OAH 71-1800-35979

STATE OF MINNESOTA
OFFICE OF ADMINISTRATIVE HEARINGS

FOR THE DEPARTMENT OF HUMAN SERVICES

In the Matter of the SIRS Appeal by Community Living Options, Inc.

FINDINGS OF FACT, CONCLUSIONS OF LAW, AND RECOMMENDATION

This matter came before Administrative Law Judge Jessica A, Palmer-Denig for a hearing on September 15-17, 2020. The parties submitted written closing arguments, and the record closed upon receipt of the parties' final submissions on November 30, 2020.

Leonard Schweich, Assistant Attorney General, appeared on behalf of the Minnesota Department of Human Services (Department). Samuel D. Orbovich and Pari McGarraugh, Fredrikson & Byron, P.A., appeared on behalf of Community Living Options, Inc. (Appellant).

STATEMENT OF THE ISSUES

1. Has the Department established that it may recover an overpayment of Minnesota Health Care Program (MHCP) funds in the amount of $1,717,515.20 from Appellant?

2. Has the Department established that it may terminate Appellant's participation in the MHCP?

SUMMARY OF RECOMMENDATION

The Department established that it may recover $1,717,515.20 from Appellant as an overpayment of MHCP funds. The Department established that it has the authority to terminate Appellant's participation in the MHCP, and also that grounds for doing so exist. Therefore, the Administrative Law Judge recommends that the Commissioner of Human Services (Commissioner) **AFFIRM** the Notice of Overpayment, Termination, and Payment Withhold, issued December 20, 2018 (Notice of Overpayment), with modifications as suggested below.

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

FINDINGS OF FACT

I. Regulatory Background and Requirements

1. Minnesota participates in the Medicaid program,[1] which funds medical assistance (MA)[2] for eligible individuals who are unable to pay for their medical care.[3] The Department is charged with administering and overseeing this program through the MHCP.[4]

2. The Department created an internal unit, called the Surveillance and Integrity Review Section (SIRS) unit, to review and monitor compliance with federal and state law related to the payment for MA-eligible services by service providers and recipients participating in the MHCP.[5] The SIRS unit is directed to identify and investigate "fraud, theft, abuse, or error by vendors or recipients of health services through" the MHCP, and in such cases impose "sanctions against vendors and recipients of health services."[6]

3. Personal care assistance is one of the services available to MA recipients through the MHCP.[7] Eligible personal care assistance services may include assistance with activities of daily living such as dressing, grooming, bathing, eating, and toileting, among others.[8] Recipients may also receive assistance with health-related procedures and tasks, including exercises, assistance with self-administration of medication, and seizure intervention.[9]

4. Each recipient must be assessed to determine the type and amount of personal care assistance services for which the person qualifies.[10] A public health nurse conducts this assessment and creates a service plan.[11]

5. Services are then provided by a personal care assistant (PCA), who is employed by a personal care assistance provider agency.[12] Services provided by PCAs are supervised by a qualified professional (QP).[13]

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[1] *See generally* 42 U.S.C. § 1396-1396v (2018); Minn. Stat. §§ 256B.01-.85 (2020).
[2] *See* Minn. Stat. § 256B.02, subd. 8.
[3] *See* 42 U.S.C. § 1396-1; 42 C.F.R. § 430.0 (2020).
[4] Minn. Stat. § 256B.04; Minn. R. 9505.0011 (2019); *see also* Minn. Stat. §§ 256B.01-.85; Minn. R. 9505.0295, .0335 (2019).
[5] Minn. Stat. § 256B.04, subd. 10; Minn. R. 9505.0180, .2160-.2245 (2019).
[6] Minn. R. 9505.2160, subp. 1; *see also* Transcript (Tr.) Volume (Vol.) I at 32-33 (Cina). Note that the record contains three transcripts recording the three days of hearing in this matter. In this recommendation, the transcript for September 15, 2020, is referenced as Tr. Vol. I; the transcript for September 16, 2020, is Tr. Vol. II; the transcript for September 17, 2020, is Tr. Vol. III.
[7] Minn. Stat. § 256B.0659; Minn. R. 9505.0335.
[8] Minn. Stat. § 256B.0659, subds. 1(b), 2(a)-(b).
[9] *Id.*, subds. 1(h), 2(c).
[10] *Id.*, subds. 3a(a), 4.
[11] *Id.*, subds. 3a(a), 6, 1(q) (defining a service plan as a "written summary of the assessment and description of the services needed by the recipient").
[12] *Id.*, subd. 1(m); Minn. R. 9505.0335, subp. 1(C).
[13] Minn. Stat. §§ 256B.0625, subd. 19c, .0659, subds. 1(k), 14(a).

6. PCAs provide services to recipients pursuant to a care plan, which is a "written description of personal care assistance services developed by the personal care assistance provider according to the service plan."[14] Each recipient "must have a current personal care assistance care plan based on the service plan. . . that is developed by the [QP] with the recipient and responsible party."[15] The care plan must be completed within the first week after a provider agency begins providing services, and then updated as needed and at least annually.[16]

7. Care plans contain certain specific information, including a description of the "recipient's individualized needs for assistance with activities of daily living, instrumental activities of daily living, health-related tasks, and behaviors."[17] The care plan must be signed and dated by the recipient or responsible party and the QP,[18] and a copy is kept in the recipient's home and in the recipient's file at the provider agency.[19]

8. A QP may be a mental health professional, registered nurse, licensed social worker, or a qualified designated coordinator.[20] The QP works for the provider agency, and must train, supervise, and evaluate PCAs.[21] Among their duties, QPs develop and monitor the recipient's care plan, and document all training, communication, evaluations, and actions needed to improve the performance of the PCAs who provide services.[22] The QP documents the services provided in the agency's recipient and employee files and in the recipient's home, including completing documentation related to the care plan, the results of the QP's evaluations, and communications with the recipient and agency staff.[23]

9. PCAs are required to document the services they provide to recipients on a daily basis on a timesheet form, and the timesheet form must be submitted on a monthly basis to the provider and then kept in the recipient's health record.[24] The services identified on the timesheet must correspond to the care plan, and the timesheet must also contain the following specific information required by law:

> (1) full name of personal care assistant and individual provider number;
>
> (2) provider name and telephone numbers;

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[14] Minn. Stat. § 256B.0659, subds. 1(n), 7, 12(b).
[15] *Id.*, subd. 7(a).
[16] *Id.*, subd. 7(c).
[17] *Id.*, subd. 7(b)(5).
[18] *Id.*, subd. 7(b)(6).
[19] *Id.*, subd. 7(a).
[20] Minn. Stat. §§ 256B.0625, subd. 19c, .0659, subd. 1(k).
[21] Minn. Stat. § 256B.0659, subds. 13(a)-(b), 14.
[22] *Id.*, subd. 13(b)(1), (5).
[23] *Id.*, subd. 14(f).
[24] *Id.*, subd. 12(a).

(3) full name of recipient and either the recipient's medical assistance identification number or date of birth;

(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 medical assistance payments; and,

(9) dates and location of recipient stays in a hospital, care facility, or incarceration.[25]

10. In Minnesota, PCA services may be provided by different types of agencies.[26] A "personal care assistance provider agency" includes both personal care assistance provider organizations (PCPO), and personal care assistance choice agencies (PCA Choice).[27]

11. In the PCA Choice program, a fiscal intermediary assists the recipient in paying and accounting for PCA services.[28] Unless otherwise provided "all other statutory and regulatory provisions relating to personal care assistance services apply to a recipient using the personal care assistance choice option."[29] The Legislature has described this program further:

> Personal care assistance choice is an option of the personal care assistance program that allows the recipient who receives personal care assistance services to be responsible for the hiring, training, scheduling, and firing of personal care assistants according to the terms of the written agreement with the personal care assistance choice agency…. This program offers greater control and choice for the recipient in who provides the personal care assistance service and when the service is scheduled. The recipient or the recipient's responsible party must choose a personal care assistance choice provider agency as a fiscal intermediary. This personal care assistance choice provider agency manages payroll, invoices the

[25] *Id.*, subd. 12(b)-(c).
[26] *Id.*, subd. 1(l).
[27] *Id.*
[28] *Id.*, subd. 18(a).
[29] *Id.*; *see also* Ex. 103 at 2 ("While this option provides flexibility and increases a recipient's responsibilities, it remains a federal and state funded [MA] service. All other federal and state regulations regarding PCA services apply unless covered in this bulletin."), 8 ("Under PCA Choice, the recipient or responsible party, the PCA Choice provider, the [QP], and the PCA are responsible for following the regulations which cover PCA services.").

> state, is responsible for all payroll-related taxes and insurance, and is responsible for providing the consumer training and support in managing the recipient's personal care assistance services.[30]

12. Under the PCA Choice program, the recipient or responsible party hires and fires PCAs and QPs, develops a care plan with the assistance of a QP if needed, and with the QP's assistance as requested, the recipient or responsible party trains and supervises the PCA who provides services.[31] Unlike the PCPO model, which requires more frequent visits by the QP, in the PCA Choice model the QP is required to visit the recipient a minimum of only once every 180 days.[32]

13. A PCA Choice provider agency must meet all provider agency standards,[33] and perform the following specific duties:

> (1) be the employer of the [PCA] and the [QP] for employment law and related regulations including, but not limited to, purchasing and maintaining workers' compensation, unemployment insurance, surety and fidelity bonds, and liability insurance, and submit any or all necessary documentation including, but not limited to, workers' compensation, unemployment insurance, and labor market data required under [Minn. Stat. § 256B.4912, subd. 1a (2020)];
> (2) bill the medical assistance program for [PCA] services and [QP] services;
> (3) request and complete background studies that comply with the requirements for [PCAs] and [QPs];
> (4) pay the [PCA] and [QP] based on actual hours of services provided;
> (5) withhold and pay all applicable federal and state taxes;
> (6) verify and keep records of hours worked by the [PCA] and [QP];
> (7) make the arrangements and pay taxes and other benefits, if any, and comply with any legal requirements for a Minnesota employer;
> (8) enroll in the [MA] program as a [PCA Choice] agency; and,
> (9) enter into a written agreement [with the recipient or responsible party] before services are provided.[34]

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[30] Minn. Stat. § 256B.0659, subd. 18(b).
[31] *Id.*, subd. 19(a); *see also* Ex. 103 at 4, 6 (outlining the duties of the QP under PCA Choice and noting that the QP must determine the services that can be supervised by the recipient or responsible party, or that must be supervised by the QP, and that the QP must visit the recipient in the recipient's home at least once every year); Ex. 105 at 1.
[32] Minn. Stat. § 256B.0659, subds. 14(c), 19(a)(4); Ex. 104 at 2 (stating that for PCA Choice visits "[t]he QP must visit the location of service delivery and meet with the recipient and responsible party to oversee the delivery of PCA services at least every 180 days"); Ex. 105 at 1.
[33] Minn. Stat. § 256B.0659, subd. 19(b)(1).

14. The agreement between the PCA Choice agency and the recipient must be in writing, with a copy provided to the recipient or responsible party, each PCA, and the QP.[35] The agreement outlines the duties assigned to the recipient and the PCA Choice agency, as well as the PCA and QP, financial and administrative information, and documentation requirements related to timesheets, activity records, and the recipient's care plan.[36]

15. Certain required documentation must be completed and kept in the PCA provider agency file or at the recipient's home.[37] Such required documentation includes employee files containing applications, background study documents, verification of training completion, supervisory visit information, and employment evaluations; recipient files containing the service plan and care plan; and agency policy manuals documenting employment-related policies and policies related to the provision of care; timesheets for each personal care assistant along with completed activity sheets for each recipient served; and agency marketing materials.[38]

16. To obtain payment for services provided, each occurrence in which a health service is provided to a recipient must be documented.[39] Providers must maintain certain specific documents, identified as health service records, related to the provision of and billing for PCA services, including the recipient's care plan, daily timesheets containing all required items of information, and documentation of supervision of PCA services by a QP.[40] Providers are also required to maintain certain financial records, and this includes employee timesheets.[41] Health service records and financial records related to a service for which a provider billed or received payment must be retained for at least five years after the initial date of billing, though in years four and five after the billing date, the records may be stored on microfilm or in an electronic format.[42]

17. PCA provider agencies are required to provide investigators with immediate access to their offices during business hours, without prior notice, and must provide investigators with documents and records related to services provided and claims submitted.[43] Health service and financial records must be available at the provider's place of business on the day on which investigators request access.[44] A provider must store records in a manner that allows review by investigators at the provider's place of business during business hours.[45]

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[34] *Id.*, subd. 19(c); *see also* Ex. 103 at 5.
[35] Minn. Stat. § 256B.0659, subd. 20(a).
[36] *Id.*
[37] *Id.*, subd 28(a).
[38] *Id.*
[39] Minn. R. 9505.2175, subp. 1.
[40] *Id.*, subps. 1-2, 7(B), (H), (L).
[41] Minn. R. 9505.2180, subp. 1(H).
[42] Minn. R. 9505.2190, subp. 1.
[43] Minn. Stat. § 256B.0659, subd. 31.
[44] Minn. R. 9505.2185, subp. 2.
[45] Minn. R. 9505.2190, subp. 1.

II. Factual Background

A. Appellant's Operations

18. Appellant was established in 1995.[46] Appellant enrolled with the Department as a PCA Choice agency in 2000.[47] During the time period relevant to this case, Appellant served around 40 clients through its PCA Choice program.[48] Appellant has never operated as a PCPO.[49]

19. In connection with its operations as a PCA Choice agency, Appellant entered into a Provider Agreement containing the terms under which it provides and bills for PCA services.[50] Under the Provider Agreement, Appellant agreed to "[m]aintain records that fully disclose the extent of services provided to MHCP recipients for a period of five years after the initial date of billing [the Department], in accordance with Minnesota Rules 9505.2160 – 9505.2245, or for the duration of contested case proceedings, whichever is longer."[51] Appellant executed an addendum to the Provider Agreement for PCA Choice providers, in which it agreed to be the employer of the personal care assistant and qualified professional as provided in Minn. Stat. § 256B.0659, subd. 19(c)(1), and "[t]o provide acknowledgement of participation from a qualified professional, as defined in MS 256B.0625 subd. 19c and to notify MHCP of any changes in affiliation status."[52]

20. Appellant operates more than 50 licensed home and community services facilities, including adult and child foster care homes, and two assisted living homes.[53] Appellant did not provide PCA services in these settings, and these operations are not at issue in this case.[54]

21. Appellant is owned by Jeff Feltz, who serves as its executive director.[55] Mr. Feltz's wife, Linda Feltz, is Appellant's office manager.[56] Alissa Lundberg works for Appellant as an administrative assistant; her duties include calculating timesheets and processing payroll, billing for services, and document filing.[57]

22. Mr. Feltz drafted and approved position descriptions for PCAs and QPs, an employee handbook governing the work of PCAs, and a PCA training manual.[58]

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[46] Tr. Vol. II at 68 (Feltz).
[47] *Id.*
[48] Tr. Vol. I at 47 (Cina); Tr. Vol. II at 72 (Feltz).
[49] Tr. Vol. II at 70 (Feltz).
[50] Ex. 9; *see also* Minn. R. 9505.0335, subp. 1(D).
[51] Ex. 9 at DHS33.
[52] *Id.* at DHS36.
[53] Ex. 4 at 2; Ex. 5 at DHS24; Tr. Vol. II at 68 (Feltz).
[54] Ex. 2 at DHS12; Tr. Vol. II at 69 (Feltz).
[55] Ex. 2 at DHS8; Tr. Vol. II at 68 (Feltz). There is another owner of Appellant identified in the record, Douglas Easter, but Mr. Easter was not involved in the events of this case. Tr. Vol. I at 47 (Cina).
[56] Ex. 5 at DHS24; Tr. Vol. II at 81 (Feltz).
[57] Tr. Vol II at 6 (Lundberg).
[58] Ex. 111; Ex. 112; Ex. 113; Ex. 120; Tr. Vol. II at 79, 91-93 (Feltz).

23. The PCA position description required PCAs to enter into a written agreement with Appellant and the recipient or responsible party; to provide care in accordance with the recipient's care plan; and to report to the responsible party and the QP.[59]

24. The QP job description stated that, as of January 1, 2010, all PCAs were required to be supervised by a QP and that the QP was required to perform the duties listed in Minn. Stat. § 256B.0659.[60] The QP position description further provided that the QP reported to the provider agency, and that the duties of the QP included, among other things: (1) developing and modifying care plans; (2) monthly monitoring of the care plan to ensure the needs of the recipient were met and providing instruction on the care plan to PCAs and recipients; (3) training and supervising PCAs and documenting such activities; (4) maintaining written records, including time and supervision logs; (5) engaging in direct observation of the PCA within the first 14 days of provision of services to a recipient and at least every 180 days thereafter; (6) documenting all communications with recipients and PCA staff on agency-provided forms; and (7) evaluating and documenting QP services for the recipient on agency-provided forms.[61]

25. Mr. Feltz also wrote an agreement for the recipient or responsible party, Appellant, the PCA, and the QP to sign to outline the responsibilities of the different participants in the provision of PCA Choice services.[62] Under this agreement, the QP is required to assist the recipient or responsible party in developing a care plan and to determine which tasks performed by the PCA may be adequately supervised by the recipient or responsible party, and which tasks must be supervised by the QP.[63] The recipient or responsible party must monitor and verify the hours worked by the PCA and QP.[64] The agreement does not provide for retention of documents by the recipient or responsible party.[65] Appellant is required to verify and maintain records of the hours worked by the QP and PCA.[66]

26. Appellant provided PCAs with timesheets to use to track the hours they worked.[67] Appellant's payroll policy instructed that timesheets were to be kept in a basket or assigned area, and employees were responsible for ensuring timesheets were in the assigned area.[68] PCAs then completed the timesheets and submitted them to

[59] Ex. 111 at CLO0012-CLO0013. The position description noted that the PCA was an employee at will and that employment could be terminated at any time at the option of the employee, the recipient or responsible party, or by Appellant. *Id.*
[60] Ex. 112 at CLO0015. This position description also provided that the QP could be terminated by Appellant. *Id.* at CLO0016.
[61] *Id.* at CLO0015-CLO0019, CLO0043-CLO0045.
[62] Tr. Vol. II at 75 (Feltz); Ex. 110.
[63] Ex. 110 at 2.
[64] *Id.* at 1.
[65] *See id.* at 1-2.
[66] *Id.* at 3.
[67] Tr. Vol. II at 79 (Feltz); Ex. 117 at 1, 3.
[68] Ex. 114.

Appellant by mail, email, facsimile, or in person by the staff member, recipient, or responsible party.[69]

27. Upon receiving timesheets for PCA services, two to three of Appellant's employees, including Lundberg, processed the payroll.[70] First, staff reviewed the timesheets to determine whether they contained all required information, and followed up on any missing items or errors on the timesheets with the PCA or responsible party.[71]

28. Once the timesheets were correct and complete, staff entered the hours worked from the timesheets into Appellant's payroll system.[72] Appellant required PCAs to submit timesheets for each pay period by Thursday of one week, and the PCAs were paid eight days later, on Friday of the following week.[73] Appellant processed payroll prior to receiving reimbursement for services from the Department.[74]

29. To bill the Department, Appellant's staff used the timesheets to create another document tracking each PCA's hours, which Appellant called "conversion sheets" or "green sheets."[75] On these conversion sheets, staff converted the hours worked by the PCA each day into a correlating number of units in 15 minute increments.[76] One hour translated into four 15 minute increments.[77] Those units were then multiplied by the billing rate for the services authorized for the recipient based on their service assessment so that these amounts could be billed to the Department.[78]

30. Lundberg submitted claims to the Department through the Department's online billing portal, MN-ITS.[79] When Appellant received remittance advice from the Department indicating that claims were paid, Appellant's staff marked the conversion sheets to indicate that payment had been received.[80]

31. Each conversion sheet documented two months of PCA time billed by Appellant.[81] When each conversion sheet had been fully completed for that time period and Appellant had received payment, the conversion sheets were filed in the recipient's file maintained by Appellant.[82]

32. Other than documenting the hours worked for conversion into billing units, the conversion sheets did not replicate information required to be contained on

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[69] Tr. Vol II at 8-9 (Lundberg); Ex. 114; *see also* Ex. 115.
[70] Tr. Vol. II at 96 (Feltz).
[71] *Id.* at 14-15 (Lundberg).
[72] *Id.* at 14, 16.
[73] *Id.* at 13.
[74] *Id.* at 10, 13.
[75] *Id.* at 9, 16-17; *see also* Ex. 116.
[76] Tr. Vol. II at 9-10, 21 (Lundberg).
[77] *Id.* at 9-10.
[78] *Id.* at 9-10, 16-18, 22; *see also* Tr. Vol. II at 35 (Cina).
[79] Tr. Vol. II at 7, 17 (Lundberg).
[80] Tr. Vol. II at 22 (Lundberg); *see also* Ex. 116; Ex. 121.
[81] Tr. Vol. II at 23 (Lundberg).
[82] *Id.*

timesheets, such as the beginning and ending time of the shift, a.m. and p.m. designations, and the PCA and recipient signatures, and the conversion sheets did not contain an acknowledgement that submitting false claims is a federal crime.[83]

33. Appellant's process for payroll and billing for QP services worked in the same way described above.[84]

34. Lundberg also submitted requests to the Department for issuance of provider numbers for billing, which are called a Unique Minnesota Provider Identification (UMPI) number, for newly hired PCAs.[85] Lundberg transmitted the request to the Department by facsimile; the process for issuance of an UMPI number could take several weeks, and when the number was eventually issued, the effective date would usually be listed as the date the Department received Appellant's faxed request.[86] Providers may bill for services up to one year after services are provided.[87] In some instances, Appellant processed payroll for hours worked and paid PCAs who had not yet received an UMPI number.[88]

35. Appellant ceased operations as a PCA Choice provider in December 2017, because it was no longer able to bill for PCA services,[89] as described in further detail below. Appellant transitioned its clients to other PCA agencies to receive services.[90] To provide its clients with time to accomplish this transition, Appellant continued to provide services to clients for approximately two months; Appellant was not eligible to receive payment for these services from the Department.[91]

B. The Department's Investigation

36. In May 2015, the Department received a tip indicating that a PCA working for Appellant, Corey Elling, provided services to a recipient, C.H., for approximately one year even though he had not passed a background study and did not have a valid provider number, and that recipients receiving services through Appellant had not received a visit from a QP in years.[92]

37. The Department determined that this information merited further inquiry.[93] Investigator Anthony Cina was assigned to conduct the investigation.[94]

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[83] Ex. 115; Ex. 116; Tr. Vol. I at 59 (Cina); *see also* Minn. Stat. § 256B.0659, subd. 12(c).
[84] Tr. Vol. II at 20 (Lundberg).
[85] *Id.* at 11; *see also* Tr. Vol. III at 4.
[86] Tr. Vol. II at 12 (Lundberg).
[87] Tr. Vol. I at 110 (Cina).
[88] Tr. Vol. II at 10-12 (Lundberg).
[89] *Id.* at 71 (Feltz).
[90] *Id.* at 72.
[91] *Id.*
[92] Ex. 2 at DHS8; Ex. 15 at DHS916; Tr. Vol. I at 34 (Cina).
[93] Ex. 15 at DHS916.
[94] Tr. Vol. I at 34 (Cina).

38. Investigator Cina began by looking into the allegations regarding Mr. Elling.[95] Investigator Cina confirmed that Mr. Elling was not assigned an UMPI number, and so Appellant could not have submitted claims for services provided by Mr. Elling.[96] Investigator Cina reviewed claims submitted for PCA care provided to C.H., finding that Appellant submitted claims for C.H.'s care using provider numbers for two PCAs, Kyle Ehmke and Shannon Mullins.[97]

39. In February 2014, Mr. Elling successfully passed a background study check.[98] In November 2014, however, Appellant submitted another background study request for him.[99] The Department's Background Studies Unit told Investigator Cina that, on December 1, 2014, Appellant and Mr. Elling would have been informed that the background study would take additional time to complete and that Mr. Elling could not provide PCA care until his background study was finalized.[100]

40. On March 19, 2015, the Department sent a letter to Appellant notifying it that Mr. Elling was disqualified and was not permitted to have direct contact with persons receiving services from programs licensed by the Department and other agencies.[101] Appellant terminated Mr. Elling in March 2015, when it learned he had been disqualified.[102] Until that time, Appellant believed that Mr. Elling was qualified to provide services based on his earlier successful background study.[103]

41. In a letter dated May 15, 2015, the Department notified Appellant that Mr. Elling's disqualification had not been set aside, so he remained disqualified from providing services to Appellant's clients.[104]

42. On April 19, 2017, Investigator Cina contacted Appellant to learn where its documents and records were located in anticipation of conducting an onsite inspection, and he spoke with Ms. Feltz.[105] Based on the tip received by the Department, Investigator Cina suspected fraud related to Mr. Elling's services so he did not advise Appellant of the exact date he would conduct an onsite inspection, but he provided a date range.[106] Ms. Feltz told Investigator Cina that documents were located at

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[95] *See id.* at 35-36.
[96] *Id.*; Ex. 2 at DHS9; *see also* Tr. Vol. III at 4.
[97] Ex. 2 at DHS9; Ex. 100 at 313-14; Tr. Vol. I at 36 (Cina).
[98] Ex. 14 at DHS913; Tr. Vol. I at 36 (Cina).
[99] Ex. 14 at DHS912; Ex. 15 at DHS916.
[100] Ex. 2 at DHS9. The Administrative Law Judge has included this information in the Findings of Fact because it explains later determinations made by Investigator Cina. Ultimately, as explained in the Memorandum below, the Administrative Law Judge does not credit the information Investigator Cina received.
[101] Ex. 14 at DHS914.
[102] Tr. Vol. II at 78, 110, 113 (Feltz).
[103] *Id.* at 113.
[104] Ex. 8 at DHS31.
[105] Ex. 4 at 1; Ex. 5 at 1; Tr. Vol. I at 37-38 (Cina)
[106] Ex. 4 at 1; Ex. 5 at 1; Tr. Vol. I at 38-39 (Cina).

Appellant's business offices in Zimmerman, Minnesota, and that payroll records were stored electronically while all other records were maintained in paper format.[107]

43. On May 9, 2017, Investigator Cina and two other SIRS unit investigators conducted an onsite inspection at Appellant's offices.[108] During the visit, the investigators formally interviewed Ms. Feltz.[109] Ms. Lundberg was not formally interviewed, but she provided additional information in response to their questions.[110]

44. The investigators requested access to Appellant's files and records, and specifically sought to review employee files and timesheets, payroll records, and recipient files, including care plans and notes of QP supervision.[111] The investigators reviewed files for eleven clients who received services from Appellant, including C.H.[112] Investigators selected a review period of February 1, 2015, through September 30, 2016, with some additional inquiry into records from 2014 related to the allegations about Mr. Elling.[113]

45. With respect to Mr. Elling, Appellant's payroll records disclosed that Appellant paid Mr. Elling for 1,936 hours of PCA services between March 28, 2014, and March 27, 2015.[114] Investigator Cina calculated that Mr. Elling provided 663 hours of PCA services during the time period after Appellant was allegedly notified that the second background investigation would take additional time to complete, and the time he was ultimately disqualified and reconsideration denied.[115] Other records showed that Appellant had been reimbursed for only 646 hours of PCA services provided to C.H., in the amount of $10,396.80, between February 19, 2014, and February 22, 2015.[116] Appellant's conversion sheets for Mr. Elling's time contained entries beginning March 5, 2014, and ending March 17, 2015.[117] The conversion sheets for Mr. Elling were not marked to show that the Department had paid for the hours reflected there.[118]

46. Upon reviewing the recipient files, the investigators discovered that the files did not contain copies of QP supervision notes during the review period.[119] When questioned, Ms. Feltz indicated that Appellant had not had a QP for PCA clients since 2014 or 2015.[120] Ms. Feltz reported that one employee, Kristine Millerbernd, was qualified to act as a QP, but that she provided only "fill-in" QP services and provided no

[107] Tr. Vol. I at 38, 40 (Cina).
[108] Ex. 4 at 1; Tr. Vol. I at 43 (Cina).
[109] Ex. 4 at 2; Tr. Vol. I at 47-48 (Cina).
[110] Ex. 4 at 2; Tr. Vol. I at 48 (Cina).
[111] Tr. Vol. I at 45 (Cina).
[112] Ex. 2 at DHS9, DHS12; Tr. Vol. I at 47 (Cina). The investigative team did not review the individual files for recipients other than the selected group of eleven. Tr. Vol. I at 107 (Cina).
[113] Tr. Vol. I at 44 (Cina).
[114] Ex. 2 at DHS10; Ex. 11 at DHS83.
[115] Ex. 2 at DHS10.
[116] *Id.*
[117] Ex. 13 at DHS853-DHS859.
[118] *Id.*
[119] Tr. Vol. I at 49 (Cina); Ex. 4 at 4.
[120] Ex. 4 at 2.

such services to clients in northern Minnesota, as those clients were too far away.[121] Ms. Feltz indicated that QPs are considered employees and that the process for billing QPs is essentially the same as billing for PCA services.[122] Ms. Feltz told investigators that if Appellant had performed any QP services and documentation existed, such documentation would be found in the recipient files.[123] Ms. Feltz acknowledged that she knew recipients were supposed to receive visits from QPs, and she was aware that recipients were not receiving these services.[124]

47. The investigators discovered that recipient files maintained by Appellant lacked care plans for any time after 2012.[125] Ms. Feltz told the investigators that Appellant had prepared care plans, speaking about these activities in the past tense, and that care plans are completed during QP visits, but she noted that it was possible some recipients had gone three years without a QP visit.[126] Ms. Feltz acknowledged she knew that Appellant was required to have care plans on file and that Appellant's files did not contain care plans.[127]

48. The investigators found no PCA timesheets in the files dating before January 1, 2016, other than records from the pay period spanning December 2015 to January 2016.[128] Ms. Feltz told the investigators that records were kept for one year and then shredded to save space, so the records investigators sought for the beginning of 2016 and before no longer existed.[129]

49. Investigator Cina asked whether the documents were maintained in an electronic format, as he was prepared to copy the records to a CD, DVD, or flash drive, but he was told that the records did not exist.[130] Investigator Cina was told that some records might be available in an electronic format in emails from recipients or responsible parties because Appellant's staff did not consistently delete emails.[131] The investigators could not access and copy documents from Appellant's email system during the on-site investigation.[132]

50. The investigators learned that some additional records were kept in a storage shed behind Appellant's offices, but Ms. Feltz told them that shelves in the shed

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[121] *Id.*
[122] *Id.* at 4.
[123] *Id.*
[124] *Id.* at 5; Tr. Vol. I at 56 (Cina).
[125] Ex. 4 at 5; Tr. Vol. I at 50 (Cina). Investigators were able to locate service assessments created by public health nurses, but not care plans. Ex. 4 at 5.
[126] Ex. 4 at 4; Tr. Vol. I at 50-52 (Cina).
[127] Tr. Vol. I at 52 (Cina).
[128] *Id.* at 60; Ex. 4 at 5.
[129] Ex. 4 at 3; Tr. Vol. I at 54 (Cina).
[130] Tr. Vol. I at 54 (Cina).
[131] *Id.*
[132] *Id.*

had broken and that the records were in disarray.[133] The investigators did not enter the shed.[134]

51. After the onsite inspection, Investigator Cina requested additional documentation from Appellant.[135] Investigator Cina sent Appellant a letter on June 1, 2017, requesting personnel files for any employees who provided qualified professional supervision of PCA services through Appellant since January 1, 2013.[136] He asked that the documents be provided to him by June 9, 2017.[137]

52. On June 8, 2017, Investigator Cina sent a follow-up request noting that as of that date he had not yet received the requested documents related to qualified professionals employed by Appellant.[138] He indicated that, if the records were not received by June 15, 2017, the Department would suspend all future payments for services until the records were produced, and might also pursue termination of Appellant's participation in the MHCP.[139]

53. Appellant subsequently provided personnel files and payroll records for Nancy Strachan and Ms. Millerbernd.[140] According to those records, Appellant paid Ms. Strachan for only 75 hours of QP services during the two-year period between January 1, 2013, and December 31, 2014.[141] Appellant had not paid Ms. Millerbernd any amounts for providing QP services between January 1, 2013, and June 8, 2017.[142]

54. Investigator Cina interviewed Ms. Strachan by telephone on June 7, 2017.[143] Ms. Strachan worked as a Behavioral Analyst in Appellant's group homes beginning in 2006.[144] In 2007, Appellant learned that she had a degree in psychology, and she was asked to provide QP services in addition to her other duties, but she reported to Investigator Cina that the time she spent providing QP services was minimal.[145] She did not remember seeing more than seven recipients per year as a QP.[146] Ms. Stachan was based in Pine City, Minnesota; she performed QP visits only within an hour-and-a-half of Pine City, and never visited recipients farther north than Mille Lacs, Minnesota.[147]

55. As a QP, Ms. Strachan completed initial assessments for new recipients and reviewed care plans to ensure that the care provided was in compliance with the

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[133] Ex. 4 at 4.
[134] *Id.*
[135] Tr. Vol. 1 at 57 (Cina).
[136] Ex. 6 at DHS26.
[137] *Id.*
[138] Ex. 7 at DHS29.
[139] *Id.*
[140] Ex. 2 at DHS11.
[141] *Id*.
[142] *Id.* As explained below, Ms. Millerbernd began providing QP services in June 2017. *See* Ex. 10.
[143] Ex. 3 at DHS13.
[144] *Id.*
[145] *Id.*
[146] Ex. 2 at DHS11.
[147] *Id.*; Tr. Vol. I at 56 (Cina).

recipient's needs.[148] Ms. Strachan told Investigator Cina that many recipients did not have care plans.[149] In these instances she offered assistance with writing care plans, but stated that she was not required to write them because the recipients were all PCA Choice program participants and they and their responsible parties bore that responsibility themselves.[150] When recipients lacked care plans, Ms. Strachan compared PCA timesheets to the public health nurse's assessment for that recipient to determine whether the care provided was consistent with the recipients' needs.[151] Ms. Strachan left her employment with Appellant in December 2014.[152]

56. On June 23, 2017, Mr. Feltz sent a letter to Investigator Cina explaining the Appellant had found it challenging to provide QP services to clients in the far northern parts of Minnesota because of the travel required.[153] However, he advised Investigator Cina that Ms. Millerbernd, a current staff member and a seven-year employee of Appellant, met the qualification requirements to act as a QP.[154] Ms. Millerbernd had begun visiting clients the previous week to review progress, update care plans, and provide additional training to the PCAs for those clients.[155] Ms. Millerbernd reported to Mr. Feltz that the recipients were "all doing fine with their current situation and level of care."[156] She was planning another trip to meet with clients with whom she had not been able to connect, but Mr. Feltz reported to Investigator Cina that all of those clients had current care plans in place.[157] Mr. Feltz further indicated that, with this change, Appellant's provision of QP services would be stable in the future.[158]

C. The Department's Imposes a Payment Withhold

57. On October 18, 2017, the Medicaid Fraud Control Unit (MFCU) of the Minnesota Attorney General's Office executed a search warrant at Appellant's offices.[159] The MCFU seized approximately 30 boxes of documentation and Appellant's computers.[160] Appellant's computers were returned within two to three days, but the MFCU retained Appellant's documents for 16 months.[161]

58. The Department issued a Notice of Payment Withhold on November 2, 2017, indicating that the Department would withhold all MHCP payments from Appellant

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[148] Ex. 3 at DHS13.
[149] *Id.*
[150] *Id.*
[151] *Id.*
[152] *Id.*
[153] Ex. 10.
[154] *Id.*
[155] *Id.*
[156] *Id.*
[157] *Id.*
[158] *Id.*
[159] Ex. 2 at DHS12; Ex. 124; Tr. Vol. II at 73 (Feltz).
[160] Ex. 125; Tr. Vol. II at 73, 99 (Feltz).
[161] Tr. Vol. II at 73 (Feltz).

for PCA services effective as of that date.[162] The Department stated that the Affidavit of Probable Cause supporting the search warrant executed on October 18, 2017, in addition to other documents that the Department had obtained, established a credible allegation of fraud based on concerns that Appellant employed a disqualified PCA, submitted claims to DHS with missing or incomplete supporting documentation, and failed to adequately monitor PCA services.[163] The Department advised Appellant that it would continue to withhold payments until the Department or a prosecuting authority determined that there was insufficient evidence of fraud, or until legal proceedings related to the alleged fraud had concluded.[164]

59. In May 2018, the MFCU notified the Department that it had closed its case regarding Appellant and would not pursue criminal charges.[165]

D. The Department Issues a Notice of Overpayment and Terminates Appellant as a PCA Provider

60. On December 20, 2018, the Department issued a Notice of Overpayment, Termination, and Payment Withhold (Notice of Overpayment).[166] The Notice of Overpayment indicated that the Department determined Appellant submitted claims from February 1, 2014, to August 5, 2014, and February 1, 2015, to September 30, 2016, for which funds were recoverable in the amount of $1,717,515.20.[167] The Department identified four determinations supporting the Notice of Overpayment: (1) Appellant submitted claims for PCA services without supporting documentation; (2) the claims were for PCA services that were not supported by care plans; (3) the services were not performed under the supervision of a QP; and (4) Appellant allowed a PCA to work without a provider number and completed background study.[168]

61. The Notice of Overpayment informed Appellant that the Department would terminate its participation as a provider in the MHCP, effective January 22, 2019.[169] The Department stated its decision was based on the nature, severity, and chronicity of Appellant's violations and it articulated two specific reasons for termination: (1) Appellant failed to develop and maintain health service records as required by Minn. R. 9505.2175; and (2) Appellant repeatedly failed to comply with the terms of its provider agreement with the Department relating to PCA services.[170] The Department advised Appellant that it could apply for reinstatement five years from the date of termination or when the basis for the termination no longer existed.[171]

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[162] Ex. 1 at DHS1.
[163] *Id.*; Tr. Vol. I at 67-68 (Cina).
[164] Ex. 1 at DHS1.
[165] Ex. 2 at DHS12.
[166] Ex. 100.
[167] *Id.* at 1.
[168] *Id.*
[169] *Id.*
[170] *Id.* at 2.
[171] *Id.* at 3.

62. The Notice of Overpayment included two attached spreadsheets, totaling over 300 pages, detailing Investigator Cina's findings as to the individual claims supporting the Notice of Overpayment.[172] The spreadsheets noted for each claim the absence of timesheets, care plans, or QP documentation, based on the investigators' review of Appellant's files and Ms. Feltz's statements on the day of the onsite visit regarding Appellant's timesheet shredding practices and the lack of QP visits for recipients.[173] In the first spreadsheet, Investigator Cina documented claims lacking all required documentation dated within the review period of February 1, 2015, through September 30, 2016, in the amount of $1,707,551.04.[174] In the second spreadsheet, Investigator Cina identified claims related to services provided to C.H., occurring between February 1, 2014, and August 5, 2014, in the amount of $9,964.16.[175] The second spreadsheet identified the lack of timesheet documentation for each of the claims for C.H.'s services, but these services also were not supported by a care plan or documentation of QP supervision.[176]

63. On January 22, 2019, Appellant submitted a timely appeal of the Notice of Overpayment.[177]

E. Appellant's Retrieval of Documentation

64. After the MFCU returned approximately 30 boxes of seized documents to Appellant, Appellant maintained the documents as they had been returned, without alteration.[178] Appellant subsequently provided the boxes of documents to an accounting firm, Wipfli LLP (Wipfli).[179] The boxes of documents were then securely stored with limited access in Wipfli's offices.[180]

65. Appellant, through its counsel, engaged Wipfli to conduct a review of its records, including payroll records, conversion sheets, timesheets, and other documents, to assess the records and render an opinion as to whether the records supported the hours billed by Appellant for PCA services.[181]

66. In the course of its work, Wipfli conducted data mining of Appellant's email accounts, which were electronically stored with Opus Computer Services (Opus), Appellant's third-party Information Technology (IT) support service.[182] In doing so, Wipfli sought to capture timesheet documentation that would have been transmitted by PCAs

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[172] *Id.* at 8-314; Tr. Vol. I at 73-78 (Cina). Note that each page of the spreadsheets contains two different page numbers. Throughout this recommendation, the Administrative Law Judge has used pinpoint cites reflecting the page number from the larger page range of 1-314.
[173] Ex. 100 at 8-314; Tr. Vol. I at 73-75, 107 (Cina).
[174] Ex. 100 at 8-312; Tr. Vol. I at 78 (Cina).
[175] Ex. 100 at 313-14; Tr. Vol. I at 78 (Cina).
[176] Ex. 100 at 313-14; Tr. Vol. I at 78 (Cina).
[177] Ex. 101.
[178] Tr. Vol. II at 99-100 (Feltz).
[179] *Id.* at 100; Ex. 128 at 1.
[180] Tr. Vol. III at 21 (Newfield).
[181] Tr. Vol. II at 100-101, 106 (Feltz); Tr. Vol. III at 60 (Newfield); Ex. 128 at 1-5.
[182] Ex. 133 at 2-3.

to Ms. Feltz and Ms. Lundberg.[183] After obtaining raw data from Opus, which was then maintained in a secure manner by Wipfli, Wipfli conducted a forensic examination of the data to locate timesheets that remained stored within the email system.[184]

67. Wipfli also found hard copy timesheets located in approximately five to seven of the 30 boxes of documents it received from Appellant.[185]

68. In conducting its analysis, Wipfli reviewed the spreadsheets attached to the Notice of Overpayment,[186] but it used spreadsheets prepared earlier in the Department's investigation for its analysis to analyze whether it had located documentation supporting billings for particular claims.[187] Wipfli took this approach because the earlier spreadsheets contained a higher dollar value of claims, and Wipfli wanted to ensure that it did not miss any items in the analysis it provided.[188] Those spreadsheets identified approximately 136,000 hours of PCA services provided to recipients served by Appellant.[189]

69. Wipfli compared the timesheets it located, either from Appellant's email system or in hard copy form in the document boxes, to the claims spreadsheets.[190] Wipfli located timesheets supporting 61,215 hours of PCA time.[191] Wipfli created a spreadsheet identifying for each claim line, in a column labeled "W," the number of hours of PCA time supported by signed timesheets.[192] For the remainder, Wipfli was

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[183] *Id.* at 2.
[184] *Id.* at 2-5; Ex. 128 at 5; Tr. Vol. III at 22 (Newfield).
[185] Tr. Vol. III at 19 (Newfield); Ex. 128 at 5.
[186] *See* Ex. 100.
[187] Tr. Vol. III at 14 (Newfield); Ex. 134; Ex. 135. Exhibits 134 and 135 were received into the record without objection at the beginning of the hearing. Tr. Vol. I at 9, 13. Investigator Cina testified, without objection, that these exhibits were earlier versions of the spreadsheets used to support the Notice of Overpayment. *Id.* at 135-36 (Cina). The Department subsequently objected to the testimony of Mr. Newfield regarding Wipfli's use of these documents in its analysis, on the basis of relevance under Minn. R. Evid. 402 and the concern that the probative value was outweighed by the danger of confusion, under Minn. R. Evid. 403. Tr. Vol. III at 12-13. The Department made only general objections, and it provided no specific information as to the differences between these documents other than that the dollar amounts differed, and the earlier spreadsheets contained the notation "shredded timesheet" for some claims. *See id.* at 58 (Newfield). As Exhibits 134 and 135 were already received into the record at the time of this testimony, and the documents were work papers prepared for this case by the Department in connection with its investigation, the Administrative Law Judge overruled the objection and allowed Mr. Newfield to testify regarding Wipfli's review of these documents. *Id.* at 13-14. As these documents can be cross-referenced with other exhibits in the record, the Administrative Law Judge finds that any differences between the earlier versions of the Department's spreadsheets and the final spreadsheet attached to the Notice of Overpayment are not material to the outcome of this matter.
[188] Tr. Vol. III at 14 (Newfield).
[189] *Id.* at 30.
[190] *Id.*; Ex. 128 at 3; Ex. 134; Ex. 135.
[191] Tr. Vol. III at 30 (Newfield); Ex. 128 at 3.
[192] Tr. Vol. III at 43-44 (Newfield); Ex. 128 at 9-19, 21-23, 25, 27-30, 32-36, 38, 40-50, 52. Wipfli also examined whether the Department's payments for PCA services could be correlated to Appellant's payroll records and conversion sheets. Ex. 128 at 1-2, 4. As explained in greater detail below, the Administrative Law Judge determines that timesheets are in a distinct category based on the legal requirements for documentation and document retention by PCA providers, and that Wipfli's analysis of documents other than timesheets is not material the outcome of the case.

unable to locate timesheets supporting the payments made by the Department for PCA care.[193]

70. Among possible examples, Appellant's records yielded timesheets supporting PCA hours provided to recipient M.R. by PCA Dean Rutherford between February 1 and February 3, 2015, which the Department's spreadsheet supporting its Notice of Overpayment identified as lacking documentation.[194] Similarly, recovered records included a signed timesheet for Mr. Rutherford for services provided to recipient R.R. between February 1 and February 3, 2015.[195] Timesheet documentation was recovered for PCA services provided by Ryan Jansen to recipient K.O. between February 5, 2015, and February 16, 2016, which the Department's spreadsheet identified as claims lacking documentation.[196]

71. Wipfli located a signed hardcopy timesheet documenting PCA hours provided by Ms. Mullins to C.H. from February 1, 2014, through February 3, 2014.[197] The timesheet contains the required elements for timesheets, including the beginning and ending times of the shift, a.m. and p.m. designations, signatures of the recipient or responsible party and the PCA, and an acknowledgment that false information reported on timesheets is a federal crime.[198] This timesheet correlates to the hours the Department identified on the second spreadsheet attached to the Notice of Overpayment for PCA services provided to C.H. by Ms. Mullins.[199]

72. Wipfli also located signed timesheets for services provided by Mr. Ehmke to C.H. reflecting PCA hours between February 19, 2014, and August 5, 2014, which relate to claims identified on the Department's spreadsheet attached to the Notice of Overpayment.[200] These timesheets documented all of the hours listed on the Department's spreadsheet.[201] These timesheets also contained the required elements, such as the time the shift began and ended, a.m. and p.m. designations, signatures, and the fraud acknowledgement.[202]

73. Wipfli did not review whether any of the claims identified by the Department in this action were for services supported by care plans or supervised by a QP.[203]

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[193] Tr. Vol. III at 63 (Newfield).
[194] Ex. 100 at 233; Ex. 131-001 at 1.
[195] Ex. 100 at 242; Ex. 131-002 at 1.
[196] Ex. 100 at 180; Ex. 131-038 at 1.
[197] Tr. Vol. III at 54 (Newfield); Ex. 132-090 at 1.
[198] Ex. 132-090 at 1.
[199] Ex. 100 at 313.
[200] Tr. Vol. III at 51-52 (Newfield); Ex. 100 at 313-14; Ex. 132-099 at 2-8. There is another timesheet for Mr. Ehmke, found at Ex. 132-099 at 1, that reflects hours worked from February 18 until March 3, but the daily entries do not identify the year, and the bottom of the page is cut off above the signature and date, so that the dates worked and the date the timesheet might have been signed cannot be determined.
[201] Ex. 100 at 313-14; Ex. 132-099 at 2-8.
[202] Ex. 132-099 at 2-8.
[203] Tr. Vol. III at 57 (Newfield).

74. Any fact referenced in the Memorandum below that is not specifically referenced in these Findings of Fact is incorporated herein.

75. Any Conclusion of Law more properly deemed to be a Finding of Fact is incorporated herein.

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

CONCLUSIONS OF LAW

1. The Commissioner and the Administrative Law Judge have jurisdiction in this matter pursuant to Minn. Stat. §§ 14.50, 256B.04, subd. 15, .064, subd. 2 (2020).

2. The Department has complied with all procedural requirements of law and rule. Appellant received due and proper notice of the Department's determinations in this matter and Appellant timely appealed. Therefore, this matter is properly before the Administrative Law Judge and the Commissioner.

3. The Commissioner may impose sanctions against a "vendor of medical care" for fraud, theft, or abuse in connection with services provided to medical assistance recipients.[204]

4. Abuse by a vendor is defined as "a pattern of practices that are inconsistent with sound fiscal, business, or health service practices, and that result in unnecessary costs" to the MHCP.[205] Specific practices deemed by rule to be abuse by a vendor include failing to develop and maintain health service records as required under Minn. R. 9505.2175, and repeatedly failing to comply with the requirements of the provider agreement that relate to the programs covered by Minn. R. 9505.2160-.2245.[206]

5. Among the available sanctions, the Commissioner may suspend or withhold payments to a vendor, suspend or terminate the vendor from participation in the MHCP, or impose a fine.[207] In determining an appropriate sanction, the Commissioner must consider the nature, chronicity, and severity of the vendor's conduct and the effect of the conduct on the health and safety of persons served by the vendor.[208]

6. The Commissioner may also obtain monetary recovery from a vendor who has been improperly paid as a result of conduct prohibited under Minn. Stat.

[204] Minn. Stat. § 256B.064, subd. 1a.
[205] Minn. R. 9505.2165, subp. 2(A).
[206] *Id.*, subp. 2(A)(7), (18).
[207] Minn. Stat. § 256B.064, subd. 1b.
[208] *Id.*

§ 256B.064, subd. 1a, including fraud, theft, or abuse, or due to an error by the vendor or the Department.[209]

7. Appellant is a "personal care assistance provider agency,"[210] and a "vendor of medical care."[211]

8. To be eligible for reimbursement, PCA services must be provided according to a care plan containing specific information related to the recipient and his or her needs.[212] PCA services provided to a recipient must be performed under the supervision of a QP.[213]

9. As a condition of payment by the MHCP, a vendor must document each occurrence of a health service rendered to a recipient.[214]

10. Providers must maintain certain specific documents, identified as health service records, related to the provision of and billing for PCA services, including the recipient's care plan, daily timesheets containing all required items of information, and documentation of supervision of PCA services by a QP.[215] Providers are also required to maintain certain financial records, including employee timesheets.[216]

11. Health service records and financial records related to a service for which a provider billed or received payment must be retained for at least five years after the initial date of billing, though the records may be stored on microfilm or in an electronic format.[217]

12. MHCP funds paid for a health service that is not documented shall be recovered by the Department.[218]

13. The Department bears the burden to establish, by a preponderance of the evidence, that it may recover the amounts identified in its Notice of Overpayment.[219]

14. The Department did not establish that Appellant lacked timesheets for all of the claims identified in support of the Notice of Overpayment.[220] However, to the extent claims are not supported by a correlating time sheet received into the record, the Department established Appellant billed for services without adequate supporting documentation.

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[209] *Id.*, subd. 1c(a).
[210] *See* Minn. Stat. § 256B.0659, subd. 1(l); Minn. R. 9505.0335, subp. 1(D).
[211] *See* Minn. Stat, § 256B.02, subd. 7(a); Minn. R. 9505.0175, subp. 50, .2165, subp. 16a (2019).
[212] Minn. Stat. § 256B.0659, subd. 7(a)-(b); Minn. R. 9505.0335, subp. 2(D).
[213] Minn. Stat. § 256B.0659, subd. 14.
[214] Minn. R. 9505.2175, subp. 1.
[215] *Id.*, subps. 1-2, 7(B), (H), (L).
[216] Minn. R. 9505.2180, subp. 1(H).
[217] Minn. R. 9505.2190, subp. 1.
[218] Minn. R. 9505.2175, subp. 1.
[219] Minn. R. 1400.7300, subp. 5 (2019).
[220] *See* Ex. 131; Ex. 132.

15. The Department established, for all claims supporting the Notice of Overpayment between February 1, 2015, and September 30, 2016, that Appellant failed to ensure that its recipients had care plans and that PCA services were provided under the supervision of a QP, and that Appellant failed to maintain documentation of such services for claims billed to the MHCP. Therefore, the Department may recover an overpayment in the amount of $1,707,551.04.

16. The Department did not establish by a preponderance of the evidence that Appellant lacked timesheets to support claims billed to the MHCP for PCA services provided to recipient C.H. between February 1, 2014, and September 5, 2014, or that the PCA services provided to C.H. during that time period were provided by a person who did not have a completed background study. While the Department established that Mr. Elling did not have a provider number, the Department did not establish that any funds from the MHCP were paid for services he rendered, meaning that there is no overpayment attributable to Mr. Elling's services.

17. The Department established, for claims supporting the Notice of Overpayment between February 1, 2014, and August 5, 2014, that these claims were not supported by care plans and the services provided were not performed under the supervision of a QP, and that Appellant failed to maintain documentation establishing it met these requirements. Therefore, the Department may recover an overpayment in the amount of $9,964.16, related to these claims.

18. The Commissioner has authority to recover from Appellant an overpayment in the amount of $1,717,515.20.

19. The Commissioner has authority to terminate Appellant from participation as a PCA provider in the MHCP.

20. Any Finding of Fact that is more properly considered to be a Conclusion of Law is incorporated herein.

21. Any portion of the Memorandum below that constitutes a Conclusion of Law is incorporated herein.

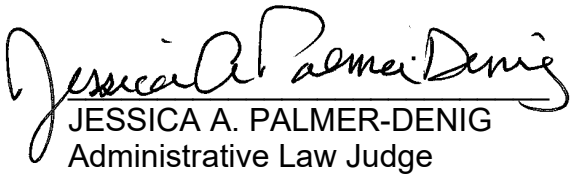
Based on these Conclusions of Law, and for the reasons explained in the accompanying Memorandum, which is incorporated herein, the Administrative Law Judge makes the following:

RECOMMENDATION

The Department has established by a preponderance of the evidence that it may recover an overpayment from Appellant in the amount of $1,717,515.20. The Department has also met its burden to show that grounds exist to terminate Appellant's participation in the MHCP as a PCA provider. The Administrative Law Judge recommends that the Department modify the Notice of Overpayment to remove the statement that Appellant allowed a person to work without a completed background

study and provider number. Other than that modification, the Administrative Law Judge recommends that the Commissioner **AFFIRM** the Notice of Overpayment.

Dated: February 23, 2021



JESSICA A. PALMER-DENIG
Administrative Law Judge

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NOTICE

This Report is a recommendation, not a final decision. The Commissioner will make the final decision after a review of the record. Under Minn. Stat. § 14.61 (2020), 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, P.O. Box 64254, St. Paul, MN 55164-0254, telephone (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 (2020). 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 to be imposed.

Under Minn. Stat. § 14.62, subd. 1 (2020), the Commissioner is required to serve a final decision upon each party and the Administrative Law Judge by first class mail or as otherwise provided by law.

MEMORANDUM

I. Introduction

The Department seeks to recover an overpayment from Appellant in the amount of $1,717,515.20, for claims related to PCA services provided to Appellant's PCA Choice clients from February 1, 2014, to August 5, 2014, and February 1, 2015, to

September 30, 2016.[221] The Department made four determinations in support of its overpayment claim: (1) Appellant submitted claims for PCA services without supporting documentation; (2) the claims were for PCA services that were not supported by care plans; (3) the services were not performed under the supervision of a QP; and (4) Appellant allowed a PCA to work without a provider number and completed background study.[222]

The Department also determined that the nature, chronicity, and severity of the violations warranted Appellant's termination from participation in the MHCP, related to the provision of PCA services.[223] The Department identified two reasons for its decision to terminate Appellant: (1) Appellant failed to develop and maintain health service records as required by Minn. R. 9505.2175; and (2) Appellant repeatedly failed to comply with the terms of its provider agreement with the Department relating to PCA services.[224]

The Department bears the burden to prove its claims by a preponderance of the evidence.[225] To establish a fact by a preponderance of the evidence, "it must be more probable that the fact exists than that the contrary exists."[226] If the evidence is equally balanced, then that fact or issue has not been proven by a preponderance of the evidence.[227]

The Administrative Law Judge concludes that the Department has established that it may recover the claimed overpayment, though it did not meet its burden to show that recovery is justified for all of the reasons identified in the Notice of Overpayment. The Administrative Law Judge further concludes that the Department has established it may terminate Appellant's participation in the MHCP.

II. Overpayment Claims: February 1, 2015 - September 30, 2016

The greater portion of the Department's overpayment claim, $1,707,551.04, stems from PCA services provided between February 1, 2015, and September 30, 2016. Relevant to this time period, the Notice of Overpayment indicates that the Department determined Appellant submitted claims without supporting documentation for services that were provided without care plans and without supervision by a QP.[228] In response, Appellant contends that the Department's case is fundamentally flawed because the Department has treated it as a traditional PCA provider agency, or PCPO, rather than a PCA Choice agency. Appellant argues that as a PCA Choice agency, it was not required to prepare or maintain care plans, provide QP services or keep

[221] Ex. 100 at 1.
[222] *Id.*
[223] *Id.* at 1-2.
[224] *Id.* at 2.
[225] Minn. R. 1400.7300, subp. 5.
[226] *City of Lake Elmo v. Metropolitan Council*, 685 N.W.2d 1, 4 (Minn. 2004).
[227] *Id.*
[228] Ex. 100 at 1.

records related to such services, or to maintain copies of timesheets documenting services provided by PCAs to the recipients it served.

A. PCA Provider Agency Standards

PCA services are governed by Minn. Stat. § 256B.0659. Subdivisions 18, 19, and 20 of that statute address the PCA Choice program, which is intended to provide recipients of PCA services greater control and choice over the services provided.[229] In this model, a recipient who receives personal care assistance services is responsible for the hiring, training, scheduling, and firing of personal care assistants according to a written agreement with a PCA Choice agency, which serves as a fiscal intermediary.[230]

Appellant contends that PCA Choice agencies have only the duties listed in Minn. Stat. § 256B.0659, subds. 18-19. The PCA Choice provider agency "manages payroll, invoices the state, is responsible for all payroll-related taxes and insurance, and is responsible for providing the consumer training and support in managing the recipient's personal care assistance services."[231] The statute further contains a specific list of duties for PCA Choice agencies, including acting as the employer for the PCAs and QPS; handling all employment-related matters such as unemployment insurance, workers' compensation, taxes and insurance; billing the MHCP and paying PCAs and QPs; enrolling as a PCA Choice provider; verifying and keeping records of PCA and QP hours worked; and entering into a written agreement with recipients for the provision of service.[232] Appellant argues that other than these specifically identified responsibilities, all other regulatory responsibilities are transferred to the recipient or responsible party, noting that Minn. Stat. § 256B.0659, subd. 18(a), provides that a PCA Choice recipient may use a fiscal intermediary to pay and account for medically necessary covered PCA services, and that "[u]nless otherwise provided in this section, all other statutory and regulatory provisions relating to personal care assistance services apply to a recipient using the personal care assistance choice option."

Appellant reads the statute to transfer regulatory responsibilities, including the obligation to create and maintain required documentation, to the PCA Choice recipient, who is accorded more choices and flexibility by participating in this program. It is true that PCA Choice recipients are given more responsibility. They have the authority to hire, fire, and train PCAs, which would be an obligation of the PCPO in the traditional PCA model. They also are allowed to develop their own care plans and to supervise and evaluate the services of the PCA with the QP. But the statute does not state that all responsibilities and regulatory obligations that are normally within the ambit of a provider become the responsibility of the recipient, unless specifically addressed to the PCA Choice agency.

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[229] Minn. Stat. § 256B.0659, subd. 18(b).
[230] *Id.*
[231] *Id.*
[232] *Id.*, subd. 19(c).

Further, in determining the meaning intended by the legislature, this subdivision cannot be considered in isolation from the other provisions in Minn. Stat. § 256B.0659. Statutes are construed to give effect to all of their provisions.[233] Statutory language is read as a whole, and various provisions of the same statute must be interpreted in light of each other.[234] Under Minn. Stat. § 256B.0659, subd. 1(l), "'personal care assistance provider agency' means a medical assistance enrolled provider that provides or assists with providing personal care assistance services and includes a personal care assistance provider organization, *personal care assistance choice agency*, class A licensed nursing agency, and Medicare-certified home health agency."[235] Therefore, PCA Choice agencies are included within the general category of PCA provider agencies. The statute also directs that a PCA Choice provider agency must "meet all personal care assistance provider agency standards."[236]

In light of these provisions, subdivision 18(a) cannot be interpreted as Appellant urges. Instead, the Administrative Law Judge interprets subdivision 18(a) to mean that, unless specifically altered by the provisions related to the PCA Choice program, other statutory and regulatory provisions continue to apply to the provision of PCA services to PCA Choice recipients. This means that PCA Choice providers must still comply with the general requirements of laws and regulations that apply to PCA services, unless specifically altered for the PCA Choice program.

Appellant argues that by applying general PCA provider agency standards to it, the Department is enforcing an unpromulgated rule. This is not so. Instead, the Department is enforcing generally applicable statutory standards that are unchanged by the PCA Choice provisions of Minn. Stat. § 256B.0659.

This is consistent with advisories the Department has issued regarding the PCA Choice program indicating that "[w]hile this option provides flexibility and increases a recipient's responsibilities, it remains a federal and state funded [MA] service. All other federal and state regulations regarding PCA services apply unless covered in this bulletin," and "[u]nder PCA Choice, the recipient or responsible party, the PCA Choice provider, the [QP], and the PCA are responsible for following the regulations which cover PCA services."[237] This interpretation is also consistent with prior decisions of this tribunal in which PCA Choice agencies have been held to the same standards as PCPOs related to providing services and creating and maintaining documents regarding those services.[238]

It is also important to note that the Department's regulations related to documentation and maintenance of health service and financial records apply to a

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[233] Minn. Stat. § 645.16 (2020).
[234] *State v. Riggs*, 865 N.W.2d 679, 683 (Minn. 2015).
[235] Emphasis added.
[236] Minn. Stat. § 256B.0659, subd. 19(b).
[237] Ex. 103 at 2, 8.
[238] *See In re the SIRS Appeal of Elite Nursing Servs., Inc.*, No. 84-1800-34588, 2018 WL 3586883 (Minn. Office Admin. Hearings May 22, 2018); *In re the SIRS Appeal of Care on Wheels Home Care Servs., LLC*, No. 65-1800-32792, 2017 WL 413193 (Minn. Office Admin. Hearings Jan. 5, 2017).

"vendor of medical care."[239] Under Minn. R. 9505.2160-.2245, the Department has established standards applicable to health service and financial records of vendors of health services.[240] Under Minn. R. 9505.2165, subp. 16a, the term "vendor" means a vendor of medical care, as provided in Minn. Stat. § 256B.02, subd. 7, and "vendor" includes "a provider and also a personal care assistant." Minn. R. 9505.2175 mandates the creation and maintenance of documents related to the provision of PCA services and makes a vendor's compliance with these requirements a condition of payment from the MHCP.[241] Appellant notes that Minn. R. 9505.2175, subp. 7, refers to a "fiscal agent" and that the statute governing PCA Choice providers uses the term "fiscal intermediary" instead.[242] This distinction does not bear on the requirements Appellant must meet since the regulation also places this obligation on "a personal care provider,"[243] and Appellant qualifies as such.

Finally, Appellant acknowledged its obligation to comply with the terms of the Department's regulations regarding the creation and retention of documents relating to PCA services in the Provider Agreement it executed in order to operate as a PCA Choice agency. Appellant agreed with the Department to "[m]aintain records that fully disclose the extent of services provided to MHCP recipients for a period of five years after the initial date of billing [the Department], in accordance with Minnesota Rules 9505.2160 – 9505.2245."[244]

Based on this analysis, the Administrative Law Judge determines that Appellant had obligations with respect to the creation and retention of documents related to PCA services provided to its clients. These obligations are addressed more specifically below.

B. Timesheets

PCA providers are required to have health service and financial records available at the provider's place of business on the day on which investigators request access.[245] A provider must also store records in a manner that allows review by investigators at the provider's place of business during business hours.[246] A provider's failure to develop or maintain health service records, to maintain financial records, or to make health services records or financial records available to the Department as required is considered abuse.[247]

Based on this record, there can be no serious dispute as to whether Appellant was in compliance with these provisions. When the Department's investigative team

[239] Minn. Stat. § 256B.02, subd. 7(a); Minn. R. 9505.0175, subp. 50, .2165, subp. 16a.
[240] Minn. R. 9505.2160, subp. 1.
[241] Minn. R. 9505.2175, subps. 1, 7.
[242] Minn. Stat. § 256B.0659, subd. 18(a).
[243] Minn. R. 9505.2175, subp. 7.
[244] Ex. 9 at DHS33.
[245] Minn. R. 9505.2185, subp. 2.
[246] Minn. R. 9505.2190, subp. 1.
[247] Minn. R. 9505.2165, subp. 2(A)(7), (9), (12).

arrived for its onsite inspection, the files they reviewed did not contain any PCA timesheets dating before January 1, 2016, other than those dating back to December 23, 2015, that would have spanned into the first payroll period in January 2016.[248] Ms. Feltz told the investigators that Appellant kept timesheets for only one year and then shredded them to save space.[249] Ms. Feltz told Investigator Cina that the time records the Department sought for earlier periods did not exist.[250] Beyond the records within Appellant's offices, the investigators were told that some additional records were located in a storage shed outside, but that the storage shed's shelving was broken and the records in the shed were in disarray.[251]

Investigator Cina testified that he was told that some timesheets might be available in an electronic format in emails from recipients or responsible parties because Appellant's staff did not consistently delete emails.[252] In fact, through an extensive forensic examination, Appellant did locate timesheets in its email system. Additional timesheets were found within boxes of Appellant's paper records that had been seized by the MFCU and subsequently returned to Appellant.

The Department argued, both before and during the hearing, that Appellant should be barred from relying on any timesheets that were not available to investigators on the day that they conducted the onsite review and that any records subsequently recovered should be excluded from the record. The Administrative Law Judge denied the Department's request prior to the hearing[253] and admitted the contested evidence into the record at the hearing. The Administrative Law Judge writes again on this topic to provide additional analysis and to further develop the record on this issue.

The Department is a creature of statute and has only the powers given to it by the legislature.[254] The statutory authority exercised by government agencies must be expressly stated in legislation or implied from the express powers granted.[255] "While express statutory authority need not be given a cramped reading, any enlargement of express powers by implication must be fairly drawn and fairly evident from the agency objectives and powers expressly given by the legislature."[256]

As noted above, the Department's rules expressly provide that the failure to maintain health services and financial records or to provide them to the Department is considered abuse and may lead to substantive consequences for a provider. However, there is no statute or rule stating that the failure to meet these standards on the day of

[248] Ex. 2 at DHS11; Ex. 4 at 5; Tr. Vol. 1 at 60 (Cina).
[249] Ex. 4 at 3; Tr. Vol. I at 54 (Cina). Shredding of timesheets was an administrative office policy. Mr. Feltz did not learn that staff had decided to maintain only the current year and one-year prior of timesheets until after execution of the search warrant. Tr. Vol. II at 107 (Feltz).
[250] Tr. Vol. I at 54 (Cina).
[251] Ex. 4 at 4.
[252] Tr. Vol. I at 54 (Cina).
[253] Order Denying Motion in Limine (Sept. 3, 2020).
[254] *In re Hubbard*, 778 N.W.2d 313, 318 (Minn. 2010).
[255] *Id.*
[256] *Peoples Natural Gas Co. v. Minn. Pub. Utils. Comm'n*, 369 N.W.2d 530, 534 (Minn. 1985).

an onsite inspection may result in exclusion of evidence in a contested case hearing or justify estopping an appellant from the pursuit of a defense.

The statutes and rules governing the contested case process control the admissibility of evidence and argument in a case under Minnesota Statutes, chapter 14.[257] Under Minn. Stat. § 14.51 (2020), the procedural rules for contested cases "shall be binding upon all agencies and shall supersede any other agency procedural rules with which they may be in conflict." Minn. R. 1400.7100, subp. 1 (2019), provides that "[a]ll parties shall have the right to present evidence, rebuttal testimony, and argument with respect to the issues, and to cross-examine witnesses." Further, under Minn. Stat. § 14.60, subd. 1 (2020), and Minn. R. 1400.7300, subp. 1 (2019), probative evidence is to be admitted in a contested case proceeding. Minn. R. 1400.7300, subp. 1, specifically provides as follows:

> The judge may admit all evidence which possesses probative value, including hearsay, if it is the type of evidence on which reasonable, prudent persons are accustomed to rely in the conduct of their serious affairs. The judge shall give effect to the rules of privilege recognized by law. Evidence which is incompetent, irrelevant, immaterial, or unduly repetitious shall be excluded.

As noted by the Minnesota Court of Appeals, "a contested case proceeding is a de novo review, and not a mere appeal from the agency's decision."[258] This is entirely consistent with one of the purposes underlying the Administrative Procedure Act, in that it increases the fairness of agencies in their conduct of contested case proceedings.[259]

The Department contends that documents must be kept on hand by providers because it does not have the resources to conduct a forensic analysis like the one performed by Wipfli. That may well be true, but that does not justify the Department's decision to ignore probative evidence when it became available during the course of this case.[260] The Department based the Notice of Overpayment on its conclusion that Appellant "[s]ubmitted claims for PCA services without supporting documentation,"[261]

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[257] *See GH Holdings, LLC v. Minn. Dep't of Commerce*, 840 N.W.2d 838, 843 (Minn. Ct. App. 2013) (invalidating a rule adopted by the Minnesota Petroleum Tank Release Compensation Board (Board) limiting the evidence in a contested case hearing to that previously submitted to the Board).

[258] *In re the Rate Appeal of Sleepy Eye Care Ctr. v. Comm'r of Human Servs.*, 572 N.W.2d 766, 770 (Minn. Ct. App. 1998).

[259] Minn. Stat. § 14.001(6) (2020).

[260] The position taken by the Department here is somewhat in contrast to its conduct over several years in other SIRS matters in which it has been willing to review documentation provided after the issuance of a notice of overpayment. *See, e.g.*, *In re the SIRS Appeal of Cmty. Involvement Programs-FSE*, No. 60-1800-35962, 2020 WL 1505857, at *2 (Minn. Office Admin. Hearings Feb. 24, 2020); *In re the SIRS Appeals of Regine Ndifor,* No. 21-1800-35148, 2019 WL 4687099, at *9 (Minn. Office Admin. Hearings Aug. 23, 2019); *In re the SIRS Appeal of Well-Springs Healthcare, Inc.*, No. 11-1800-11424-2, 1998 WL 937346, at *3 (Minn. Office Admin. Hearings Dec. 17, 1998).

[261] Ex. 100 at 1.

meaning without timesheets.[262] It is now clear that Appellant did have many of these timesheets when it submitted claims for payment.

The Department was aware of these timesheets during the contested case process, as they were produced in discovery, and the Department does not contest the authenticity of the timesheets. Instead, the Department seems to urge the following line of reasoning: (1) the Department did not uncover the timesheets at the inspection and was told they had been shredded;[263] (2) the Department reasonably concluded that the timesheets did not exist; (3) notwithstanding actual evidence that some of the timesheets do exist, everyone must go on believing that they do not.[264] In accordance with that position, the Department provided no evidence or analysis related to the timesheets or the impact of these recovered documents on its claims,[265] leaving to the Administrative Law Judge the task of cross referencing thousands of timesheets, the claims identified in over 300 pages of spreadsheets attached to the Notice of Overpayment, and the spreadsheet prepared by Appellant's expert witness detailing the results of Wipfli's analysis. The Administrative Law Judge provides some examples of claims for which timesheet support exists in the Findings of Fact.

Appellant argues that it actually retained or recovered documentation in addition to the timesheets, in the form of conversion sheets, payroll records, and payment remittances, that support the vast majority of the claims in the Notice of Overpayment. Appellant contends that these records show that it provided all of the services for which it received payment, and so there were no improper payments that would justify a recovery.[266] Appellant contends that these documents meet its obligation to "verify and keep records of hours worked" by the PCA under Minn. Stat. § 256B.0659, subd. 19(c)(6). Therefore, according to Appellant the entire Notice of Overpayment should be rescinded.

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[262] Tr. Vol. I at 75 (Cina) (explaining that the reference to documentation related to timecards).

[263] Appellant notes that the Department did not review every recipient file and argues that the Department's conclusions as to files it did not specifically examine constituted an erroneously conducted random sample extrapolation of claims. *See* Minn. R. 9505.2220. The Department did not perform a random sample extrapolation, but instead relied on Ms. Feltz's statement that all timesheets were shredded after one year. Moreover, as the Administrative Law Judge credits Appellant for every timesheet received into the record, arguments as to the Department's review of the files are now moot.

[264] This line of reasoning is problematic when considered in light of the variety of circumstances that may arise during an investigation. An investigator may miss something during an onsite inspection, or confront a language barrier that causes confusion about the documents the agency wishes to see, or may come to conclusions based on a misunderstanding or a cultural bias. Limiting the contested case process to the investigator's determinations or the documents the investigator collected could prevent an appellant from fully exploring its defenses and holding an agency to its burden of proof.

[265] Investigator Cina testified he had not reviewed Appellant's exhibits prior to his testimony in this case. Tr. Vol. II at 58 (Cina). It is unclear whether Investigator Cina ever reviewed any of the information Appellant provided to the Department during discovery. Even if Investigator Cina reviewed Appellant's documentation at some point, the Department decided not to provide his analysis of Appellant's recovered records.

[266] *See* Minn. Stat. § 256B.064, subd. 1c(a).

The information produced on timesheets allows SIRS to conduct a comprehensive review of the services provided.[267] The other documentation retained or recovered by Appellant does not contain all of the information required by law to be present on a timesheet.[268] The Administrative Law Judge determines timesheets are in a separate category from other documentation and that it is the timesheets that matter to this analysis. Under Minn. Stat. § 256B.0659, subd. 12, PCAs must document services provided to recipients, consistent with the recipient's care plan, on a timesheet form containing certain information, including the time in and out, with a.m. and p.m. designations, signatures of the recipient or responsible party and the PCA, and an acknowledgement that providing false information violates the law. Under the Department's regulations, this is the tool used to verify and keep records of hours worked, and documentation of services through timesheets is a condition of payment for the services provided.[269] The Department "shall recover" program funds paid for services that are not documented in the manner required by law.[270]

Appellant argues that, under Minn. Stat. § 256B.0659, subd 28(a)(4), timesheets may be retained at the PCA provider agency or in the recipient's home. Appellant maintains it satisfied this requirement because it instructed recipients and responsible parties to maintain timesheets in their homes for ten years.[271]

But under Minn. Stat. § 256B.0659, subd. 12(a), timesheets "must be submitted on a monthly basis to the provider and kept in the recipient's health record." Under the Department's regulations, a "vendor must document" the service provided in the recipient's health service record and a "vendor must keep a health service record."[272] "Health care service records maintained by a personal care provider . . . or fiscal agent must meet" these requirements and the documentation identified includes timesheets.[273] Additionally, a "vendor shall retain all health service and financial records related to a health service for which payment under a program was received or billed for at least five years after the initial date of billing."[274] Appellant agreed with the Department to "[m]aintain records that fully disclose the extent of services provided to MHCP recipients for a period of five years after the initial date of billing [the Department], in accordance with Minnesota Rules 9505.2160 – 9505.2245."[275] This supports placing the burden for retention of timesheets on the PCA provider agency.

The statutes and rules granting the Commissioner authority to review and audit documentation are also consistent with a reading requiring timesheets to be retained by the provider. Minn. Stat. § 256B.0659, subd. 31, grants the Commissioner the right of access "to the office during regular business hours and to documentation and records

[267] Tr. Vol. I at 59, 120, 137, 148 (Cina).
[268] Ex. 115; Ex. 116; Tr. Vol. I at 59 (Cina).
[269] Minn. R. 9505.2175, subps. 1, 7(H).
[270] *Id.*, subp. 1.
[271] Ex. 4 at 3; Tr. Vol. II at 77 (Feltz).
[272] Minn. Stat. § 9505.2175, subps. 1-2.
[273] *Id.*, subp. 7.
[274] Minn. R. 9505.2190, subp. 1.
[275] Ex. 9 at DHS33.

related to services provided and submission of claims for services provided." Minn. R. 9505.2190, subp. 1, provides that "[v]endors must maintain and store records in a manner that will allow for review by the department." Another provision dictates that a "vendor shall grant the department access during the department's normal business hours to examine health service and financial records related to a health service billed to a program," and a recipient is deemed to have consented to a vendor's release of health services records to the Department in connection with a review of MA reimbursement claims.[276]

The Administrative Law Judge determines that Appellant had an obligation to retain timesheets for PCA services provided to its recipients and billed to the Department. Appellant complied with this obligation as to timesheets for one year, and then shredded timesheets to save space. Notwithstanding this practice, Appellant was able to recover a substantial number of timesheets that were unavailable on the day of the onsite inspection. The Administrative Law Judge determines that, as to the timesheets retained or recovered by Appellant contained in Exhibits 131 and 132, the Department has not established that Appellant billed for services represented on those timesheets without required documentation.[277] For the Department's claims related to services that remain unsupported by timesheet documentation, the Department has met its burden.

If this were the Department's only basis for recovery, a line-by-line analysis of the claims identified in the Notice of Overpayment would be necessary, and this analysis would lead to a reduction of the amount of the overpayment to be recovered. However, because the Administrative Law Judge determines that the Department proved its other claims in support of the Notice of Overpayment for this review period, the total amount of the overpayment stands.

C. Care Plans and QP Supervision

Services provided by PCAs are supervised by a QP.[278] PCAs provide services according to a care plan for the recipient, which is a "written description of personal care assistance services" to be provided consistent with the recipient's service plan.[279] Each recipient must have a current care plan.[280] A care plan must be completed within the first week after a provider agency begins providing services, and then updated as needed and at least annually.[281] Care plans contain certain specific information, including a description of the "recipient's individualized needs for assistance with

[276] Minn. R. 9505.2185, subp. 2; Minn. Stat. § 256B.27, subd. 3.
[277] The Administrative Law Judge notes that Minn. R. 9505.2175 requires documentation to be kept in a recipient's health service record. The Administrative Law Judge determines this is not a strict requirement as to the location of the record, so long as the record is retained. Investigator Cina noted that documents may be stored electronically, and he was prepared to download documentation that was not directly located within a recipient's file. Tr. Vol. I at 54 (Cina).
[278] Minn. Stat. §§ 256B.0625, subd. 19c, .0659, subds. 1(k), 14.
[279] Minn. Stat. § 256B.0659, subd. 1(a)(n).
[280] *Id.*, subd. 7(a).
[281] *Id.*, subd. 7(c).

activities of daily living, instrumental activities of daily living, health-related tasks, and behaviors."[282] The care plan must be signed and dated by the recipient or responsible party and the QP.[283] A copy of the care plan must be kept in the recipient's home and at the provider agency.[284] QPs develop and monitor the recipient's care plan, and complete documentation of their services.[285] Documentation of the QP's services is maintained in the provider agency's files and in the recipient's home.[286]

Appellant maintains that, as a PCA Choice provider, it was not required to have care plans or to provide QP supervision for the PCAs serving its PCA Choice clients, or to maintain documentation related to care plans and QP visits. The PCA Choice program differs from the traditional PCPO model in several respects related to care plans and QP supervision. Under PCA Choice, the recipient or responsible party can hire and fire QPs, a recipient develops his or her own care plan with the assistance of a QP if that is needed, and may request that the QP provide assistance to enable the recipient or responsible party to train and supervise the PCAs.[287] Reflecting the additional choice and control available to PCA Choice recipients, the QP is required to visit the recipient a minimum of only once every 180 days.[288] These differences, however, do not eliminate the basic requirements that PCA services be provided pursuant to a care plan and with the involvement and supervision of a QP, and that records be retained that show services were provided in compliance with these requirements. Such records establish that services have been provided appropriately and protect the safety of vulnerable recipients.[289]

Even as a PCA Choice provider, Appellant was required to be the employer of PCAs and QPs, pay them, keep records of the hours they worked, and bill the MHCP for their services.[290] To be eligible for payment, the services provided were to be documented, and care plans and QP supervision records are among the documents the provider agency is required to retain.[291] Under its Provider Agreement with the Department, Appellant agreed to "[m]aintain records that fully disclose the extent of services provided to MHCP recipients for a period of five years after the initial date of billing [the Department], in accordance with Minnesota Rules 9505.2160 – 9505.2245,"[292] to be the employer of the personal care assistant and qualified

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[282] *Id.*, subd. 7(b)(5).
[283] *Id.*, subd. 7(b)(6).
[284] *Id.*, subd. 7(a).
[285] *Id.*, subd. 13(b)(1), (5).
[286] *Id.*, subd, 14(f).
[287] *Id.*, subd. 19(a); *see also* Ex. 103 at 6 (outlining the duties of the QP under PCA Choice and noting that the QP must determine the services that can be supervised by the recipient or responsible party, or that must be supervised by the QP, and that the QP must visit the recipient in the recipient's home at least once every year); Ex. 105 at 1.
[288] Minn. Stat. § 256B.0659, subds. 14(c), 19(a)(4); Ex. 104 at 2 (stating that for PCA Choice visits "[t]he QP must visit the location of service delivery and meet with the recipient and responsible party to oversee the delivery of PCA services at least every 180 days"); Ex. 105 at 1.
[289] Tr. Vol. I at 50-51 (Cina).
[290] Minn. Stat. § 256B.0659, subd. 19(c)(1)-(2), (4), (6).
[291] Minn. R. 9505.2175, subps. 1, 7(B), (L).
[292] Ex. 9 at DHS33.

professional as provided in Minn. Stat. § 256B.0659, subd. 19(c)(1), and "[t]o provide acknowledgement of participation from a qualified professional, as defined in MS 256B.0625 subd. 19c."[293]

Appellant's files reviewed by the Department's investigators did not contain care plans after 2012.[294] Ms. Feltz admitted to Investigator Cina that she knew Appellant was required to maintain care plans for recipients.[295] Ms. Strachan told Investigator Cina that, when she worked as Appellant's QP, many recipients did not have care plans.[296] Ms. Strachan provided minimal QP services, seeing only about seven clients per year, and never more than 1.5 hours from Pine City, so some of Appellant's clients were unserved even then.[297] After Ms. Strachan left Appellant in December 2014, Appellant did not provide QP services again until after the Department's onsite inspection in 2017.[298] Ms. Feltz told Investigator Cina that it was possible some recipients had gone three years without a QP visit.[299] Yet, when Mr. Feltz was questioned at the hearing about QP visits, his testimony reflected his understanding that QPs were required to visit recipients at least every 180 days.[300]

The Department acknowledges that Appellant was not necessarily required to provide QP services itself under the PCA Choice program.[301] However, PCA Choice recipients were required to receive visits from a QP at least every 180 days, and more often at the recipient's request, and Appellant was required to have records showing that recipients received these services. Appellant maintains that it never failed to provide a QP visit if requested by a recipient and that it simply did not receive any requests.[302] But Appellant did not staff a QP position for over two years, begging the question as to how it would have responded if it received a request. The record contains a letter dated January 14, 2015, just after Ms. Strachan left, that was ostensibly sent by Appellant to its recipients regarding QP services.[303] The letter notifies recipients that Appellant will not provide QP services and instructs that recipients and responsible parties should obtain their own QPs, the QP would be required to apply to work at Appellant, and that they should immediately attend to this requirement and put their selected QP in touch with Appellant.[304] Assuming that this letter was sent, there was no

[293] *Id.* at DHS36.
[294] Ex. 4 at 5.
[295] Tr. Vol. I at 53 (Cina).
[296] Ex. 3 at DHS13.
[297] Ex. 2 at DHS 11; Ex. 3 at DHS13.
[298] Ex. 2 at DHS 11; Ex. 3 at DHS13; Ex. 10.
[299] Ex. 4 at 4; Tr. Vol. I at 50-52 (Cina).
[300] Tr. Vol. II at 83-84 (Feltz) (testifying that QP's visited with clients once or twice per year, and that "other than the 180-day visit," it was his understanding that QP visits occurred at the request of the recipient).
[301] Tr. Vol. I at 50 (Cina).
[302] Tr. Vol. II at 84 (Feltz).
[303] Ex. 119. Mr. Feltz was not questioned about this document.
[304] *Id.*

follow through, as Appellant did not bill for any QP services between the time Ms. Strachan left and Ms. Millerbernd began providing these services in June 2017.[305]

Appellant maintains that the services it provided were consistent with the type and amount of services that were authorized for each recipient under the service authorizations completed by public health nurses. According to Investigator Cina, the investigative team found service plans in the recipient files they reviewed.[306] But service plans prepared annually by a public health nurse, and a care plan guiding the provision of PCA services on a day-to-day basis in a recipient's home, are different tools used to ensure proper care for recipients. These tools are regulated in different sections of Minn. Stat. § 256B.0659 and are clearly different things.[307]

Unlike Appellant's timesheets, Appellant has not come forward with any care plans or QP supervision records to cast doubt on the Department's evidence that these were lacking. The Administrative Law Judge finds that Appellant failed to ensure its recipients had care plans or QP supervision for the services provided, and for which it billed, and failed to have documentation of its compliance. This is considered "abuse" under the Department's regulations.[308] The Commissioner may obtain monetary recovery from a vendor who has been improperly paid as a result of abuse.[309] Care plans and QP supervision must be documented as a "condition for payment," and program funds paid for a health service not documented in the recipient's health service record "shall be recovered" by the Department.[310] By billing for services that were not supported by care plans or supervised by a QP, Appellant received improper payments that may now be recovered for all of the claims identified in the Notice of Overpayment between February 1, 2015, and September 30, 2016.[311]

Appellant argues that the Department may not seek a monetary recovery because it did not notify Appellant of its documentation errors and impose a fine first, pursuant to Minn. Stat. § 256B.064. Subdivision 1a(a)(7) of that statute provides that the Commissioner may impose sanctions against a vendor for the "failure to correct errors in the maintenance of health service or financial records for which a fine was imposed or after issuance of a warning." This statute also provides that:

> The commissioner may order a vendor to forfeit a fine for failure to fully document services according to standards in this chapter and Minnesota Rules, chapter 9505. The commissioner may assess fines if specific required components of documentation are missing. The fine for

[305] Ex. 2 at DHS11.
[306] Ex. 4 at 5.
[307] Minn. Stat. § 256B.0659, subds. 3a, 6-7.
[308] Minn. R. 9505.2165, subp. 2(A)(7).
[309] Minn. Stat. § 256B.064, subds. 1a(a), 1c(a).
[310] Minn. R. 9505.2175, subp. 1.
[311] While not precedential, the Administrative Law Judge finds persuasive prior decisions of this tribunal holding that the absence of a care plan or the lack of QP services allows the Department to recover funds paid for those services as improper payments. *See, e.g., Elite Nursing Servs, Inc.*, 2018 WL 3586883, at *1, *9; *In re the SIRS Appeal of Richangel Care Inc.*, No. 10-1800-34462, 2017 WL 6603489, at *6 (Minn. Office Admin. Hearings Dec. 20, 2017).

> incomplete documentation shall equal 20 percent of the amount paid on the claims for reimbursement submitted by the vendor, or up to $5,000, whichever is less. If the commissioner determines that a vendor repeatedly violated this chapter, chapter 254B or 245G, or Minnesota Rules, chapter 9505, related to the provision of services to program recipients and the submission of claims for payment, the commissioner may order a vendor to forfeit a fine based on the nature, severity, and chronicity of the violations, in an amount of up to $5,000 or 20 percent of the value of the claims, whichever is greater.[312]

Additionally, Minn. Stat. § 256B.0659, subd. 28(b), addresses record-keeping requirements for PCA agencies and provides that the Commissioner "may assess a fine of up to $500 on provider agencies that do not consistently comply with the requirements of this subdivision."

Appellant argues that the Department must first impose a fine as a statutory prerequisite to the imposition of a monetary sanction.[313] The Administrative Law Judge rejects this argument. The Department did not rely on Minn. Stat. § 256B.064, subd. 1a(a)(7) as a basis for the overpayment determination. Further, Minn. Stat. §§ 256B.064, subd. 2(f), .0659, subd. 28(b), offer the Commissioner discretion to address the failure to complete or maintain documentation with a fine. Neither of these statutes limits the Commissioner's authority to take other action. Additionally, it should be noted that this case does not involve minor documentation problems or "specific required components of documentation" that were missing.[314] The documentation failures here were far more widespread, and resulted from the absence of certain key documents required for the provision of services in the first place.

The Commissioner retains the authority under Minn. Stat. § 256B.064, subds. 1a(a), 1c(a), to impose sanctions for abuse and obtain a monetary recovery. Moreover, under Minn. R. 9505.2175, subp. 1, payment for services that are not documented "shall be recovered." Therefore, the Commissioner has the authority to recover the overpayment from Appellant.

III. Overpayment Claims: February 1, 2014 - August 5, 2014

The Department asserted claims for PCA services provided to recipient C.H. from February 1, 2014, through August 5, 2014.[315] The Department was unable to determine who had provided these services, as C.H.'s file did not contain timesheets verifying the services provided.[316]

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[312] Minn. Stat. § 256B.064, subd. 2(f).
[313] This argument has been used, without success, before this tribunal in the past. *Elite Nursing Servs., Inc.*, 2018 WL 3586883, at *11.
[314] Minn. Stat. § 256B.064, subd. 2(f).
[315] Ex. 100 at 1.
[316] Tr. Vol. I at 36 (Cina).

The Department's Notice of Overpayment for this period is based, in part, on its determination that Appellant allowed a person without a completed background study to provide services.[317] The substance of this claim became somewhat confused during the hearing; at some points the testimony shifted to whether Mr. Elling had been allowed to work when he was disqualified from providing services. For example, Investigator Cina testified as to his initial concerns that Mr. Elling "failed a background study and was providing services," and to his investigative conclusion that Mr. Elling "failed his background study for part of the time that he was employed" by Appellant.[318] Working without a completed background study and working after being disqualified are two different things.

In any event, the record shows that the Department sent a letter dated March 19, 2015, notifying Appellant that Mr. Elling was disqualified.[319] Appellant terminated Mr. Elling in March 2015, when it learned of the disqualification.[320] Appellant's records indicate his last shift was March 17, 2015.[321] Mr. Elling's final pay date was March 27, 2015.[322] There is no evidence that Appellant allowed Mr. Elling to provide PCA services after his disqualification.

The evidence also does not support the Department's claim that Mr. Elling provided PCA services without having a completed background study. Mr. Elling successfully passed a background study in February 2014.[323] In November 2014, however, Appellant submitted another background study request for him.[324] When Investigator Cina reviewed Mr. Elling's history, he consulted the Department's Background Studies Unit, and he was told that, on December 1, 2014, Appellant and Mr. Elling "would have been informed" that Mr. Elling could not provide services until the background study was completed or a reconsideration decision was issued, if he was disqualified.[325]

There are several problems with this evidence. First, the person in the Background Studies Unit who provided this information is not identified in the record. Second, unlike the Department's disqualification and reconsideration decisions, there is no documentary evidence of the Department's notification of Appellant as to Mr. Elling's status in December 2014. Third, the assertion that Appellant "would have been" told leaves open questions as to whether Appellant actually was told and how. The Administrative Law Judge finds this uncorroborated hearsay from an unnamed source to be insufficiently reliable.

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[317] Ex. 100 at 1.
[318] Tr. Vol. I at 38-39, 66 (Cina).
[319] Ex. 14 at DHS914.
[320] Tr. Vol. II at 78, 113 (Feltz).
[321] Ex. 13 at DHS859.
[322] Ex. 11 at DHS83.
[323] Ex. 14 at DHS913; Tr. Vol. I at 36 (Cina).
[324] Ex. 14 at DHS912; Ex. 15 at DHS916.
[325] Ex. 2 at DHS9.

Further, the Department provided no information about the legal basis for asserting that Mr. Elling could not continue to work under the background study that he passed in February 2014, while it considered the new background study request. Under Minn. Stat. § 245C.13, subd. 2 (2020), a person subject to a background study may not perform services for which a background study is required until the background study is completed. But Mr. Elling already had a completed, and successful, background study, and Mr. Feltz testified that Appellant believed that Mr. Elling was able to work under that background study.[326] Investigator Cina's report does not provide any information as to the legal basis for the Department to consider Mr. Elling's earlier background study to be void, and the Department did not cite any legal authority in its closing brief. Investigator Cina was the Department's only witness, and he testified that he was not familiar with the background study laws.[327]

The Department has the burden of proof to establish its claims by a preponderance of the evidence. Mr. Elling successfully completed a background study, and the Department provided no fact witness to explain why this background study was not valid. The Department also provided no legal argument addressing this issue or substantiating the basis for considering that earlier background study void. On this record, the Department has not met its burden to establish that Appellant allowed a person who did not have a completed background study to provide PCA services.

Additionally, Appellant has provided timesheets for all of the claims the Department identified on the Notice of Overpayment during this time period.[328] The record establishes that Mr. Ehmke and Ms. Mullins completed signed timesheets related to all of those services.[329] Mr. Elling did not have an UMPI number and so Appellant could not bill for his services,[330] and the Department has not established that Appellant received any payment related to the services Mr. Elling provided. Therefore, the Department has not established that any portion of the overpayment claimed is attributable to services provided by Mr. Elling. As a result, the Commissioner should modify the Notice of Overpayment to remove this basis for its action.

This does not end the inquiry, however. Investigator Cina reviewed C.H.'s file and did not find a care plan or evidence of QP supervision for the services provided to C.H.[331] As discussed above, care plans and QP supervision are required for PCA services to be eligible for payment. Therefore, the Department has met its burden to establish that it may recover the portion of the overpayment attributable to this time period, which is $9,964.16.[332]

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[326] Tr. Vol. II at 113 (Feltz).
[327] *Id.* at 49-50 (Cina).
[328] Ex. 100 at 313-14; Ex. 132-090 at 1; Ex. 132-099 at 2-8.
[329] Ex. 132-090 at 1; Ex. 132-099 at 2-8.
[330] Tr. Vol. II at 19-20 (Lundberg), 78 (Feltz).
[331] Tr. Vol. I at 78 (Cina).
[332] Ex. 100 at 313-14; Tr. Vol. I at 78 (Cina).

IV. Termination of Appellant's Participation in the MHCP

The Department determined that it would terminate Appellant as a provider of PCA services through the MHCP, as of January 22, 2019.[333] The Department identified two reasons for the termination: (1) Appellant failed to develop and maintain health service records as required by Minn. R. 9505.2175, and (2) Appellant repeatedly failed to comply with the terms of its provider agreement with the Department relating to PCA services.[334] The Department has established that both of these reasons are valid bases for Appellant's termination.

As explained above, notwithstanding that Appellant was a PCA Choice provider, rather than a PCPO, Appellant was required to develop and maintain health service records as required by Minn. R. 9505.2175. That rule provides that "[a]s a condition for payment by a program, a vendor must document each occurrence of a health service provided to a recipient."[335] Health service records maintained by a "personal care provider, consumer-directed home care provider, or fiscal agent" must meet this standard.[336] Required documentation for PCA services includes: (1) the recipient's care plan; (2) daily documentation of the care provided, including the beginning and ending time of the service with a.m. and p.m. designations, an identification of the personal care services provided, the recipient or responsible party's signature, and the signature of the PCA on the timesheet with an affirmation that the information is correct and an acknowledgement that falsifying records is fraud; and (3) documentation of supervision by a QP, including the dates that the QP provided supervision.[337]

Appellant failed to maintain the required health service records for its PCA Choice clients. Appellant established that it did retain some timesheets, though the timesheets were not maintained in an accessible manner, as required by law. Nevertheless, Appellant was able to recover only a portion of the timesheets documenting approximately 46 percent of the amounts paid by the Department. Appellant's conversion sheets and payroll records do not meet the health service record requirements because they do not contain all the information identified in Minn. R. 9505.2175, subp. 7(H). Appellant also failed, during the time period examined by the Department, to maintain care plans and documentation of required QP visits.

Appellant signed a Provider Agreement with the Department that required it to maintain health service and financial records, in accordance with Minn. R. 9505.2160-.2245, for five years or possibly longer.[338] Appellant failed to comply with this term of its agreement. Additionally, Appellant agreed "[t]o provide acknowledgement of

[333] Ex. 100 at 1-2.
[334] *Id.* at 2.
[335] Minn. R. 9505.2175, subp. 1.
[336] *Id.*, subp. 7.
[337] *Id.*, subp. 7(B), (H), (L).
[338] Ex. 9 at DHS33.

participation from a qualified professional."[339] Appellant failed to comply with this term as well.

The failure to develop and maintain service records and the repeated failure to comply with a provider agreement are both "abuse" under Minn. R. 9505.2165, subps. 2(7), (18). The Commissioner may impose a sanction upon a provider who has engaged in abuse.[340] In determining an appropriate sanction, the Commissioner must consider the nature, severity, and chronicity of the violations.[341] Appellant's record-keeping failures are not incidental or isolated; as to some of the required documentation Appellant's failure to maintain records was a wholesale lack of compliance with law. When considered all together and given the number of missing care plans, timesheets, and documentation of QP visits for Appellant's PCA clients, the lack of documentation means that there were thousands of individual instances in which Appellant did not maintain records or comply with its Provider Agreement. Appellant is a sophisticated entity with multiple business lines. Investigator Cina's report notes that Appellant received total payments of $65,230,169.46, from the MHCP between 2014 and the date of the report.[342] Appellant was capable of ensuring that services were provided and documentation maintained, but it failed to do so.

Appellant's failure to maintain these documents and to provide QP visits, or ensure that they were being provided, means that the Department cannot evaluate the PCA services provided to Appellant's clients. The Department points out that individuals who qualify for PCA services are particularly vulnerable, as they receive services within their homes and outside of the public eye. The Department also notes that it is unable to conduct the type of forensic analysis and data mining that Appellant undertook to find records; instead, records must be readily available to it so that its investigators can ensure that MA funds are used appropriately for care provided to recipients.

Appellant maintains that it has been painted in a false light in this matter and accused of engaging in fraud.[343] Appellant contends it provided all of the services that were billed, and that all such services were necessary for the recipients and in accordance with their service authorizations. The Department showed that Appellant failed, on a broad scale, to ensure that its PCA services were provided and documented as required by law. Given these considerations, the nature, chronicity, and severity of the violations established by the Department permit the Commissioner to terminate Appellant's participation in the MHCP as a sanction for noncompliance.[344] Therefore,

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[339] *Id.* at DHS36.
[340] Minn. Stat. § 256B.064, subd. 1b.
[341] *Id.*
[342] Ex. 2 at DHS9.
[343] Fraud and abuse are separate bases for sanctions. Minn. Stat. § 256B.064, subd. 1a(a)(1). "Fraud" is defined to include actions like theft, perjury, forgery, and making false claims. Minn. R. 9505.2165, subp. 4. The Department did not allege that Appellant engaged in fraud, and this recommendation makes no finding of fraud.
[344] Appellant argues that the Department's decision to terminate its status as a provider is moot because its provider enrollment had already been terminated. Issues related to Appellant's provider enrollment do not fall within the scope of this proceeding and do not limit the Commissioner's authority to act.

the Commissioner has sufficient grounds to uphold Appellant's termination as provided in the Notice of Overpayment.

V. Conclusion

The Administrative Law Judge determines that the Department established by a preponderance of the evidence that it may recover an overpayment from Appellant in the amount of $1,717,515.20. The Department also met its burden to show that grounds exist to terminate Appellant's participation in the MHCP as a PCA provider. The Department did not meet its burden as to all of its claims, however. The Administrative Law Judge recommends that the Department modify the Notice of Overpayment to remove the statement that Appellant allowed a person to work without a completed background study and provider number. Other than that modification, the Administrative Law Judge recommends that the Commissioner **AFFIRM** the Notice of Overpayment.

J. P. D.