Department of Health and Human Services

DEPARTMENTAL APPEALS BOARD

Civil Remedies Division

John J. Hainkel, Jr. Home and Rehabilitation Center,
(CCN: 19-5149),

Petitioner

v.

Centers for Medicare & Medicaid Services.

Docket No. C-12-1166

Decision No. CR3350

Date: August 28, 2014

DECISION

Petitioner, John J. Hainkel, Jr. Home and Rehabilitation Center (Petitioner or facility), is a long-term care facility located in New Orleans, Louisiana, that participates in the Medicare program. Based on a complaint survey completed on June 8, 2012, the Centers for Medicare & Medicaid Services (CMS) determined that Petitioner was not in substantial compliance with Medicare participation requirements relating to prevention of resident abuse and administration of the facility in a manner to maintain the highest practicable well-being of each resident.

Specifically, this case involves Petitioner's former Office Manager, who when confronted with allegations that she was misappropriating funds from residents, was able to immediately access and aggressively confront one of the complaining residents during the pending investigation. Further, at the time of hiring, Petitioner did not document any reference checks for the Office Manager, or eight other employees, despite a facility policy to perform complete reference checks. CMS did not dispute, though, that the facility did perform criminal background checks on the employees.

I sustain CMS's determinations that Petitioner was not in substantial compliance with three Medicare participation requirements. I also find the $2000 per instance civil money penalties (PICMPs) that CMS imposed for each of these violations are reasonable enforcement remedies. I do not sustain the deficiency or PICMP for Tag F225, which alleged a violation of 42 C.F.R. § 483.13(c)(1)(ii)-(iii), because Petitioner performed criminal background checks for the employees.

I. Procedural Background

Surveyors from the Louisiana State Department of Health and Hospitals, Health Standards Section (state survey agency) conducted a survey of Petitioner on June 8, 2012. The state survey agency determined that Petitioner was not in substantial compliance with several Medicare participation requirements.

By letter dated June 19, 2012, CMS notified Petitioner that the survey found the facility was not in substantial compliance with Medicare participation requirements and that the conditions constituted immediate jeopardy to the health and safety of Petitioner's residents. CMS informed Petitioner that it was imposing the following remedies: five PICMPS, each in the amount of $2,000, for the alleged violations of 42 C.F.R. § 483.13(b) and (c)(1)(i) (Tag F223), 42 C.F.R. § 483.13(e) (Tag F224), 42 C.F.R. § 483.13(c)(1)(ii)-(iii), (c)(2)-(4) (Tag F225), 42 C.F.R. § 483.13(c) (Tag F226), and 42 C.F.R. § 483.75 (Tag F490) (total PICMP amount of $10,000); a denial of payment for new admissions (DPNA) effective June 13, 2012, which would continue until the day before the facility achieved substantial compliance or its provider agreement was terminated; and termination of Petitioner's provider agreement if it had not achieved substantial compliance before July 1, 2012. CMS Exhibit (Ex.) 1.

By letter dated July 13, 2012, CMS notified Petitioner that the state survey agency conducted another survey on June 27, 2012, and found that the immediate jeopardy had been removed, but the facility remained out of substantial compliance with the five Medicare participation requirements cited in its previous notice letter. CMS stated further that the state survey agency conducted another survey on June 28, 2012, and based on that survey, the state agency found that Petitioner was also not in substantial compliance with the Medicare participation requirement, 42 C.F.R. § 483.13(c)(1)(ii)-(iii), (c)(2)-(4) (Tag F225, scope and severity level D), for another incident. With respect to the remedies, CMS advised Petitioner that the DPNA and PICMPs imposed in the June 19, 2012 letter remained in effect, but it was extending the termination date to December 8, 2012. CMS Ex. 2.

In a letter dated July 31, 2012, CMS notified Petitioner that it had achieved substantial compliance with Medicare participation requirements. CMS advised Petitioner that it had rescinded the termination remedy, and the DPNA, which was already imposed, was in

effect from June 13, 2012 through July 15, 2012. CMS advised Petitioner further that the PICMPs, totaling $10,000, were already imposed and remained in effect. CMS Ex. 3.

On August 10, 2012, Petitioner timely requested a hearing before an administrative law judge (ALJ) to contest CMS's findings of noncompliance cited in the June 8, 2012 survey. I was assigned this case for hearing and decision on August 27, 2012. On August 27, 2012, I issued an Acknowledgment and Initial Pre-hearing Order (Pre-hearing Order).

On May 22, 2013, I convened a video hearing from the offices of the Departmental Appeals Board in Washington, D.C. CMS counsel participated from a video location in Dallas, Texas. Petitioner's counsel and the parties' witnesses participated from a video location in Baton Rouge, Louisiana. I admitted into evidence CMS Exs. 1-25 and Petitioner Exhibits (P. Exs.) 1-14. Order Following Telephone Conference (March 1, 2013); Transcript (Tr.) at 7.

In accordance with my Pre-hearing Order, Petitioner offered direct testimony in the form of declarations from Petitioner's Administrator (P. Ex. 7), Petitioner's Human Resources Director (P. Ex. 8), Petitioner's Occupational Therapist (P. Ex. 9), who was contracted to work at the facility, Petitioner's Facility Maintenance employee (P. Ex. 12), and Petitioner's General Manager (P. Ex. 14). CMS offered direct testimony in the form of declarations from two state survey agency surveyors (CMS Exs. 24, 25).

At the video hearing, Petitioner cross-examined one of the surveyors, and CMS cross-examined Petitioner's Administrator and Petitioner's Human Resources Director. Petitioner had also requested to cross-examine the other surveyor; however, she was unavailable to testify. I advised the parties that I would hold the record open so that CMS could provide me with a status report on the surveyor's availability. By email dated July 8, 2013, CMS counsel provided a status report in which he stated that the surveyor had not returned to work and her return to work date was still not definite. CMS counsel, therefore, withdrew CMS Ex. 25, the surveyor's declaration. The CMS exhibits admitted in the record are now CMS Exs. 1-24.

The parties have filed pre-hearing briefs (CMS Pre-hrg. Br.; P. Pre-hrg. Br.) and post-hearing briefs (CMS Br.; P. Br.). The parties also filed post-hearing reply briefs (CMS Reply; P. Reply).

II. Issues

In its pre-hearing brief (footnote 1) and post-hearing brief (footnote 3), CMS noted that Tag F224 (42 C.F.R. § 483.13(e)) was deleted during the state Informal Dispute Resolution (IDR) process and therefore is not an issue before me.

This case now presents the following issues:

1) Whether Petitioner was in substantial compliance with the Medicare participation requirements at 42 C.F.R. § 483.13(b) and (c)(1)(i) (Tag F223);

2) Whether Petitioner was in substantial compliance with the Medicare participation requirements at 42 C.F.R. § 483.13(c)(1)(ii)-(iii), (c)(2)-(4) (Tag F225);

3) Whether Petitioner was in substantial compliance with the Medicare participation requirement at 42 C.F.R. § 483.13(c) (Tag F226);

4) Whether Petitioner was in substantial compliance with the Medicare participation requirement at 42 C.F.R. § 483.75 (Tag F490);

5) If Petitioner was not in substantial compliance, whether the enforcement remedies that CMS imposed – a $2,000 PICMP for each deficiency – are reasonable.

In its submissions, Petitioner asked that I review CMS's immediate jeopardy determination for the alleged noncompliance with each of these alleged deficiencies. P. Hearing Request; P. Pre-hrg. Br. at 22-23; P. Br. at 24. However, as I explained during my February 27, 2013 telephone prehearing conference, and in my March 1, 2013 Order Following Telephone Conference, I have no authority here to review whether CMS's scope and severity determinations were clearly erroneous for these deficiencies. An ALJ may review CMS's scope and severity findings (which include a finding of immediate jeopardy) only if a successful challenge would affect the range of the CMP that CMS could impose or if CMS has made a finding of substandard quality of care that results in the loss of the facility's authority to conduct a nurse aide training and competency evaluation program. 42 C.F.R. §§ 498.3(b)(14); 498.3(d)(10); *see, e.g.*, *Fort Madison Health Ctr.*, DAB No. 2403, at 12-14 (2001).

Neither of those two elements is present in this case – CMS proposes PICMPs, and the regulations provide for only one range of PICMP ($1,000 to $10,000) without regard to the scope and severity of noncompliance. Further, Petitioner indicated that the facility does not have a nurse aide training program. Order Following Telephone Conference, March 1, 2013.[1] Therefore, the immediate jeopardy finding is not reviewable here

[1] Even if Petitioner had a nurse aide training program, CMS's scope and severity finding would not affect approval of such a program. If CMS imposes a penalty of $5,000 or more, the state agency cannot approve the program, so the facility would lose its program

because it does not affect the range of the CMP or cause the facility to lose approval of its nurse aide training program. Therefore, I will only review issues of substantial compliance with the participation requirements and the reasonableness of the amount of the PICMPs.

III. Statutory and Regulatory Framework

The Social Security Act (Act) establishes the requirements that a long-term care facility must meet to participate in the Medicare and Medicaid programs and authorizes the Secretary of the U.S. Department of Health and Human Services (Secretary) to promulgate regulations implementing those statutory requirements. Act §§ 1819 (42 U.S.C. § 1395i-3), 1919 (42 U.S.C. § 1396r).[2] Specific Medicare participation requirements for long-term care facilities are found at 42 C.F.R. Part 483. A long-term care facility must remain in substantial compliance with program requirements to participate in Medicare. 42 C.F.R. § 483.1(b). "Substantial compliance" means "a level of compliance with the requirements of participation such that any identified deficiencies pose no greater risk to resident health or safety than the potential for causing minimal harm." 42 C.F.R. § 488.301. "Noncompliance" means "any deficiency that causes a facility to not be in substantial compliance." *Id*.

The Act authorizes the Secretary to impose enforcement remedies against a long-term care facility for failure to comply substantially with the federal participation requirements. The Secretary has delegated to CMS and the states the authority to impose those remedies. State agencies survey facilities on behalf of CMS to determine whether the facilities comply with federal participation requirements. 42 C.F.R. §§ 488.10-.28, 488.300-.335. The regulations specify the enforcement remedies that CMS may impose if a facility is not in substantial compliance with Medicare requirements. 42 C.F.R. § 488.406.

The statement of deficiencies (SOD) is a contemporaneous record of the state survey agency's observations and investigative findings, and the Board has made it clear that CMS may make a prima facie showing of noncompliance based on that document if the factual findings and allegations it contains are specific, undisputed, and not inherently unreliable. *Glenburn Home*, DAB No. 1806, at 25 (2002); *see also Florence Park Care Ctr.*, DAB No. 1931, at 13 (2004) ("CMS is obligated to present evidence only with respect to factual assertions that are in dispute."); *Emerald Oaks*, DAB No. 1800, at

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approval without regard to the immediate jeopardy finding. Social Security Act (Act) § 1819(f)(2)(B) (42 U.S.C. § 1395i-3(f)(2)(B)); 42 C.F.R. § 483.151(b)(2)(iv).

[2] The Act, as amended, is available at http://www.ssa.gov/OP_Home/ssact/ssact.htm. On this website, each section of the Act contains a reference to the corresponding chapter and code in the United States Code.

42 n.18 (2001) (concluding that a statement of deficiencies constituted evidence of the facility's prior medication problems because the facility failed to contest the basis for the deficiency citation); *Guardian Health Care Ctr*., DAB No. 1943 (2004).

CMS may impose a per-day CMP for the number of days a facility is not in substantial compliance or a per-instance CMP for each instance of the facility's noncompliance. 42 C.F.R. § 488.430(a). A per-day CMP may range from either $50 to $3,000 per day for less serious noncompliance or $3,050 to $10,000 per day for more serious noncompliance that poses immediate jeopardy to the health and safety of residents. 42 C.F.R. § 488.438(a)(2). "Immediate jeopardy" exists when "the provider's noncompliance with one or more requirements of participation has caused, or is likely to cause, serious injury, harm, impairment, or death to a resident." 42 C.F.R. § 488.301.

If CMS imposes one or more enforcement remedies against a long-term care facility based on a noncompliance determination, the facility may request a hearing before an ALJ to challenge the noncompliance finding and enforcement remedies. Act §§ 1128A(c)(2) (42 U.S.C. § 1320a-7a(c)(2)),1866(h) (42 U.S.C. § 1395cc(h)); 42 C.F.R. §§ 488.408(g), 498.3(b)(13).

IV. Findings of Fact and Conclusions of Law

1. Petitioner was not in substantial compliance with participation requirements at 42 C.F.R. § 483.13(b) and (c)(1)(i) (Tag F223) because it did not take reasonable steps to protect Resident 3 from abuse by a staff member.

A resident "has the right to be free from verbal, sexual, physical, and mental abuse, corporal punishment, and involuntary seclusion." 42 C.F.R. § 483.13(b). A facility must not use "verbal, mental, sexual, or physical abuse, corporal punishment, or involuntary seclusion" against a resident. 42 C.F.R. § 483.13(c)(1)(i). Medicare regulations define the term "abuse" to mean "the willful infliction of injury, unreasonable confinement, intimidation, or punishment with resulting physical harm, pain or mental anguish." 42 C.F.R. § 488.301.

The phrase "willful infliction" means that the actor must have acted deliberately, not that the actor must have intended to inflict injury or harm. *Merrimack Cnty. Nursing Home*, DAB No. 2424, at 4 (2011); *Britthaven, Inc., d/b/a Britthaven of Smithfield*, DAB No. 2018, at 4 (2006). According to the CMS State Operations Manual (SOM), Appendix PP, Tag F223, verbal abuse is "the use of oral, written or gestured language that willfully includes disparaging and derogatory terms to residents or their families, or within their hearing distance, regardless of their age, ability to comprehend, or disability." The SOM describes mental abuse as including, but not limited to "humiliation, harassment, threats of punishment or deprivation."

The Board has held that "[p]rotecting and promoting a resident's right to be free from abuse necessarily obligates the facility to take reasonable steps to prevent abusive acts, regardless of their source." *Western Care Mgmt. Corp. d/b/a Rehab Specialties Inn*, DAB No. 1921, at 12 (2004); *Pinehurst Healthcare & Rehab. Ctr.*, DAB No. 2246, at 6 (2009). The Board has also held that noncompliance with 42 C.F.R. § 483.13(b) and (c)(1)(i) can be found even if no actual abuse of a resident occurred. *Honey Grove Nursing Ctr.*, DAB No. 2570, at 3 (2014); *see also Holy Cross Vill. at Notre Dame, Inc.*, DAB No. 2291, at 7 (2009) (citation omitted). As the Board has explained:

> The goal of section 483.13(b) is to keep residents free from abuse. This goal cannot be achieved if a facility could be found in compliance even though it failed to take reasonable steps to protect residents from potentially injurious acts which it knew or should have known might occur and which might be willful . . . .

Honey Grove Nursing Ctr., DAB No. 2570, at 3 (citing *Western Care Mgmt. Corp.*, DAB No. 1921). "It is sufficient for CMS to show that the facility failed to protect residents from reasonably foreseeable risks of abuse." *Holy Cross Vill. at Notre Dame, Inc.*, DAB No. 2291, at 7 (citing *Western Care Mgmt. Corp.*, DAB No. 1921, at 15). However, the Board has also noted that "considerations of foreseeability are inapposite when staff abuse has occurred" because "a facility acts through its staff and cannot disown the consequences of the actions of its employee." *Honey Grove Nursing Ctr.*, DAB No. 2570, at 4 (quoting *Gateway Nursing Ctr.*, DAB No. 2283, at 8 (2009)).

The SOD alleges that, based on review of documents and interviews, Petitioner violated 42 C.F.R. § 483.13(b) and (c)(1)(i) (Tag F223) because Petitioner "failed to protect and prevent verbal abuse" of Resident 3. CMS Ex. 4, at 1. The alleged deficiency centers on an incident that took place between Petitioner's Office Manager and Resident 3. According to the SOD, on May 24, 2012, Petitioner's Office Manager, who had just been suspended pending an investigation into misappropriation of resident funds, found and confronted Resident 3. The SOD alleges that the Office Manager moved through the facility, went upstairs, yelled at, and verbally threatened Resident 3 until she gave the Office Manager a money order receipt that proved that the Office Manager had stolen money from Resident 3. The SOD alleges that Resident 3 was left alone during this incident, and police soon after arrived to escort the Office Manager out of the facility. CMS Ex. 4, at 1.

I find that the totality of the evidence shows that Petitioner's Office Manager abused Resident 3 and that Petitioner's staff failed to take all reasonable steps to protect Resident 3. As discussed below, therefore, I find that Petitioner was not in substantial compliance with participation requirements at 42 C.F.R. § 483.13(b) and (c)(1)(i) (Tag F223).

a. Petitioner's Office Manager verbally abused Resident 3 on May 24, 2012.

On the evening of May 23, 2012, a facility resident went to Petitioner's Administrator to discuss an issue "that was upsetting him." CMS Ex. 20, at 1; *see* P. Ex. 7, at 4. The resident told the Administrator that the Office Manager had told him that he owed the facility $500, and that if he didn't pay the money, the General Manager (who was the Administrator's wife) would kick him out of the facility. P. Ex. 7, at 4; CMS Ex. 20, at 1. The resident told the Administrator that he paid the amount. P. Ex. 7, at 4. According to the Administrator, "this . . . struck [him] as strange" because another resident, Resident 3, had also expressed a concern to him that she did not think she would be able to stay at the facility much longer because she could not afford it. P. Ex. 7, at 4; CMS Ex. 20, at 1. The Administrator stated that Resident 3 did not relate the circumstances to anything being amiss with her funds; rather, she questioned whether she owed the facility additional funds. P. Ex. 7, at 5. The Administrator assured both residents that he would look into the matter. P. Ex. 7, at 4; CMS Ex. 20, at 1.

Petitioner's Administrator asked his administrative assistant to investigate the billing for these two residents who claimed that the Office Manager had told them they owed money to the facility. P. Ex. 7, at 4-5; CMS Ex. 20, at 1. The following day, on May 24, 2012, Petitioner's assistant reported that neither resident owed any money to the facility. CMS Ex. 20, at 1. According to Petitioner's Administrator, his administrative assistant discovered that the Office Manager told Resident 3 that she owed $1600, but she could pay $800 or else the Administrator "would kick her out of the home." CMS Ex. 20, at 1. Resident 3 paid $800 to the Office Manager in the form of a money order. CMS Ex. 20, at 1-2; *see* P. Ex. 7, at 5; CMS Ex. 22, at 3. The assistant reported that the Office Manager neither deposited the funds she collected from the two residents into any facility account nor credited the residents' accounts. P. Ex. 7, at 5.

That morning, after obtaining this information, in the presence of Petitioner's Human Resources Director, the Administrator advised the Office Manager of the allegations against her involving possible theft of resident funds. The Administrator informed the Office Manager that he was suspending her pending an investigation and ordered her to leave the building. Tr. 85. He instructed the Human Resources Director to escort the Office Manager from the facility.[3] P. Ex. 7, at 5; P. Ex. 8, at 2; P. Pre-hrg. Br. at 2; Tr. 85, 86-87. The Administrator stated that he then initiated an "OTIS [Online Tracking

[3] Although there are conflicting versions in the record as to whether the Office Manager actually left the building at some point after she was suspended, I do not find this detail to be material to my findings.

Incident System] report," an incident report that the facility filed with the state survey agency. P. Ex. 7, at 5. [4]

According to the Administrator's testimony and his June 5, 2012 statement which was provided to the state surveyors, instead of leaving the premises as ordered, the Office Manager proceeded to make her way through the building to find Resident 3. Tr. 111; CMS Ex. 20, at 2; *see* P. Ex. 8, at 2. According to the Human Resources Director, he followed the Office Manager and ordered her to leave the building. P. Ex. 8, at 2; CMS Ex. 20, at 11; *see* P. Ex. 7, at 3; Tr. 90. Petitioner's records show that the Office Manager went upstairs and confronted Resident 3 in a hallway. CMS Ex. 22, at 15; P. Ex. 1, at 7; *see* CMS Ex. 20, at 2; *see* Tr. 90, 111. Petitioner's Incident Witness Statement notes that the Office Manager proceeded to yell at Resident 3, demanding the money order receipt from her. CMS Ex. 23, at 2. The Occupational Therapist, who was transporting a resident back to her room, stated that he "had no idea what was going on" but "[he] stopped and tried to get [the Office Manager] to lower her voice." P. Ex. 9, at 2. The Incident Witness Statement notes that Resident 3 handed over the receipt because she felt scared by the Office Manager's conduct. CMS Ex. 23, at 2; *see* P. Ex. 1, at 2; CMS Ex. 20, at 2; CMS Ex. 22, at 4. The Human Resources Director stated that he left the area and went back to the Administrator's office to get assistance. P. Ex. 8, at 2; CMS Ex. 20, at 2, 11. According to the Administrator's June 5, 2012 statement, the General Manager called the police, who soon arrived and escorted the Office Manager from the building. CMS Ex. 20, at 2.

Petitioner's management terminated the Office Manager's employment on May 29, 2012. P. Ex. 3, at 16. In the facility's "Separation Notice," the Human Resources Director stated the "reason for separation" as follows: "Employee interfered in an active investigation of resident abuse. Employee violated company policy on conduct. Employee violated company abuse and neglect policy. Employee arrested for theft. Falsified job application." P. Ex. 3, at 16. When asked on cross-examination whether the Office Manager's violation of the facility's abuse and neglect policy was derived from her verbal abuse of Resident 3, Petitioner's Administrator stated "it was not." Tr. 110. The Administrator stated that the Office Manager violated the facility's abuse policy because she "disregarded a direct order by me to leave the facility, and accordingly she interrupted an OTIS investigation, which is grounds for termination." Tr. 110.

Despite the Administrator's testimony, I find that record evidence shows the Office Manager's conduct amounted to verbal abuse against a resident. *See* 42 C.F.R. § 483.13(b); 42 C.F.R. § 483.13(c)(1)(i). I find further that there was willful intimidation and resulting mental anguish. *See* 42 C.F.R. § 488.301.

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[4] Petitioner's Administrator stated that the OTIS report is "the mechanism established through the Louisiana Dept. of Health and Hospitals for reporting potential abuse and/or misappropriations of resident funds." P. Ex. 7, at 5.

Statements of Petitioner's management and Petitioner's incident report created during the course of its investigation strongly suggest that the Office Manager engaged in abusive behavior towards Resident 3. In an Incident Witness Statement completed contemporaneously to the incident, the Human Resources Director stated that the Office Manager "was told to punch out & go home because 2 residents reported that they were asked to pay bills & the money was missing. [Office Manager] was found on 2nd floor yelling at [Resident 3] – trying to get the money order receipt from her." He stated further that "[Resident 3] said that she didn't know what was going on, but [the Office Manager] was yelling at her and demanding that she give her the money order receipt. [Resident 3] said that she was scared & gave it to her." CMS Ex. 23, at 2.

Further, in an undated statement, the Human Resources Director states that the Office Manager "confronted the resident in the hallway," she "continued to refuse to leave," and he "rushed downstairs to get the administrator. The entire incident occurred in less than 5 minutes." P. Ex. 1, at 7. In an Incident Report dated May 31, 2012, which Petitioner submitted to the state survey agency, Petitioner's Administrator reported that an investigation had substantiated an allegation of financial exploitation against the Office Manager and that her victims included Resident 3. In the summary, the Administrator stated that after he suspended the Office Manager, the Office Manager went to the second floor of the facility and "verbally abused" Resident 3. P. Ex. 1, at 1-2. The Administrator stated further that "[Resident 3] was counseled and she told us that she had been frightened when [the Office Manager] demanded that she give her the money order receipt." P. Ex. 1, at 1-2.

In his statement dated June 5, 2012, which he provided to the state surveyors, the Administrator stated that they "discovered that when [the Office Manager] when [sic] upstairs she had found [Resident 3] and forced her to give her the receipt for the money order. [Resident 3] was very upset." CMS Ex. 20, at 2; *see* P. Ex. 7, at 2. In an undated and unsigned statement, a staff member (apparently Petitioner's General Manager) relates what happened on May 24, 2012, and states she called 911 and told the police operator that "a disgruntled employee" was "harassing patients." CMS Ex. 20, at 4.[5]

[5] As CMS notes in its post-hearing brief, this statement is missing a page and the author is not identified. However, based on the context, CMS states that it believes the statement was written by Petitioner's General Manager. CMS Br. at 4 n.2. Petitioner refers to this statement as "Unknown author's narrative" in its post-hearing brief but does not dispute CMS's claim that it was written by Petitioner's General Manager. P. Br. at 7; *see* P. Reply at 12. Given the context and that Petitioner does not object to CMS's belief that the author of the statement is the General Manager, I find that it was most likely written by Petitioner's General Manager.

Resident 3 was alert and oriented, was not cognitively impaired, and was wheelchair-bound. P. Ex. 2, at 3, 8. Although facility progress notes indicate that she had adequate vision, Petitioner's Administrator represented that Resident 3 is legally blind. P. Ex. 2, at 8; CMS Ex. 20, at 2. I have no reason to discount Resident 3's statements that she felt "frightened" and "scared" when the Office Manager began yelling at her, demanding that she hand over the money order receipt. Even though she did not know the entirety of the situation, Resident 3 reported to the Administrator's assistant that she handed over the receipt because she felt threatened and intimidated by the Office Manager. P. Ex. 1, at 7; CMS Ex. 20, at 2; CMS Ex. 23, at 2. There can be little doubt that the Office Manager engaged in abusive conduct towards Resident 3.[6]

Petitioner argues that the May 24, 2012 incident involving the Office Manager and Resident 3 was not abuse. Petitioner attempts to downplay what occurred, and, in challenging the claim that Resident 3 was abused, relies on the declarations of its Human Resources Director, its General Manager, an Occupational Therapist who was contracted to work at Petitioner's facility, and a Facility Maintenance employee. P. Br. at 11-12.

In his declaration, Petitioner's Human Resources Director claims that "under no circumstance did [he] hear [the Office Manager] utter any disparaging, derogatory, inflammatory, curse or threatening remarks. Furthermore, during the entire period witnessed by me, at no time was [the Office Manager] in close proximity to R#3 such that [the Office Manager] could have threatened, abused, harmed, touch [sic] or in any way contacted R#3." P. Ex. 8, at 3.

According to the Occupational Therapist, he was transporting a resident back to her room when he saw the Office Manager in the hall. He declares that the Office Manager was "asking [Resident 3] why she was saying she [the Office Manager] had done something wrong." P. Ex. 9, at 2. He states that he "had no idea what was going on" but he "stopped and tried to get [the Office Manager] to lower her voice." P. Ex. 9, at 2. The Occupational Therapist claims that "under no circumstance did [he] hear [the Office Manager] utter any disparaging, derogatory, inflammatory, curse or threatening remarks." P. Ex. 9, at 2. He declares further that he "witnessed [the Office Manager] questioning [Resident 3] but did not believe that the Office Manager was close to Resident 3 such that she "could have threatened, abused, harmed, or touched" the resident. P. Ex. 9, at 2. He states that if he had believed Resident 3 was in distress, he would have intervened to protect her. P. Ex. 9, at 2.

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[6] The fact that Petitioner's investigation substantiated the allegations that the Office Manager stole money from Resident 3 (and another resident) establishes that Resident 3 was also a victim of extortion, another form of abusive conduct. *See* P. Ex. 6, at 3; CMS Ex. 13, at 5. Petitioner did not dispute this with its own evidence.

Petitioner's Facility Maintenance employee declares that he saw the Office Manager in the hallway as he was on his way to make a repair in the restorative gym and "thought it was normal business." P. Ex. 12, at 2. He claims that he "did not hear anything." P. Ex. 12, at 2. Like the Human Resources Director and the Occupational Therapist, the Facility Maintenance employee maintains that "[u]nder no circumstance did [he] hear [the Office Manager] utter any disparaging, derogatory, inflammatory, curse or threatening remarks." P. Ex. 12, at 2. He claims further that he did not believe that "staff members or residents were being threatened or abused." P. Ex. 12, at 2.

Petitioner contends further that the General Manager's testimony also calls into question whether Resident 3 was yelled at, threatened or scared. *See* P. Br. at 12. In her declaration, the General Manager states that, on the morning of May 24, 2012, she and the Administrator's assistant spoke to Resident 3, who told them that she had given a money order for $800 to the Office Manager. P. Ex. 14, at 1. The General Manager reviewed the money order receipt. She declares that the police interviewed Resident 3 later that morning, and she was present at the interview. P. Ex. 14, at 2. The General Manager claims that the police asked Resident 3 "the same questions that [the Administrator's Assistant] and I had asked earlier." P. Ex. 14, at 2. According to the General Manager, "[a]t no time did [Resident 3] seem upset or scared." P. Ex. 14, at 2.

To the extent that Petitioner's witnesses claim in their declarations that they do not believe that the Office Manager threatened Resident 3, I do not find their testimony credible. Their testimony does not corroborate with Petitioner's contemporaneous written reports and other evidence that show that the Office Manager confronted Resident 3 and yelled at her. CMS Ex. 23, at 2; P. Ex. 1, at 1, 7. The statements by the Human Resources Director, the Occupational Therapist, and the Facility Maintenance employee that they did not hear the Office Manager "utter any disparaging, derogatory, inflammatory, curse or threatening remarks" are clearly inconsistent with the May 31, 2012 Incident Report submitted to the state survey agency. As discussed above, Petitioner's Administrator states in that report that the Office Manager went to the second floor of the facility and "verbally abused" Resident 3. P. Ex. 1, at 1-2. Moreover, I note that in the facility's Incident Witness Statement, the Human Resources Director himself had stated that the Office Manager was "yelling at [Resident 3] – trying to get the money order receipt from her." CMS Ex. 23, at 2. Nowhere in his declaration, which was executed approximately seven months after the incident, does the Human Resources Director mention that the Office Manager yelled at Resident 3. Considering he does not reconcile this important inconsistency, I find his statements in his declaration regarding the Office Manager's demeanor to be less than believable. I note further that Petitioner's Facility Maintenance employee admits in his declaration that he "did not hear anything." Given that he did not hear anything, his testimony that he did not believe that the Office Manager was verbally abusing Resident 3 is entitled to little weight. P. Ex. 12, at 2.

Further, I note that the General Manager did not witness the Office Manager's confrontation of Resident 3 and thus has no first-hand knowledge of what occurred. According to her declaration, the General Manager apparently interviewed Resident 3 before the confrontation with the Office Manager, and then she was present when the police interviewed Resident 3 after the incident. Based on what appears to be her undated and unsigned statement, the General Manager was in an office downstairs and called the police, stating that "a disgruntled employee" was "harassing patients." CMS Ex. 20, at 4; *see supra* p. 11 n.6. While her statement that Resident 3 did not seem "upset or scared" after the incident may be true, this does not persuade me that an abusive confrontation did not occur earlier between the Office Manager and Resident 3.

I thus assign little weight to the testimony that Petitioner has put forth to dispute that the Office Manager abused Resident 3. I find that Petitioner's contemporaneous documentation and evidence relating to the May 24, 2012 incident is more reliable and entitled to more weight than the after the fact statements of Petitioner's witnesses in declarations executed several months later.

Petitioner contends that CMS relies solely on "unauthenticated hearsay" as support for its arguments. P. Reply at 2. I note that Petitioner makes specific objections to CMS Exs. 4, 5, 6, and 10, which I address in a separate section below, as well as the more general assertion that CMS relies on "anecdotes of documents" that are "untested through direct evidence testimony or cross-examination." P. Br. at 2-3; P. Reply at 4.

Petitioner's claims regarding hearsay evidence are misplaced. I am allowed to admit and consider hearsay statements in these administrative proceedings even if they would be inadmissible under the rules of evidence applicable to court proceedings. *See* 42 C.F.R. § 498.61; *Florence Park Care Ctr.*, DAB No. 1931 (2004). The Board has recognized that hearsay statements "may be accorded appropriate weight, if supported by adequate indicia of reliability." *Omni Manor Nursing Home*, DAB No. 1920, at 16 (2004). The weight an ALJ accords hearsay is "determined by the degree of reliability, based on relevant indicia of reliability and whether the hearsay is corroborated by other evidence in the record as a whole." *Id*. at 17. I note further that, at the hearing, the parties raised no objections to the authenticity of the exhibits already entered into the record. Tr. 16.

Here, the staff statements, Resident Incident Report, and Incident Witness Statement to which Petitioner objects as containing hearsay, were generated by Petitioner either contemporaneously to the incident or during the course of its own investigation. *See* P. Reply at 7; CMS Ex. 20, at 1-4, 13; CMS Ex. 23, at 1-2. Because the statements in these documents describing the incident between the Office Manager and Resident 3 are generally consistent with each other, I assign them great weight because they possess sufficient indicia of reliability.

Petitioner contends further that Resident 3 suffered no mental anguish or behavioral changes as a result of the confrontation with the Office Manager. According to Petitioner, when the police interviewed Resident 3 following the incident, she did not seem "upset or scared." P. Ex. 14, at 2. Petitioner notes further that the social worker, who checked on Resident 3 twice on May 24, 2012, documented that Resident 3 denied being upset and stated that she was "fine." P. Ex. 2, at 5-6.

However, there is troublesome evidence that the Office Manager "confronted" Resident 3, "yelled" at her, "demanded" the money order receipt, and "forced" the resident to give it to her. P. Ex. 1, at 7; CMS Ex. 20, at 2; *see* CMS Ex. 23, at 2. Resident 3 stated that she "didn't know what was going on" when the Office Manager began yelling at her, but she handed over the money order receipt because she felt intimidated and threatened. CMS Ex. 20, at 2; CMS Ex. 23, at 2. As Petitioner's Administrator's own statement shows, Resident 3 was "very upset" and staff calmed her down. CMS Ex. 20, at 2. Contrary to what Petitioner argues, I find that it is reasonable to infer that Resident 3 clearly suffered some emotional distress as a result of the abusive incident with the Office Manager. Although it is not the focus of the violation, Resident 3 must have also been distressed at the thought that she could possibly no longer afford to live at the residence due to the Office Manager's scheme to defraud money from her due to a purported facility price increase.

The Office Manager's conduct also constituted "abuse" within the meaning of Petitioner's own abuse prevention policy. Petitioner's policy stated that "[v]erbal conduct may be abusive because of either the manner of communication or the content of the communication," and listed the following as examples of abusive verbal conduct: "yelling, cursing, ridiculing, harassment, coercion, threats, intimidation and other communication which is derogatory or disrespectful." P. Ex. 6, at 3; CMS Ex. 13, at 5. Here, there is no dispute that, at a minimum, the Office Manager was yelling at Resident 3. CMS Ex. 23, at 2; *see* P. Ex. 1, at 1-2; P. Ex. 9, at 2. Even if I were to accept Petitioner's position that no abuse occurred, which I do not, the Board has held that actual abuse need not occur for a facility to violate 42 C.F.R. § 483.13(b) and (c)(1)(i). *Honey Grove Nursing Ctr.*, DAB No. 2570, at 3 (2014); *see also Holy Cross Vill. at Notre Dame, Inc.*, DAB No. 2291, at 7 (2009) (citation omitted).

b. Petitioner's management and staff failed to take all reasonable steps to protect Resident 3 from the Office Manager's abusive conduct.

To carry out its duty to protect its residents from abuse, a facility must "take reasonable steps to prevent abusive acts, regardless of their source." *Western Care Mgmt. Corp.*, DAB No. 1921, at 12; *Pinehurst Healthcare & Rehab. Ctr.*, DAB No. 2246, at 6 (2009). Here, I find that Petitioner's management and staff failed to take all reasonable steps to protect Resident 3 from the Office Manager's abusive confrontation.

As discussed above, the Office Manager refused to obey the Administrator's order to leave the premises after he suspended her, and instead she roamed the facility to find Resident 3. The Human Resources Director followed the Office Manager once he realized that she was not leaving the premises, which was a reasonable step to protect the residents from any potential harm from the Office Manager. However, the Human Resources Director and other facility staff in the vicinity should have taken appropriate measures to protect the resident and prevent the abusive confrontation. Instead, the Human Resources Director and other staff essentially watched while the Office Manager yelled at a vulnerable wheelchair-bound resident and created a situation of intimidation.

By taking no effective action, Petitioner's management and staff did not protect Resident 3 from the Office Manager's abusive conduct. Petitioner was obligated to ensure that Resident 3 was free from abuse, and its own abuse prevention policy explicitly requires staff to "[t]ake immediate protective action if needed to remove resident from danger." CMS Ex. 13, at 2. The measures a facility takes to protect its residents from abuse are left to its discretion so long as they were reasonable. *See Woodstock Care Ctr. v. Thompson*, 363 F.3d 583, 586 (6th Cir. 2003).

Here, given the Office Manager's aggressive and threatening behavior, the decision of Petitioner's Human Resources Director to permit the confrontation with Resident 3 to occur clearly did little to protect the resident. Once the Human Resources Director realized that the Office Manager's "target" was Resident 3, he could have physically intervened between them, removed Resident 3 from the area so that Resident 3 would not continue to be victimized by the Office Manager, or asked other staff members for assistance. Any of these actions would certainly have been a reasonable step to protect Resident 3.

Petitioner contends that its staff responded appropriately and took reasonable steps to protect Resident 3 and the other residents from the Office Manager's conduct on May 24, 2012. Petitioner points out that upon learning that the Office Manager may have misappropriated residents' funds, Petitioner's Administrator addressed the allegations quickly and seriously. Petitioner notes that, consistent with the facility's abuse prevention policy, the Administrator opened an investigation and immediately suspended the Office Manager on May 24, 2012, and ordered her to leave the facility. *See* P. Ex. 6, at 2; CMS Ex. 13, at 3. Petitioner contends further that the Office Manager had never displayed any acts of insubordination in the past, and thus, its staff had no reason to anticipate that she would defy orders and victimize Resident 3. P. Br. at 13; *see* P. Ex. 8, at 3. Petitioner states that at no time was Resident 3 left "alone, unattended, [or] unsupervised" in the presence of the Office Manager, there were several staff members in close proximity, and "[t]he entire interaction occurs over approx. 2 minutes." P. Pre-hrg. Br. at 11; P. Br. at 7, 12; P. Ex. 7, at 3; Tr. 105-06.

Petitioner's staff may have potentially anticipated the Office Manager's refusal to leave the premises and her confrontation with Resident 3 if it had complied with its reference check policy, which I discuss more later. Specifically, if Petitioner called the Office Manager's previous employers, perhaps staff would have been able to learn about any past improprieties and would have been able to avert the resident abuse. Ultimately however, a facility is responsible for the acts of its employees and "considerations of foreseeability are inapposite when *staff abuse* has occurred." *Honey Grove Nursing Ctr.*, DAB No. 2570, at 4 (citing *Gateway Nursing Ctr.*, DAB No. 2283, at 8 (2009)) (emphasis added). Thus, the fact that Petitioner's staff may or may not have foreseen the Office Manager's abusive behavior is irrelevant.

Moreover, the fact that the abuse may have only lasted a few minutes is not a defense to Petitioner's failure to protect Resident 3 from abuse. Nothing in the regulations or even in Petitioner's own abuse prevention policy states that an abusive act must be of a certain duration to satisfy the definition of "abuse." That the confrontation may have been very brief is irrelevant and does not detract from the fact that the Office Manager verbally abused, scared, and intimidated the resident. Furthermore, I find this abuse started days earlier with the Office Manager's extortionist threats to evict Resident 3 and another elderly resident from their home unless they provided her with money.

2. Petitioner was not in substantial compliance with the participation requirement at 42 C.F.R. § 483.13(c) (Tag F226) because it did not implement its abuse prevention policy and reference check policy.

A facility must "develop and implement written policies and procedures that prohibit mistreatment, neglect, and abuse of residents and misappropriation of resident property." 42 C.F.R. § 483.13(c). The SOD alleges that, under Tag F226, based on review of documents and interviews, Petitioner violated 42 C.F.R. § 483.13(c) because Petitioner's staff "failed to implement their abuse policy to immediately take protective action as needed to remove a resident from danger." CMS Ex. 4, at 16. The citation refers to the confrontation that took place between Petitioner's Office Manager and Resident 3 on May 24, 2012. CMS Ex. 4, at 15-20.

In its prehearing brief, CMS expands upon the factual allegations for Petitioner's noncompliance under Tag F226 in the SOD, arguing that the citation "involve[s] Resident #3, and the failure to perform background checks on employees." CMS Pre-hrg. Br. at 10. Although CMS did not include the failure to perform reference checks as part of the Tag F226 citation in the SOD, I do not find that CMS is precluded from expanding upon the allegations in the SOD. The Board has explained that the SOD "is a notice document, and is not designed to lay out every single detail in support of a finding that a violation has been committed . . . ." *Alden Town Manor Rehab. & HCC*, DAB No. 2054, at 17-18 (2006).

In providing guidance in interpreting 42 C.F.R. § 483.13(c), the SOM states,

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

SOM, App. PP, Tag F226.

As I discuss below, I find that Petitioner, although having developed valid abuse prevention policies, failed to effectively implement them, and accordingly, was not in substantial compliance with 42 C.F.R. § 483.13(c).

a. Petitioner's failure to separate and protect Resident 3 from the Office Manager's abusive confrontation demonstrates that Petitioner did not implement its abuse prevention policy.

There is no dispute that Petitioner developed an abuse prevention policy as required by 42 C.F.R. § 483.13(c). P. Ex. 6; CMS Ex. 13, at 1-5. Consistent with the regulatory requirements, Petitioner's policy regarding abuse and neglect prohibits the "abuse or neglect of any resident by any person, whether employee, contractor, other provider, legal guardian, family or other person." P. Ex. 6, at 1; CMS Ex. 13, at 1. In listing "examples of the type of conduct which constitutes abuse," the policy states in relevant part:

> Verbal/Emotional/Psychological Abuse: Verbal conduct may be abusive because of either the manner of communication or the content of the communication. Examples include yelling, cursing, ridiculing, harassment, coercion, threats, intimidation and other communication which is derogatory or disrespectful. Non-verbal communication, such as gestures, that have the same effect may be considered emotional or psychological abuse.

P. Ex. 6, at 3; CMS Ex. 13, at 5.[7]

[7] Additionally, Petitioner's policy lists extortion as another type of abusive conduct and describes it as follows: "Attempting to acquire or acquiring something of value from a client or a client's family by physical force, intimidation, or abuse of official authority. Examples include coercing a client to give up something of value or soliciting payment

The policy provides further that the facility must "[t]ake immediate protective action if needed to remove resident from danger" and that if there is an allegation of abuse, such action routinely includes transfer of the employee from direct care of the resident during the investigation. CMS Ex. 13, at 2.

Petitioner's Administrator began an investigation into allegations that the Office Manager had misappropriated residents' funds. On the morning of May 24, 2012, he suspended the Office Manager pending the investigation and ordered her to leave the facility immediately. However, instead of leaving the facility's property, the Office Manager sought out Resident 3 in another part of the building. In the presence of the Human Resources Director, the Office Manager yelled at Resident 3, frightening her into handing over a money order receipt that apparently implicated the Office Manager. Neither the Human Resources Director nor other staff members that were in the area took any effective steps to separate or shield Resident 3 from the Office Manager's yelling.

Upon learning the Office Manager may have misappropriated residents' funds, Petitioner's Administrator immediately initiated an investigation and an OTIS report. P. Ex. 7, at 5. Further, the Administrator suspended the Office Manager when she came into work on May 24, 2012, and ordered her to leave the facility. I agree with Petitioner that this was a reasonable measure to ensure that the Office Manager had no further contact with the residents and to protect the residents from any further harm while the investigation was ongoing. P. Pre-hrg. Br. at 16; P. Reply at 12.

However, the evidence also shows that Petitioner did not take subsequent action to separate and protect Resident 3 from the Office Manager's abusive conduct, and this instance of abuse violated Petitioner's abuse prevention policy. Petitioner's Office Manager was able to confront Resident 3, a vulnerable, wheelchair-bound resident, and created a situation of intimidation in which she verbally abused and threatened the resident.

Petitioner does not dispute that the Human Resources Director did not physically intervene between the Office Manager and Resident 3 or attempt to remove the resident from the area. Instead, the Human Resources Director observed the confrontation and then left Resident 3 in the hallway to get assistance. Petitioner also does not dispute that no other staff member stepped in to protect Resident 3 or remove her from the confrontation with the Office Manager. *See* P. Pre-hrg. Br. at 11; P. Br. at 7, 11-12; Tr. 105-07.

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from a client or family by threatening the client with harm." P. Ex. 6, at 3; CMS Ex. 13, at 5.

Petitioner claims that Resident 3 "was never alone, unattended nor unsupervised in the presence of" the Office Manager following the Office Manager's suspension. P. Br. at 12. While Petitioner's assertion may be true, this does not demonstrate compliance with its own abuse prevention policy, which explicitly requires its staff to"[t]ake immediate protective action if needed to remove resident from danger." CMS Ex. 13, at 2. In retrospect, the Office Manager's goal in confronting the resident appears to have been to obtain evidence of the money order funds she extorted from the resident. However, it would have been a reasonable expectation that she would have sought out the resident for exposing her illegal misappropriation of funds, and the facility should have planned how it would safeguard the resident from potential harm from with the Office Manager, even before the Administrator informed the Office Manager of the allegations against her.

The SOM explains:

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

SOM, App. PP, Tag F226. I find that the evidence shows that Petitioner's management and staff did not do all that was within its control to protect Resident 3 from abuse. By failing to take actions to further protect Resident 3 from contact with the Office Manager, who, as it turns out, did in fact exploit this resident financially, Petitioner failed to implement its abuse prevention policy.

b. Petitioner's lack of documentation for required reference checks demonstrates that Petitioner failed to implement its reference check policy.

Petitioner's April 9, 2012 reference check policy states:

> Policy
>
> In keeping with [Petitioner's] commitment to provide the highest quality service possible, this policy establishes the facility's position on reference checks for candidates for employment and on background checks for certain individuals in any category of employment, including existing employees, independent contractors, and volunteers.

> Reference Checks
>
> All appointing authorities, through their supervisory personnel, are required and responsible for performing a complete reference check prior to making an offer of employment to a candidate. The reference check may include verification of employment, performance and any factual information represented on the application.

CMS Ex. 13, at 9.

The employment application Petitioner used contains a section titled "Reference and Prior Employment Check." In this section, there are spaces to add the names of three references and spaces in which to record the "Results of Check." *See* CMS Ex. 16, at 8. For each of the nine employment applications in question during the survey, the section for documenting the results of reference checks is blank. CMS Br. at 14; CMS Ex. 16, at 4, 8, 12, 16, 20, 24, 28, 31; CMS Ex. 17, at 9. The applications lack any documentation that Petitioner's staff had performed the requisite reference checks.

Petitioner's former Office Manager is among the nine employees whose personnel files lack evidence of documentation of reference checks. *See* CMS Ex. 4, at 8. The Office Manager's personnel file contained a checklist of documents that were required to be in her file, and although the item "reference checks" is on the list, there was no indication that staff had placed any such documents in her file. CMS Ex. 17, at 6. Petitioner's Human Resources Director, who testified that he is responsible for performing reference checks on applicants, did not contest these facts. Tr. 123. When directed to look at the Office Manager's employment application and the application of another employee, he conceded that they were "not annotated" to indicate that staff had completed reference checks. Tr. 118-23, 124; *see* CMS Ex. 16, at 8; CMS Ex. 17, at 6, 9.

Petitioner's policy imposed upon staff the duty to perform a "complete reference check" before making an offer of employment. CMS Ex. 13, at 9. It is undisputed that, however, for all nine employees, Petitioner did not have any documentation that its staff performed reference checks prior to their hiring. Without proof of documentation, Petitioner had no reliable way to verify, or prove here for that matter, that its staff carried out its duty under the policy to perform complete reference checks. Accordingly, I find the evidence establishes that Petitioner did not effectively implement its reference check policy, and thus, Petitioner was not in substantial compliance with 42 C.F.R. § 483.13(c).

Petitioner contends that its reference check policy does not require that staff document reference checks, and CMS therefore improperly relies on Petitioner's policy to demonstrate noncompliance. P. Br. at 15-16; P. Reply at 9. Petitioner argues further that

CMS has not produced any evidence to show that its staff had not completed reference checks for the specific employees. P. Br. at 16, 25; Tr. 37.

I find Petitioner's claim that its reference check policy contains no requirement that reference checks be documented disingenuous. Although the language of Petitioner's reference check policy does not explicitly require documentation, it is only logical that such a requirement would be inherent in the policy. Without documentation, Petitioner has no way to prove in good faith that its staff complied with its policy and performed complete reference checks that included "verification of employment, performance and any factual information represented on the application." *See* CMS Ex. 13, at 9. Petitioner's employment application contains spaces in which to record the results of reference checks, which suggests Petitioner's intention that hiring personnel would document the results of its reference checks. By failing to document that they had performed reference checks for nine identified employees, Petitioner's staff failed to follow its own policy.

I do not find credible Petitioner's claim that its staff completed reference checks for the Office Manager. *See* Tr. 35, 37; P. Br. at 16; P. Reply at 10-11, 14. Petitioner maintains that its Human Resources Director had informed one of the surveyors that he had performed reference checks on the Office Manager but had no documentation. Tr. 35; *see* CMS Ex. 9, at 6. At the hearing, Petitioner's Human Resources Director testified that it was not his practice to annotate employment applications to indicate that he had performed reference checks. Tr. 120. With respect to the Office Manager, the Human Resources Director states in his declaration that he "contacted all three references provided by [the Office Manager] on her employment application." P. Ex. 8, at 4. The Human Resources Director states that "[f]rom those calls, [he] received no information that would have suggested [the Office Manager] was unfit to work within the skilled nursing home environment." P. Ex. 8, at 5. Petitioner's Administrator also states in his declaration that his staff "contacted all three references provided by [the Office Manager] on her employment application." P. Ex. 7, at 7.

As for the other eight employees for whom CMS alleges that Petitioner failed to document that reference checks were done, Petitioner asserts that CMS cannot rely on the statements of the surveyor whose declaration was withdrawn and contends that the other surveyor admitted that he cannot recall which personnel files he had reviewed. Tr. 47. Based on these grounds, Petitioner argues that CMS has failed to produce prima facie evidence that Petitioner failed to perform reference checks on the other eight employees. P. Br. at 17; P. Reply at 11.

Considering that Petitioner has produced no documentation that reference checks were done, I assign little weight to the statements of Petitioner's Human Resources Director and Administrator regarding unannotated contacts of the Office Manager's references. Moreover, had the Human Resources Director called the Office Manager's references, it

does not strike me as credible that he would not have taken the time to document having done a reference check, especially where the employment application contains a space to enter this information. Petitioner has not come forward with any plausible explanation as to why it would not require documentation of its reference checks.

Neither the Human Resources Director nor the Administrator represented that staff performed reference checks on the eight other employees. The burden was on Petitioner to produce actual documentation, or credible testimony, of the reference checks, and it produced no definitive evidence to show that reference checks were done. Absent credible evidence to the contrary, I will presume that Petitioner did not perform reference checks for these employees. *Cf. Evergreene Nursing Care Ctr.*, DAB No. 2069, at 24-25 (2007) (finding, where a facility routinely maintains a treatment record whose purpose is to confirm that a necessary medical item or service was provided, in the absence of documentation that the item or service was provided, the fact-finder may presume, absent credible evidence to the contrary, that the item or service was not provided).

3. Petitioner was not in substantial compliance with the participation requirement at 42 C.F.R. § 483.75 (Tag F490) because, by not protecting against resident abuse and by not implementing its abuse prevention policies, Petitioner did not administer its facility in a manner that ensured the highest practicable well-being of its residents.

A facility "must be administered in a manner that enables it to use its resources effectively and efficiently to attain or maintain the highest practicable physical, mental, and psychosocial well-being of each resident." 42 C.F.R. § 483.75. A violation of this participation requirement is usually based on findings of noncompliance with other participation requirements. *Honey Grove Nursing Ctr.*, DAB No. 2570, at 11; *Cedar View Good Samaritan*, DAB No. 1897, at 23-24 (2003); *Asbury Ctr. at Johnson City*, DAB No. 1815, at 11 (2002).

I find that Petitioner's administration was directly implicated in the abuse incident of May 24, 2012, because of its failure to protect Resident 3 from the Office Manager's abusive behavior. The Office Manager was allowed to access and confront Resident 3, and facility staff did not take preventative measures to stop the exchange, such as physically intervening between her and the Office Manager or removing Resident 3 from the area. Instead staff observed as the Office Manager verbally abused and intimidated the vulnerable resident. That management and staff did not do more to protect Resident 3 from the Office Manager's abuse demonstrates that Petitioner did not administer its facility in a manner that ensured that residents are free from abuse, let alone in a manner that ensured the highest practicable well-being of residents.

Additionally, the evidence shows that Petitioner failed to implement its reference check policy effectively, and this also demonstrates a deficiency in administration. The

objective of Petitioner's reference check policy was to ensure that Petitioner's management would not hire anyone who was unfit for service as a facility employee. It is evident that meaningful implementation of the policy required documentation of reference checks on new employees. Because its staff failed to have documentation that they had performed reference checks, Petitioner's management potentially put all of its residents at risk for harm by putting them in the care of possibly unfit employees. The fact that Petitioner lacked this crucial documentation and claimed that none was needed under its policy, establishes that Petitioner did not administer its facility in a manner so that its resources were used effectively to ensure the highest practicable well-being of its residents.

Petitioner argues that there exists no objective standard by which to measure whether a facility's resources are being used effectively. P. Br. at 20-21. Petitioner objects to CMS's reliance on the other citations as the basis for finding noncompliance with 42 C.F.R. § 483.75. Petitioner also objects to CMS's citing of 42 C.F.R. § 483.75, without specifying a particular subsection. P. Br. at 22-23.

Petitioner's arguments are unpersuasive. Whether a facility is in substantial compliance with this participation requirement will necessarily turn on the unique facts and circumstances presented by a particular case. As noted above, the Board has held that a deficiency in administration can be based on findings of other deficiencies. The text of 42 C.F.R. § 483.75, moreover, is not dependent on any of the subsections and can stand alone as a Medicare participation requirement. Here, it is clear that Petitioner was deficient in management and administration, for it failed to protect against resident abuse and failed to effectively carry out its reference check policy.

> ***4. Petitioner was in substantial compliance with the participation requirements at 42 C.F.R. § 483.13(c)(1)(ii)-(iii), (c)(2)-(4) (Tag F225) because Petitioner's staff performed criminal background checks on the employees the state agency surveyed.***

A facility may not employ individuals who have either been found guilty of abusing, neglecting, or mistreating residents, or who have been listed on a state nurse aide registry for abuse, neglect, mistreatment of residents, or misappropriation of resident property. 42 C.F.R. § 483.13(c)(1)(ii). A facility must report to the state nurse aide registry or licensing authority any knowledge the facility has of court actions against an employee that indicates unfitness for service as a nurse aide or other facility staff. 42 C.F.R. § 483.13(c)(1)(iii).

Although CMS combined its arguments for Tags F225 and F226, basing them on the same facts, CMS imposed a separate CMP for each deficiency. CMS's arguments related to Tag F225 centered on Petitioner's non-implementation of its policy for complete reference checks. Specifically, from the survey's SOD, CMS alleges that Petitioner

failed to comply with the above regulatory requirements because it failed to follow its own policy and procedures for documentation of reference checks for nine employees whom the facility recently had hired. CMS Ex. 4, at 6-10; CMS Br. at 12-16; *see* CMS Ex. 13, at 9. In its briefs, CMS also bases its CMP for Tag F225 on its conclusion that Petitioner had failed to follow its own policy and procedures to conduct reference checks on the nine new employees. CMS Pre-hrg. Br. at 12; CMS Br. at 12-13.

Although I upheld the deficiency involving Tag F226 because Petitioner clearly did not implement its reference check policy involving complete reference checks (which was also a partial basis for finding noncompliance with the derivative Tag F490 for non-efficient and non-effective administration), I do not uphold a deficiency and CMP for Tag F225 as CMS argues. This tag, as cited, requires criminal background checks, with the immediate reporting of negative results, for nursing home employees. CMS is not disputing, however, that Petitioner performed criminal background checks on the employees in question and that there were no reportable results. *See* Tr. 43. Further, CMS did not make any arguments that this deficiency was based upon a less than thorough investigation of abuse allegations or that the facility failed to prevent further abuse during a pending investigation.

5. I deny Petitioner's request to strike CMS Exs. 4, 5, 6, and 10.

In its post-hearing brief, Petitioner requests that I strike CMS Ex. 4 (the SOD), CMS Ex. 5 (Petitioner's plan of correction for the June 8, 2012 survey, which also includes the SOD), CMS Ex. 6 (the state agency survey tracking form and notification of immediate jeopardy determination, both signed by the surveyor who was not available to testify), and CMS Ex. 10 (the unavailable surveyor's survey notes for the June 8, 2012 survey) based on hearsay and authentication objections. P. Br. at 2-3, 10, 13; P. Reply at 12. Petitioner takes the position that because CMS failed to produce one of the surveyors for cross-examination, I should prohibit CMS from introducing any evidence which she might authenticate, including any exhibits which she retrieved during her investigation. P. Reply at 5. Petitioner argues that "all evidence and exhibits which originate solely through [the unavailable surveyor] should likewise be withdrawn, deemed inadmissible, and/or stricken." P. Br. at 10; *see* P. Reply at 6.

I deny Petitioner's objections to CMS Exs. 4, 5, 6, and 10 and deny its request that these exhibits be stricken from the record. Petitioner's objections are without merit.

I reiterate that hearsay statements are admissible in this administrative proceeding even if they are inadmissible under the rules of evidence applicable to court proceedings. *Florence Park Care Ctr.*, DAB No. 1931 (2004); *see* 42 C.F.R. § 498.61. The fact that a surveyor was not available to attend the hearing and submit to cross-examination does not mean that I must automatically reject evidence or statements attributed to her or obtained by her during the course of her investigation. Rather, her unavailability for

cross-examination means that her statements, while admissible, may be subject to less weight. Although Petitioner claims that CMS "fail[ed] to produce [surveyor] for testimony," if Petitioner believed there was a problem with the allegations, Petitioner could have requested a subpoena to compel her attendance and testimony; however, it did not do so. P. Reply at 5.

Moreover, the surveyor who was unavailable to testify did not personally witness the May 24, 2012 incident involving Petitioner's Office Manager and Resident 3. Her factual findings are the result of her review of facility documents, including investigation reports and contemporaneous statements of employees regarding the May 24, 2012 incident, and her interviews with staff. Therefore, the quality of the surveyor's information gathering or thought processes are of minimal value because the compliance issues presented are ones that I decide de novo based on the evidence that the parties present. The Board has explained that an ALJ hearing is not a review of how or why CMS decided to impose remedies, nor is it "restricted to the facts or evidence that were available to CMS when it made its decision. Rather, the ALJ hearing provides a fresh look by a neutral decision-maker at the legal and factual basis for the deficiency findings underlying the remedies." *Britthaven of Chapel Hill*, DAB No. 2284, at 6 (2009) (citations and internal quotations omitted). Petitioner had ample opportunity in this proceeding to present its own documentation and testimony to refute any surveyor findings, which were essentially based on Petitioner's own documentation as well.

6. The three PICMPs, each in the amount of $2,000, that CMS imposed for the substantiated deficiencies are reasonable.

In determining whether a CMP is reasonable, I consider the factors listed in 42 C.F.R. § 488.438(f): 1) the facility's history of noncompliance, including repeated deficiencies; 2) the facility's financial condition; 3) factors specified in 42 C.F.R. § 488.404; and 4) the facility's degree of culpability, which includes neglect, indifference, or disregard for resident care, comfort, or safety. The absence of culpability is not a mitigating factor. The factors in 42 C.F.R. § 488.404 include: 1) the scope and severity of the deficiency; 2) the relationship of the deficiency to other deficiencies resulting in noncompliance; and 3) the facility's prior history of noncompliance in general and specifically with reference to the cited deficiencies. I also consider whether the evidence supports a finding that the amount of the CMP is at a level reasonably related to an effort of a provider to produce corrective action with the kind of deficiencies found. *CarePlex of Silver Spring*, DAB No. 1683, at 8 (1999).

The Board has held that "an ALJ or the Board properly presumes that CMS considered the regulatory factors and that those factors support the amount imposed." *Pinecrest Nursing & Rehab. Ctr.*, DAB No. 2446, at 23 (2012) (emphasis in original). Thus, CMS is not required to present evidence regarding each regulatory factor. Instead, the burden is on Petitioner "to demonstrate, through argument and the submission of evidence

addressing the regulatory factors, that a reduction is necessary to make the CMP amount reasonable." *Id*. (quoting *Oaks of Mid City Nursing & Rehab. Ctr*., DAB No. 2375, at 26-27 (2011)).

Here, CMS imposed a $2,000 PICMP for each of the three substantiated deficiencies (total amount of $6,000). A PICMP has only one range, $1,000 to $10,000, regardless of whether or not immediate jeopardy is present. 42 C.F.R. § 488.438(a)(2).

In its prehearing brief, Petitioner claims that the PICMPs are unreasonable. P. Pre-hrg. Br. at 23. Petitioner argues that its staff's actions to protect Resident 3 and the other residents from the Office Manager during its investigation demonstrate that it has minimal culpability. P. Pre-hrg. Br. at 23-24. Petitioner contends that its Office Manager did not verbally abuse Resident 3, and it notes that the Office Manager was never alone and unsupervised with Resident 3 after she was suspended. P. Pre-hrg. Br. at 24. Petitioner contends further that it screened its employees, including the Office Manager, prior to their employment. P. Pre-hrg. Br. at 23.

As discussed above, I have concluded that Petitioner was not in substantial compliance with the participation requirements at: 42 C.F.R. § 483.13(b) and (c)(1)(i); 42 C.F.R. § 483.13(c); and 42 C.F.R. § 483.75. These regulatory violations were based on Petitioner's failure to protect Resident 3 from abuse and its failure to have evidence of documentation of reference checks on nine employees, including the Office Manager who succeeded in defrauding and abusing the resident here.

Petitioner's violations were serious. Petitioner failed to ensure that its residents were free from abuse. Here, Petitioner's Office Manager verbally abused a vulnerable resident, causing her to feel intimidated and frightened. As stated above, Petitioner is responsible for the acts of its employees. *Honey Grove Nursing Ctr.*, DAB No. 2570, at 4 (citing *Gateway Nursing Ctr.*, DAB No. 2283, at 8 (2009)) (emphasis added). Although Petitioner's Human Resources Director and other staff members were present and could have taken action, no one took all reasonable steps to separate and protect the resident from the employee's abusive confrontation. I find the lack of proactive steps to protect Resident 3 establishes culpability on Petitioner's part.

Petitioner was also highly culpable for its failure to have documentation of reference checks. Petitioner's reference check policy in effect at the time of the survey required its staff to perform a "complete reference check" on applicants. Any meaningful implementation of the policy required the documentation of reference checks. By failing to have this documentation for nine new employees, Petitioner's staff potentially endangered the safety and welfare of its residents by entrusting them in the care of possibly unfit employees. In fact, the abusive Office Manager was one of the nine identified employees whose file lacked documentation that staff had performed reference checks.

The three PICMPs that CMS imposed for the deficiencies I substantiated here, each in the amount of $2,000, are in the lower half of the PICMP range. 42 C.F.R. § 488.438(a)(2). CMS did not offer evidence of any history of noncompliance of Petitioner, and Petitioner has not claimed that its financial condition affects its ability to pay the relatively small PICMPs. Accordingly, I conclude that the three $2,000 PICMPs are reasonable.

/s/
Joseph Grow
Administrative Law Judge