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*Director*

State of California—Health and Human Services Agency  
California Department of Public Health



EDMUND G. BROWN JR.  
*Governor*

February 2, 2011

AFL 11-20

**TO:** Skilled Nursing Facilities

**SUBJECT:** Appeal Procedures for Penalties Issued Pursuant to Section 14126.022 of the Welfare and Institutions Code

In accordance with Section 14126.022 of the Welfare and Institutions Code (W&I) this notice is to provide guidelines for facility requirements for appeals of penalties assessed as a result of state audits for compliance with the 3.2 nursing hour per patient day (NHPPD) staffing requirements. These are the sole guidelines to be used in the appeal process.

**APPEAL PROCEDURES**

**Section 1: Definitions**

The following definitions shall be used throughout this AFL unless otherwise noted.

- (a) Duplicate. "Duplicate" means a counterpart or facsimile copy of the original produced by the same impression or from the same matrix as the original or by some technique of accurate reproduction.
- (b) Hearing Officer. "Hearing officer" means a hearing officer appointed by the Director of the Department of Health Care Services to conduct these hearings pursuant to [W&I Section 14126.022\(f\)](#).
- (c) Hearing. "Hearing" means a proceeding conducted by a hearing officer to resolve facts and issues in dispute.
- (d) Party. "Party" means the facility or the Department of Public Health and their representatives participating in the hearing.
- (e) NHPPD. "NHPPD" means the actual nursing hours performed by direct caregivers per patient day.
- (f) File. "File" means delivery of a pleading or other paper to, and its date stamping by, the Office of Administrative Hearings and Appeals (OAHA), Office of Legal Services, Department of Health Care Services.

- (g) Service. "Service" means the delivery of any legal document through personal delivery, the United States Postal Service or other carrier where an acknowledgment of delivery is obtained by the person or entity making service.
- (h) Request for appeal. "Request for appeal" means "request for hearing."
- (i) Day. "Day" means calendar day.

Section 2: Notice of Penalty

- (a) The Department of Public Health shall notify facilities by written notice of penalties assessed pursuant to W&I Section 14126.022(f) by one or more of the following methods:
  - (1) Personal delivery to the facility;
  - (2) Mail through U.S. Postal Service, certified, return receipt or any carrier with receipt documentation returned to the Department.

Section 3: Request for Hearing

- (a) Pursuant to W&I Section 14126.022(f)(2)(C)(i), a facility may request a hearing for any penalty issued in accordance with W&I Section 14126.022 as follows:
  - (1) A written request in accordance with Section 3(b) shall be filed with the Department of Health Care Services, with a copy served on the Department of Public Health, within 15 days of the receipt of the written notice of the audit or examination findings. The request shall be sent by facsimile or regular mail to the following:

Office of Administrative Hearings and Appeals  
1029 J Street, Suite 200  
MS 0016  
Sacramento, CA 95814

Facsimile (916) 323-4477

And

Department of Public Health  
Office of Legal Services  
1501 Capitol Avenue, MS 0506  
P.O. Box 997377  
Sacramento, CA 95899-7377

Facsimile (916) 440-7709

(2) All late requests for hearings shall be denied and the assessed penalty deemed final unless the facility shows good cause for late filing of the appeal request. Good cause will be determined by OAHA prior to the acceptance or rejection of the late appeal.

(b) The request for hearing shall be known as the "Statement of Disputed Issues." It shall be in writing, signed by the facility or its authorized agent, and shall state the physical address of the facility and the name of the agent, if any agent has been designated, and the e-mail addresses of both. The request for hearing shall also include the telephone numbers, mailing addresses, email addresses, and facsimile numbers for both the facility and any designated agent. A facility or the agent shall specify the name and address of the individual authorized on behalf of the facility to receive any and all documents, including the final decision, relating to proceedings conducted pursuant to this article. The Statement of Disputed Issues need not be formal, but it shall be specific as to each issue in dispute, setting forth the facility's contentions as to those issues. The Statement of Disputed Issues shall be accompanied by all documents the facility intends to submit into evidence at hearing.

#### Section 4: Issues Not Subject to Appeal

The authorizing statute provides for a hearing conducted by a non-attorney hearing officer. As such, issues which are not subject to appeal under this section are:

- (a) The date and the number of days audited by the Department of Public Health or the Department of Health Care Services.
- (b) The procedures contained in the AFL issued by the Department of Public Health that govern the audit process.
- (c) The appeal process contained in this AFL.
- (d) Any information reported by the facility to the auditor.
- (e) Issues related to other facilities not subject to the audit at issue.
- (f) Issues of law, such as laches, estoppel, or res judicata
- (g) Failure of the Department of Public Health or Department of Health Care Services to meet statutory deadlines.
- (h) Noncompliance with the minimum staffing requirement not resulting in a penalty.

#### Section 5: Provision of Documents by the Department of Public Health

Within 10 days of receipt of the facility's request for appeal, the Department of Public Health shall submit to the appealing facility and to the Department of Health Care Services all

supporting documents that the Department of Public Health intends to introduce into evidence at the hearing. These documents shall be delivered electronically through email to the addresses provided by the facility unless the facility does not have the capability to receive electronic documents. In the alternative, the Department of Public Health shall send the documents in the same manner required for the Notice of Penalty.

#### Section 6: Time, Place, and Notice of Hearing

All hearings shall be held in Sacramento at a date, time, and location to be determined by OAHA, Department of Health Care Services. Written notice of the time and place of formal hearing shall be electronically mailed by the OAHA to the email addresses designated by each party at least 20 days before the date of hearing. This period may be shortened with the consent of the parties. Any party may waive notice. The hearing date will not be rescheduled unless good cause is submitted to the Hearing Officer prior to the hearing date and within one business day of when the party becomes aware of the need for a continuance. The Hearing Officer shall determine whether good cause exists.

#### Section 7: Discovery

- (a) Discovery is limited to the following. The parties shall exchange all relevant documents which they intend to introduce into evidence at hearing. As previously set forth, the facility's documents are to accompany the Statement of Disputed Issues, and the Department of Public Health is to produce its documents within 10 days of receipt of the Statement of Disputed issues. At the stated times, each party shall also provide to the other party:
- (1) The names and addresses of witnesses to the extent known to the other party, including, but not limited to, those intended to be called to testify at the hearing. If a witness does not proficiently speak or understand English, at the time discovery is provided the proponent of the witness shall file a request with OAHA that an interpreter be provided at the hearing in accordance with Section 8(j).
  - (2) Statements of witnesses then proposed to be called by the party and of other persons having personal knowledge of the acts, omissions, or events which are the basis for disputed audit or examination findings.
  - (3) All writings, including but not limited to audit work papers, patient ledgers, and invoices or things which the party then proposes to offer into evidence.
- (b) Nothing in this section shall require the disclosure of any writing or thing which is privileged from disclosure by law or otherwise made confidential or protected as the attorney's work product.
- (c) The provisions of this article provide the exclusive right to and method of discovery as to any proceeding governed by this article.

Section 8: Conduct of Hearing

- (a) Testimony shall be taken only on oath, affirmation, or penalty of perjury.
- (b) The proceedings at the hearing shall be electronically recorded.
- (c) Each party shall have the right to:
  - (1) Call and examine parties and witnesses.
  - (2) Introduce and authenticate the documents it has previously provided as those intended to be submitted into evidence.
  - (3) Question opposing witnesses and parties on any matter relevant to an appealable issue even though the matter was not covered in the direct examination.
  - (4) Impeach any witness regardless of which party first called the witness to testify.
  - (5) Rebut the evidence against it.
- (d) The hearing need not be conducted according to technical rules relating to evidence and witnesses, with the exception of requirements set forth in these procedures.
  - (1) Any relevant evidence shall be admitted if it is the sort of evidence on which responsible persons are accustomed to rely in the conduct of serious affairs, regardless of the existence of any common law or statutory rule which might make improper the admission of such evidence over objection in civil actions.
  - (2) Hearsay evidence may be used for the purpose of supplementing or explaining other evidence but over timely objection shall not be sufficient in itself to support a finding unless it would be admissible over objection in civil actions. An objection is timely if made before submission of the case for decision.
  - (3) The rules of privilege shall be effective to the same extent that they now or hereafter may be recognized in civil actions.
  - (4) Irrelevant and unduly repetitious evidence, as determined by the hearing officer, shall be excluded.
- (e) The following additional exception to the “best evidence” rule ([Evidence Code Section 1520](#)) applies:
  - (1) A duplicate is admissible to the same extent as an original unless:

- (a) A genuine question is raised as to the authenticity of the original or the duplicate.
- (b) It would be unfair to admit the duplicate in lieu of the original.
- (f) The hearing officer shall control the taking of evidence in a manner best suited to ascertain the facts and safeguard the rights of the parties. Prior to taking evidence, the hearing officer shall set forth the order in which evidence will be received. The hearing officer may hear any issue before any other issue in the proceeding where it is found that the decision on that issue could abate further proceedings. The hearing officer may question any party or witness.
- (g) The Department of Public Health shall present its audit findings and evidence first at the hearing. The Department of Public Health has the burden of proof of demonstrating, by a preponderance of the evidence, that the audit findings were correctly made. Once the Department has presented such a prima facie case, the burden of proof shifts to the facility to demonstrate, by a preponderance of the evidence, that the facility's position regarding the disputed issues is correct.
- (h) The burden of producing evidence as to a particular fact is on the party against whom a finding on that fact would be required in the absence of further evidence.
- (i) The hearing shall be conducted in the English language. If a party or witness does not proficiently speak or understand English and language assistance was requested in accordance with Section 7(a)(1), an interpreter, certified pursuant to Government Code section 11435.30, shall be provided at state expense. If no certified interpreter is available, the hearing officer may authorize the use of another interpreter if the hearing officer determines that the interpreter has adequate skills and experience to provide correct interpretation.

#### Section 9: Continued or Further Hearings

- (a) The hearing officer, in his or her sole discretion, may continue a hearing to another time or place, or order a further hearing, either on the hearing officer's own motion, or upon the request of any party with a showing of good cause.
  - (1) Notice of the time and place of the continued or further hearing, except as provided herein, shall be provided in the same manner as required for the initial Notice of Hearing.
  - (2) Oral notice of the time and place of the continued hearing may be given to each party present at a hearing. Such oral notice shall subsequently be confirmed in the same manner as required for the initial Notice of Hearing.

Section 10: Representation at a Hearing

- (a) A hearing officer may refuse to allow any person to represent a party in any hearing when the person:
- (1) Engages in unethical, disruptive, or contemptuous conduct.
  - (2) Intentionally fails to comply with the proper instructions or orders of the hearing officer or the provisions of this article.
- (b) This section shall not be construed to limit the right of a party or its representative to make evidentiary and procedural objections and state the reasons for those objections

Section 11: Disqualification of Hearing Officer

- (a) A hearing officer shall voluntarily withdraw from any proceedings in which the hearing officer:
- (1) Cannot give a fair or impartial hearing.
  - (2) Has an interest.
- (b) A party may request the disqualification of a hearing officer by filing an affidavit stating in detail the grounds upon which it is claimed that a fair and impartial hearing cannot be given or that the hearing officer has an interest in the proceeding. The hearing officer shall immediately present the affidavit to the Chief of Appeals, Office of Administrative Hearings and Appeals, Department of Health Care Services, who shall:
- (1) Investigate the allegations and advise the complaining party in writing of the decision granting or denying the request to disqualify the hearing officer. A copy of the decision shall be mailed to the other parties. Or
  - (2) Reassign the case to another hearing officer without investigation.

Section 12: Decision

- (a) The hearing officer shall take the matter under submission at the conclusion of the hearing. A decision shall be issued within the 120 day period set forth in W&I Section 14126.022(f)(2)(D)(ii). The hearing officer's decision is the final decision of the Director of the Department of Public Health. No further administrative appeal is available. A copy of the decision shall be:
- (1) Filed by the Department of Health Care Services as a public record.
  - (2) Served by the Department of Health Care Services on each party in the case and each party's representative.

- (b) A dismissal decision based upon default shall be issued, without the taking of evidence, if a facility fails to appear at a hearing. A copy of the decision shall be filed and served as set forth in (a) above. The decision shall include a statement that, if the facility had good cause for the failure to appear, it may submit a statement of good cause and request that the decision be vacated and the hearing reconvened. Any such request must be filed with the hearing officer within seven days of receipt of the decision. The hearing officer's decision to vacate, or not vacate, the decision is final. No further administrative review is available.

### Section 13: Recovery of Penalty Amount

Upon receipt of a decision concluding that the facility was in violation of the 3.2 NHPPD requirements, or upon receipt of a dismissal decision based upon default, the facility shall pay the administrative penalty to the Department of Public Health within 30 days of receipt of the decision. The facility shall pay \$15,000 if a decision concludes, or the Department alleged in a dismissed appeal, that at least 5 percent of the days audited did not meet or exceed the 3.2 NHPPD requirement. The facility shall pay \$30,000 if a decision concludes, or the Department alleged in a dismissed appeal, that over 49 percent of the days audited did not meet or exceed the 3.2 NHPPD requirement.

If you have questions regarding this AFL contact Roseliz Kondo, Office of Legal Services, California Department of Public Health, at (916) 440-7764.

Sincerely,

**Original Signed by Pamela Dickfoss**

Pamela Dickfoss  
Acting Deputy Director  
Center for Health Care Quality