

STATE OF MINNESOTA
OFFICE OF ADMINISTRATIVE HEARINGS
FOR THE DEPARTMENT OF HUMAN SERVICES

In the Matter of the SIRS Appeal of
Joyce Marie Banks

**FINDINGS OF FACT,
CONCLUSIONS OF LAW,
AND RECOMMENDATION**

The above-entitled matter came before Administrative Law Judge LauraSue Schlatter for a hearing on October 4, 2016 and the record closed on that date.

Gail A. Feichtinger, Assistant Attorney General, appeared on behalf of the Minnesota Department of Human Services (Department). Joyce Marie Banks (Appellant) appeared on her own behalf.

STATEMENT OF THE ISSUES

Did the Department properly seek to suspend Appellant's participation as a provider in the Minnesota Health Care Program (MHCP) for a period of five years?

SUMMARY OF RECOMMENDATION

The Administrative Law Judge concludes that the Department properly determined that Appellant should be suspended for five years and respectfully recommends that Appellant's suspension be **AFFIRMED**.

REGULATORY BACKGROUND

Medicaid

Medicaid is a jointly-financed federal and state program established under Title XIX of the United States Social Security Act.¹ Its purpose is to provide necessary medical assistance to eligible persons who have insufficient income and resources to pay for the cost of their medical care.² The federal government shares the cost of providing medical assistance with states that elect to participate in the Medicaid program.³ In return, the states must comply with federal statutes and the rules issued

¹ 42 U.S.C. §§ 1396-1396w-5 (2012).

² See 42 U.S.C. § 1396-1; see also *Atkins v. Rivera*, 477 U.S. 154, 156 (1986) ("In Massachusetts, persons who lack sufficient income, measured on a monthly basis, to meet their basic needs automatically qualify for Medicaid.").

³ See 42 U.S.C. §§ 1396a, b.

by the Centers for Medicare and Medicaid (CMS) of the United States Department of Health and Human Services.⁴

CMS regulations require states to have surveillance and utilization control programs in order to guard against the “unnecessary or inappropriate use of Medicaid services and . . . excess payments.”⁵ In order to discover and correct inappropriate use of Medicaid payments and excess payments, states must conduct post-payment reviews.⁶

The Medicaid program in Minnesota is administered by the Department and is a MHCP, commonly referred to as Medical Assistance (MA).⁷ Because the Department receives and administers federal funds, it must establish and maintain a program of utilization review in order to prevent the unnecessary or inappropriate use of MA funds, and to determine whether excess MA payments are being made.⁸ State law permits the Department to impose sanctions on the provider and/or recover the excess payments if the Department discovers that a provider has inappropriately billed MA or erroneously received excess payments.⁹

In order to safeguard against inappropriate use of MA and excess MA payments, the Department created the Surveillance and Integrity Review Section (SIRS) and promulgated rules to monitor providers’ compliance with federal and state rules, regulations, and statutes.¹⁰ The SIRS conducts post-payment reviews or audits of claims submitted for MA payments.¹¹ These investigations are necessary to prevent fraud and abuse, as well as to detect instances of improper payment of MA funds.¹²

Abuse is defined under the rules governing the MA program to include the following practices: submitting claims that lack required information or contain incorrect information; submitting claims that overstate the level or amount of health service provided; submitting repeated claims or causing claims to be submitted for health services that are not reimbursable under the programs; and failing to develop and maintain required health service records.¹³ The Department may suspend or terminate a vendor’s participation in the MHCP if the Department determines the vendor has

⁴ See 42 U.S.C. § 1396a; 42 C.F.R. § 430.10 (2015); see also *Atkins*, 477 U.S. at 156-57 (“The Federal Government shares the costs of Medicaid with States that elect to participate in the program. In return, participating States are to comply with requirements imposed by the Act and by the Secretary of Health and Human Services.”).

⁵ 42 C.F.R. § 456.3(a) (2015).

⁶ 42 C.F.R. § 456.23 (2015).

⁷ See Minn. Stat. §§ 256B.01-.85 (2016).

⁸ Minn. Stat. § 256B.04, subd. 15(a); see also 42 C.F.R. §§ 456.1-.725 (2015).

⁹ See Minn. Stat. §§ 256B.064, .0641.

¹⁰ See Minn. R. 9505.2160-.2245 (2015).

¹¹ See 42 C.F.R. § 456.23 (requiring post-payment reviews); Minn. Stat. § 256B.04, subd. 15(a), (requiring post-payment reviews).

¹² See Minn. R. 9505.2200, subp. 1, .2215, subp. 1(A).

¹³ Minn. R. 9505.2165, subp. 2.

committed fraud, theft, or abuse in connection with the provision of medical care to recipients of public assistance.¹⁴

Personal Care Assistants

Recipients of personal care assistant (PCA) services require services to live independently in the community in a stable medical condition.¹⁵ PCA services covered under the Medicaid program include services and supports furnished to an individual to assist in accomplishing “activities of daily living; health-related procedures and tasks; observation and redirection of behaviors; and instrumental activities of daily living.”¹⁶ The amount and types of services authorized are based on assessment of the recipient’s needs in several areas of dependency.¹⁷ MA payments cover personal care services that include, among other activities, bowel and bladder care; skin care; range of motion exercises; respiratory assistance; bathing; grooming and hair washing; turning and positioning; assistance with medication that is ordinarily self-administered; cleaning equipment; dressing or undressing; assistance with food and nutrition; accompanying the recipient to medical appointments and to other activities, such as church and school if the PCA is needed to provide services while the recipient is away from home; and other services essential to the provision of covered services.¹⁸

PCA services must be documented daily by each personal care assistant, on a timesheet form approved by the commissioner.¹⁹ The following criteria must be included in the timesheet: (1) full name of personal care assistant and individual provider number; (2) provider name and telephone numbers; (3) full name of recipient; (4) consecutive dates, including month, day, and year, and arrival and departure times with a.m. or p.m. notations; (5) signatures of recipient or the responsible party; (6) personal signature of the personal care assistant; (7) any shared care provided, if applicable; (8) a statement that it is a federal crime to provide false information on personal care service billings for MA payments; and (9) dates and location of recipient stays in a hospital, care facility, or incarceration.²⁰

Based upon the evidence in the hearing record, the Administrative Law Judge makes the following:

FINDINGS OF FACT

1. Appellant has been a PCA for over three years.²¹ Appellant provides PCA services to one client, J.K. Most recently, Appellant was employed by All Home Health, Inc. (All Home Health).²² During this time, Appellant also worked for Sally’s Beauty

¹⁴ Minn. Stat. § 256B.064, subds. 1a(1), b.

¹⁵ See Minn. R. 9505.0335, subp. 1(H) (2015).

¹⁶ Minn. Stat. § 256B.0659, subd. 2(a).

¹⁷ See *id.*, subd. 3a.

¹⁸ Minn. R. 9505.0335, subp. 8 (2015).

¹⁹ Minn. Stat. § 256B.0659, subd. 12.

²⁰ *Id.*

²¹ Testimony (Test.) of Appellant.

²² Test. of Rochelle Spanel; Test. of Appellant.

Supply, LLC (Sally's).²³ Appellant lived with J.K. and C.G.K. prior to providing PCA services for J.K.²⁴

2. J.K. suffers from chronic illness.²⁵

3. C.G.K., J.K.'s wife, was listed as the responsible party for J.K.²⁶ C.G.K. was previously employed as a PCA for All Home Health for unrelated recipients.²⁷

4. Appellant entered into a written employee agreement with All Home Health.²⁸ Appellant received training from All Home Health and passed a test on the training.²⁹

5. PCA services provided during the night can be billed as long as the PCA is actually providing services. The PCA cannot bill for the time he or she spends sleeping.³⁰

6. J.K. was not authorized to receive assistance from more than one PCA at a time.³¹

7. PCAs are not allowed to amend the care plan and adjust the services recipients receive.³²

Investigation

8. The SIRS received a tip through its hotline that J.K.'s PCAs were check splitting.³³ The SIRS unit uses the term "check-splitting" to refer to a situation where a PCA shares some part of her PCA payments with her client.³⁴

9. The case was assigned to SIRS investigator Rochelle Spanel. Ms. Spanel began an investigation into PCA services provided by Appellant.³⁵ Ms. Spanel requested information from the Minnesota Information Management System (MIMS).³⁶ Ms. Spanel also requested Appellant's employment data from the Minnesota Department of Employment and Economic Development (DEED).³⁷

²³ Test. of Appellant.

²⁴ Test. of Appellant.

²⁵ Test. of C.G.K.

²⁶ Test. of R. Spanel.

²⁷ Test. of C.G.K.

²⁸ Test. of Appellant.

²⁹ Test. of Appellant; Test. of C.G.K.

³⁰ Test. of R. Spanel.

³¹ Test. of R. Spanel.

³² Test. of R. Spanel.

³³ Test. of R. Spanel.

³⁴ Test. of R. Spanel.

³⁵ Test. of R. Spanel.

³⁶ Test. of R. Spanel; Exhibit (Ex.) 2 DHS 2-5.

³⁷ Test. of R. Spanel.

10. On February 3, 2016, Ms. Spanel contacted All Home Health, the employer for Appellant's PCA services, to obtain all PCA records relating to J.K. from July 1, 2014 to September 30, 2014, and July 1, 2015 to September 30, 2015.³⁸

11. On January 15, 2016, the Department sent a subpoena to Sally's requesting Appellant's timesheets for her employment there.³⁹

12. On February 1, 2016, the Department received, in relevant part, the following information from Sally's:

- a. A notarized affidavit from the Custodian of Records;
- b. Punch detail reports for Appellant for hours worked from July 1, 2015 to September 30, 2015.⁴⁰

13. Ms. Spanel then compared timesheets submitted by Appellant with Appellant's timesheets for Sally's.⁴¹ Time entry for Sally's must be done on location.⁴²

14. Appellant's timesheets for All Home Health and Sally's leave very little time for sleep and travel. For example, Appellant provided a timesheet for All Home Health listing services provided on July 12, 2015 from 9:00 p.m. to 6:00 a.m. on July 13, 2015; and Sally's records show that Appellant punched in at 8:30 a.m. and punched out at 2:30 p.m. and punched back in at 2:57 p.m. and worked until 6:39 p.m.⁴³ The timesheets at Department's Exhibits 7 and 10 demonstrate there were many similar instances showing very little time between Appellant's time working for Sally's and the times Appellant claimed to be providing PCA services for J.K.⁴⁴

15. The timesheets submitted to All Home Health contain the phrase:

Review the completed timesheet for accuracy before signing, it is a federal crime to provide false information on PCA billings for Medical Assistance payment. Your signature verifies the time and services entered above are accurate and that the services were performed as specified in the PCA Care Plan.⁴⁵

16. Appellant signed the timesheets that were submitted to All Home Health before the time was entered.⁴⁶

³⁸ Ex. 7 at DHS 13; Test. of R. Spanel.

³⁹ Ex. 10 at DHS 56.

⁴⁰ See Ex. 10.

⁴¹ Test. of R. Spanel.

⁴² Test. of R. Spanel.

⁴³ Ex. 100 at 8; Ex. 10 at DHS 58; Test. of R. Spanel.

⁴⁴ Exs. 7, 10.

⁴⁵ See Ex. 7 at DHS 14-29, 34-48.

⁴⁶ Test. of Appellant.

17. C.G.K. filled out the hours on Appellant's timesheets.⁴⁷ Appellant did not know she could make corrections to timesheets submitted to All Home Health.⁴⁸

18. C.G.K. signed Personal Care Assistant Performance Reviews which stated that Appellant followed proper timesheet procedures.⁴⁹

19. Ms. Spanel created a spreadsheet with the hours Appellant claimed on timesheets to All Home Health and the hours worked at Sally's.⁵⁰

20. Ms. Spanel found 70 overlapping instances within a 92-day time period on Appellant's timesheets.⁵¹ The Department documented each day of overlapping time in a Claims Overlap chart.⁵² For example, Appellant provided a timesheet through All Home Health providing PCA services to J.K. on August 21, 2015 from 5:00 a.m. to 12:00 p.m.⁵³ The Department's Exhibit 10 lists Appellant punching in at Sally's on August 21, 2015 at 8:38 a.m. and punching out at 4:11 p.m. and punching in at 4:35 p.m. and punching out at 8:36 p.m.⁵⁴

21. Consistent with Department policy and practice, Ms. Spanel determined the amount of overpayment by disallowing entire shifts where there was an overlap.⁵⁵

22. C.G.K. suffers from Post-Traumatic Stress Disorder (PTSD), bipolar disorder, and anxiety. C.G.K. claims that she incorrectly recorded Appellant's hours. She believes her mental health and stress were factors that affected how she recorded the hours on Appellant's timesheets.⁵⁶

23. At the evidentiary hearing in this matter, Appellant provided timesheets which were marked and admitted as Exhibit 100. The timesheets covered periods spanning July 7, 2014 through October 8, 2014, and July 2, 2015 through October 7, 2015.⁵⁷

24. The timesheets Appellant provided at the hearing are inconsistent with those Appellant and C.G.K. submitted to All Home Health and the Department, and upon which the Department based the PCA payments to Appellant that are at issue in this case.

⁴⁷ Test. of C.G.K.

⁴⁸ Test. of Appellant.

⁴⁹ Ex. 7 at DHS 32-33; Ex. 9 at DHS 51-52.

⁵⁰ Test. of R. Spanel; Ex. 4.

⁵¹ Test. of R. Spanel.

⁵² Ex. 4.

⁵³ Test. of R. Spanel; Ex. 7 at DHS 42.

⁵⁴ Test. of R. Spanel; Ex. 10 at DHS 59.

⁵⁵ Test. of R. Spanel.

⁵⁶ Test. of C.G.K.

⁵⁷ Ex. 100.

25. Appellant and C.G.K. did not submit the timesheets in Exhibit 100 to All Home Health or the Department prior to the hearing.⁵⁸

26. Both Appellant and C.G.K. claimed to have completed the timesheets in Exhibit 100 after receiving the Department's exhibits.⁵⁹

27. Consistent with the Department's practice, Ms. Spanel consulted with her supervisor and others in the SIRS unit to determine an appropriate sanction in Appellant's case.⁶⁰

28. The Department considered the many days on which Appellant's timesheets overlap, the significant amounts of overlapping time she claimed on individual days, and the large dollar amount she received in overpayments. The Department determined that the nature, chronicity, and severity of Appellant's violations of the applicable MHCP rules warranted a five-year suspension of her eligibility to provide services as an MHCP provider.⁶¹

29. The Department is also attempting to recover the overpayment from All Home Health.⁶²

Procedural Due Process and Sanctions

30. On February 26, 2016, the Department sent a letter by certified mail to Appellant notifying her that the Department was suspending her from the MHCP for a period of five years. This suspension was effective 30 days after February 26, 2016.⁶³ The letter also informed Appellant of her right to appeal the suspension.

31. Appellant appealed her suspension from MHCP by letter. The Department received the appeal on March 8, 2016.⁶⁴

32. Appellant's appeal was timely.⁶⁵

33. On June 19, 2016 the Department served the Appellant by mail with a Notice and Order for Prehearing Conference and Hearing, initiating the contested case hearing in this matter.⁶⁶

Based upon these Findings of Fact, the Administrative Law Judge makes the following:

⁵⁸ Test. of Appellant; Test. of C.G.K.

⁵⁹ Test. of Appellant; Test. of C.G.K.

⁶⁰ Test. of R. Spanel.

⁶¹ Test. of R. Spanel.

⁶² Test. of R. Spanel.

⁶³ Ex. 3 at DHS 6.

⁶⁴ Ex. 11 at DHS 62.

⁶⁵ Test. of R. Spanel; Ex. 11 at DHS 62.

⁶⁶ Nettleton Aff. (June 21, 2016).

CONCLUSIONS OF LAW

1. The Administrative Law Judge and the Commissioner of the Department of Human Services (Commissioner) have jurisdiction to consider this matter pursuant to Minn. Stat. §§ 14.50, 256B.04, subd. 15(c), .064, subd. 2 (2016).

2. The Department has complied with all relevant procedural requirements of statute and rule.

3. Minn. Stat. § 256B.0659, subd. 12 requires a PCA to document daily the PCA services the PCA provides on a timesheet form approved by the Commissioner.⁶⁷

4. The Department bears the burden of proof to show by a preponderance of the evidence¹ that the Appellant violated Minn. Stat. § 256B.064; Minn. R. 9505.2165, subp. 2(A)(1).⁶⁸

5. Minn. Stat. § 256B.064, subd. 1a, in relevant part states,

[t]he commissioner of [DHS] may impose sanctions against a vendor of medical care for any of the following: fraud, theft, or abuse in connection with the provision of medical care to Recipients of public assistance; ... and a pattern of making false statements of material facts for the purpose of obtaining greater compensation than that to which the vendor is legally entitled.... The term “vendor” includes a provider and also a personal care assistant.⁶⁹

6. A PCA who submits repeated claims, or causes claims to be submitted, from which required information is missing or incorrect has committed abuse in connection with the provision of medical care to recipients of public assistance.⁷⁰

7. The Department bears the burden of demonstrating, by a preponderance of the evidence, that Respondent’s participation as a provider in MHCP should be suspended.⁷¹

8. The Department established by a preponderance of the evidence that Respondent violated the requirements of Minn. Stat. § 256B.0659, subd. 12, when she failed to personally complete her PCA timesheets each day she provided services for J.K.

9. The Department established by a preponderance of the evidence that Respondent committed abuse pursuant to Minn. R. 9505.2165, subp.2.A(1), when she repeatedly reported that she provided PCA services during times she was working for Sally’s, or commuting to or from her job at Sally’s, or when she was sleeping.

⁶⁷ Minn. Stat. § 256B.0659, subd. 12.

⁶⁸ Minn. R. 1400.7300, subp. 5 (2015).

⁶⁹ Minn. R. 9505.2165, subp. 16a.

⁷⁰ Minn. R. 9505.2160, subp.1; .2165, subp. 2.A(1).

⁷¹ Minn. R. 1400.7300, subp. 5 (2015)

10. In determining the appropriate sanction, the Department must consider the nature, chronicity, or severity of the conduct, as well as the impact on the health and safety of the person served.⁷²

11. The Department may impose sanctions based on Appellant's conduct.⁷³ The Department demonstrated by a preponderance of the evidence, taking into consideration the nature, chronicity, and severity of Appellant's conduct, that Appellant's five-year suspension is an appropriate sanction.

Based upon these Findings of Fact and Conclusions of Law, and for the reasons explained in the accompanying Memorandum, the Administrative Law Judge makes the following:

RECOMMENDATION

The Administrative Law Judge recommends that the Commissioner **AFFIRM** the Department's action suspending Appellant's participation in the MHCP for five years.

Dated: November 2, 2016



LAURASUE SCHLATTER
Administrative Law Judge

Reported: Digitally Recorded
No transcript prepared

⁷² Minn. Stat. § 256B.064, subd. 1b.

⁷³ Minn. Stat. § 256B.064, subd. 1b.

NOTICE

This Report is a recommendation, not a final decision. The Commissioner of Human Services (the Commissioner) will make the final decision after a review of the record. Under Minn. Stat. § 14.61 (2016), the Commissioner shall not make a final decision until this Report has been made available to the parties for at least ten calendar days. The parties may file exceptions to this Report and the Commissioner must consider the exceptions in making a final decision. Parties should contact Debra Schumacher, Administrative Law Attorney, PO Box 64254, St. Paul, MN 55164-0254, (651) 431-4319 to learn the procedure for filing exceptions or presenting argument.

The record closes upon the filing of exceptions to the Report and the presentation of argument to the Commissioner, or upon the expiration of the deadline for doing so. The Commissioner must notify the parties and Administrative Law Judge of the date the record closes. If the Commissioner fails to issue a final decision within 90 days of the close of the record, this Report will constitute the final agency decision under Minn. Stat. § 14.62, subd. 2a (2016). In order to comply with this statute, the Commissioner must then return the record to the Administrative Law Judge within ten working days to allow the Judge to determine the discipline imposed.

Under Minn. Stat. § 14.62, subd. 1 (2016), the Commissioner is required to serve her final decision upon each party and the Administrative Law Judge by first class mail or as otherwise provided by law.

MEMORANDUM

Appellant and C.G.K. each stated that they did not intend to falsify the timesheets. They acknowledged they were careless in their recordkeeping due to extraneous circumstances. Appellant stated her need to work two jobs to provide for her family and that she was not trained in how to enter her time. C.G.K. testified to her mental health and stress. While these conditions might explain the timesheet discrepancies, they do not justify submitting false timesheets.

Appellant and C.G.K. were on notice and were trained in the importance of submitting correct timesheets. Appellant's explanation that C.G.K. was responsible for Appellant's timesheets is irresponsible. The language on the timesheet clearly states Appellant is responsible for submitting accurate information. Further, Appellant could have received clarification from All Home Health. Appellant and C.G.K. engaged in the careless practice of Appellant signing timesheets and C.G.K. filling in the hours later without Appellant. Appellant submitted false timesheets and ignored the rule requiring her to personally fill out the timesheets daily. Compliance with this rule might have helped ensure that Appellant's timesheets were accurate.

Appellant and C.G.K.'s credibility is severely undermined by Exhibit 100. Appellant and C.G.K. both testified that they filled in the timesheets in Exhibit 100. Appellant testified to filling out the timesheets in Exhibit 100 because the timesheets in

the Department's exhibits were incorrect. This means that the timesheets were completed after Appellant saw the overlaps and could have attempted to correct them to eliminate any overlaps. Additionally, C.G.K. initially testified that the timesheets in Exhibit 100 were supposed to be submitted and she submitted other timesheets instead. This testimony indicates conflicting stories about who completed the documents. Appellant and C.G.K. signed the timesheets that contained the phrase:

“...It is a federal crime to provide false information on PCA billings for Medical Assistance payment. Your signature verifies the time and services entered above are accurate and that the services were performed as specified in the PCA Care Plan.”

By signing the documents, Appellant and C.G.K. affirmed that the hours entered in Exhibit 100 were true. Even though these documents were not submitted to All Home Health for billing purposes, the timesheets still contained the language noted above. If Appellant's testimony is to be believed, she and C.G.K. submitted timesheets and signed the timesheets with incorrect dates. If C.G.K. is believed, the timesheets were in her possession and were not submitted during this entire process. Either outcome does not reflect favorably on Appellant and C.G.K. These factors undermine the credibility of Appellant and C.G.K. and therefore the weight of their testimony is diminished.

The Administrative Law Judge recognizes that Appellant and C.G.K. were under significant stress. However, PCA services are funded with limited resources and vendors are required to report their hours accurately. Appellant and C.G.K. submitted false timesheets 70 days out of a 92-day period. This fact demonstrates that these actions were not a mistake; this conduct was a practice. Appellant's ongoing practice of misreporting her time warrants a serious sanction.

The Department considered the situation according to the factors required by statute and found that a five-year suspension is appropriate given the recurring pattern of submitting false timesheets. The Administrative Law Judge respectfully recommends that the Commissioner affirm the Department's five-year suspension of Appellant's participation as a MHCP provider.

L. S.