

STATE OF MINNESOTA
OFFICE OF ADMINISTRATIVE HEARINGS

FOR THE MINNESOTA DEPARTMENT OF HEALTH

In the Matter of an Assessment
issued to Innsbruck Healthcare
Center September 20, 1988

ORDER ON MOTION FOR
SUMMARY JUDGMENT

A Motion for Summary Judgment was submitted on January 6, 1989 by Benson K. Whitney and Michael D. Christianson, from the firm of Popham, Haik, Schnobrich & Kaufman, Ltd., 3300 Piper Jaffray Tower, Minneapolis, Minnesota 55402, on behalf of Innsbruck Healthcare Center (Facility). Thomas B. McSteen, Special Assistant Attorney General, Suite 136, 2829 University Avenue S.E., Minneapolis, Minnesota 55414. submitted a response to that Motion for the Department of Health. The final submission was received on February 14, 1989.

Based upon all of the records, files and proceedings herein, the Administrative Law Judge makes the following:

ORDER

1. Based on the reasons contained in the memorandum appended to this Order, Innsbruck Healthcare Center's Motion for Summary Judgment is, in all respects, DENIED.

Dated this 14th day of February, 1989.

PETER C. ERICKSON
Administrative Law Judge

MEMORANDUM

The Facility argues that summary judgment should be granted in its favor because the "conditions" found by the Department do not support a violation of the rule cited. Summary judgment is appropriate when no genuine issues of material fact are presented. Nord v. Herried, 305 N.W.2d 337, 339 (Minn. 1981). The evidence must be considered in the most favorable light to the non-moving party. Sauter v. Sauter, 70 N.W.2d 351 (Minn. 1955). For the purpose of this motion, the Administrative Law Judge will treat the facts alleged by the Department as true.

Innsbruck claims that the Department did not properly investigate and cite the violations alleged in its Correction Order issued On July 18, 1988 and Assessment dated September 20, 1988. This position hinges upon an interpretation of the language in Minn. R. 4655.5800 Subp. 2(B), which sets forth requirements for the Director of Nursing Service as follows:

Establishing procedures for general nursing care and for aseptic techniques; developing nursing policy and procedure manuals and written job descriptions for each level of nursing personnel. Written nursing procedure manuals shall be available at each nurses' station.

Innsbruck contends that the word "establish" must only be interpreted to mean presenting information on proper procedures to staff members. The Department reads the rule to mean ensuring that the proper procedures are followed. Innsbruck asserts that the Department must base any citation

on the sufficiency of the procedural manuals available for employee use and the updated information presented to the nursing staff. The Department only examined the care provided to patients in the initial inspection and the follow-up visit. The Department's citations and assessment were based on observed patient care provided by nursing personnel, rather than the sufficiency of the information provided to nursing staff by the Director of Nursing.

Innsbruck's claim of adherence to the rule and compliance with the correction order relies upon its definition of "establish." in support of that definition, Innsbruck claims: 1) the rule is procedural in nature; 2) the Department must distinguish between formulating a procedure and being responsible for carrying it out; 3) a non-cited specific rule governs hand washing in facilities; and 4) the Commissioner interpreted the rule as procedural through the fine levied for violations of the rule.

Regarding the "procedural" nature of the rule, Innsbruck asserts that since two of the three duties of the rule involve writing manuals or job descriptions and ensuring that the manuals are located at nurses' stations, the third duty (establishing procedures) must also involve non-care related requirements. If Innsbruck is correct, however, the duty to establish procedures would be identical to the duty to write procedural manuals. This interpretation treats "establishing procedures for general nursing care and aseptic techniques" as mere repetition.

With respect to the difference between formulating procedures and carrying them out, Innsbruck claims that:

There is, however, an obvious difference between placing a duty on the Director of Nursing to establish procedures for infection control and imposing on the Director of Nursing direct responsibility for every failure of a staff member to follow the correct established techniques.

Innsbruck Memorandum of Law, at 15.

This assertion does not take into account Minn.R. 4655.5800 Subp. 2(A),

which expressly names the Director of Nursing as the individual responsible for "[t]he total nursing care of all patients...." The Department, through its rules, has designated the Director of Nursing as the individual responsible for ensuring adherence to correct nursing techniques.

Minn.R. 4655.2000 specifically requires adherence to hand washing procedures in facilities. Innsbruck asserts that this is the proper substantive rule to cite with respect to aseptic procedure violations found in the Facility. The rule requires all employees and volunteers to follow personal hygiene policies, and cross-references minn.R. 4655.1400, item B which states that the Administrator must formulate written personnel policies including personal hygiene practices. The Department charged only the nursing staff with following inappropriate aseptic techniques. The hand washing requirements of nursing staff, aimed at preventing infection, may be more restrictive than the general requirements for all staff. The hand washing violations alleged herein were appropriately charged under the rule concerning aseptic procedures for nursing staff. The distinction between the classes of employees covered by the two rules lends further support to the conclusion that Minn. R. 4655.5800 Subp. 2(B) is substantive, not procedural.

Innsbruck relies upon the \$300.00 fine levied as further evidence of the procedural nature of the rule. Since the fine levied was not of the \$350.00 category, Innsbruck argues that the rule did not "present a substantive standard applied to direct patient care." Facility Reply Memorandum, at 11. To arrive at this conclusion, Innsbruck examined the Commissioner's Finding of Fact, Conclusions and Order Adopting Rules, paragraph 21. Innsbruck overlooked nearly identical language in paragraph 20, however, which labelled both \$300.00 and \$350.00 fines as being "directly related to the actual provision of the services...." The violations listed in paragraph 21 (\$350.00 fine) are for improper administration of oxygen, medications and dietary needs, obviously serious infractions. The Commissioner's Order does not indicate that Minn. Rule 4655.5800, Subp. 2(B) is merely procedural.

Innsbruck claims to have met the requirements of the Correction Order. The Director of Nursing revised the nursing manual, conducted training sessions, retained consultants and conducted inspections. if the violations cited had been for failure to have a manual of nursing procedures, the remedial actions of the Director of Nursing would have been sufficient. The violations cited in the Correction Order by the survey team, however, leave no doubt that the failure to follow aseptic procedures among the nursing staff was the crucial omission. The Department found that proper aseptic techniques were not followed by the nursing staff on both the first and follow-up visits. The Correction order suggested a method of correction through instruction of nursing staff and "infection control rounds ... by the director of nursing to assure follow through of aseptic techniques." The Department emphasized the direct care responsibility of the Director of Nursing, rather than paperwork requirements. The changes suggested by the Department required adherence to proper aseptic procedures. not merely training in those procedures.

The Judge agrees with Innsbruck that the rule at issue herein is not well drafted. The requirement to "establish " procedures yields itself to differing interpretations. However, the regulatory scheme promulgated by the Department holds the Director of Nursing responsible for direct care delivery to patients. The Department's interpretation of Minn. R. 4655.5800 Subp. 2(B) falls squarely within that regulatory scheme and is necessary to assure proper patient care. This interpretation is appropriate and can be implemented by the Department on a case-by-case basis. See Reserve Life Insurance Co. v. Commissioner of Commerce, 402 N.W.2d 631, 634 (Minn.App. 1987); Bunge Corp. v. Commissioner of Revenue, 305 N.W.2d 779, 784 (Minn. 1981).

Innsbruck argues that the Department has violated the Facilities right to due process by issuing an assessment without naming the individual employees who allegedly followed improper procedures. Innsbruck complains that it is unable to identify the individuals who provided improper care, if any, and therefore cannot respond to the Department's charges. This claim fails on three grounds. First, the Department is required by statute to notify the provider of the deficiency, cite the rule or statute violated, state the suggested method of correction and specify the time allowed for correction. minn.Stat. sec. 144A.10 subd. 4. If, upon reinspection, the deficiency is not corrected, the Department must send the provider a notice of noncompliance specifying the uncorrected violations and assessing a fine. Minn.stat. 144A.10 subd. 5. The statute does not require the Department to identify those individuals present in the facility, beyond establishing that the individuals are employees of the provider or volunteers. Second, the Director of Nursing or the Administrator accompanied the survey team through the facility and observed both the patient care provided and the conduct of the survey team during the re-inspection of the facility. The notes of the survey team have been provided to Innsbruck and an exit interview was conducted at the end of the first and second visits, which were tape recorded by the Facility. These actions provided ample notice to Innsbruck of the procedures which required improvement. Third, the Administrator has indicated that "once you get those orders and ... the situation you can determine who the staff people are." Exhibit 8, Department's Memorandum in Response to Motion for Summary Judgment (Manee Deposition at 56). Innsbruck has not been denied due process by the Department's failure to name specific staff members violating appropriate nursing standards.

P.C.E.