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DEPARTMENT OF LICENSING AND REGULATORY AFFAIRS
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Introduction

The Bureau of Community Health Systems (BCHS) is the State Agency responsible for regulating Certified Nurse Aides (CNAs) and taking action against a CNA's certificate of registration when a CNA violates the law in the performance of their CNA duties. BCHS may take action against a CNA's certificate of registration for abuse, neglect, or misappropriation of a resident's property, as well as other violations of the law.

If BCHS believes that a CNA's certificate of registration should be revoked because the CNA violated the law, BCHS may issue a Notice of Intent (NOI) to Revoke Certificate of Registration. BCHS will mail a copy of the NOI to the CNA and also email the NOI to the CNA through the MI-NATES database. The NOI will contain the specific laws BCHS believes the CNA has violated and the reasons why BCHS believes the certificate of registration should be revoked.

A CNA who has been issued a NOI has the right to request an Administrative Hearing to challenge the NOI and BCHS's attempt to revoke their registration. Information on how to request an Administrative Hearing will be contained in the NOI issued to the CNA.

The purpose of this document is to provide an overview of the Administrative Hearing process, including what to expect at the hearing. It is intended as a resource for CNAs challenging a NOI and who are representing themselves at an Administrative Hearing. Nothing contained in this document should be considered legal advice.

Administrative Hearing

Administrative Hearings are conducted by an Administrative Law Judge (ALJ). The ALJ is employed by the Michigan Office of Administrative Hearings and Rules (MOAHR). MOAHR is an independent agency – it is not a part of BCHS. The Administrative Hearing gives the CNA an opportunity to address the allegations in an NOI and present evidence and arguments for why their registration should not be revoked.

Basic Terms Used at an Administrative Hearing

The following are some terms related to the Administrative Hearing process:

Administrative Law Judge (ALJ) is an attorney who works for MOAHR and conducts the hearing. The ALJ considers the **Evidence** presented by the **Parties**, which may include **Witness Testimony** and/or **Documents**. The ALJ may also question witnesses. After the hearing, the ALJ will issue a written **Proposal for Decision**.

Parties are the people affected by the outcome of the Administrative Hearing and who will present evidence at the hearing. The CNA who is challenging BCHS's attempt to revoke their registration is a Party and is referred to as the **Petitioner**. BCHS is also a Party and is referred to as the **Respondent**.

Notice of Hearing is a document that MOAHR sends to the **Parties** informing them of the date and time when the hearing will be held. The Notice of Hearing will also indicate whether the hearing will be conducted by telephone, video conference, or in person. Most of the Administrative Hearings that MOAHR conducts are by phone or video conference, unless a Party requests an in-person hearing and the ALJ determines there is a good reason for the request. For hearings held by telephone or video conference, instructions on how to call into the hearing will also be provided in the Notice of Hearing. The Notice of Hearing also contains other important information about the hearing, including information about how the parties submit proposed documents (referred to as exhibits, see below) before the hearing so that everyone has them and can refer to them during the hearing, and how to request a different hearing date if it conflicts with the CNA's schedule. The CNA should carefully review the Notice of Hearing when they receive it.

Evidence is the way the **Parties** show the ALJ what happened in the matter. The ALJ will decide whether to accept the evidence offered – that is whether to “admit” the evidence and consider it as part of the Administrative Hearing. An ALJ might not accept evidence that is offered by a party if the evidence is unreliable or irrelevant. An example of unreliable evidence might be a witness who wishes to testify about a rumor they heard, or an unsigned or undated document. For evidence that the ALJ admits, the ALJ will also decide how much importance to give the evidence.

Witnesses are the people who participate in the hearing by giving testimony. Parties arrange for their own witnesses to appear at the hearing.

Testimony is a common form of evidence and consists of oral statements made by a witness at the hearing. The CNA may choose to testify on their own behalf, and

both parties are allowed to have other witnesses provide testimony to support their positions. A witness who testifies, including the CNA if they choose to testify, will be required to swear or affirm, under oath, that their testimony will be true.

Exhibits are another common form of evidence and generally consist of documents but may also include things like pictures, video, email, text messages, and audio recordings. Generally, before a document or other type of exhibit is admitted as evidence, a witness testifies about the document to explain and answer questions about it. Information on how to submit proposed Exhibits to MOAHR before the hearing is contained in the Notice of Hearing.

Burden of Proof and **Preponderance of the Evidence** are terms used to describe which party is responsible for proving a fact and how convincing the evidence must be to establish the fact. In Administrative Hearings involving CNAs, BCHS is responsible for proving the facts alleged in the NOI and, therefore, has the burden to prove those facts. And the degree to which BCHS must prove the necessary facts is by a **Preponderance of the Evidence**, which means that the evidence supporting the fact must be more convincing than evidence offered in opposition to it.

Proposal for Decision is a written document that the ALJ prepares and sends to both parties after the Administrative Hearing is complete. The Proposal for Decision will contain “findings of fact” and “conclusions of law.” The Proposal for Decision is not the final decision but rather the ALJ’s proposal for what the decision should be. Information in the Proposal for Decision will explain how the parties can point out errors that the ALJ may have made by filing “exceptions” to the Proposal for Decision. After the required time has passed for parties to file exceptions to the Proposal for Decision, the Proposal for Decision and the entire record for the case is referred to the director of the Department of Licensing and Regulatory Affairs for review and issuance of a Final Decision and Order.

Findings of fact contained in the Proposal for Decision are determinations that the ALJ makes about what has been proven to be true based on the evidence admitted at the Administrative Hearing.

Conclusions of law in the Proposal for Decision are conclusions that the ALJ makes by applying the findings of fact to the applicable law. Ultimately, the ALJ determines whether BCHS has met its burden of proof by showing that the CNA violated the law as alleged in the NOI.

Exceptions are written statements prepared by the parties in response to the Proposal for Decision explaining why the party does not agree with the Proposal for Decision. Exceptions might identify why the party believes the Proposal for Decision is wrong or give specific examples of where the party believes the ALJ made a

mistake about a finding of fact or conclusion of law. A party is not required to file Exceptions if they agree with the Proposal for Decision. Information on how to file Exceptions, and the deadline for doing so, is provided in the Proposal for Decision.

The Importance of Attending the Hearing

The Administrative Hearing is held at the request of the CNA. The hearing will still be held if the CNA does not attend the hearing. A CNA who does not attend the hearing cannot present evidence to support their version of events, and there will be no one to introduce evidence on their behalf. While BCHS still has the burden of proving the allegations in the NOI by a preponderance of the evidence, the hearing rules allow the ALJ to accept the allegations contained in the NOI as true if BCHS asks the ALJ to do so and the CNA does not attend the hearing.

Preparing for the Hearing

At the Administrative Hearing, the CNA may either represent themselves or be represented by an attorney. The CNA is responsible for obtaining their own attorney at their own expense.

If the CNA or someone who the CNA would like to attend the hearing (such as a witness to support the CNA's case) is unable to attend the hearing as scheduled, the CNA may request that the hearing be rescheduled. Instructions on how to request a different hearing date are included in the Notice of Hearing. The CNA should state the specific reason for requesting a different hearing date and provide alternative hearing dates at the time they make their request. The ALJ decides whether to grant a request to reschedule a hearing, and usually only does so if there is a good reason to do so.

BCHS will likely have witnesses testify on its behalf, and the CNA must decide whether to have witnesses testify on their behalf. If the CNA wants a witness to testify, the CNA is responsible for notifying the witness of the date and time of the hearing and providing the witness with information about how to participate in the hearing, such as providing the witness with the telephone number or video conference link provided in the Notice of Hearing. If the CNA intends to have a witness testify about a proposed exhibit, or to ask the witness questions about an exhibit, the CNA should provide the exhibit to the witness before the hearing.

Before a witness testifies at the hearing, the ALJ will require the witness to swear or affirm that their testimony will be truthful.

The CNA must also decide whether to submit exhibits (documents, papers, photographs, videos, emails, texts, audio recordings, etc.) at the hearing. For exhibits that the CNA wants the ALJ to consider, a witness may be necessary to explain the exhibit before the ALJ will allow the exhibit to be admitted into evidence. This might include witness testimony about what an exhibit shows, when the exhibit was created, who created the exhibit, and why the exhibit is relevant. If the CNA needs a witness to explain a proposed exhibit, the CNA should have that witness attend the hearing and provide testimony about the exhibit.

Additionally, for any exhibits the CNA wants the ALJ to consider, the CNA must provide the exhibits to MOAHR and to BCHS before the hearing (usually about a week before the scheduled hearing). Any proposed exhibits that BCHS intends to use at the hearing must also be submitted to MOAHR and provided to the CNA before the hearing. So, about a week before the hearing, both parties and the ALJ will have copies of the proposed exhibits that the parties intend to admit into evidence. Instructions on how to submit proposed exhibits to MOAHR before the hearing are in the Notice of Hearing.

The Hearing

The audio portion of all hearings is recorded. If a videoconference hearing is held, only the audio portion of the hearing is recorded. At the beginning of the hearing, the ALJ will usually provide an overview of how the hearing will be conducted, which may include identifying or explaining: the issue(s) to be decided, which party has the burden of proof, which party will present their case first, and when the parties can expect that the Proposal for Decision will be issued. The ALJ may also give instructions for the hearing, including the importance of the parties and their witnesses to speak clearly, not to talk over or interrupt one another, and what to do if a party is involuntarily disconnected from the hearing.

In general, each party will have the opportunity to make an **opening statement** about what they believe the evidence will show. Each party will have the opportunity to call witnesses to testify, and the CNA may also testify. As stated above, each witness who testifies will swear or affirm, under oath, that they will tell the truth before they testify. For every witness who testifies, including the CNA, the opposing party will have an opportunity to also question the witness.

Each party may also challenge or “object” to another party’s witness or proposed exhibits and explain to the ALJ why that witness should not be allowed to testify (or testify about a particular matter) or why a proposed exhibit should not be admitted into evidence. The ALJ will decide whether to allow witness testimony or to admit an exhibit into evidence when there is an objection.

Because BCHS has the burden of proof, BCHS will present its case first.

BCHS will present its witnesses, ask the witnesses questions, have the witnesses identify exhibits, and ask that exhibits be admitted into evidence. The ALJ may also ask questions of the witnesses. Once BCHS finishes questioning its witness, the CNA will have the opportunity to ask questions of the BCHS witness. It is important for the CNA to listen carefully to the testimony of a BCHS witness so they can ask their own questions. The CNA may find it helpful to take notes as the BCHS witness testifies to prepare follow up questions they would like to ask.

Once the BCHS witnesses have testified and BCHS has presented its case, the CNA will have an opportunity to have their witnesses testify and present their case. The CNA may wish to prepare an outline or specific questions they intend to ask their witnesses. If the CNA chooses to testify on their own behalf, this is the time to do so. After each of the CNA's witnesses testify, the representative from BCHS will have the opportunity to ask the CNA's witness questions, and the ALJ may also question the witness.

The ALJ is responsible for making sure the hearing is conducted in a fair and impartial manner. In doing so, the ALJ will ensure that the rules of evidence are generally followed and may rule that certain testimony or exhibits will not be allowed into the hearing record.

At the conclusion of the hearing, the ALJ will give the parties the opportunity to make a **closing statement**. The closing statement is not evidence, but rather a summary of the evidence presented during the hearing and a party's reasons for why they believe that the evidence submitted during the hearing supports their position.

After the Hearing

After the hearing, the ALJ reviews the evidence that was admitted during the hearing and prepares a written Proposal for Decision containing findings of fact and conclusions of law. The Proposal for Decision will indicate whether the ALJ believes BCHS has proven the allegations in the NOI based on the admitted evidence

As discussed above, the parties may file written Exceptions to the Proposal for Decision. How to file written Exceptions, and the deadline for doing so, is explained in the Proposal for Decision. If a party files Exceptions, the other party will have an opportunity to file a Response. The way to file a Response to Exceptions, and the deadline for doing so, will also be explained in the Proposal for Decision.

Once the deadline for filing Exceptions and Responses to the Exceptions has passed, MOAHR creates a **certified record** for the case. The certified record contains all the documents MOAHR received or issued in the case and includes the exhibits

offered and admitted into evidence, a copy of the audio recording of the hearing or a transcript timely requested by a party to be made part of the certified record, the Proposal for Decision, and any Exceptions and Responses to Exceptions that the parties have filed. The certified record is then sent to the Director of the Department of Licensing and Regulatory Affairs. The Director of Licensing and Regulatory Affairs reviews the entire certified record and prepares a written **Final Decision and Order**. The Final Decision and Order may accept, reject, or modify the ALJ's Proposal for Decision. The Director's Final Decision and Order is the final decision at the administrative level.

Note about Neglect Cases

For cases in which BCHS alleges the CNA committed neglect, BCHS has the burden to prove that: (1) a resident was neglected, and (2) the CNA was responsible for the neglect. However, the CNA may refute an allegation of neglect by proving that the neglect was caused by factors beyond the CNA's control. The CNA has the burden of proof, however, to show by a preponderance of the evidence that factors beyond their control existed that caused the neglect.

Conclusion

The issuance of a NOI to revoke a CNA's certificate of registration is a serious matter. The Administrative Hearing is the CNA's opportunity to address the allegations BCHS has made. Familiarity with the above information and the notices and instructions in the Notice of Hearing will help the CNA understand the hearing process and present their case. Before attending the Administrative Hearing, the CNA should consider the following:

- (1) What has BCHS alleged to support revoking the CNA's registration and what is the issue to be resolved? (See the NOI and Notice of Hearing).
- (2) What must BCHS prove at the hearing?
- (3) What evidence (witness testimony and exhibits) will the CNA need to present at the Administrative Hearing to counter BCHS's allegations?
- (4) What must be done to make sure exhibits that support the CNA's case are obtained and submitted to MOAHR before the hearing and that necessary witnesses are confirmed to attend the hearing?