

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

In the Matter of Rate Appeal of
Wedgewood Health Care Center, Inc.

RECOMMENDED ORDER GRANTING
DEPARTMENT'S MOTION FOR SUMMARY
DISPOSITION AND DENYING FACILITY'S
MOTION 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 dated May 5, 1995, and the parties' cross-motions for summary disposition. Briefs regarding the cross-motions were filed and oral argument was heard on September 18, 1996, at the Office of Administrative Hearings in Minneapolis, Minnesota. The record with respect to the motions closed at the conclusion of the oral argument.

Paul M. Landskroener, 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"). Samuel D. Orbovich, Attorney at Law, Orbovich & Gartner, 445 Minnesota Street, Suite 710, St. Paul, Minnesota 55101, appeared on behalf of the Facility, Wedgewood Health Care Center, Inc.

Based upon all of the files, proceedings, and arguments herein, and as discussed in the attached Memorandum:

IT IS HEREBY RESPECTFULLY RECOMMENDED:

1. That the Department's Motion for Summary Disposition be GRANTED.
2. That the Facility's Motion for Summary Disposition be DENIED.

Dated this 24th day of October, 1996

BARBARA L. NEILSON
Administrative Law Judge

NOTICE

This Report is a recommendation, not a final decision. The Commissioner of Human Services will make the final decision after a review of the record. The Commissioner may adopt, reject or modify the Recommendation. Under Minn. Stat. § 14.61, the final decision of the Commissioner shall not be made until this Report has been made available to the parties to the proceeding for at least ten days. An opportunity must be afforded to each party adversely affected by this Report to file exceptions and present argument to the Commissioner. Parties should contact David Doth, Commissioner, Minnesota Department of Human Services, Second Floor Human Services Building, 444 Lafayette Road, St. Paul, Minnesota 55155, to ascertain the procedure for filing exceptions or presenting argument. Pursuant to Minn. Stat. § 14.62, subd. 1, the Agency is required to serve its final decision upon each party and the Administrative Law Judge by first class mail or as otherwise provided by law.

MEMORANDUM

Wedgewood Health Care Center, Inc. (“Wedgewood” or “the Facility”) operates a nursing home in Minnesota and receives reimbursement from the Department for allowable costs incurred in providing care to residents under the federal Medicaid Act, 42 U.S.C. § 1396a, and the State’s Medical Assistance Program, Minn. Stat. Ch. 256B (hereinafter “MA reimbursement”). The reimbursement rates at issue in this proceeding were set under Minn. Stat. § 256B.41-256B.50 and Minn. Rules 9549.0010 through 9549.0080 (collectively known as “Rule 50”). To receive medical assistance payments, nursing homes submit annual cost reports showing costs incurred during the reporting year, which generally runs from October 1 through the following September 30. Minn. R. 9549.0041, subp. 1. During desk audits, DHS auditors review the cost reports and supporting documentation. Minn. R. 9549.0020, subp. 19, and 9549.0041. The auditors allow, disallow, or reclassify costs reported on the provider’s cost report and, based upon adjusted allowable costs, calculate a prospective per diem rate for a rate year running from July 1 through the following June 30. Minn. R. 9549.0041, subp. 11, 13. Providers may appeal specific audit adjustments after they receive the final rate notice. Minn. Stat. § 256B.50, subd. 1b. If the appeal is not resolved informally, the provider may demand a contested case hearing. Minn. Stat. § 256B.50, subd. 1h.

The sole issue raised in the present case relates to the proper treatment under Rule 50 of certain extra payments made to the Facility’s owner and administrator, Edward Lehmann, Sr., during the relevant reporting years. The Department and the Facility have filed cross motions for summary disposition in this matter. Summary disposition is the administrative equivalent to summary judgment. Minn. Rules pt. 1400.5500(K). 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. Sauter v. Sauter, 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. 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. See Minn. Rules pt. 1400.6600.

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. Hunt v. IBM Mid America Employees Federal Credit Union, 384 N.W.2d 853, 855 (Minn. 1986). 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. 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). In this contested case proceeding, Wedgewood bears the burden of demonstrating by a preponderance of the evidence that the Department's determination is incorrect. Minn. Stat. § 256B.50, subd. 1c (1994); see also REM-Canby, Inc. v. Minnesota Department of Human Services, 494 N.W.2d 71, 74 (Minn. App. 1992). 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. Id. 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. Id.

Based upon the memoranda, affidavits, depositions, and other materials filed by the parties, and construing the facts in a light most favorable to the Facility, it appears that the relevant facts in this case are as follows. Wedgewood Healthcare Center, Inc., is a subchapter S corporation owned by Edward Lehmann, Sr., who was also a corporate officer, the sole member of the Board of Directors, the sole stockholder, and the Facility's administrator during the field audit period. See the Record Index provided by the Department (hereinafter referred to as "R. ____") at 2 (Answers to Interrogatories), 37-38 (corporate documents), 79, 80, 88 (Lehmann Deposition), and 127 (Vetsch Deposition). Wedgewood operates a nursing home in Inver Grove Heights, Minnesota. R. 128 (Vetsch Deposition).

The Department conducted a field audit of the cost reports submitted by Wedgewood for the reporting periods ending September 30, 1987, 1988, 1989, and 1990. The rates at issue in this appeal are those paid in rate years beginning January 1, 1988, 1989, 1990, and 1991. R. 352. The Department determined based upon the records examined during the field audit that Mr. Lehmann received an annual salary as the Facility's administrator of approximately \$52,000.00 on a bi-weekly basis during each of the four rate years subject to the field audit. R. 270. In December or January of each year, Mr. Lehmann and the accountant for Wedgewood, Gordon Vetsch, met and calculated the amount that would "compensate whatever - after our needs for the facility, what we needed to go on, then we would see what was left there as profit or salary and so forth." R. 84 (Lehmann Deposition). Mr. Lehmann agreed during his deposition that after he and Mr. Vetsch planned what the facility would need from the cash it had on hand, the remainder would be profit and that would be paid to Mr. Lehmann as compensation. R. 84-85. The Facility also based the extra payments in part on "whether the corporation had generated non-nursing home daily rate revenues over the year and whether the rate setting cap limitations promulgated in law gave the corporation additional opportunity to incur additional compensation costs in the general and administrative cost category." R. 5 (Facility's Response to Interrogatory No. 4). Messrs. Lehmann and Vetsch were careful to

ensure that the payments would not cause Wedgewood to exceed the general and administrative cost category limit. R. 84 and 97 (Lehmann Deposition); R. 127-28 (Vetsch Deposition). As a result, Mr. Lehmann received extra payments or “salary adjustments” after the end of the rate year but before the cost reports were filed in each of the four years at issue in this case. Each extra payment was reported as “administrator salary” in Wedgewood’s cost reports, along with the amount of Mr. Lehmann’s base salary for each year. Wedgewood did not differentiate between Mr. Lehmann’s bi-weekly salary and the year-end adjustments in its cost reports. R. 270 (Audit Step 0-8-1).

As a result of the field audit, the Department disallowed \$840,000.00 in extra payments that were made to Edward Lehmann, Sr., in the category of “administrator salary” during the relevant reporting years. Specifically, the Department disallowed \$150,000.00 paid to Mr. Lehmann in December of 1988, \$200,000.00 paid in December, 1989, \$200,000.00 paid in December, 1990, and \$290,000.00 paid in December, 1991. R. 270-71 (Audit Step 0-8-1), 316-17, 324-25, 333-34, 343-44 (Summary of Findings), and 353-354 (Determination of Long Term Care Rate Appeal). The Department did not disallow any of Mr. Lehmann’s bi-weekly salary. R. 316, 324, 333, 343 (Summary of Findings). Wedgewood appealed the final field audit findings by letter dated December 29, 1993. The Department issued a determination dated December 15, 1994, regarding the Facility’s appeal of the disallowance of the extra payments. R. 352-55. The Facility requested a contested case hearing by letter dated January 4, 1995, and later limited the issues appealed to the compensation adjustments relating to Mr. Lehmann. R. 356, 357.

The Department’s auditors indicated in their Summary of Findings that the compensation reported for Mr. Lehmann was “one of the highest amounts reported by any facility in the industry,” that the facility had experienced deterioration in the level of resident care and decline in upkeep of the physical plant, and that “certain essential needs of the residents were not being met, which is a primary responsibility of the facility administrator.” The auditors pointed out that Edward Lehmann, Jr., was being compensated to work on Wedgewood’s financial matters, thereby relieving Edward Lehmann, Sr., of financial responsibilities usually handled by the administrator. The auditors noted that a “replacement administrator was hired [by Wedgewood after the time period covered by the field audit] for the specific purpose of restoring the facility operation to a level that would meet the residents’ needs and prevent further action against the provider” and that the compensation provided to the replacement administrator was approximately the same rate that had previously been paid to Mr. Lehmann without the added adjustment. They concluded that the “bonuses” given to Mr. Lehmann were not reasonable, prudent, or cost conscious and were not compensation for services rendered, relying upon Minn. R. 9549.0035, subp. 8.B. and C. Id. at 317, 325, 334, and 344. The auditors further indicated that the fact that Mr. Lehmann had continued to claim a large amount of compensation (\$266,471.00) during the most recent cost reporting year despite the fact that he was not administrator of the facility during a large part of that reporting year supported their conclusion. R. 316-17, 324-25, 333-34, 343-44. In its later determination of Wedgewood’s rate appeal, the Department cited as the reason for its disallowance the Facility’s lack of a written policy for the payment of “bonuses” to its employees as required by Minn. R. 9549.0035, subp. 4.B. R. 353-54.^[1]

In response to the discovery requests made by the Department after the commencement of the contested case proceeding, Wedgewood produced what it alleges to be its written compensation policy. It supplied the Department with personnel policies, two job descriptions for the position of administrator, and an administrator contract for each rate year at issue. R. 42-76. The administrator contracts obligated Mr. Lehmann to function as Wedgewood's Administrator and perform in accordance with his job description, and further stated that "[b]ase salary shall be negotiable with the Board of Directors of this facility." R. 69-72 and 76. Mr. Lehmann testified during his deposition that "base salary" meant his approximately \$52,000.00 annual salary and not the year-end payments. R. 88. None of these documents expressly authorized the payment of year-end bonuses or extra compensation to Mr. Lehmann.

There appear to be no genuine issues of material fact in dispute regarding the amount or documentation of the end-of-the-year payments that were made by the Facility to Edward Lehmann, Sr. The Department maintains that several grounds exist for disallowing the extra payments. For purposes of this Motion for Summary Disposition, however, the Department is asserting only that the disallowance of the extra payments was proper because Wedgewood did not have a written compensation policy that related the year-end payments made to Mr. Lehmann to the performance of specified duties or to the number of hours worked, as required by Minn. R. 9549.0035, subd. 4.B. That rule provision provides in pertinent part as follows:

Subp. 4. **Compensation for personal services.** Compensation for personal services includes all the remuneration paid currently, accrued or deferred, for services rendered by the nursing facility's owners or employees. Only compensation costs for the current reporting period are allowable subject to the requirements of parts 9549.0010 to 9549.0080.

A. Compensation includes:

(1) salaries, wages, bonuses, vested vacations, vested sick leave, and fringe benefits paid for managerial, administrative, professional, and other services;

(2) amounts paid by the nursing facility for the personal benefit of the owners or employees;

* * *

B. The nursing facility must have a written policy for payment of compensation for personal services. The policy must relate the individual's compensation to the performance of specified duties and to the number of hours worked.^[2]

Wedgewood maintains that this rule is in conflict with Minn. Stat. § 256B.431, subd. 1 (1994). That statutory provision states in pertinent part as follows:

The commissioner [of Human Services] shall establish, by rule, limitations on compensation recognized in the historical base for top management personnel. For rate years beginning July 1, 1985, the commissioner shall not provide, by rule, limitations on top management personnel. Compensation for top management personnel shall continue to be categorized as a general and administrative cost and is subject to any limits imposed on that cost category. . . .

The Facility argues as a threshold matter that the plain language of Minn. Stat. § 256B.431, subd. 1, precludes the Department from imposing any limitation on the compensation paid to Mr. Lehmann other than the cap on the General and Administrative cost category (hereinafter “G & A costs”). Since the adjustments paid to Mr. Lehmann amount to the difference between the G & A costs incurred by the facility prior to the year-end payment and the G & A cap amount, no disallowance could be appropriate under Wedgewood’s interpretation. The Facility asserts that all compensation paid to top management employees such as Mr. Lehmann is exempt from the compensation policy rule. The Department contends that the statute prohibits compensation for top management being directly limited by rule by application of a mathematical cap, but does not prevent the Department from imposing basic allowable cost standards on the top management compensation claimed by a facility. Thus, the Department acknowledges that it could not adopt a rule that limits top management compensation to \$52,000.00 without violating the statute, but argues that it can properly require that the compensation be only for the current reporting period (Minn. R. 9549.0035, subp. 4); the compensation be supported by a written compensation policy (subp. 4.B.); the compensation be given only for necessary services (subp. 4.C.); and the compensation be actually paid within 107 days after the end of the reporting period (subp. 4.D.).^[3] The Department maintains that the requirement of written compensation policy documentation under subpart 4.B. is no different from these other basic cost rules and that none of them conflict with Minn. Stat. § 256B.431, subd. 1. The Department thus maintains that the rule does not conflict with the statute and that Wedgewood’s lack of a written compensation policy governing the payment of extra compensation or bonuses is sufficient to require that summary disposition be granted in the Department’s favor. Thus, the issue to be decided in the context of these cross-motions for summary disposition is the legal issue of the applicability of the compensation policy rule in light of the language of the statute and, if the compensation policy rule is determined to properly apply, whether Wedgewood has an adequate written compensation policy to support the year-end payments to Mr. Lehmann.

The statutory language contains three references to limitations on top management compensation. The first sentence in the pertinent paragraph requires the Department to “establish, by rule, limitations on compensation recognized in the historical base for top management personnel.” Minn. Stat. § 256B.431, subd. 1. The second sentence, relied upon by Wedgewood, prohibits the Department from providing by rule “limitations on top management personnel.” Id. The third sentence states that “[c]ompensation for top management personnel shall continue to be categorized as a general and administrative cost and is subject to any limits imposed on that cost category.” Minn. Stat. § 256B.431,

subd. 1. The second and third sentences were adopted in 1984 as an amendment to the statute. Laws of Minnesota 1984, Chap. 641, § 17.

The legislative history of Minn. Stat. § 256B.431 and the history of DHS rate-setting rules is instructive in understanding the statutory provision. Prior to 1983, rates were paid to nursing homes in the MA program pursuant to Rule 49, which was the predecessor to Rule 50. Rule 49, which was codified in Minn. R. 9510.0010 through 9510.0480, strictly limited top management compensation by imposing absolute dollar limits based on the number of beds and specifying a maximum compensation level of \$35,000.00 (with adjustments for increases in the Consumer Price Index). Minn. R. 9510.0340, subp. 2 (1982). In 1983, the Legislature directed the Commissioner of Human Services to develop a new payment system for nursing homes. See 1983 Laws of Minnesota, Ch. 199 (codified at Minn. Stat. § ch. 256B (1983 Supp.)). The Commissioner was directed to “establish, by rule, limitations on compensation recognized in the historical base for top management personnel.” Id., § 12 (codified at Minn. Stat. § 256B.431, subd. 1 (1983 Supp.)). The reference in the statute to limitations on compensation “in the historical base” related to limitations imposed by Rule 49 on compensation on top management personnel. Thus, at that time, the Legislature wanted to continue the Rule 49 compensation limits. In 1984, before the promulgation of Rule 50, the Legislature apparently adopted a different view and amended Minn. Stat. § 256B.431, subd. 1 to insert the two sentences on which the Facility relies. See 1984 Laws of Minnesota, ch. 641, § 17.

In the context of this history, it is evident that the first sentence of Minn. Stat. § 256B.431, subd. 1, which expressly requires that the Department adopt rules to limit the “historical base” of top management compensation, refers to limitations that were imposed by Rule 49 on top management compensation. When the second sentence of Minn. Stat. § 256B.431, subd. 1, is read in light of the first sentence, it is clear that the second sentence merely prohibits the Department from promulgating a rule setting an upper dollar limit on top management compensation. The third sentence expressly makes top management compensation a G & A cost and subjects that compensation to “any limits imposed on that cost category.” It would be inconsistent with the other language contained in that paragraph of the statute to interpret the second sentence to mean that the DHS may apply absolutely no rule provisions to disallow any portion of the compensation provided to top management personnel other than the overall cap on G & A costs. To accept Wedgewood’s assertion, one must conclude that the Legislature intended to create a unique cost, not subject to the standards of documentation, reasonableness, prudence, or necessity that all other G & A costs must meet. The statutory language does not indicate that top management compensation is to be unique, but merely states that there is to be no absolute mathematical limit and that such compensation is to be a G & A cost subject to any limits imposed on that cost category.

This interpretation of the statute is further supported by the common definition of the word “limitation,” which is not defined by the statute. “Limitation” is defined in the New Webster’s Dictionary and Thesaurus at 574 (1991 ed.) as “a limiting or being limited.” “Limit” is, in turn, defined as “the furthest extent, amount etc., . . . boundary, confines, . . . a point which may or cannot be passed, . . . an established highest or lowest amount,

quantity, size etc.” Taking into consideration the usual meaning of “limit” or “limitation,” it appears that the statute merely prohibits the Department from promulgating a rule setting an absolute highest amount or upper boundary with respect to top management compensation. The application of the compensation policy rule does not result in the imposition of such an absolute limit. Rather, the application of the rule provision merely results in the disallowance of the portion of the compensation not supported by a written policy.

The Administrative Law Judge thus concludes that top management compensation is subject to the Rule 50 standards for all other G & A costs, including the requirement that the facility have a written compensation policy documentation relating compensation paid to the performance of specified duties and the number of hours worked under Minn. R. 9549.0035, subp. 4.B.^[4] The Judge agrees with the Department that the G & A cap is not the only method of determining what compensation costs will be allowed and included in determining a facility’s payment rate. Costs that are reported as compensation must, as the Department points out, actually be compensation for services rendered in accordance with Minn. R. 9549.0035, subp. 4, before they are allowable in the first place and properly included in the G & A cost category. Compensation which is not paid pursuant to a written compensation policy that relates the payments to specific duties performed or hours worked is not allowable compensation. Even if the written compensation policy rule were interpreted as a “limitation” on top management personnel, that “limitation” applies to all employee compensation. It is not, therefore, a limitation on top management compensation *per se*. Moreover, the third sentence of Minn. Stat. § 256B.50.431, subd. 1, expressly provides that top management compensation is subject to “any limits imposed on [the G & A] cost category.” The compensation policy requirement applies to the G & A cost category, and thereby is properly used in this instance.

Wedgewood argues that the Department has violated Minn. Stat. § 256B.431, subd. 1 by imposing a limit of \$52,000.00 on top management compensation. The Facility maintains that the Department is, in essence, applying an unpromulgated rule. Wedgewood relies on the testimony of Patrick Betz in making this argument. That testimony does not demonstrate that the DHS imposed a limit of \$52,000.00 or that the Department has departed from a longstanding interpretation of the compensation policy rule. Mr. Betz merely testified that, although DHS auditors do not routinely ask to see written compensation policies, they are free to do so when the circumstances warrant such an inquiry. R. 242-43. The size of the year-end payments to Mr. Lehmann would warrant such an inquiry here. Moreover, even if, as Mr. Betz testified, the Department has previously accepted job descriptions, time-and-attendance records, and evidence that the compensation was actually paid as sufficient to satisfy the compensation policy requirement (R. 262), those documents comply with the literal requirements of the rule and were, in fact, accepted as a compensation policy for Mr. Lehmann’s base salary which was not disallowed. As noted above, supporting documentation relating the extra payments made to Mr. Lehmann to specific duties performed and hours worked is completely lacking. There is no persuasive evidence that the Department was arbitrarily limiting Mr. Lehmann’s compensation to approximately \$52,000.00; rather, that amount happened to be the base salary the Facility had decided to give Mr. Lehmann and was the only amount supported by a written compensation policy. Finally, the Department has

provided evidence that it has on at least one other occasion disallowed a bonus when it was not supported by a compensation policy. See DHS' Response to Interrogatory No. 1 and Document Requests 2 and 8.

The remaining issue is whether the documentation provided by Wedgewood is adequate under the rule. The issue of adequate documentation of bonuses in addition to salary was addressed in In the Matter of the Rate Appeal of EWL, Inc. d/b/a Golden Oaks, OAH Docket No. 11-1800-9690-2 (Recommended Order issued June 10, 1996). In that case, bonuses were paid to Edward Lehmann, Jr. by EWL, Inc. in the form of end-of-the-year salary adjustments. In that matter, the Administrative Law Judge recommended that the Department's disallowance be affirmed, reasoning as follows:

All of the documents provided by Golden Oaks are silent with respect to the subject of salary or end-of-the-year salary adjustments for Mr. Lehmann or any other Golden Oaks employee. These documents are not sufficient to satisfy Minn. R. 9549.0035, subp. 4.B. because they do not "relate [Mr. Lehmann's] compensation to the performance of specified duties and to the number of hours worked." In the absence of such documentation, there is no independent or objective basis on which the Department may determine that the payments made to Mr. Lehmann were, in fact, compensation for services rendered rather than the taking by the owner of profits.

Id. at 7.

There is no significant difference between the situation in Golden Oaks regarding documentation of bonuses paid and this matter. None of the written policies, job descriptions, or contracts supplied by Wedgewood during discovery mentions the possibility of an end-of-the-year salary adjustment or bonus or sets forth on what basis or for what reasons such adjustments or bonuses were to be awarded. Although the reference to a "base salary" in the administrator contract may, as the Facility argues, imply that additional compensation might be awarded, such a vague implication is not sufficient to meet the requirement of the rule that the "compensation [be related] to the performance of specified duties and to the number of hours worked." There is no differentiation in Wedgewood's job descriptions between the routine job duties associated with the base salary and extra duties that will earn the administrator a bonus. Wedgewood has not offered any minutes of its Board of Directors or other documentation referring to discussions of Mr. Lehmann's salary or negotiation or calculations of the year-end payments. There is no evidence that the year-end payments were tied to specific duties performed or hours worked. R. 86-87 (Lehmann Deposition); R. 124 (Vetsch Deposition). Mr. Lehmann testified during his deposition, "First our goals, we satisfied the need, and then if something was left it was for compensation. . . . I don't know if [the extra compensation] was tied to performance, it is what was left over, you know." R. 86. Wedgewood has failed to show that the salary adjustments or bonuses are supported by documentation sufficient to create a genuine issue of material fact. Applying the rule to the undisputed facts, the Department is entitled to summary disposition in its favor as a matter of law.

The Department has raised questions regarding the source of the funds used to pay the extra payments received by Mr. Lehmann. In light of the Judge's recommendation that summary disposition be granted to the Department based on inadequate documentation, there is no reason to analyze the source of the funds at issue.

The Administrative Law Judge recommends that the Department's Motion for Summary Disposition be granted, and that the Facility's Motion for Summary Disposition be denied.

B.L.N.

^[1] Wedgewood asserts that the Department changed the factual basis for the disallowance in its appeal determination and contends that, under Minn. Stat. § 256B.50, subd. 1h, the Commissioner's determination is of no legal effect. The statute provides that, "[w]hen a contested case demand is referred to the office of the attorney general, the contested case procedures described in subdivision 1c apply and the written determination issued by the commissioner is of no effect." This provision merely means that the Commissioner's determination is not dispositive once a contested case hearing has been demanded and that the proceeding before an Administrative Law Judge is *de novo*. The determination still suffices to provide notice to the Facility of the basis for the disallowance by DHS and avoid any claim by the Facility that it was prejudiced by a lack of notice. Wedgewood had an opportunity to provide relevant documentation of its alleged written compensation policy during discovery in this matter. Moreover, it appears in any case that the Department's determination merely asserted a new or additional legal theory for the disallowance and that Wedgewood has not made an adequate showing of lack of notice or prejudice. See, e.g., St. Paul's Church Home v. Minnesota Department of Human Services, OAH Docket No. 4-1800-1846-2 at 4 (Recommended Order issued March 3, 1988) ("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 so long as there is no prejudice and/or adequate notice to rebut is afforded").

^[2] The rule goes on to provide that "[c]ompensation payable under the plan must be consistent with the compensation paid to persons performing similar duties in the nursing facility industry" and specifies that employees covered by collective bargaining agreements are not required to be covered by compensation policies under certain circumstances. Because there is no evidence that Mr. Lehmann was covered by a collective bargaining agreement, that provision is obviously not involved in this matter. The Department has further clarified that it is not relying on the "consistent compensation" provision of the rule in its motion for summary disposition. Thus, the Department is not claiming for purposes of this motion that the compensation paid to Mr. Lehmann must be consistent with that paid to other nursing home administrators performing similar duties. Because the "consistent compensation" provision is not at issue in this matter, Wedgewood's discussions of its continued viability in light of Minn. Stat. § 256B.431, subd. 1, are irrelevant to the determination of the cross-motions.

^[3] The Department also contends that it could properly apply the general cost principles set forth in Minn. R. 9549.0035, subp. 8, but acknowledges that these principles are not asserted as a ground for the current Motion for Summary Disposition.

^[4] The Administrative Law Judge is not persuaded to reach a contrary result by virtue of the statements made by Mr. Osell during the Rule 50 rulemaking hearing. Mr. Osell's statements do not clearly indicate that it was the view of the DHS that absolutely no rule provisions other than the G & A cap could be applied to disallow any portion of claimed top management compensation.