



**STATE OF WISCONSIN**  
**Division of Hearings and Appeals**

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In the Matter of

DECISION

HIL Meadowbrook

ML-10-0116

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A petition was filed March 4, 2010, under Wis. Stat. § 50.03(5g) (f) and Wis. Stat. § 227.44, to review a decision by the Department of Health Services (Department), Division of Quality Assurance (DQA) to impose a forfeiture on the petitioner's facility. On May 4, 2010, the Department submitted a motion to dismiss the appeal. The parties agreed to the following: a) the parties submit simultaneous briefs because there were not any material facts in dispute, and therefore no need for an evidentiary hearing on the motion. Instead, the parties agreed to the facts as stated in the petitioner's appeal; and b) the pertinent issue at this time is whether the petitioner has a right to a hearing in this case concerning the interpretation of a specific Wisconsin Administrative Code section: DHS 83.32(3)(g). Both parties timely filed their briefs to the Division of Hearings and Appeals (DHA) by June 15, 2010.

The issue for determination is if the petitioner has a right to a hearing as to whether the Department correctly imposed a forfeiture against the petitioner's CBRF because the facility allegedly violated DHS 83.32(3)(g), Wis. Adm. Code by using restraints that were not approved by the Department.

There appeared at that time and place, the following persons:

**PARTIES IN INTEREST:**

Petitioner:

HIL Meadowbrook, by

Paul Pedrosa  
HIL Meadowbrook  
2835 N Grandview Blvd - Ste 150  
Pewaukee, WI 53072

Respondent:

Department of Health Services, by

Attorney Steven M. Gloe  
Department of Health Services  
Office of Legal Counsel  
P. O. Box 7850  
Madison, WI 53707-7850

Administrative Law Judge (ALJ):

Joseph A. Nowick  
Division of Hearings and Appeals

**FINDINGS OF FACT**

1. HIL Meadowbrook is a licensed Community Based Residential Facilities (“CBRF”) under Chapter 50 of Wisconsin Statutes and Chapter DHS 83 of the Wisconsin Administrative Code and is located at 1405 Wedgewood Court in Watertown, Wisconsin.
2. A regulatory survey (inspection) was conducted by the Bureau of Quality Assurance (BQA) on June 19, 2009. As a result of the survey, HIL Meadowbrook was cited under DHS 83.32(3)(g) for failing to obtain Department approval of a waiver to use a physical restraint on a resident. The regulatory survey resulted in the issuance of a Statement of Deficiency (“SOD”), SOD # HZ0511.
3. Another regulatory survey was conducted by the Bureau of Quality Assurance (BQA) on February 3, 2010. As a result of the survey, HIL Meadowbrook was cited under DHS 83.32(3)(g) for failing to obtain Department approval of a waiver to use a physical restraint on the same resident that was the subject of the June, 2009 SOD. The regulatory survey resulted in the issuance of SOD # HZ0512 and a forfeiture of \$800, both of which were timely appealed by HIL Meadowbrook.

### DISCUSSION

The Department has moved to dismiss the case because it asserts that the petitioner is not entitled to an administrative hearing. The right of a CBRF to a hearing is addressed in Wis. Stats. §50.03(5g), which states:

(f) If a community-based residential facility desires to contest the revocation of a license or to contest the imposing of a sanction under this subsection, the community-based residential facility shall, within 10 days after receipt of notice under par. (e), notify the department in writing of its request for a hearing under s. 227.44. The department shall hold the hearing within 30 days after receipt of such notice and shall send notice to the community-based residential facility of the hearing as provided under s. 227.44 (2).

The above provision incorporates the right to a hearing criteria in Wis. Stats. §227.42:

(1) In addition to any other right provided by law, any person filing a written request with an agency for hearing shall have the right to a hearing which shall be treated as a contested case if:

(a) A substantial interest of the person is injured in fact or threatened with injury by agency action or inaction;

(b) There is no evidence of legislative intent that the interest is not to be protected;

(c) The injury to the person requesting a hearing is different in kind or degree from injury to the general public caused by the agency action or inaction; and

(d) There is a dispute of material fact.

The petitioner admits that there is no dispute in fact in that it is not arguing that it had not continued the use of restraints without Department approval. Instead, the petitioner’s basic argument is that it had submitted a request for approval of a waiver in order to continue the use of restraints in this case to the MCO that is the petitioner’s funding source for review and subsequent forwarding to the Department by the MCO, as is the procedure of that MCO. The petitioner contends that it did not wait for the actual approval because it was in the best medical interests of the client to use the restraints, as verified by the medical professionals involved with the case.

It is the responsibility of the facility requesting a waiver to follow the correct procedures. Those procedures are specified in WI Admin Code, DHS §83.32(3):

(g) *Freedom from physical restraints.* Be free from physical restraints except upon prior review and approval by the department upon written authorization from the resident's primary physician or advanced practice nurse prescriber as defined in s. N 8.02 (2). The department may place conditions on the use of a restraint to protect the health, safety, welfare and rights of the resident. (Emphasis added)

As the waiver request and the accompanying paperwork had been sent to the MCO, HIL Meadowbrook argues that it had done all that it could do and the failure to get a timely waiver was due to the MCO. Thus, the petitioner's argument basically rests on the principle of fairness. Because the MCO failed to promptly submit the waiver request to the Department, HIL Meadowbrook must now pay a forfeiture of \$800. Based on that, the petitioner asserts that the ALJ should remove the SOD and the accompanying forfeiture. It is the long-standing policy of the Office of Administrative Hearings that the Department's Administrative Law Judges do not possess equitable powers. See, Wisconsin Socialist Workers 1976 Campaign Committee v. McCann, 433 F.Supp. 540, 545 (E.D. Wis.1977). This office must limit its review to the clearly stated law as set forth in statutes, federal regulations, and administrative code provisions. See also, Oneida County v. Converse, 180 Wis.2nd 120, 125, 508 N.W.2d 416 (1993). I note that the issue is the status of the use of restraints at the time of the compliance visit. The subsequent approval of the waiver by the Department does not change the fact that the Department had not given its permission at that time.

#### **CONCLUSIONS OF LAW**

1. There is no right to a hearing under Wis. Stats. 227.44, because there is no dispute of fact.
2. An Administrative Law Judge does not have equitable powers.

**NOW, THEREFORE, it is ORDERED**

That the petition for review herein be and the same is hereby dismissed.

#### **REQUEST FOR A REHEARING**

This is a final hearing decision. If you think this decision is based on a serious mistake in the facts or the law, you may request a rehearing. You may also ask for a rehearing if you have found new evidence which would change the decision. To ask for a new hearing, send a written request to the Division of Hearings and Appeals, P.O. Box 7875, Madison, WI 53707-7875.

Send a copy of your request to the other people named in this decision as "PARTIES IN INTEREST." Your request must explain what mistake the Administrative Law Judge made and why it is important or you must describe your new evidence and tell why you did not have it at your first hearing. If you do not explain these things, your request will have to be denied.

Your request for a new hearing must be received no later than 20 days after the date of this decision. Late requests cannot be granted. The process for asking for a new hearing is in Wisconsin Statutes § 227.49. A copy of the statutes can found at your local library or courthouse.

#### **APPEAL TO COURT**

You may also appeal this decision to Circuit Court in the county where you live. Appeals must be filed no more than 30 days after the date of this hearing decision (or 30 days after a denial of rehearing, if you ask for one).

For purposes of appeal to circuit court, the Respondent in this matter is the Department of Health Services. Appeals must be served on the Office of the Secretary of that Department, either personally or by certified mail. The address of the Department is: 1 West Wilson Street, Room 650, Madison, Wisconsin, 53703.

The appeal must also be served on the other "PARTIES IN INTEREST" named in this decision. The process for appeals to circuit court is in Wisconsin Statutes §§ 227.52 and 227.53.

Given under my hand at the City of  
Madison, Wisconsin, this \_\_\_\_\_ day  
of \_\_\_\_\_, 2010.

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Joseph A. Nowick  
Administrative Law Judge  
Division of Hearings and Appeals