STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS

HEALTHPLAN SOUTHEAST, INC., )
Petitioner, )
vs. ) CASE NO. 93-2721RX
AGENCY FOR HEALTH CARE ADMINISTRATION, )
Respondent. )

## FINAL ORDER

Upon due notice, this cause came on for formal hearing on August 25, 1993 in Tallahassee, Florida, before Ella Jane P. Davis, a duly assigned hearing officer of the Division of Administrative Hearings.

## APPEARANCES

For Petitioner: John C. Pelham, Esquire
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For Respondent: Michael O. Mathis, Esquire
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## STATEMENT OF THE ISSUE

Whether or not existing rule 59A-12.006(3)(d) F.A.C., the Health Maintenance Organization (HMO) rule, constitutes a valid agency exercise of delegated legislative authority.

## PRELIMINARY STATEMENT

By prehearing stipulation, the issues herein were narrowed as governed by Sections 120.52(8)(c), (d), and (e) F.S. [1992 Supp.].

At commencement of formal hearing, Roberta Agner, the administrator of Madison County Memorial Hospital, voiced a desire to testify in support of the rule. She had not been subpoenaed nor called by either party as a witness. By stipulation of the parties, however, she was called as the Hearing Officer's witness, and permitted to testify in narrative format outside the hearing of all other witnesses, subject to objections and cross examination by each party.

Ralph Gray and Linda Enfinger also testified orally. By stipulation, the deposition of Dr. James Conn, M.D., expert, was admitted in lieu of his oral testimony as Respondent's exhibit. The parties also submitted a joint composite exhibit.

A transcript was filed September 8, 1993. Proposed final orders were filed by each party, respectively, on September 23, 1993. Each proposed finding of fact has been ruled upon in the appendix to this final order, pursuant to Section 120.59(2) F.S.

FINDINGS OF FACT

1. Existing Rule 59A-12.006(3)(d) F.A.C. provides:

> 59A-12.006 Quality of Care. Each HMO or PHC shall:
> (3) Ensure that the health care services it provides or arranges for are accessible to the subscriber with reasonable promptness. Such services shall include, at a minimum:
> (d) Average travel time from the HMO geographic services area boundary to the nearest primary care delivery site and to the nearest general hospital under arrangement with the HMO to provide health care services of no longer than 30 minutes under normal circumstances. Average travel time from the HMO geographic services area boundary to the nearest provider of specialty physician services, ancillary services, specialty inpatient hospital services and all other health services of no longer than 60 minutes under normal circumstances. The AHCA shall waive this requirement if the HMO provides sufficient justification as to why the average travel time requirement is not feasible or necessary in a particular geographic service area;

2. The existing rule in final form, supra, was adopted in February 1992 following extensive "workshopping" and other public hearing procedures. There is no suggestion herein that there are any enacting defects with regard to this rule.

3. Validity of the rule is challenged solely under Sections 120.52(8)(c), (d), and (e) F.S. [1992 Supp.]. The grounds of invalidity alleged are that:

> The rule enlarges, modifies, or contravenes the specific provisions of the law implemented, i.e., Section 641.49, Section 641.495(3) and Section 641.56, F.S.;
>
> The rule is vague, fails to establish adequate standards for agency decisions, or vests unbridled discretion in the agency; or
>
> The rule is arbitrary and capricious.

4. Petitioner, Healthplan Southeast, Inc., (Healthplan), is a Florida corporation based in Tallahassee, Florida, and is a health maintenance organization (HMO) which provides comprehensive health care services to its subscribers.

5. Petitioner has requested a waiver under the challenged rule. The agency's denial of that request for a waiver is the subject of DOAH Case No. 93-2606, and involves disputed issues of material fact.

6. Respondent, Agency for Health Care Administration (AHCA), is the state agency charged with the responsibility of implementing, interpreting, and enforcing the rules adopted pursuant to the authority set forth in Section 641.56, F.S.

7. The Department of Health and Rehabilitative Services, (HRS), adopted Rule 10D-100.006(2)(a), the predecessor to Rule 59A-12.006(3)(d) as an agency rule in 1988.

8. At the time of adoption of Rule 10D-100 in 1988, Ralph Gray was Unit Manager of the Managed Care Unit at HRS and was responsible for promulgating and implementing the rule.

9. At the time Mr. Gray inherited the responsibility of promulgating Rule 10D-100, some preliminary work had already been performed and a draft rule existed which already included a requirement that the average travel time to the nearest primary care delivery site or the nearest institutional service site be thirty minutes or less.

10. Mr. Gray accepted the draft that he inherited and moved forward with the rule adoption process without doing any independent investigation to determine the origin or validity of the thirty minute average time requirement.

11. The rule as it was originally adopted in 1988, provided that HMOs should ensure that health care provided for subscribers was accessible with reasonable promptness by ensuring that the average travel time from an HMO geographic service area boundary to the nearest primary care delivery site or to the nearest institutional service site would be no longer than thirty minutes under normal circumstances.

12. The specific language of the rule, as it existed from 1988 until February 1992, simply required an HMO to ensure that a subscriber had access to either a primary care delivery site or an institutional service site within an average travel time of thirty minutes. The rule as it was applied by the agency from 1988 until February 1992 did not require that an HMO provide a subscriber access to both a primary care delivery site and an institutional service site within thirty minutes. Neither did the rule as applied from 1988 to 1992 require that the institutional service site be under contract with the HMO.

13. Amendments to Rule 10D-100 were proposed in 1991 in response to amendments to Chapter 641, Part IV, F.S. enacted by the 1991 Legislature and to establish additional quality of care standards for HMOs and Prepaid Health Clinics (PHCs).

14. In 1991-1992, Ralph Gray was again the person in charge of implementing amendments to Rule 10D-100 that were necessary in order to comply with the statutory changes in 1991. Mr. Gray assembled a team to assist him in

the rule adoption process. In addition to Mr. Gray, the team consisted of Linda Enfinger, Registered Nurse Specialist with the agency's HMO Unit and Dr. James Conn, M.D., Consultant to the Agency Office of Licensure and Certification.

15. The rule amendments at issue herein included a change from "or" to "and" in the language of the rule which resulted in the thirty minute average travel time requirement being applicable to both primary care delivery sites and general hospitals under arrangement with the HMO to provide health care services. This change was not specifically mandated by the changes to Chapter 641 F.S. adopted by the Legislature in 1991.

16. The change from "or" to "and" came about because of concern informally expressed to team members about HMO subscribers in northern Dade County and in Broward County having to travel long distances over considerable periods of time in congested traffic situations to obtain hospital services, and focused upon the Miami--Ft. Lauderdale population concentration corridor which is complex in roadways and traffic patterns and in its number of people and motor vehicles.

17. There were no formal written complaints espousing the foregoing concept of traffic congestion and excessive distance to HMO provider hospitals in Dade and Broward counties, and the agency neither conducted nor commissioned any specific formal review or study to verify the presence or absence of such a problem either in Dade--Broward or in any other geographic area of the state. However, Mr. Gray reviewed listings of their providers supplied to the agency by HMOs and determined for himself that there were accessibility problems in the Dade--Broward area.

18. No issue or concern clearly in opposition to the thirty minute average travel time restriction was raised in any workshop or public hearing during the 1991-1992 rule amendment process. Petitioner did not appear at the December 19, 1991 public hearing. Letters from the public in response to that public hearing did not contain adverse comments regarding the thirty minute travel requirement. Letters from the public during this process generally supported the time requirement upon accessibility grounds. A concomitant thrust of the public comment letters was to the effect that the agency should encourage HMOs to sign-up licensed local general hospitals in rural areas such as Madison County because of the need for such services from the HMOs.

19. Opinion testimony offered at formal hearing herein that the thirty minute average travel time requirement as included in the predecessor rule was probably originally based on federal regulation 42 CFR 5 was speculative and unpersuasive. However, it is clear that the time limit, at least, was carried over from the 1988 HRS rule.

20. No witness knew with certainty that the 1983 version of 42 CFR 5, dealing with the federal criteria for designating geographic areas having shortages of primary medical care professionals, was taken into consideration at the time the state's 1988 HMO rule was drafted. The 1992 version of 42 CFR 5 apparently applies to correctional institution populations who must usually have care providers travel to them, and became effective in October 1992, eight months after the new rule amendments were finally promulgated. On the other hand, the use of the thirty minute average travel time figure in CFR from 1983 to date is indicative of a continuing industry standard.

21. Mr. Gray and Dr. Conn each had the "sense" or "impression" that thirty minutes average travel time was an industry standard. Mr. Gray's opinion in this regard was based on an absence of any serious question or challenge to this

provision at any of the public meetings during the 1991-1992 rule amendment process. Dr. Conn's opinion was partly based on the same factor. However, his opinion is more persuasive because it is based, in part, upon his personal experience in the private health industry sector as Medical Director of the Capital Health Plan HMO from 1981 through 1982.

22. During the amendment process, the agency did not conduct any formal studies to determine whether the thirty minute average travel time requirement had any validity or in any way satisfied the statutory mandate to ensure access to health care services with reasonable promptness. However, at formal hearing, the consistent and unrefuted expert medical and nursing testimony was to the effect that excessive travel time can exacerbate bone fracture, shock, and hemorrhaging. Dr. Conn specifically testified that there are many medical conditions that need to be evaluated capably within thirty minutes of the onset of symptoms. Medical physician Conn and nurse administrator Enfinger, as experts in their fields, recited factual examples from their own professional experience of emergency room protocols and general hospital "on-call" physician rosters which require response time ranging from 15 minutes to 45 minutes of notification of the occurrence of trauma.

23. Dr. Conn testified as an acknowledged expert in managed health care that the rule's thirty minutes average travel time provision is a good and adequate interpretation of the statutory mandate of the enabling legislation at Section 641.495(3) F.S., to ensure that HMOs provide health care services to their subscribers with reasonable promptness with respect to geographic location.

24. According to Mr. Gray, the 1991-1992 rule amendment changing the words "institutional service site" to "general hospital under arrangement with the HMO" occurred because the term "general hospital" was thought by agency personnel to be synonymous with "institutional service site" and because "general hospital" was thought to be less confusing due to generally understood industry perceptions of the term. There is no evidence in this record to the contrary.

25. The change of terms within the rule from "institutional service site" to "general hospital under arrangement with the HMO," did not draw comments or raise concern during the rule amendment process, and Dr. Conn testified convincingly at formal hearing that a primary care physician's office would probably not have the technical equipment or personnel capabilities of treating severe emergencies, capabilities that would be present at a general hospital.

26. HMO subscribers are in the nature of a captive audience in that they are not free to select from any provider if they wish to continue to enjoy the reduced cost benefits of the HMO provider contract.

27. Emergency-type treatment for a subscriber must be paid for by his HMO even if that treatment was rendered in a health care facility not signed up with the HMO.

28. Roberta Agner, administrator of Madison County Memorial Hospital, testified that the rule as amended acts to protect those subscribers receiving HMO services and the HMO itself by insuring adequate health care through the HMO. Ms. Agner's foregoing opinion is colored by the fact that without the new rule in effect, the Petitioner's HMO subscribers in Madison County may come to

Ms. Agner's hospital, which is currently not signed up with Petitioner's HMO, only for life and death situations if they are to remain assured of payment of their fees by their HMO.

29. Nonetheless, Ms. Agner's testimony is credible that HMO subscribers sometimes perceive symptoms such as acute chest pain as an emergency situation and utilize a local non-HMO facility only to discover after diagnosis and treatment that the HMO does not acknowledge the situation as a compensable emergency (life or death situation) because upon medical hindsight, the precipitating symptom is not, in fact, a heart attack. She gave several similar medical conditions that routinely result in such disputes. The greater weight of all the evidence is that prudent patients and hospital emergency rooms must treat these symptoms initially as emergencies. From this, the undersigned reasonably infers that the absence of the thirty mile rule could have a life-threatening "chilling effect" on HMO subscribers promptly seeking truly necessary emergency health care for fear of making an expensive wrong self-diagnosis.

30. Without the challenged rule provision, a subscriber to Petitioner's HMO living in Madison County, Florida could have to travel from as far away as the Suwannee River (the eastern boundary) to Tallahassee in Leon County to receive hospital services. Without the rule, such a subscriber would have to travel sixty minutes average travel time (distance divided by legal speed limit equals time) from downtown Madison, which is not at the eastern boundary, to either provider hospital in Tallahassee. This trip's average travel time in unusual circumstances could be more than sixty minutes. As found supra, many conditions routinely require medical attention in a general hospital within 15 to 45 minutes. The rule as currently written has demonstrable impact on subscribers living in rural areas receiving health care services from their HMO promptly.

31. Petitioner presented no evidence specifically attacking the portion of the rule providing for the sixty minute average travel time for specialty physician services, specialty inpatient hospital services, and all other health services.

32. Petitioner complained that the agency has no uniform interpretation or guidelines for interpreting the rule's terms, "average travel time" and "normal circumstances." Despite such assertion, the rule is clear on its face. Each witness who was asked to apply the rule used standard dictionary definitions and elementary school mathematical formulas. Each witness uniformly started with the premise that distance calculated by existing roadways, divided by legal speed limits, would equal "average travel time" under "normal circumstances." All witnesses were able to list numerous hypothetical factual situations, including but not limited to weather and traffic conditions, which might render a travel time "not normal," but which would have to be weighed and considered on a case by case basis.

33. The rule provides that the agency shall waive the average travel time requirement if an HMO provides "sufficient justification" as to why the requirement is not "feasible" or "necessary" in a particular geographic service area. Thus, an HMO which cannot meet the average travel time requirement of the rule still has the opportunity to prove the requirement ought not to apply to it, bearing the burden to go forward and the burden of proof. This is clearly a flexible standard designed to accommodate a variety of "not normal" circumstances.

34. Petitioner's assertion that the rule is invalid because it does not establish a uniform interpretation or guidelines to supplement or explain "feasible" or "necessary," is not persuasive since, as used in the rule, these terms are clearly susceptible of interpretation by dictionary and of being applied on a case by case factual basis. Some types of evidence which agency personnel or the HRS consultant, Dr. Conn, advanced as probably going to prove "sufficient justification" were improved medical techniques, modes of transportation such as rescue flights, and unavailability of any accredited or licensed general hospitals in a given geographic service area. In such situations, the rule's waiver provision provides balance to the rule's initial thirty minute travel requirement.

## CONCLUSIONS OF LAW

35. The Division of Administrative Hearings has jurisdiction over the parties and subject matter of this cause pursuant to Section 120.56, F.S.

36. Section 641.495(3) F.S. [1991] provides, in pertinent part:

> (3) The organization shall ensure that the health care services it provides to subscribers, including physician services as required by s. 641.19(7)(d) and (e), are accessible to the subscribers, with reasonable promptness, with respect to geographic location, hours of operation, provision of after-hours service, and staffing patterns within generally accepted industry norms for meeting the projected subscriber needs. (Emphasis supplied)

37. The rule in question seeks to interpret, implement, and enforce the emphasized statutory language.

38. The inclusion of the term, "general hospital under arrangement with the HMO" in the rule is not an expansion of statutory authority just because general hospitals are not specifically named in the statute as are physician services. Indeed, the statute refers first to all "health care services the HMO provides to subscribers," and in determining whether an agency has enlarged upon its statutory framework, the court may look at the entire statutory framework. See, United States Shoe Corp. v. DPR, Bd. of Opticianary, 578 So.2d 376 (Fla. 1st DCA 1991). The inclusion in the rule of the term "general hospital under arrangement with the HMO," is not an enlargement, modification, or contravention of the statute. Nor is it capricious or arbitrary.

39. If anything, the rule interprets the statutory term, "reasonable promptness, with respect to geographic location." It does not enlarge, modify, or contravene the statute. There is nothing vague about the rule or when it is to be applied. The rule comes into play when an HMO is certified, renews its certification, or expands its area of operation. The rule sets a reasonable standard, subject to a reasonable waiver, the waiver to be determined upon the facts of each case.

40. A similar travel time of thirty minutes has been promulgated in the federal sector in connection with health manpower shortage areas. It is also noted that a similar travel time of thirty minutes has been promulgated in several HRS accessibility rules for certificates of need. See, for instance,

Rule 59C-1.038(9)(a) F.A.C. Although the evidence falls short of establishing that federal Rule 42 CFR 5 directly influenced the drafting of the challenged rule, its predecessor rule, or other similar state health care rules, it is reasonable to conclude from these rules and all the evidence that thirty minutes travel time is an industry standard.

41. The challenged rule goes a step further than just establishing a reasonable average travel time. It provides HMO applicants an opportunity to show when thirty minutes is altered by "not normal circumstances" and any other reason a waiver would be "substantially justified." Thus, the average travel time established by rule does not rigidly control the granting or withholding of an HMO certificate of authority, renewal of authority, or expansion of authority/territory. Applicants have the opportunity to demonstrate eligibility by diverse means on a case by case basis. By analogy, see Humana, Inc. v. Dept. of Health and Rehabilitative Services, 469 So.2d 889 (Fla. 1st DCA 1985). Cf. Dept. of Health and Rehabilitative Services v. Johnson and Johnson Home Health Care, Inc. 947 So.2d 361 (Fla. 1st DCA 1984).

42. Pursuant to Section 641.56 F.S., the agency is authorized to promulgate rules "not inconsistent with law, which may be necessary to carry out the duties and authority conferred on the department by this part and to protect the health, safety, and welfare of the public." In cases such as this, where an agency is granted broad rulemaking authority by statute, " . . . the validity of regulations promulgated thereunder will be sustained so long as they are purposes of the enabling Legislation . . ." See, Florida Beverage Corporation v. Wynne, 306 So.2d (Fla. 1st DCA 1975).

43. One who attacks the validity of a rule on grounds of arbitrariness or capriciousness carries the burden of demonstrating by a preponderance of the evidence that the rule is not supported by fact or logic, was adopted without thought or reason, or is otherwise not based on competent, substantial evidence. See, Agrico Chemical Company v. State, Department of Environmental Regulation, 365 So.2d 769 (Fla. 1st DCA 1979); Jax Liquor's, Inc. v. Division of Alcoholic Beverages and Tobacco, et al., 388 So. 2d 1306 (Fla. 1st DCA 1980); Grove Isle, Ltd. v. State, Department of Environmental Regulation, 454 So.2d 571 (Fla. 1st DCA 1984).

44. Agencies are to be accorded wide discretion in the exercise of their lawful rulemaking authority. See, Florida Commission of Human Relations v. Human Development Centers, 413 So.2d 1251 (Fla. 1st DCA 1982).

45. Further, the agency's interpretation of a statute need not be the sole possible interpretation or even the most desirable one, it need only be within the range of possible interpretations. See, Department of Administration v. Nelson, 424 So.2d 852 (Fla. 1st DCA 1982); Department of Professional Regulation, Board of Medical Examiners v. Durrani, 455 So.2d 215 (Fla. 1st DCA 1984); General Telephone Co. of Florida v. Florida Public Service Commission, 446 So.2d 1063 (Fla. 1984).

46. The weight of the evidence is that the rule amendment promulgation process was reasonable and rational. The thirty minute average travel time provision perhaps was not as thoroughly investigated and debated as other parts of the rule during the rule amendment process only because it was not directly challenged in the course of that process and was not challenged as a "proposed rule" under Section 120.54 F.S. Also, the thirty minute provision meets an industry standard and had been included in the rule since 1988. Only the amendment of other terms has somewhat altered the effect of the original thirty

minute provision. It is enough that at formal hearing pursuant to Section 120.56 F.S., it was clearly demonstrated that the thirty minute requirement of the current rule as now in effect, made applicable to both "the nearest primary care delivery site and to the nearest general hospital under arrangement with the HMO" has a basis in fact and logic.

47. Where an agency has responded to rulemaking incentives and has allowed affected parties to help shape rules they know will regulate them in the future, the judiciary must not overly restrict the range of the agency's interpretive powers. Permissible interpretations of statutes must and will be sustained, though other interpretations are possible and may even seem preferable according to some views. See, State Dept. of Health and Rehabilitative Services v. Framat Realty, Inc., 407 so.2d 238 (Fla. 1st DCA 1981). The test laid down in Department of Professional Regulation, Board of Medical Examiners v. Durrani, supra, is not whether the rule under review is the best or even the preferred interpretation, but that it is a possible interpretation. In view of the evidence presented at formal hearing, the agency's interpretation of promptness is reasonable.

48. The challenged rule provision is a possible interpretation and within the agency's rule making authority pursuant to Section 641.56 F.S. and should be held valid.

49. Petitioner bears the duty to go forward and the burden of proof herein. Since no evidence with regard to the sixty minute requirement was offered, that requirement's invalidity has not been established.

RECOMMENDATION

Upon the foregoing Findings of Fact and Conclusions of Law recited herein, it is ORDERED that

Existing Rule 59A-12.006(3)(d) F.A.C. constitutes a valid exercise of delegated legislative authority.

DONE AND ORDERED this 19th day of November, 1993, at Tallahassee, Florida.

ELLA JANE P. DAVIS, Hearing Officer
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Filed with the Clerk of the
Division of Administrative Hearings
this 19th day of November, 1993.

APPENDIX TO FINAL ORDER 93-2721RX

The following constitute specific rulings, pursuant to S120.59(2), F.S., upon the parties' respective proposed findings of fact (PFOF).

Petitioner's PFOF:

| | |
|---|---|
| 1-15 | Accepted, but material unnecessary, subordinate or cumulative to the facts as found has not been adopted. |
| 16 | Rejected as not supported by the record and as unpersuasive legal argument |
| 17-21 | Accepted in part and rejected in part upon the record evidence as a whole and as covered in FOF 32-34. What is rejected is not dispositive or controlling for the reasons set out in the FOF and COL. |
| 22 | Accepted in FOF 20. |

Respondent's PFOF:

| | |
|---|---|
| 1-5 | Accepted, but material unnecessary, subordinate or cumulative to the facts as found has not been adopted. More specifically, the excessive wordiness of the proposals as to who examined the witness or whether oral testimony was given upon direct or cross examination or upon redirect examination has been excluded as irrelevant. |
| 6-18 | These proposals amount to identification of various exhibits by a witness. The exhibits are in evidence and were considered. Immaterial matters have not been adopted. The material substance of those exhibits and the oral evidence and stipulations concerning them are covered in FOF 3, 18-21. |
| 19-20 | Rejected as stated because misleading as stated. However, official recognition was taken of 42 CFR 5 in both its forms. Its significance is covered in FOF 19-21. |
| 21 | Accepted, but material unnecessary, subordinate or cumulative to the facts as found has not been adopted. |
| 22 | Rejected as stated because not comprehensive of all testimony as stated. Covered in FOF 5, 32, and 34 as supported by the record as a whole. |
| 23-30 | Accepted, but material unnecessary, subordinate or cumulative to the facts as found has not been adopted. More specifically, the excessive wordiness of the proposals as to who examined the witness or whether oral testimony was given upon direct or cross examination or upon redirect examination has been excluded as irrelevant. Additionally, proposals which amounted to no more than identification of exhibits were excluded as subordinate. The exhibits themselves together with relevant testimony have been considered and facts found accordingly. |
| 31-32 | Rejected as stated because misleading as stated. However, official recognition was taken of 42 CFR 5 in both its forms. Its significance is covered in FOF 19-21. |

33-35 Accepted, but material unnecessary, subordinate or cumulative to the facts as found has not been adopted. More specifically, the excessive wordiness of the proposals as to who examined the witness or whether oral testimony was given upon direct or cross examination or upon redirect examination has been excluded as irrelevant.

COPIES FURNISHED:

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NOTICE OF RIGHT TO JUDICIAL REVIEW

PARTY WHO IS ADVERSELY AFFECTED BY THIS FINAL ORDER IS ENTITLED TO JUDICIAL REVIEW PURSUANT TO SECTION 120.68, FLORIDA STATUTES. REVIEW PROCEEDINGS ARE GOVERNED BY THE FLORIDA RULES OF APPELLATE PROCEDURE. SUCH PROCEEDINGS ARE COMMENCED BY FILING ONE COPY OF A NOTICE OF APPEAL WITH THE AGENCY CLERK OF THE DIVISION OF ADMINISTRATIVE HEARINGS AND A SECOND COPY, ACCOMPANIED BY FILING FEES PRESCRIBED BY LAW, WITH THE DISTRICT COURT OF APPEAL, FIRST DISTRICT, OR WITH THE DISTRICT COURT OF APPEAL IN THE APPELLATE DISTRICT WHERE THE PARTY RESIDES. THE NOTICE OF APPEAL MUST BE FILED WITHIN 30 DAYS OF RENDITION OF THE ORDER TO BE REVIEWED.