



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



February 7, 2022

AFL 22-08

TO: Skilled Nursing Facilities

SUBJECT: Appeal Procedures for Direct Care Service Hours Per Patient Day Penalties

AUTHORITY: Welfare and Institutions Code (WIC) section 14126.022

All Facilities Letter (AFL) Summary

- This AFL announces updates to WIC section 14126.022 regarding penalties and appeal rights for skilled nursing facilities (SNFs) that are non-compliant with the direct care service hours per patient day (DHPPD) requirement.
- This AFL provides SNFs with the procedures for appealing penalties assessed as a result of staffing audits for non-compliance with DHPPD requirements for nurses and certified nurse assistants.

Background

On June 29, 2020, WIC section 14126.022 was amended to increase penalties and expand appeal rights for SNFs found non-compliant with the minimum nurse staffing requirement. SNFs found to be non-compliant with the minimum staffing requirements on fewer than five percent of the audited days[1] now have the right to request an administrative appeal, even though these SNFs are not subject to an administrative penalty. All other non-compliant SNFs will be subject to increased administrative penalties of \$25,000 for having between 5 percent and 49 percent non-compliant days, or \$50,000 for more than 49 percent non-compliant audited days.

In accordance with amended WIC section 14126.022, this AFL establishes the guidelines for SNF appealing penalties assessed as a result of staffing audits for compliance with the 3.5 DHPPD and the 2.4 minimum DHPPD for certified nurse assistants (CNA) staffing requirements, as found in Health and Safety Code section 1276.65. These are the sole guidelines to be used in the appeal process.

Appeal Procedures

Definitions

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

- "Acceptance" means the Department of Health Care Services (DHCS) Office of Administrative Hearings and Appeals' (OAHA) determination that the appeal transmitted to OAHA meets the requirements for appeals contained in this AFL.
- "Assessment" means administrative penalty or fine.
- "Day" or "business day" both mean any weekday that is not an official State or Federal holiday.
- "DHPPD" means the actual direct care service hours performed by direct caregivers per patient day.
- "File" means the transmittal of an appeal received and accepted by OAHA.

- "Hearing" means a proceeding conducted by a hearing officer to resolve facts and issues in dispute that provides both parties with the opportunity to examine witnesses.
- "Hearing officer" means an individual appointed by the Director of DHCS to conduct these hearings pursuant to WIC section 14126.022(f).
- "Party" means the SNF or the California Department of Public Health (CDPH) and their representatives.
- "Service" means providing any legal document to the opposing party through personal delivery, the U.S. Postal Service, or other carrier where an acknowledgment of delivery is obtained by the person or entity making service, or by electronic transmission to the E-fax mailboxes listed in the ***Request for Hearing*** section, number 1, below.

Notice of Penalty

CDPH shall provide facilities with written notice of penalties assessed pursuant to WIC section 14126.022(f) by one or more of the following methods:

- Personal delivery to the facility.
- Mail through U.S. Postal Service, certified, return receipt, or any carrier with receipt documentation returned to CDPH.
- Electronic mail to the facility and/or licensee.

Request for Hearing

Pursuant to WIC section 14126.022(f)(2)(C)(i), a facility may request a hearing for any penalty issued in accordance with WIC section 14126.022 as follows:

1. Within 15 business days after it receives written notice of the audit findings, a facility seeking a hearing shall file a written request for a hearing with DHCS and shall serve a copy on CDPH. The request shall be sent by electronic facsimile or regular mail to the following:

California Department of Health Care Services

Office of Administrative Hearings and Appeals

3831 North Freeway Blvd., Suite 200

Sacramento, CA 95834

Facsimile (916) 323-4477

And

California Department of Public Health

Office of Legal Services

1415 L Street, Suite 500

Sacramento, CA 95814

Facsimile (916) 636-6221

2. The request for hearing shall be known as the "Statement of Disputed Issues":
 - The Statement of Disputed Issues shall be in writing, signed by the SNF or its authorized agent, and shall state the physical address of the SNF and the name of the agent, if any agent has been designated, and the email addresses of both.
 - The Statement of Disputed Issues shall also include the telephone numbers, mailing addresses, and facsimile numbers for both the SNF and any designated agent.
 - A SNF or the agent shall specify the name and address of the individual the SNF authorizes to receive all documents relating to proceedings conducted pursuant to this AFL, including the final decision.

- The Statement of Disputed Issues need not be formal, but it shall be specific as to each disputed issue and shall specify the SNF's contentions as to those issues.
- The Statement of Disputed Issues shall be accompanied by all documents the SNF intends to introduce into evidence at hearing.

Issues Not Subject to Appeal

WIC section 14126.022 provides for a hearing conducted by a non-attorney hearing officer. As such, issues that are not subject to appeal under this section are:

- The audit dates and number of days CDPH audited
- The procedures contained in the CDPH-issued AFL 21-11 Guidelines for 3.5 DHPPD Staffing Audits that govern the audit process
- The appeal process contained in this AFL
- CDPH's process for establishing and granting waivers from nurse staffing standards
- Any information the facility reported to the auditor
- Issues of law, such as laches, estoppel, res judicata, or due process
- CDPH's and/or DHCS' failure to meet statutory deadlines
- CDPH's databases maintained in the ordinary course of business, including the database maintained for these audits and any system used to verify nursing certification status or training status

Documents Provided by CDPH

Within 10 business days after OAHA accepts the facility's hearing request, CDPH shall submit all supporting documents that CDPH intends to introduce into evidence at the hearing to the appealing facility and to OAHA. These documents should be delivered electronically through email to the addresses the facility provides unless the facility does not have the capability to receive electronic documents. Alternatively, CDPH shall send the documents in the same manner required for the Notice of Penalty.

Time, Place, and Notice of Hearing

All hearings shall be held in Sacramento at a date, time, and location that OAHA determines, or conducted by any other method permitted pursuant to a declaration of emergency and/or emergency order. At least 20 days before the hearing date, OAHA shall email written notice of the hearing's time and place to each party at their designated email address. This period may be shortened with the parties' consent. Any party may waive notice.

Discovery

Discovery is limited to the following. The parties shall exchange all relevant documents that they intend to introduce into evidence at hearing. As previously set forth, the SNF's documents are to accompany the Statement of Disputed Issues, and CDPH is to produce its documents within 10 business days of receipt of the Statement of Disputed Issues. At the specified times, each party shall also provide to the other party:

1. The names and addresses of witnesses to the extent known to the 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.
2. List of witnesses that the party intends to call to testify, including their name, title, and the scope of their testimony.
3. All writings, including, but not limited to, audit work papers, and invoices or things that the party intends to offer into evidence.

Nothing in this section shall require the disclosure of any writing or thing that is privileged from disclosure by law or otherwise made confidential or protected as the attorney's work product or attorney client-privileged.

This section's provisions provide the exclusive right to and method of discovery as to any proceeding governed by this AFL.

Conduct of Hearing

The following is applicable to the conduct of hearing:

- Testimony shall be taken only on oath, affirmation, or penalty of perjury.
- The hearing's proceedings shall be electronically recorded.
- Each party shall have the right to:
- Call and examine parties and witnesses.
- Introduce and authenticate the documents it has previously provided as those intended to be introduced into evidence.
- Question opposing witnesses and parties on any matter relevant to an appealable issue even though the matter was not covered in the direct examination.
- Impeach any witness regardless of which party first called the witness to testify.
- Rebut the evidence against it.
- Except for the requirements in this AFL, the hearing need not be conducted according to technical rules relating to evidence and witnesses.

Any relevant evidence shall be admitted if it is the sort of evidence on which responsible persons are accustomed to relying in the conduct of serious affairs, regardless of the existence of any common law or statutory rule that might make improper the admission of such evidence over objection in civil actions.

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.

The rules of privilege shall be effective to the same extent that they are now or hereafter may be recognized in civil actions.

Irrelevant and unduly repetitious evidence, as determined by the hearing officer, shall be excluded.

The following additional exception to the "best evidence" rule (Evidence Code section 1520) applies – A duplicate is admissible to the same extent as an original, unless:

- A genuine question is raised as to the authenticity of the original or the duplicate, or
- It would be unfair to admit the duplicate in lieu of the original.

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. Before 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.

CDPH shall present its audit findings and evidence first at the hearing. CDPH has the burden of proof of demonstrating, by a preponderance of the evidence, that the audit findings were correctly made. Once CDPH has presented such a prima facie case, the burden of proof shifts to the SNF to demonstrate, by a preponderance of the evidence, that the facility's position regarding the disputed issues is correct.

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.

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 the Discovery section, number 1, of this AFL above, 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.

Continued or Further Hearings

Either on the hearing officer's own motion or on any party's request and showing of good cause, the hearing officer, in his or her sole discretion, may continue a hearing to another time or place or order a further hearing.

- 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.

- 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.

Representation at a Hearing

A hearing officer may refuse to allow any person to represent a party in any hearing when the person:

- Engages in unethical, disruptive, or contemptuous conduct, or
- Intentionally fails to comply with the proper instructions or orders of the hearing officer or the provisions of this section.

This section shall not be construed to limit the right of a party or its representative to make evidentiary and procedural objections and to state the reasons for those objections.

Disqualification of Hearing Officer

A hearing officer shall voluntarily withdraw from any proceedings in which the hearing officer:

- Cannot give a fair or impartial hearing, or
- Has an interest.

A party may request the disqualification of a hearing officer by filing an affidavit stating in detail the grounds on 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 OAHA Chief of Appeals, who shall:

- 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
- Reassign the case to another hearing officer without investigation.

Decision

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 WIC section 14126.022(f)(2)(D)(ii). The hearing officer's decision is the final decision of the Director of CDPH. No further administrative appeal is available. A copy of the decision shall be:

- Retained by OAHA as a public record.
- Served by OAHA on each party in the case and each party's representative.

If a SNF fails to appear at a hearing, a dismissal decision based on default shall be issued without the taking of evidence. A copy of the decision shall be filed and served, as described above. The decision shall include a statement that, if the SNF 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.

Recovery of Penalty Amount

Within 30 days of receiving either a decision concluding that the SNF facility was in violation of the 3.5 or 2.4 DHPPD requirement or a dismissal decision based on default, the SNF shall pay the administrative penalty to CDPH.

- The SNF shall pay \$25,000 if a decision concludes or CDPH alleged in a dismissed appeal that at least five (5) percent and up to 49 percent of the days audited did not meet or exceed the 3.5 or 2.4 DHPPD requirement.
- The SNF shall pay \$50,000 if a decision concludes or CDPH alleged in a dismissed appeal that over 49 percent of the days audited did not meet or exceed the 3.5 or 2.4 DHPPD requirement.

Questions

If you have questions regarding this AFL, please email your inquiry to CDPHLegal@cdph.ca.gov and address it to Staffing Audits Appeals team.

Sincerely,

Original signed by Cassie Dunham

Cassie Dunham

Acting Deputy Director

[1] Equates with one-day non-compliant out of 24 audited days.

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