Department of Health and Human Services

DEPARTMENTAL APPEALS BOARD

Civil Remedies Division

In the Case of:	)	
	)	
Rose Care of Little Rock,	)	Date: May 14, 1998
	)	
Petitioner,	)	
	)	
- v. -	)	Docket No. C-97-311
	)	Decision No. CR532
Health Care Financing	)	
Administration.	)	
	)	

DECISION

I decide that Rose Care of Little Rock, (Rose Care) Petitioner herein, was in substantial compliance with 42 C.F.R. § 483.20(d)(3)(ii) for the period December 7, 1996 through January 11, 1997, and that, accordingly, the Health Care Financing Administration (HCFA) is not authorized to impose a civil money penalty (CMP) against Petitioner based upon Petitioner's alleged noncompliance with that section of the regulation.

I. Background facts and procedural history

The parties do not dispute that on January 11, 1997, a Licensed Psychiatric Technician Nurse (LPTN), who shall hereafter be referred to as J.L.K., administered excessive doses of insulin to two diabetic residents of Petitioner's nursing facility, resulting in the death of one resident and treatment of the other at a hospital emergency room. J.L.K.'s employment with the facility was terminated on January 12, 1997.

On January 23, 1997, the Arkansas Department of Human Services (State Survey Agency), in response to the incident, concluded a survey of the facility and cited it for violations of three regulatory requirements for participation in the Medicare and Medicaid programs, including 42 C.F.R. § 483.20(d)(3)(ii). Section 483.20(d)(3)(ii)

requires that the services provided or arranged by a facility must, "[b]e provided by qualified persons in accordance with each resident's written plan of care."

HCFA imposed significant CMPs against Petitioner as a result of the State Survey Agency's findings, including a penalty of $200 per day for the period from December 7, 1996 (the date J.L.K. began providing direct patient care at Petitioner's facility), through January 11, 1997, based on Petitioner's alleged violation of 42 C.F.R. § 483.20(d)(3)(ii). HCFA assessed this penalty based on a finding that J.L.K. was not "qualified" to provide insulin injections.

In January 1998, the parties hereto entered into a Compromise Settlement Agreement and Joint Stipulation of Facts, wherein Petitioner agreed to pay a reduced CMP in settlement of two of the three alleged violations. The parties further agreed that with respect to Petitioner's alleged violation of 42 C.F.R. § 483.20(d)(3)(ii), only an issue of law remained which could be decided on written submissions without the need for an in-person evidentiary hearing.

Pursuant to the request of the parties hereto, I established a schedule for the submission of both initial and reply briefs. I received initial briefs from both parties, and a reply brief from Petitioner. HCFA has not submitted a reply brief, and, as the time period for submission of same has expired, I conclude that HCFA does not intend to further reply. Accordingly, this matter is ready for adjudication.

The parties Compromise Settlement Agreement, Joint Stipulation of Facts, and briefs in support of their respective positions are hereby received into the record in this case. Further, I hereby receive into evidence Petitioner's exhibits marked as P. Ex. 1 through 20 and HCFA's exhibits marked as HCFA Ex. 1 through 28. Neither party has objected to the admission of these exhibits, and HCFA referred to several of its exhibits in its brief. The exhibits have limited relevance to the issue before me, but are received into evidence for the sole purpose of making the record complete.

II. Issue and Stipulated Facts

The sole issue before me, as agreed by the parties, is stated as follows:

> Whether the nursing home facility has fully complied with the provisions of 42 C.F.R. § 483.20(d)(3)(ii) when it solely relies upon and accepts state nursing licensure as evidence that the applicant is deemed a qualified person within the meaning of the regulation.

The parties stipulated to the following facts:

1. On November 28, 1996, J.L.K. completed an application for employment for a nursing position at Rose Care.

2. On the employment application, J.L.K. stated that he had previously been employed as a nurse by the Arkansas State Hospital and worked at the Arkansas Children's Hospital and the Arkansas Nursing Home.

3. The chronological listing of previous employment provided by J.L.K. on the employment application showed that he had not been employed in a health care-related field since October 1971.

4. J.L.K. presented evidence to the nursing home that he was currently licensed by the Arkansas State Board of Nursing as a Psychiatric Technician Nurse, through December 31, 1998.

5. J.L.K. presented evidence to the facility that he had been licensed by the State Board of Nursing for the two-year period ending December 31, 1996.

6. Rose Care personnel were informed prior to hire that the State Board of Nursing considered J.L.K. to be a LPTN in "good standing" with the Board.

7. Rose Care solely relied upon and accepted the State Board of Nursing licensure as evidence that J.L.K. was qualified to provide nursing services, as defined by Arkansas law, Ark. Code Ann. § 17-87-102(6).

8. J.L.K. was hired by Rose Care on December 4, 1996 and received orientation at the facility by a licensed practical nurse from December 4 to December 6, 1996, after which J.L.K. began providing direct patient care at Rose Care, starting December 7, 1996.

9. J.L.K. worked as an LPTN from December 7, 1996 until January 11, 1997, and he was terminated by Rose Care on January 12, 1997 for his involvement in an incident on January 11, 1997.

10. During J.L.K.'s period of employment, no other incidents or reprimands were cited by the State Survey Agency for his failure to perform his nursing services.

11. The State Survey Agency determined that Rose Care was not in compliance with three Medicaid nursing facility regulatory provisions, including noncompliance with 42 C.F.R. § 483.20(d)(3)(ii) and cited that finding as Tag F-282 on the Form 2567.

12. HCFA agreed with the State Survey Agency finding contained in the Form 2567 for the survey of Rose Care and imposed a CMP against Rose Care.

III. Findings of Fact and Conclusions of Law

I adopt the Stipulated Facts as set forth above, and further make the following Conclusions as a matter of law:

13. The term "qualified persons" for purposes of 42 C.F.R. § 483.20(d)(3)(ii) means licensed by a State having appropriate jurisdiction.

14. Petitioner's employee, J.L.K., was at all times relevant hereto licensed by the State of Arkansas to perform those services required by the residents' plans of care.

15. J.L.K. was a "qualified person" within the meaning of the aforesaid regulation.

16. Inasmuch as Petitioner employed a "qualified person" to provide services consistent with the residents' plans of care, Petitioner was, at all times relevant hereto, in substantial compliance with the aforesaid regulation.

IV. Discussion

The provision contained at 42 C.F.R. § 483.20(d)(3)(ii), while requiring that services be performed by "qualified persons," does not define the term "qualified." I note further that HCFA has not offered a definition of the term, although HCFA was given an opportunity to brief the issue. HCFA has provided neither regulatory authority nor promulgated policy to support its position that J.L.K. was not qualified to administer insulin to residents. Instead, HCFA argues that because, prior to his employment at Rose Care, J.L.K. had not worked as a nurse or in a medically related field since 1971, he was not "qualified." HCFA further argues that the fact that J.L.K. caused the death of a patient and put another in serious jeopardy is further evidence that J.L.K. was not qualified. HCFA Brief at 4, 5.

I find HCFA's arguments unconvincing. HCFA has offered no evidence that, at the time J.L.K. was hired and continuing through the date of the survey, there was either a regulatory requirement or an official policy statement requiring that nursing staff must have worked as a nurse or in a medically related field for any specified time period prior to new employment in a nursing facility. HCFA's other argument, that the results of the employee's care demonstrate he was not qualified to administer that care, begs the issue. If an anesthesiologist who is properly licensed by a State licensing authority and certified by an anesthesiology board were to accidentally administer too much anesthesia resulting in harm to a patient, would HCFA argue that the anesthesiologist was not qualified to administer the drug? I think not. The anesthesiologist would indeed have made a grievous error, but that single fact would not make the anesthesiologist unqualified to care for patients. What makes the anesthesiologist "qualified" is the fact that the anesthesiologist is licensed by a State licensing authority and certified by an anesthesiology board and that qualification continues until the licensing authority or the anesthesiology board determines otherwise.

As Petitioner ably argues, it is the fact that the employee is licensed by the State which makes him "qualified." I concur with Petitioner's argument that when 42 C.F.R. Part 483 is read as a whole it becomes evident that licensure by a State is the sole requirement for nurses. Petitioner Initial Brief at 4. In discussing the requirements for sufficient staff to provide nursing care to all residents in accordance with individual plans of care, the provision at 42 C.F.R. § 483.30(a)(1) requires only that the care be given by licensed nurses, except when that requirement is waived due to extenuating circumstances. The regulation is silent as to other requirements.

Further, the regulations contained in Part 483 do set forth specific qualification requirements for activities directors (42 C.F.R. § 483.15(f)(2)); social workers (42 C.F.R. § 483.15(g)(3)); and nurse aides (42 C.F.R. Part 483, Subpart D). It is clear that if HCFA wished to impose specific qualifications on nurses, it could have, and presumably would have, done so. The fact that it chose not to do so, when it did impose specific qualifications on other categories of employees, leads me to the inescapable conclusion that HCFA elected to leave the issue of nurse qualifications up to State licensing authorities.

V. Conclusion

In the case before me, the parties have stipulated that the nurse in question was licensed and in good standing with the State licensing authority at the time he was hired and throughout the term of his employment.

Since licensure by the State is the only regulatory requirement for qualification for nurses, I must conclude that Petitioner fully complied with the provisions of 42 C.F.R. § 483.20(d)(3)(ii) when it solely relied upon and accepted State nursing licensure as evidence that J.L.K. was qualified to provide the nursing services required with respect to the residents' plans of care.

Accordingly, I find for Petitioner. No basis exists for the imposition of a CMP under 42 C.F.R. § 483.20(d)(3)(ii).

/s/

Stephen J. Ahlgren

Administrative Law Judge