).)

Category Three: Any cost reported on Venture's general ledger with reference to a check number was disallowed even if Venture submitted other forms of proof to support the costs incurred. (Cost disallowed per subp. 5A (3).)

DHS disallowed category one costs under subp. 5A (5) because Venture had no documentation establishing an audit trail as required by the rule. An "audit trail" has been defined as the "[c]hain of evidence connecting account balances or other summary results to original transactions and calculations. The flow of events between the original transaction and the account balances in the financial statements." Black's Law Dictionary 131 (6th Ed. 1992). As an example of disallowed category one costs, DHS pointed to numerous entries in Venture's ledger which stated "Disb per client spreadsheet" or used similar language. The Department argued that these types of entries are not, by their very nature, supportable with paid invoices. However, it argued that the total lack of documentation explaining the source and purpose of the costs makes it impossible for an auditor to determine whether they are allowable under Rule 53. DHS argued, therefore, that such category one costs should be disallowed.

Most of the costs DHS disallowed fall into category two. These costs were supported by a general ledger reference to a check number or copies of the canceled checks. DHS argues, however, that canceled checks do not contain the kind of information normally found in invoices and do not satisfy the requirements in Subpart 5A (3). Category 3 costs are similar to category 2 costs but also contain other evidence tending to support the cost but falling short of the information required of an invoice.

IV

A. Venture made numerous arguments for allowing all the costs it claimed. Venture's most fundamental argument is that Rule 53 does not require providers to document costs with paid invoices containing the information set forth in pt. 9553.0035, subp. 5A (3). It suggested that any kind of documentation permissible under generally accepted accounting principles will suffice and that it adequately documented its costs as permitted under subp. 5A (5). That argument is not persuasive.

Subp. 5A (3) requires that costs be supported by an invoice containing specific information. When the required information is not on a vendor's invoice, the rule states that the "providers must document their good faith attempt [sic] to obtain the information. . . ." Under the quoted language, providers have a duty to attempt to obtain required information vendors fail to include on their invoices. As noted by DHS, subitem

3 applies to data missing from invoices submitted by vendors, it does not apply to missing invoices -- i.e., invoices providers fail to keep or invoices they lose.

Subitem (5) is not an alternative to subitem (3). The plain language of subitem 5, as DHS argued, pertains to costs which cannot be supported by invoices -- e.g., adjusting journal entries. In such cases those costs must be documented under subitem (5), which requires documentation consistent with generally accepted accounting principles and in a manner providing an audit trail.

The Administrative Law Judge is persuaded that subitem (5) is not an alternative to subitem 3 for other reasons. The 6 subitems in subpart 5A are connected with the conjunctive word "and", which indicates that no subitem is an alternative for another. Examination of the 6 subitems supports the punctuation used. The rule must mean that costs which are not required to be documented under subitems 3 or 4 must be documented under subitem 5. This is implicit in the requirement of subitem 3 that providers make a good faith effort to obtain all the information required on vendor invoices. Furthermore, interpreting subitem 5 as an alternative to subitem 3 could interfere with the effectiveness of departmental audits and impair the reliability of costs claimed. The rulemaking history of part 9553.0035, subp. 5 supports the conclusion that subitems 3 and 5 were not intended to be alternative means for documenting costs. The rulemaking history, which was discussed in detail by DHS in its Reply Memorandum in Support of Motion for Summary Disposition at pps. 9-12, clearly reflects this conclusion. Following a public hearing on Rule 53, an Administrative Law Judge who understood certain language proposed by the Department to be a catchall when invoices and contracts did not explain a cost or revenue item, suggested language to clarify the rule. The Department reaffirmed the Administrative Law Judge's understanding that subitem 5 was a catchall by adopting the clarifications recommended by the Administrative Law Judge.

Even if there was merit to Venture's argument that any costs can be documented by showing that generally accepted accounting principles were followed, Venture made no showing that it followed generally accepted accounting principles with respect to the disallowed costs. Stratton asserted that Venture did so, but she is not an accountant and she did not show that she has any knowledge or training in accounting principles. Hence, she is not competent to testify about them and her assertions must be rejected.

Venture's argument that canceled checks are adequate documentation must also be rejected. Costs which are documented by canceled checks alone are not allowable under the plain language of part 9553.0035, subp. 5 A (3). The rule requires that costs be documented by invoices showing what goods and services were purchased and that they were provided to the facility. Canceled checks do not contain that information. In Leisure Hills of Grand Rapids, Inc. v. Minnesota Department of Human Services, OAH Docket No. 8-1800-1178-2 (October 9, 1990) aff'd on other grounds 480 N.W.2d 149 (Minn. Ct. App. 1992), the Commissioner held that canceled checks do not provide adequate documentation of alleged purchases from an oil

company because they do not provide a sufficient audit trail. Leisure Hills involved costs claimed by a nursing home under the MA program but the same principles apply here. cf. Healy v. Commissioner of Revenue, Minn. Tax Court Docket No. 5111 (June 23, 1989) (canceled checks are inadequate documentation of entertainment expenses under tax laws). App. at 22. It is irrational to hold that cost records which are inadequate for tax purposes meet generally accepted accounting principles.

Venture argued that some disallowed costs were supported by some evidence in addition to canceled checks. It argued, among other things, that its activity calendars tend to support some of the costs claimed for resident entertainment, such as meals. That argument is not persuasive. Providers must document costs in the manner set forth in the rules. The rules require specific forms of documentation. Specifics are needed to assure that the costs claimed were actually incurred and to avoid the need for reviewing thousands of separate purchases on a case-by-case basis and deciding for each whether it is more likely than not that each cost is allowable. Venture's arguments, if accepted, would lead to an administrative nightmare.

Although Venture asserted that the Strattons would never fabricate costs and objected to the alleged implication that it had done so, the asserted honesty of its owners is not in issue. DHS has no viable way of determining whether costs are allowable unless they are properly documented. It cannot allow costs simply on the basis of an owner's assertion that they are legitimate.

B. Venture also argued that paid invoices should not be required because the missing invoices were inadvertently lost or destroyed when the Strattons moved into a new home in 1990. Citing Cohan v. Commissioner of Internal Revenue, 39 F.2d 540 (2d Cir. 1930) and Minn. Stat. § 256B.48, subd. 3a (1992 Supp.), Venture argued that reasonable cost estimates are permissible under the circumstances.

In Cohan, the evidence showed a taxpayer had incurred deductible travel and entertainment expenses, but all such expenses were disallowed by the board of tax appeals because the specific amount spent could not be ascertained due to the taxpayers failure to keep any records. On appeal, the Second Circuit held that absolute certainty is not required to claim a deduction, and because money was spent, it said the board should make as close an approximation of costs as it could, "bearing heavily if it chooses upon the taxpayer whose inexactitude is of his own making." Cohan, supra, 39 F.2d at 544. The Cohan decision is inapplicable here. When it was decided, there apparently were no laws or regulations specifically requiring taxpayers to keep records substantiating business expenses. Rule 53, on the other hand, requires adequate documentation. Hence, applying the Cohan decision would be inconsistent with the plain language of the rule.

In an earlier, less sophisticated era, detailed records may not have been required in order to get some kind of a tax deduction. Under Rule 53, however, providers must maintain adequate data supporting costs claimed. This is obviously done to protect the public and prevent fraud. The Cohan decision itself has been

rejected by name in federal tax regulations. See, 26 C.F.R. §§ 1.274 - 5 (a) (3) and 1.274 - 5 (a) (4) (1995). Now, travel and entertainment expenses, for example, must be substantiated in detail. 26 C.F.R. § 1.274 - 5.

In one case an administrative tribunal for the Medicare program concluded that costs for which primary source documents had been lost or destroyed should be recognized. Imperial Hospital v. Blue Cross Assoc/Blue Cross of Virginia, 1980 CCH Medicare and Medicaid Rptr, paragraph 30,649, PRRB hearing Dec. No. 80-D39, June 20, 1980. In that case a hospital (Hospital) affiliated with a chain organization terminated its participation in the Medicare program but merged with another hospital affiliated with the chain. Subsequent to the merger, the records of the Hospital that ended its participation were lost or destroyed. The Provider Reimbursement Review Board (PRRB or Board) held that the Hospital's costs should be allowed because its prior and subsequent audit history supported a finding for reimbursing most of the expenses. The Board noted that during the Medicare audit for the 1973 cost year, all primary source documents were available and only a few minor audit adjustments had been made and that the group to which the provider belonged received an unqualified opinion from its certified public accountants. Finally the Board looked at the absence of any evidence indicating that the providers total costs were unreasonable or out of line with comparable facilities in the same geographic area. The Imperial Hospital decision lends little support for the relief Venture seeks because there is no evidence that the governing Medicare statutes and regulations were similar to the statutes and rules regulating the Medicaid program in Minnesota. Medicare rates are not set using the same methodology applicable to ICFs/MR and don't involve the same auditing risks or needs.

C. Although Rule 53 contains no language permitting estimates when records are lost or for other reasons, § 256B.48, subd. 3a does. The statute states:

AUDIT ADJUSTMENTS. If the commissioner requests supporting documentation during a field audit for an item of cost reported by a long-term care facility, and the long-term care facility's response does not adequately document the item of cost, the commissioner may make reasoned assumptions considered appropriate in the absence of the requested documentation to reasonably establish a payment rate rather than disallow the entire item or cost. These provisions shall not diminish the long-term care facility's appeal rights.

Minn. Laws 1992, c. 513, Art. 7, § 111. The statute became effective on August 1, 1992.^[2] The Department argued that the statute cannot be retroactively applied in this case and that it is only discretionary with the commissioner in any event.

The Venture field audit began on September 11, 1990 and was completed November 29, 1990. On April 5, 1991 the field audit report was issued. It was appealed on May 31, 1991 and on September 27, 1993 an appeal determination was issued. Venture requested a contested case hearing on the appeal determination on

October 26, 1993. Because the statute was not enacted until after the field audit and Venture's contested case request the Department argues that it is inapplicable here.

Minn. Stat. § 645.21 states that "[n]o law shall be construed to be retroactive unless clearly and manifestly so intended by the legislature." The statute applies to laws relating to substance, procedure and remedy. Ekstrom v. Harmon, 256 Minn. 166, 98 N.W.2d 241 (1959); Chapman v. Davis, 233 Minn. 62, 45 N.W.2d 822 (1951); Matter of Wage & Hour Violations of Holley Inn, 386 N.W.2d 305 (Minn. Ct. App. 1986). A statute is not retroactive simply because it relates to antecedent events. However, applying § 256B.48, subd. 3a to Venture's cost reports would give retroactive effect to the statute. The statute must be applied prospectively; that is, to field audits in progress or commenced on or after August 1, 1992 when the new language became effective. For purposes of determining whether a prospective or retrospective application exists, the relevant event is the field audit.

Venture argued that the reasonableness and likely validity of the costs it claimed is reflected in its relatively low rates. In a proper case, it likely would be appropriate to consider Venture's rates and costs compared to those of other similarly situated facilities under section 256B.48, subd. 3a. Assuming that the Commissioner's consideration of those factors is permissible here, the Administrative Law Judge is persuaded that this is not a proper case for the Commissioner to apply the statute. Although there is some evidence that Venture's rates were lower than the rates of other ICFs/MR, there is no meaningful evidence that the disallowed costs were lower than the costs of other similarly situated facilities. Furthermore, the Administrative Law Judge is persuaded that the Commissioner's powers under the statute should be exercised sparingly and cautiously. When records are lost due to a provider's carelessness, the Administrative Law Judge is persuaded the Commissioner should not grant relief. The rule should be applied to eliminate any incentive for fraud and unbusinesslike practices.

At least one agency has a regulation relating to lost records. An Internal Revenue Service regulation permits taxpayers to make reasonable reconstructions of their expenditures when records are lost due to circumstances beyond the taxpayers control, such as destruction by fire, flood, earthquake or other casualty. 26 C.F.R. § 1.274 - 5 (c) (5) (1995). The benefits of the regulation are not available to records which were inadvertently thrown out after a taxpayer moved due to marital difficulties because those records were not lost due to a casualty beyond the taxpayer's control. Gizzi v. C.I.R., 65 P.C. 342, 345 - 46 (1975).

Floods, earthquakes, fires and other natural calamities are acts of God and can be verified. This is not so when records are allegedly lost or misplaced. Furthermore, when natural calamities result in the destruction of records, providers are not chargeable with any wrong doing. However, providers who lose or inadvertently destroy required records are responsible.

On a motion for summary disposition by DHS in a case involving allowable costs in calculating per diem rates, the provider must establish a genuine issue of material fact with evidence which would support a decision for it. Except for the telephone and some vehicle costs, Venture failed to meet that burden with respect to any other costs disallowed under part 9553.0035, subp. 5 A relating to adequate documentation.

Venture argued that there are material fact disputes which preclude summary disposition. The first factual dispute alleged pertains to the location of the field audit. Stratton stated that the field audit took place in Venture's dining room and at its accountant's office and not only in the dining room. The location where the field audit took place is not material to any issue raised by the Department's motion.

Second, Stratton disputed Brotherton's statements that "[f]or hundreds of costs, Venture submitted nothing but canceled checks as supporting documentation. Stratton stated that "[s]everal documents contained account numbers or check numbers including the invoices and receipts and this information was on every check stub." As noted by DHS, these statements are not inconsistent and do not raise a fact issue.

Venture raised other alleged factual issues relating to documentation provided to DHS, but none of its arguments have merit. All the documentation allegedly submitted to DHS is part of the record.

VI

During the field audit, DHS disallowed the costs relating to a telephone in the Stratton's Stillwater, Minnesota home. The telephone costs were denied for the fiscal periods from January 1, 1986 through December 31, 1989. Attachment C at 1014, 1023, 1032, and 1042. Denial was based on the DHS staff's conclusion that the costs of a telephone in the Stratton's home are a personal cost of the Stratton's which are not allowable under Minn. Rules, pt. 9553.0036K. In addition, the staff concluded that the costs of a telephone in the Stratton's home are not an ordinary and necessary cost related to resident care as required under pt. 9553.0035, subp. 15A. In the initial audit report DHS explained its rationale for disallowing the cost of a telephone at the Stratton's home as follows:

Payment of the telephone bills related to the telephone number 426-3003, which has been identified as the telephone number of the residence of Nancy and James Stratton in Stillwater, Minnesota is not an allowable cost. This cost is a personal cost of the owners of the facility. There was an office area in the Stratton residence during the audit. However, no costs have been claimed as a part of the facility. The auditor determined that it would not have been necessary for the Venture Group Home to have outside office space since the facility has space that is used as office space on site.***

Attachment C at 1014.

In the Department's briefs, it admitted that there is a genuine issue of material fact on the issue of whether the telephone expenses at the Stratton's residence were ordinary, necessary and related to resident care for purposes of part 9553.0035, subp. 15 A. DHS argues, however, that the costs must be denied under part 9553.0036K. That rule lists costs which are not allowable for purposes of establishing total payment rates. Subp. K states: "Personal expenses of owners and employees, such as vacations, boats, airplanes, personal travel or vehicles, and entertainment" are nonallowable costs. DHS argues that the telephone in the Stratton's home is a personal expense which is clearly not allowable under the rule. It argued, further, that the Internal Revenue Service prohibits persons using their home as an office to deduct the costs of the telephone line if it is also used as the taxpayer's home phone number, citing 26 C.F.R. §1.262-1(b)(3) (1994). The Department's arguments regarding the scope of pt. 9553.0036K are not persuasive.

The rule relied upon by DHS (Item K) does not discuss the allowability of the cost of telephone service to a provider's home. On the contrary, it only addresses personal expenses "such as vacations, boats, airplanes, personal travel or vehicles, and entertainment." In this rule, the meaning of words of general import is limited by words of restrictive import which immediately follow and which relate to the same subject. 82 C.J.S. § 332a. Under commonly accepted rules of construction, the general words "personal expenses of owners and employees" are limited by the words "vacations, boats, airplanes, personal travel or vehicles, and entertainment." Item K does not apply to all personal expenses of owners but only to those types of personal expenses specifically mentioned. This also follows from the Department's use of the words "such as" which precede the list of specific personal expenditures. The word "such" means: "Of that kind, having particular quality or character specified. Identical with, being the same as what has been mentioned. Alike, similar, of the like kind." 'Such' represents the object as already particularized in terms which are not mentioned, and is a descriptive and relative word, referring to the last antecedent." Black's Law Dictionary 1432 (6th Ed. 1990).

In its brief, the Department suggests that there are occasions when having an office or a telephone in an owner's home may be an allowable cost. Part 9553.0036K does not, however, contain any criteria for determining when the cost of a telephone may be allowable. Hence, the staff's argument is not consistent with the plain language of the rule. The rule either prohibits claiming telephone expenses in all cases or permits them unless they are not allowable under some other rule. The Administrative Law Judge is persuaded, therefore, that Item K is inapplicable to telephone costs. Telephone costs are governed by part 9553.0035, subp. 15 A. Since allowability under subpart 15 A admittedly involves disputed fact issues, summary judgment on those costs in favor of DHS must be denied.

It is immaterial that the Internal Revenue Service has a regulation relating to telephones at a taxpayer's home because DHS has not adopted any similar rule. IRS regulations can arguably be considered, but they are not binding. Under all the

circumstances, therefore, the Administrative Law Judge is persuaded that summary disposition in favor of DHS is inappropriate on this issue.

VII

In its cost report for the reporting year ending December 31, 1989, Venture claimed expenses relating to a 1988 Chevrolet Astro van which the Strattons owned. The Strattons purchased the Chevrolet van on June 13, 1984 for \$17,388.00. Appendix at 52. On desk audit, depreciation and interest expenses relating to the Chevrolet van were disallowed. This disallowance was reaffirmed during the field audit because DHS was unable to determine the mileage attributable to the providers business usage and the Stratton's personal usage of the vehicle. DHS concluded that mileage figures were needed to determine the portion of depreciation and interest expenses which were allowable costs. Attachment C at 1040. Total expenses of \$6,032.00 relating to the Chevrolet van were disallowed during the field audit. During the field audit, Stratton gave Brotherton some mileage logs for the Chevrolet van. Altogether, three different sets of mileage logs were submitted to Stratton for examination, they were not consistent with one another. Furthermore the logs indicated that most of the mileage on the Chevrolet van involved Stratton's driving to and from the facility and her home, but the logs did not indicate that any personal miles were traveled in the vehicle. Appendix at 48.

Minn. Rules, pt. 9553.0035, subp. 5 relates to the documentation of mileage and other costs. Regarding mileage, Item D states:

Documentation of mileage must be maintained in a motor vehicle log. Except for motor vehicles exclusively used for facility business the facility or related organization must maintain a motor vehicle log for each vehicle used by the facility that shows personal and facility mileage for the reporting year. Mileage paid for the use of a private vehicle must be documented.

The language of item D is straightforward, and Venture has failed to provide any logs relating to the private mileage of the Chevrolet van. It argues, however, that allowing the costs related to the Chevrolet van is required under the terms of the partial settlement agreement in the case brought against the Department by AARM and others. The settlement agreement in that case (Attachment E) contains specific provisions relating to motor vehicle costs. In pertinent part, the agreement states:

7. Vehicle Cost -- Mileage Logs: With respect to vehicle costs reclassified on the ground that the provider failed to maintain and/or provide mileage logs, such costs will be classified, and allowed to the extent otherwise allowable, subject to the specific provisions of paragraph 8 below, as follows:

a. For a facility with 15 or fewer licensed beds, the cost of one vehicle will be classified to the program cost category if the provider provides an affidavit stating that the vehicle was used for program purposes.

b. For a facility with more than 15 licensed beds, the costs of one vehicle plus one-fifteenth of the cost of an additional vehicle or vehicles for every licensed bed in excess of 15, will be classified to the program cost category if the provider provides an affidavit stating that the vehicles were used for program purposes. The following illustrates the application of this provision: If a facility has 18 licensed beds, the cost of one vehicle and three-fifteenths of the cost of a second vehicle would be classified to the program cost category, because the total number of licensed beds exceeds 15 by three.

c. The costs of more than one vehicle per 15 licensed beds will be classified to the program cost category if the provider provides documentation from a county case manager, Regional Services Specialist or DHS Licensor of the need for the additional vehicle(s), along with an affidavit stating that the vehicle(s) were used for program purposes.

8. Vehicle Costs -- Categorization of Costs: To the extent a vehicle is recognized as a program vehicle, its operating costs will be classified, and allowed to the extent otherwise allowable, as follows:

a. Gasoline, routine servicing and repairs of vehicles will be classified as program costs.

b. Vehicle repairs that capitalized will be classified as property costs.

c. Vehicle insurance costs will be classified in accordance with the final decision, either administrative or judicial, in a contested case now pending involving St. Ann's Residence and St. Ann's Group Home, OAH Docket No. 4-1800-5843-2.

The partial settlement agreement applies to all provider rate appeals -- both desk and field audits -- received by DHS before the effective date of the agreement and to all provider rate appeals from audit reports mailed to providers during the 60 days prior to the effective date of the agreement and to which rates upon which those appeals are based. Attachment D at 1061. The effective date is the date when the partial settlement agreement was executed by all the parties. Id. at 27.

In an affidavit dated July 8, 1995, Stratton stated that the "1988 Chevrolet Astro Van was the official Venture Group Homes, INc. [sic] vehicle." Attachment L at 1199. In a subsequent affidavit dated September 1, 1995, Stratton first stated:

Fact. There were almost no costs associated with the 1982 Dodge Van during the operating years of 1988, 1989. Venture paid cash for this vehicle at the end of the lease period in 1985. By the end of 1988 this van had been used by Venture for seven years and was facing some extensive repairs that would have to be made if the facility were going to keep the vehicle. Our accountant, advisory committee and Board of Directors agreed it was time to purchase a new vehicle. This decision was based mainly on safety issues.

According to the ARRM Settlement agreement we are allowed the costs of one vehicle and are asking that the costs associated with the 1982 [Dodge van] (which are few) be disallowed but that the costs of the new vehicle be allowed. See new affidavit Attachment 1. We feel that the Department was unreasonable to not allow the costs of the new vehicle and disallow the costs of the old vehicle, as we requested. This may be because they know this would increase our program costs and open us up to a program cost operating incentive in which the Department may owe us retroactive pay.

Venture's Response to the Department's Motion for Summary Disposition at 2. The new affidavit Stratton mentioned (Attachment 1) stated: "During the second half of 1988 and in 1989 and 1990 I state that the 1988 Dodge [sic] Astro Van was used for Program purposes at Venture Group Homes Inc."

DHS argued that Venture's reliance on the terms of the settlement agreement has no basis because the settlement agreement only allows the costs of one vehicle if the facility has 15 or fewer licensed beds. If a facility has more than one vehicle for 15 licensed beds, the settlement agreement contains a procedure for obtaining approval for an additional agreement. Because Venture has not submitted the necessary documentation from a county case manager, Regional Services Specialist or a DHS licenser explaining why more than one vehicle was needed, DHS believes that the costs of the Chevrolet Astro Van cannot be allowed because the costs of the Dodge van were allowed. The Department's argument is not persuasive.

Venture has agreed to the disallowance of all costs related to the Dodge van and seeks, instead, allowance of the costs of the Chevrolet van. Given the fact that there were virtually no costs associated with the Dodge van and Stratton's affidavit that the Chevrolet van was used almost exclusively for facility purposes, the Department's motion for summary judgment should be denied, and the Department should disallow the costs of the Dodge van and allow the costs of the Chevrolet van for the second half

of the 1988 reporting year and the 1989 reporting year. No arguments were made showing that such an adjustment is prohibited at this time.

JLL

^[1] In December, 1994 Venture was dissolved. The Strattons are now a waived service provider under Rule 42.

^[2] Under Minn. Stat. § 645.02 a law which does not contain a specific effective date becomes effective on August 1 of the year adopted.