

STATE OF MINNESOTA
OFFICE OF ADMINISTRATIVE HEARINGS
FOR THE COMMISSIONER OF HEALTH

In the Matter of Good Samaritan Society,
University Specialty Center,
Extended Survey Exit January 27, 2012

**RECOMMENDED
DECISION**

The above matter was the subject of an Independent Informal Dispute Resolution Conference (IIDR) conducted by Administrative Law Judge Manuel J. Cervantes (ALJ) on August 28, 2012.

Christine Campbell and Eva Loch, Nurse Evaluators (Evaluators), appeared on behalf of the Department of Health, Division of Compliance Monitoring (Department). Mary Cahill, Division Director, also appeared.

Sharon St. Mary, Executive Director, and Nikki Tostenson, Director of Nursing, appeared on behalf of the Good Samaritan Society (Facility).

The conference was held in a courtroom at the Office of Administrative Hearings. The OAH record closed at the conclusion of the conference that morning.

FINDINGS OF FACT

1. In January 2012, the Department of Health conducted an extended survey at the Good Samaritan Society, University Specialty Center, located in Minneapolis, Minnesota. The Facility had approximately 150 residents at that time.¹

2. The Department issued a Summary Statement of Deficiencies to the Facility following the extended survey exit on January 27, 2012, citing a number of violations.²

3. The Facility was cited with Tag F 225 for violating 42 C.F.R. § 483.13(c).³

4. The requirements of § 483.13(c)(2) state,

The facility must ensure that all alleged violations involving mistreatment, neglect, or abuse, including injuries of unknown source, and

¹ Testimony of Sharon St. Mary.

² Ex. E.

³ Ex. E at 4–15.

misappropriation of resident property are reported immediately to the administrator of the facility and to other officials in accordance with State law through established procedures (including to the State survey and certification agency).⁴

5. The requirements of § 483.13(c)(3) state,

The facility must have evidence that all alleged violations are thoroughly investigated, and must prevent further potential abuse while the investigation is in progress.

6. The requirements of § 483.13(c)(4) state,

The results of all investigations must be reported to the administrator or his designated representative and to other officials in accordance with state law (including to the state survey and certification agency) within 5 working days of the incident, and if the alleged violation is verified appropriate corrective action must be taken.

7. Tag F 225 cites the Facility for violating § 483.13(c)(2), (3), and (4) by either failing to investigate, failing to prepare incident reports, or failing to notify the State Agency relative to four incidents involving resident “injuries of unknown source”.⁵ Tag F 225 further cites the Facility for failing to notify the State Agency “immediately” as required by regulation relative to six additional incidents involving resident injuries of unknown source.⁶ The Facility did not dispute Tag F 225.⁷

8. The Facility disputes Tag F 226.⁸ The gist of its objection is that the facts that supported the violations in Tag F 225 are the same facts and incidents used to support Tag F 226. So in effect, the Facility argues, the Facility is being penalized twice for the same conduct/violations. Next, the Facility asserts that its Abuse and Neglect Policy and Procedure comply with federal and state law.

9. In the alternative, if a violation is found because of Tag F 226, the Facility asserts the Department erred in its severity level and scope findings. The Facility is of

⁴ Minnesota Department of Health.

⁵ Facility (Fac.) Ex. F. “Injuries of unknown source” – An injury of unknown source should be classified as an “injury of unknown source” when both of the following conditions are met: the source of the injury was not observed by any person **or** the source of the injury could not be explained by the resident; **and** the injury is suspicious because of the extent of the injury **or** the location of the injury (e.g., the injury is located in an area not generally vulnerable to trauma) **or** the number of injuries observed at one particular time **or** the incidence of injuries over time. Ex. G at 3; § 483.13 (c)(2) and (4).

⁶ “Immediate” means as soon as possible, but ought not to exceed 24 hours after discovery of the incident. See Ex. G at 3.

⁷ Test. S. St. Mary.

⁸ Ex. E at 15 - 26.

the opinion that the severity finding should be at level 1, not 2 and the scope should be set at isolated, having an impact on a very limited number of residents.⁹

10. Section 483.13(c) Staff Treatment of Residents, states, “The facility must develop and implement written policies and procedures that prohibit mistreatment, neglect, and abuse of residents and misappropriation of resident property.”¹⁰

11. The statement of intent of § 483.13 (c) states,

The facility must develop and operationalize policies and procedures for screening, and training employees, protection of residents and for the prevention, identification, investigation, and reporting of abuse, neglect, mistreatment, and misappropriation of property. The purpose is to assure that the facility is doing all that is within its control to prevent occurrences.

Use tag F 226 for deficiencies concerning the facility’s development and implementation of policies and procedures.¹¹

10. The Facility developed a document entitled “Policy,¹² Abuse and Neglect.”¹³ The Policy, in relevant part, states,

Alleged or suspected violations involving any mistreatment, neglect or abuse including injuries of unknown origin will be reported immediately to the center administrator and other officials in accordance with state law, including the state survey and certification agency.

11. The Evaluator, who conducted the Department’s survey in January 2012, was not provided this Policy during the survey, but first saw it for the first time shortly before the present informal dispute resolution conference.¹⁴

12. The Facility developed a document entitled “Procedure,¹⁵ Abuse and Neglect.”¹⁶ The Notification Procedures, in relevant part, are as follows:

5.a. Notify the center administrator immediately of any incidents of resident abuse, misappropriation of resident property, alleged or suspected abuse and injury of unknown origin, neglect, financial exploitation or involuntary seclusion. In case of absence of the

⁹ Test. S. St. Mary.

¹⁰ Ex. H at 1.

¹¹ Ex. H; State Operations Manual (SOM), Appendix PP, F226, §483.13(c).

¹² The Merriam-Webster Dictionary defines “policy” as, a definite course or method of action selected from among alternatives and in light of given conditions to guide and determine present and future decisions. <http://www.merriam-webster.com/dictionary/policy>.

¹³ Ex. C at 2, 3; revised 2/2002, 2/2005, 1/2009, and 10/2009.

¹⁴ Test. E. Loch.

¹⁵ The Merriam-Webster Dictionary defines “procedure” as, a particular way of accomplishing something. <http://www.merriam-webster.com/dictionary/policy>. Ex. C at 5; revised 3/2004, 2/2005, 1/2006, 10/2009, 1/2011.

¹⁶ Ex. S.

administrator, follow the chain of command for notification (DNS, SW, etc.). If the alleged perpetrator is one's supervisor or department head, notify his/her supervisor. Record this notification on the Incident Report (GSS #401). "Immediately," in this procedure means "as soon as possible after discovery of the incident, and ought not to exceed the end of the shift, in the absence of a shorter state time frame requirement."

13. Paragraph 5.c., in relevant part, states,

Notify the designated agencies in accordance with state law, including the state survey and certification agency. You may need to notify more than one agency in order to fulfill federal and state regulations. Document the notifications on the Incident Report (GSS #401).

13. The Department contends the above-referenced Facility Procedure does not comport with the notice requirements of §483.13(c)(2) above, which requires immediate notification of the facility administrator **and** other state officials, including the State survey and certification agency.¹⁷

14. The Department issued Tag F 226 on two grounds: first, because the Facilities' actual written notification procedure, provisions 5.a. and c., do not comply with §483.13(c)(2)'s immediate notification to the State Agency requirement, and second, because the Facility failed to implement its own policy and procedures by failing to properly investigate and report injuries of unknown sources, as admitted in Tag F 225.

15. As support for the first ground, the Department stated,

The Notification Procedure did not direct staff to immediately notify the designated SA (State Agency) of all allegations of abuse/maltreatment and misappropriation of resident property.¹⁸

16. As support for the second ground, the Department stated,

Based on interview and documentation review, the facility failed to insure abuse prohibition policies and procedures included the immediate reporting of potential abuse, neglect and injuries of unknown origin to the designated State agency for 6 residents in the facility in reports reviewed from the previous six months. In addition, the facility failed to follow their own policies/procedures related to the investigation of allegations of abuse/neglect/mistreatment and injuries of unknown origin for 4 of 5 allegations ... reviewed.¹⁹

17. Once the Department's survey team determines that a deficiency level exists, the team is to assess the effect on resident outcome (severity level) and determine the number of residents potentially or actually affected (scope level). The

¹⁷ Emphasis added.

¹⁸ Ex. E. at 16.

¹⁹ *Id.*

team is to use the results of this assessment to determine whether the facility is in compliance. When a facility is noncompliant, the team is to consider how the deficient practice is classified according to severity and scope levels in selecting an appropriate remedy.²⁰

18. The Department issued Tag F 226 with a severity level 2. The Facility asserted that Tag F 226 was duplicative, but alternatively, if a deficiency was found, it should have been at severity level 1. Levels 1 and 2 are defined below:

Level 1 is a deficiency that has the potential for causing no more than a minor negative impact on the residents.

Level 2 is noncompliance that results in no more than minimal physical, mental and/or psychosocial discomfort to the resident and/or has the potential (not yet realized) to compromise the resident's ability to maintain and/or reach his/her highest practicable physical, mental and/or psychosocial well-being as defined by an accurate and comprehensive resident assessment, plan of care, and provision of services.²¹

19. The Department determined that the scope was widespread. The Facility challenges the Department's scope finding. The widespread scope is defined below:

The scope is widespread when the problems causing the deficiencies are pervasive in the facility and/or represent systemic failure that affected or has the potential to affect a large portion of all of the facility's residents. Widespread scope refers to the entire facility population, not a subset of residents or one unit of a facility. In addition, widespread scope may be identified if a systemic failure in the facility (e.g., failure to maintain food at a safe temperature) would be likely to affect a large number of residents and is, therefore, pervasive in the facility.²²

Based upon the exhibits submitted and the arguments made and for the reasons set out in the Memorandum that follows, the Administrative Law Judge makes the following:

RECOMMENDED FINDING AND DECISION

1. Tag F 226 is supported by the facts and should be affirmed.

Dated: September 12, 2012

/s/ Manuel J. Cervantes

MANUEL J. CERVANTES
Administrative Law Judge

²⁰ Ex. C at 1.

²¹ *Id.*

²² Ex. C at 2.

Reported: Digitally recorded (no transcript prepared).

NOTICE

In accordance with Minn. Stat. § 144A.10, subd.16 (d)(6), this recommended decision is not binding on the Commissioner of Health. Pursuant to Department of Health Information Bulletin 04-07, the Commissioner must mail a final decision to the facility, indicating whether or not the Commissioner accepts or rejects the recommended decision of the Administrative Law Judge within 10 calendar days of receipt of this recommended decision.

MEMORANDUM

The Facility challenges the issuance of Tag F 226. The operative language of § 483.13(c) is twofold; first, it requires the development of written policies and procedures that prohibit mistreatment, neglect, and abuse of residents and second, it requires the implementation of those policies and procedures.

The Facility asserts that by accepting responsibility for the deficiencies found in Tag F 225, to wit, failure to properly investigate and/or timely report resident injuries of an unknown source, the issuance of Tag F 226 was improper. The ALJ would agree with the Facility's analysis if implementation of its policies were the only deficiency found in Tag F. That, however, is not the case.

F 226 and § 483.13(c) cover more than implementation. As stated above, they are broader. They mandate the written development of policies and procedures that are consistent with the federal regulations. The Facility's Abuse and Neglect Procedure does not specifically direct Facility staff to immediately notify the designated State Agency of all allegations of abuse/maltreatment.

The Facility asserts that its Abuse and Neglect Policy (paragraph 10 above) satisfies this requirement. While this may be technically correct, the specific language of the policy, directing staff to notify the State Agency immediately, is not found in its procedures 5.a. or 5.c. (paragraphs 12 and 14 above).

This lack of specificity in the Facility's Abuse and Neglect Procedure, 5.a. and c., makes the procedures ineffectual, or at best, cumbersome because it requires staff to review both the policy and the procedure to determine what type of State Agency notification –immediate– is required. The fact that the Evaluator, while conducting her survey, received the Facility's Abuse and Neglect Procedure, but not the Facility's Abuse and Neglect Policy exemplifies this point. The Department had a reasonable basis to find that the Facility's Abuse and Neglect Procedure was not in compliance with §483.13(c)(2).

The non-compliance can be easily remedied by inserting “and the State Agency” after the word, “Administrator” in provision 5.a. of its Abuse and Neglect Procedure.

The Facility also challenges the severity and scope findings by the Department. The Evaluator testified that inadequate Facility policy or procedure can have a potential system wide impact and therefore, considered the scope widespread. The ALJ agrees.

Moreover, an inadequate abuse and/or maltreatment reporting procedure has the potential for more than minimal harm to residents because the State oversight that occurs with a Facility’s requirement to report will not occur. The ALJ concludes that the Department’s severity and scope findings are appropriate. The ALJ recommends that Tag F 226 should be affirmed.

M. J. C.