

CR 92-81

CERTIFICATE

STATE OF WISCONSIN)
) SS
DEPARTMENT OF HEALTH AND SOCIAL SERVICES)

I, Gerald Whitburn, Secretary of the Department of Health and Social Services and custodian of the official records of the Department, do hereby certify that the annexed rules relating to complaints of aide misconduct toward residents or patients were duly approved and adopted by this Department on November 13, 1992.

I further certify that this copy has been compared by me with the original on file in the Department and that this copy is a true copy of the original, and of the whole of the original.

IN TESTIMONY WHEREOF, I have hereunto set my hand and affixed the official seal of the Department at the State Office Building, 1 W. Wilson Street, in the city of Madison, this 13th day of November, 1992.



Gerald Whitburn, Secretary
Department of Health and Social Services

SEAL:

RECEIVED
NOV 13 1992
9:10 am
Revisor of Statutes
Bureau

1-1-93

ORDER OF THE
DEPARTMENT OF HEALTH AND SOCIAL SERVICES
RENUMBERING, AMENDING, REPEALING AND
RECREATING AND CREATING RULES

To renumber HSS 129.10(2)(intro.) and (a) to (j) and 129.11; to amend HSS 129.05(1)(a) and 129.10(2)(a)8 and 9 and (b), as renumbered; to repeal and recreate HSS 129.03(1); and to create HSS 129.11 and Appendix A, relating to entering on the Department's registry of nurse assistants and aides information about any substantiated allegations of misconduct toward a resident or patient.

Analysis Prepared by the Department of Health and Social Services

This rulemaking order amends ch. HSS 129, Wis. Adm. Code, the Department's administrative rules for certification of training and competency evaluation programs for nurse assistants, home health aides and hospice aides and operation of a registry of nurse assistants and aides. The amendments incorporate and fill in the process outlined in s. 146.40(4r), Stats., for the Department to follow in receiving and investigating complaints that a nurse assistant or aide has abused or neglected a resident or patient or misappropriated the property of a resident or patient and in entering any findings in the registry of nurse assistants and aides.

Federal regulations at 42 CFR 483.156 cover establishment and operation of the registry of nurse assistants and aides, the contents of the registry and disclosure of information from the registry. The regulations went into effect on April 1, 1992. States were required to comply with them beginning on that date. The Department published emergency rules for this purpose with an April 1, 1992 effective date. These are the permanent rules that will replace the emergency rules.

Under 42 CFR 483.156 a state must include in the registry information on any documented finding of abuse or neglect of a resident or patient by a nurse's assistant or aide or misappropriation of the property of a resident or patient by a nurse's assistant or aide, along with information about the outcome of any hearing on the allegation and a statement by the nurse's assistant or aide disputing the findings if the individual chooses to provide that statement.

The Department's rules define "abuse" broadly to include neglect and mistreatment, define "misappropriation of property", state how a complaint is to be submitted to the Department and how the Department is to proceed with its investigation and with its notification of the nurse's assistant or aide, provide an

opportunity for the nurse's assistant or aide to have a hearing to appeal an adverse finding and, even if the hearing officer concludes that there is reasonable cause to believe that the incident occurred, permit the individual to provide a statement disputing the Department's or the hearing officer's findings which the Department must then insert in the registry.

This order also amends s. HSS 129.05(1)(a) to add a reference to hospice aides that had been inadvertently omitted when ch. HSS 129 was recently extensively amended to add hospice aides wherever nurse assistants and home health aides were mentioned.

The Department's authority to renumber, amend, repeal and recreate and create these rules is found in ss. 146.40(4r) and 227.11(2), Stats. The rules interpret s. 146.40(4g) and (4r), Stats.

SECTION 1. HSS 129.03(1) is repealed and recreated to read:

HSS 129.03(1) "Abuse" means conduct evincing such willful and wanton disregard of a client's physical and mental needs and interests as is found in deliberate violations or disregard of client rights, or in carelessness or negligence of such degree or frequency as to manifest equal culpability, wrongful intent or evil design, or to show an intentional and substantial disregard of the aide's duties and obligations to the client. Mere inefficiency, unsatisfactory conduct, failure in good performance as the result of inability or incapacity, inadvertency or ordinary negligence in isolated instances, or good faith errors in judgment or discretion are not deemed to be abuse. "Abuse" includes neglect and mistreatment.

SECTION 2. HSS 129.05(1)(a) is amended to read:

HSS 129.05 CERTIFICATION PROCEDURES. (1) APPLICATION. (a) Application for certification of an instructional program for nurse assistants, home health aides or hospice aides or a competency evaluation program for nurse assistants ~~or~~ home health aides or hospice aides shall be made on a form provided by the department.

SECTION 3. HSS 129.10(2)(intro.) and (a) to (i) are renumbered 129.10(2)(a)(intro.) and 1 to 9, and HSS 129.10(2)(a)8 and 9, as renumbered, are amended to read:

HSS 129.10(2)(a)8 Competency evaluation program number, if applicable; and

(9) Date of completion approved under s. HSS 129.09; if applicable ~~and~~.

SECTION 4. HSS 129.10(2)(j) is renumbered 129.10(2)(b) and HSS 129.10(2)(b), as renumbered, is amended to read:

HSS 129.10(2)(b) ~~Any~~The registry shall also include, in accordance with the procedures set out in s.HSS 129.11, any finding by the department under s.146.40(4r)(b), Stats., or, if appealed, by a hearing officer under s.146.40(4r)(b), Stats., that the nurse's assistant, home health aide or hospice aide has neglected, abused or misappropriated the property of a client, and any statement by the affected nurse's assistant home health aide or hospice aide under s.146.40(4r)(e), Stats., disputing that finding.

SECTION 5. HSS 129.11 is renumbered 129.12.

SECTION 6. HSS 129.11 is created to read:

HSS 129.11 COMPLAINTS OF ABUSE OR MISAPPROPRIATION OF PROPERTY. (1) GENERAL. (a) Definitions. In this section:

1. "Aide" means any person listed on the registry, any individual providing nursing or nursing-related services to clients, a person who is enrolled in an instructional program under s. HSS 129.07, or a competency evaluation program under s. HSS 129.08(2) and (3), or who is currently or was formerly employed as a nurse assistant in a nursing home, facility for the developmentally disabled or hospital, or an aide employed by a home health agency or by a hospice certified under 42 USC 1395 to 1395ccc, whether the services were performed under contract, per diem, lease or on any other basis. "Aide" does not mean an individual who is a licensed health care professional, a registered dietitian or a volunteer.

2. "Health care provider" means a nursing home, facility for the developmentally disabled, hospital or home health agency, or a hospice certified under 42 USC 1395 to 1395ccc.

3. "Licensed health care professional" means a physician, physician's assistant or nurse practitioner, a physical, speech or occupational therapist, a physical or occupational therapy assistant, a registered nurse, a licensed practical nurse or any other health or health service professional subject to the jurisdiction of the Wisconsin department of regulation and licensing.

4. "Misappropriation of property" means intentional taking, carrying away, using, transferring, concealing or retaining possession of a client's property without the client's informed

consent and with intent to deprive the client of possession of such property, or obtaining property of a client by intentionally deceiving the client with a false representation which is known to be false, made with intent to defraud, and which does defraud the person to whom it is made. "False representation" includes a promise made with intent not to carry it out.

5. "Reasonable cause" means that the preponderance of evidence leads the decisionmaker to believe the incident occurred.

(2) COMPLAINTS. (a) Filing a complaint. 1. Any person, health care provider, agency or other entity may complain to the department about abuse or neglect of a client or misappropriation of the client's property occurring on or after April 1, 1992, that involved an aide who at the time the alleged action occurred worked for a health care provider. The complaint shall be received by the department not more than 60 days after the alleged action occurred or is discovered.

2. A complaint may be made orally or in writing. The complainant shall include as part of the complaint the following information, if known:

a. The name of the aide against whom the allegation is made;

b. The name of the health care provider where the alleged incident occurred;

c. The date, time and location of the alleged incident;

d. The name of the client involved in the alleged incident;

e. The name, address and telephone number of the complainant;

f. The names of any witnesses;

g. The names of any individuals with knowledge of the alleged action;

h. The name of the administrator of the health care provider; and

i. A description of the alleged action.

Note: A complaint may be filed with the Department by sending it to the Division of Health, Bureau of Quality Compliance, P.O. Box 309, Madison, Wisconsin 53701 or by writing

or calling the nearest regional office of the Bureau of Quality Compliance. A list of those offices is found in Appendix A.

(b) Notice of mandatory reporting. A nursing home required under 42 CFR 483.13(c)(2) to report an allegation of abuse to state officials, shall notify the aide who is the subject of the allegation that a mandatory report is being made. The notice to the aide shall be made simultaneously with the mandatory reporting. The notice shall include identification with reasonable particularity of the action which is the basis for the allegation.

(c) Investigation. 1. The department shall be responsible for investigating a complaint to determine if the alleged abuse or misappropriation of property took place.

2. Within 5 working days after receiving a complaint of alleged abuse or misappropriation of property, the department shall screen the complaint and make a determination as to whether an investigation is necessary.

3. If the department determines that an investigation of a complaint is not required, it shall notify in writing the complainant, the involved health care provider and the aide who is the subject of the complaint of its determination.

4. If the department determines that an investigation of a complaint is necessary, it shall provide the aide who is the subject of the complaint with written notice of the investigation. The notice shall contain the following:

a. A brief statement regarding the purpose of the investigation;

b. Identification with reasonable particularity of the alleged abuse or misappropriation which is the basis for the investigation and the evidence the allegation is based on;

c. The statute or rule alleged to have been violated;

d. The potential sanctions that could result if the alleged abuse or misappropriation of property is substantiated;

e. A statement that the department is obligated to complete its investigation as soon as possible; and

f. A statement that the aide's right to have a representative of his or her choice present during any contact or discussion with the department's investigators during the course of the investigation.

5. For the period prior to July 1, 1993, the department shall complete its investigation as soon as possible after receiving a complaint. Beginning July 1, 1993, the department shall complete its investigation 60 days after receiving a complaint.

(d) Decision. 1. Upon completing its investigation, the department shall prepare a written decision and mail it to the aide, the health care provider involved in the alleged incident and the complainant.

2. If the department determines there is credible evidence to substantiate the allegation, the department's written decision under subd.1 shall be sent to the aide, the involved health care provider and the complainant via certified mail, return receipt requested, and shall contain all of the following:

a. A brief description of the allegation and the investigation conducted by the department, with enumeration of the findings and conclusions;

b. Notice that the aide may contest the department's decision by timely requesting a hearing conducted before the department. The notice shall describe the appeal process under sub.(3)(a);

c. Notice that failure to contest the department's decision by timely requesting a hearing shall result in a finding that the aide committed the alleged act of abuse or misappropriation of property and that the finding shall be entered on the nurse aide registry, and what the consequences are of entering the finding on the registry;

d. Notice that the aide, whether or not the aide is appealing the department's decision, has a right to submit a short rebuttal statement in writing to dispute the finding and that the statement will be included in the registry but will not by itself have any effect on the consequences of having the finding entered on the registry; and

e. Notice that the aide may waive the right to a hearing, but, that if the aide waives the right to a hearing or does not file a timely request for a hearing, the finding shall be entered on the registry.

(e) Hearing right. 1. If an aide waives the right to a hearing or fails to file a timely appeal pursuant to sub.(3)(a)2, the department shall enter the aide's name, documentation of the department's investigation, including the nature of the allegation and evidence that led the department to conclude that the abuse or misappropriation of property took place and the aide's rebuttal statement, if provided, on the

registry. This information shall be entered on the registry within 10 days after the last day of the period under sub.(3)(a)2 during which the aide may appeal the department's decision. The department shall include the information that the aide did not appeal the decision.

2. If an aide files a timely appeal, the aide's name and a summary of the department's decision may not be entered on the registry until the hearing examiner's decision is mailed and only in accordance with sub. (3)(b).

(3) HEARINGS. (a) Request for hearing. 1. An aide may appeal the department's decision that the abuse or misappropriation of property took place by filing a request for hearing with the department.

2. The hearing request shall be submitted in writing to the department's office of administrative hearings within 30 days after the aide's receipt of the department's decision. The aide's receipt of the decision shall be determined by the returned receipt under sub.(2)(d)2 or, in lieu of a returned receipt, shall be presumed to have occurred within 5 days after the date the decision was mailed.

3. A hearing request is considered filed on the date it is received by the department's office of administrative hearings.

Note: A request for a hearing should be sent to the Department's Office of Administrative Hearings, P.O. Box 7875, Madison, Wisconsin 53707. Appeals may be delivered in person to that office at 119 King St., Madison, Wisconsin.

(b) Hearing and decision. 1. If an aide files a timely appeal, the department's office of administrative hearings shall hold a hearing in accordance with s. 227.42 stats., and issue a written decision as the department's final order within 120 days after the date the appeal was filed, except that the hearing examiner may extend the 120-day period if the aide shows that a substantial reason exists to delay the hearing.

2. The office of administrative hearings shall promptly send copies of the hearing examiner's written decision to the aide, the health care provider involved in the alleged incident and the complainant.

3. If the hearing examiner finds there is no reasonable cause to substantiate the alleged action, the finding shall not be entered on the registry.

4. If the hearing examiner finds there is reasonable

cause, the department shall enter a summary of the hearing examiner's decision on the registry within 10 working days after the date on which the hearing examiner's decision was mailed.

5. The hearing examiner's written decision shall include:

a. Notice that the aide has the right to submit a brief rebuttal statement in writing to the department to dispute the hearing examiner's decision and, that if submitted, it will be included on the registry; and

b. Notice that the aide has the right to petition for judicial review pursuant to s.227.53, Stats.

(4) DISCLOSURE OF FINDINGS. (a) Disclosure of substantiated allegations. 1. The department in response to an inquiry made to the registry shall indicate whether a finding of abuse or misappropriation of property is listed in the registry and, if listed, whether a rebuttal statement exists. Access to the decision pertaining to a listed finding and the related rebuttal statement may be obtained only by sending a written request to the department pursuant to s. HSS 129.10(5).

2. Not less than quarterly, the department shall report all new substantiated allegations to health care providers.

(b) Disclosure of unsubstantiated allegations. The decision and other records relating to an unsubstantiated allegation, which includes an allegation pending investigation, shall not be placed on the registry and are not accessible to a requestor of registry information. These records may be disclosed only to the following:

1. Authorized staff of the department and of the federal department of health and human services;

2. A law enforcement officer or agency for purposes of related investigations or prosecutions;

3. A court or administrative agency for use in related investigations or proceedings regarding licensing or regulation of a health care facility, or a licensed health professional;

4. A person engaged in bona fide research who, at the department's discretion, has been granted access but only if information identifying the aide, individual, client, complainant and health care provider involved are not disclosed to the researcher; or

5. As otherwise required by law.

(c) Duration of placement on the registry. The information

placed on the registry regarding findings of abuse or misappropriation of property shall remain on the registry permanently, unless:

1. The hearing examiner's decision is reversed by a court of law;
2. The department is notified of the death of the aide listed on the registry; or
3. As otherwise required by law.

APPENDIX A

Bureau of Quality Compliance Regional Office

Division of Health
Bureau of Quality Compliance
Madison/Southern Regional Office
3514 Memorial Drive
Madison WI 53704
(608) 246-3314

Division of Health
Bureau of Quality Compliance
Milwaukee/Southeastern Regional Office
819 N. 6th St., Rm. 875
Milwaukee WI 53203
(414) 227-5000

Division of Health
Bureau of Quality Compliance
Green Bay/Northeastern Regional Office
200 N. Jefferson St.
Green Bay WI 54301
(414) 436-3074

Division of Health
Bureau of Quality Compliance
Eau Claire/Western Regional Office
718 W. Clairemont Avenue, Rm. 136
(715) 836-4752

The rules contained in this order shall take effect on the first day of the month following publication in the Wisconsin Administrative Register as provided in s. 227.22(2), Stats.

Wisconsin Department of Health
and Social Services

Dated: November 13, 1992

By: 
Gerald Whitburn
Secretary

Seal:

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