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CLEARINGHOUSE RULE 97-047

Comments

[NOTE: All citations to “Manual” in the comments below are to the Administrative Rules Procedures Manual, prepared by the Revisor of Statutes Bureau and the Legislative Council Staff, dated October 1994.]

1. Statutory Authority

a. Section 50.50 (6), Stats., provides that, for purposes of subch. III, ch. 50, Stats., relating to rural medical centers, “[h]ospital’ has the meaning given in s. 50.33 (2) (a) or (b), except that ‘hospital’ does not include a rural primary care hospital.” In contrast, s. HFS 127.02 (10) has a broader definition inasmuch as it provides that “[h]ospital’ has the meaning given in s. 50.33 (2), Stats.” This broader definition includes a hospital as defined in s. 50.33 (2) (c), Stats., and a rural primary care hospital. It appears that there is no statutory authority for broadening the definition of “hospital” in the rule.

b. Section 50.55 (1) (a), Stats., provides that any person who violates subch. III, ch. 50, Stats., or any rule promulgated under subch. III, ch. 50, Stats., except s. 50.54 (2), Stats., may be required to forfeit not less than \$100 nor more than \$500 for each offense. However, s. HFS 127.07 (5) indicates that the Department of Health and Family Services (DHFS) “may assess forfeitures in the manner prescribed by s. 50.55, Stats., against any person who violates any **requirement** of this chapter, **except** that for violations involving the provision by a rural medical center of hospice services or nursing home services, forfeitures shall be assessed in the manner prescribed by s. 50.98, Stats., for hospice services and ss. 50.03 (13) (d) and 50.04 (5), Stats., for nursing home services” (emphasis added).

There appears to be no statutory authority for making these exceptions with respect to hospice services or nursing home services.

Also, s. HFS 127.07 (5) does not clearly provide an exception to the forfeiture provisions for violations of s. 50.54 (2), Stats., as required by s. 50.55 (1) (a), Stats., even though criminal

penalties are provided in s. HFS 127.07 (4) for violations of s. 50.54 (2), Stats. It could be argued that the violations of s. 50.54 (2), Stats. (which are included in s. HFS 127.07 (3) (a) to (c)), are not violations of any “requirement” of ch. HFS 127 and, thus, are not included in s. HFS 127.07 (5), and, thus, there is no conflict with the statutes. However, if this line of reasoning is accepted, then violations of s. HFS 127.07 (3) (d) to (f) also are not violations of any “requirement” and, thus, would not be subject to forfeiture. As it appears that this result was not intended, it appears that this line of reasoning is inappropriate. As discussed in item 5. s., below, it is suggested that s. HFS 127.07 (5) be changed to clearly provide an exception to the forfeiture provisions for violations of s. 50.54 (2), Stats.

c. Section 50.55 (1) (d), Stats., provides that a rural medical center may contest an assessment of forfeiture by sending, within 10 days after receipt of notice, a written request for hearing. The use of the phrase “10 days” normally refers to calendar days in the statutes. [See, for example, ss. 227.01 (14) and 990.001 (4), Stats.] Section HFS 127.07 (6) provides that a rural medical center that chooses to contest any department assessment may request a hearing by sending, within 10 working days after receipt of a notice of assessment, a written request for hearing. What statutory authority exists for interpreting the statutory provision to mean “10 working days”?

d. Section HFS 127.15 provides that a rural medical center licensed under ch. HFS 127 which meets various standards “shall be construed for purposes including but not limited to insurance, tax-exempt financing and reimbursement or payment for services, as the equivalent of the service-specific health care service provider that provides the same specified services.” Subchapter III, chapter 50, Stats., does not provide for such, and it is not clear that there is statutory authority for this provision. For example, it is not clear that, absent some provision in chs. 600 to 655, Stats., relating to insurance, such a requirement can be imposed on an insurer. What is the source of statutory authority for this provision?

4. Adequacy of References to Related Statutes, Rules and Forms

a. In s. HFS 127.01 (2), the reference to s. HFS 127.02 (20) should be changed to s. HFS 127.02 (22).

b. In s. HFS 127.03 (2) (a), the reference to s. HFS 127.02 (23) should be changed to s. HFS 127.02 (22).

c. Section HFS 127.03 (8) (a) 2. a. specifies that DHFS must provide written notice of a suspension or revocation at least 30 days before it takes effect. However, s. HFS 127.03 (8) (a) 2. b. appears to create an exception to that 30-day notice provision if there is an emergency. Therefore, the last sentence of s. HFS 127.03 (8) (a) 2. a. should provide a cross-reference to that exception, for example, by inserting the following at the beginning of the last sentence: “Except as provided in subd. par. b.”.

5. Clarity, Grammar, Punctuation and Use of Plain Language

a. In the first sentence of the fifth paragraph of the analysis, reference to outpatient occupational therapy services should be included in the list of health care services that a rural

medical center may provide. [See s. 50.50 (3) (cm), Stats.] Also, the reference to “end-stage renal disease” should be changed to “end-stage renal disease services.”

b. In s. HFS 127.02 (18), the term “health services” should be changed to the defined term “health care services.” Also, the use of the phrase “person or persons” and the use of the term “person” should be made consistent.

c. In s. HFS 127.03 (21), the definition of the term “rural health clinic” refers to provisions in the Code of Federal Regulations. However, the definition of the term in the statutes refers to a federal statute. Why is the rule citation different?

d. In s. HFS 127.03 (1), it appears that a comma should be inserted before the last occurrence of the phrase “a rural medical center.”

e. Section HFS 127.03 (2) (a) 5. specifies that information must be provided about the identities of all creditors holding a security interest in the premises, whether land or buildings. This would not require that information be provided about lessors of the premises. Did DHFS also intend to solicit information about lessors? If so, this should be specified.

f. Section HFS 127.03 (2) (a) 6. specifies that information must be provided about the names and qualifications of persons serving on the rural medical center’s board of directors. Did DHFS also intend to require information about their addresses? If so, this should be specified.

g. Section HFS 127.03 (2) (a) 7. provides that in the case of a change in ownership, the application for an initial license must disclose relationships or connections “among the prior licensee, the new licensee, any owner or operator of the prior licensee and the owner or operator of the new licensee.” Because there is no “new licensee” when the application is filed, it seems inappropriate to refer to the applicant as the “new licensee.” A term such as “applicant” or “proposed licensee” would appear to be more appropriate for the first use of the term “new licensee” in s. HFS 127.03 (2) (a) 7.

Also, the term “owner or operator of the prior licensee” is confusing. If it means “prior owner or operator of the rural medical center,” the latter term should be used. A similar comment applies with respect to “owner or operator of the new licensee.” It appears that the term “new owner or operator of the rural medical center” should be substituted.

On a related note, s. HFS 127.03 (7) (a) 1. requires that if a rural medical center provides nursing home services, then “any changes in the license” must be reported to DHFS at least 30 days prior to the change. Because DHFS determines if and when any applicant becomes a new licensee, it is not possible for the rural medical center to know when the change in licensees will occur in order to meet this deadline. Was it intended that any change in ownership be reported at least 30 days prior to the change? If so, s. HFS 127.03 (7) (a) 1. should be changed to reflect this.

h. In s. HFS 127.03 (3) (a) 4., the word “to” should be replaced by the word “and.”

i. Section 50.52 (2) (c) 1., Stats., refers to “current, valid state licensure” Section HFS 127.03 (4) (a) similarly refers to “current, valid state licenses” In contrast, s. HFS

127.03 (4) (b) 1. a. and 2. refer to “valid state licenses.” While it is not clear that omission of the word “current” in the latter two provisions changes the meaning, any possible ambiguity should be eliminated by choosing one phrase and using it consistently.

j. In s. HFS 127.03 (4) (b) 1. b., the reference to “their license” should be changed to “its license.”

k. Section HFS 127.03 (4) (d) 6. c. indicates that in reviewing applications to determine if an applicant is in good standing, DHFS must consider “[a]ny conviction of the applicant by a court of law for a crime related to” “Applicant” is defined in s. HFS 127.02 (3) as an entity or individual applying to be licensed as a rural medical center. It is not clear who must apply for the license, for example, the operator, director or administrator, all of whom are referred to in s. HFS 127.07 (1), or the owner. Also, if a corporate owner applies for the license, it appears that the criminal record of the operator, if different from the owner, is not pertinent. Was this result intended?

In addition, no mechanism is provided in the rule to conduct a criminal background investigation of the applicant. Thus, it is not clear how DHFS will obtain the necessary information in order to be able to consider any convictions.

l. Section HFS 127.03 (7) (b) 1. requires application for a license if the licensee transfers title of the rural medical center “to another person or firm.” It is not clear what a “firm” means. If it is intended that a new application is required whenever there is any transfer of title, the phrase “to another person or firm” could be eliminated.

m. Section HFS 127.03 (7) (b) 1. to 3. each set forth a circumstance under which an application for a new license is required. Section HFS 127.03 (7) (b) 3. then adds the following sentence: “The license may be a provisional license.”

The purpose for adding this last sentence is unclear. The definition of a “provisional license” in s. HFS 127.02 (18) is limited to the approval given to persons who are either not currently licensed by DHFS or certified by the federal government to provide one or more of the health care services that the person seeks to provide as a rural medical center. If the applicant for a license who is applying because of the provision in s. HFS 127.03 (7) (b) 3. already has a current license elsewhere, then, by definition, the license could not be a provisional license.

In addition, even if it could be a provisional license because the person is not currently licensed elsewhere, the reason for including the sentence in only s. HFS 127.03 (7) (b) 3., rather than making it applicable also to s. HFS 127.03 (7) (b) 1. and 2., is unclear.

n. Section HFS 127.03 (8) (a) 2. b. provides that DHFS may, “in the event of an emergency condition that imminently threatens the health or safety of rural medical center patients, suspend new admission to all or part of the rural medical center or suspend” The following comments apply:

- (1) Because s. HFS 127.02 (17) and (20) distinguish between “patients” and “residents,” reference to threats to “residents” also should be included.

- (2) Assuming that this is intended to be modeled after s. 227.51 (3), Stats., reference to a threat to the “welfare” of the patients or residents also should be included.
- (3) In order to avoid ambiguity as to whether prior notice is required for suspension in these emergency situations, it is suggested that the language from s. 227.51 (3), Stats., be used by changing both uses of the term “suspend” to “order summary suspension of.”
 - o. In s. HFS 127.03 (8) (d) 2., it appears that reference to suspension also should be included.
 - p. In s. HFS 127.05 (2) (b), the second-to-last occurrence of the word “or” should be replaced by a comma. [See s. 146.82 (2) (a) 5., Stats.]
 - q. In s. HFS 127.05 (4), suspension of the license is not included. Was this omission intentional?
 - r. In s. HFS 127.07 (3) (a), the word “and” should be changed to “or.” Also, it appears that the title to sub. (3) should simply read: “PROHIBITIONS.”
 - s. Section HFS 127.07 (5) permits assessment of a forfeiture against any person “who violates any **requirement** of this chapter” (emphasis added). Presumably, it is intended that a violation of s. HFS 127.07 (3) (d), (e) or (f) could result in assessment of a forfeiture. However, s. HFS 127.07 (3) (d) to (f) are not “requirements” but, rather, are prohibitions. In order to make clear that the forfeiture provisions apply, it appears to be more appropriate to change s. HFS 127.07 (5) to permit assessment of a forfeiture against any person “who violates any **provision** of this chapter” (emphasis added). [However, as discussed in item 1. b., above, if this language is changed, an exception should be added for violations of s. HFS 127.07 (3) (a) to (c), as those violations are subject to criminal penalty rather than forfeiture.]
 - t. Two different addresses are given for the Department of Administration, Division of Hearings and Appeals. [See the Notes following ss. HFS 127.03 (8) (g), 127.07 (6) and 127.08 (3) (c) 2.] Was this intentional?
 - u. In s. HFS 127.08 (2) (c) and (3) (a) 1. d., the word “of” should be inserted before the word “management.”
 - v. Section HFS 127.08 (3) (b) 4. provides that the terms of a variance may be modified only upon agreement. May the terms of a waiver also be modified? If so, this should be specified. Also, if it is intended that the agreement to modify terms be in writing, this should be specified.