

DHHS Directive Number III-6

Title: DHHS Penalty Review Committee
Effective Date: January 12, 2009
Revision History: January 1, 2002; November 3, 2008
Authority: G.S. 143B-10; 131D-34; 131E-129

Purpose

The purpose of this directive is to establish a Penalty Review Committee for the North Carolina Department of Health and Human Services (NC DHHS) as required by G.S. 131D-34 and G.S. 131E-129. This procedure will ensure an equitable administrative review process for the requirements specified in the statutes cited..

Policy

1. **Composition.** The committee shall be composed of nine (9) members as follows:
 - A. A licensed pharmacist;
 - B. A registered nurse experienced in long-term care;
 - C. A representative of a nursing home recommended by the nursing home (NH) industry;
 - D. A representative of an adult care home recommended by the adult care home (ACH) industry;
 - E. One (1) representative of the DHHS; and
 - F. Four (4) public members. One shall be a “near” relative of a nursing home patient, chosen from a list prepared by the Office of State Long-Term Care Ombudsman in the Division of Aging and Adult Services, DHHS. One shall be a “near” relative of an ACH resident, chosen from a list prepared by the Office of State Long-Term Care Ombudsman in the Division of Aging and Adult Services, DHHS. For purposes of this subdivision, a “near” relative is a spouse, sibling, parent, child, grandparent or grandchild.

Neither the pharmacist, nurse, nor public members, nor any member of their immediate family shall be employed by or own any interest in a NH or ACH.

All members of the committee shall be appointed by the secretary and

shall serve a term of two (2) years from the date of appointment. The Secretary shall fill all vacancies. Unexcused absences from three (3) consecutive meetings constitute resignation from the committee. A representative from the DHHS, designated by the secretary, shall serve as chairman of the committee. If the chairman is not in attendance at a meeting, either the secretary or the chairman may designate any other member of the committee to serve as interim-chair during the chairman's absence.

2. Meetings. The committee shall ordinarily meet once a month, or more often at the call of the chairman, as necessary to conduct the business of the committee. A majority of the membership shall constitute a quorum for committee action.
3. Staff. The committee shall be staffed by the Division of Health Service Regulation. At least one staff person shall be available for all committee meetings and as otherwise required by the committee. A registered nurse consultant from the staff of the Division of Health Service Regulation shall attend each meeting of the committee in order to respond to questions from the committee members. The Director of the Division of Health Service Regulation shall make other staff members available to the committee as necessary.
4. Per Diem. The Division of Health Service Regulation shall pay members of the committee per diem and necessary travel and expenses within the limits of G.S. 138-5 and G.S. 143-10(d).
5. Training. Before serving on the committee, each member is to complete training provided by the DHHS covering standards of care and applicable state and federal laws and regulations governing facilities licensed under G.S. 131D and 131E.
6. Role of Committee. Subject to the provisions herein, the Penalty Review Committee shall review administrative penalties assessed pursuant to N.C.G.S. 131D-34 and N.C.G.S. 131E-129 and make recommendations regarding penalties either to the Chief of the Division's Adult Care Licensure Section or the Chief of the Division's Licensure and Certification Section (whichever is appropriate).
 - A. Subject to Subpart item number 1 below, the committee shall review only penalties recommended by a DHHS official with the authority to recommend penalties.
 1. The Penalty Review Committee shall review penalty recommendations from the Adult Care Licensure Section and the Licensure and Certification Section of the Division of Health Service Regulation for Type A violations and for Type A and B violations that were not corrected in the time specified in the plan of correction. The committee shall also review Type A penalty recommendations for which staff training has been recommended in lieu of assessing the penalty.

2. Under no circumstances shall the committee review matters in which a DHHS official with authority to recommend penalties has not officially recommended a penalty or staff training in lieu of assessing the recommended penalty.
- B. A complete record of all relevant information regarding a penalty recommended by a DHHS official with authority to recommend penalties shall be provided to the committee.
1. The complete record shall be provided to each committee member a sufficient time prior to the committee meeting so as to enable each committee member to have a reasonable opportunity to review the record.
 2. The committee shall be entitled to supplement the record at a meeting via any reasonable means, including the informal questioning of individuals in attendance.
 3. If the committee deems that the information provided to it before and at the meeting is insufficient, the committee shall be empowered to postpone further deliberation pending the production of sufficient additional information.
 4. The complete record shall be compiled by the Division of Health Service Regulation staff.
 5. The complete record as compiled by the Division of Health Service Regulation staff shall include appropriate sanction proposal forms, reports of survey (which provide the factual background necessitating the proposed penalty), information to aid in determining the penalty amount as outlined in item number 9 of this document, and any other information required by law.
- C. The committee shall review each penalty recommended to determine whether the penalty is authorized by statute, reasonable under the circumstances and defensible in litigation.
- D. The committee shall vote on each penalty recommended. A majority of the committee members present shall determine the committee's position. The committee shall make any recommendation as it deems appropriate.
- E. The committee's official recommendation shall be made either to the Chief of the Division's Adult Care Licensure Section or the Chief of the Division's Licensure and Certification Section, whomever is appropriate. The chief of the appropriate section is delegated the authority to make the final decision regarding penalties hereunder and has the discretion to accept, revise or reject any recommendation made by the committee. Nothing in this directive shall impact the authority of the director of the Division of Health Service Regulation to continue to serve as the final decision maker for contested case actions under the Administrative Procedures Act (G.S. 150B). Reference is made to the DHHS Directive --I-25, for specificity regarding the division director's role with contested

case actions.

7. **Violation Definitions.** G.S. 131D-34 and 131E-129 classify and define violations by adult care homes and nursing homes as follows:
 - A. Type A Violation – A violation by a facility of the regulations, standards and requirements set forth in G.S. 131D-21 and 131E-117 or applicable state or federal laws and regulations governing the licensure or certification of a facility which results in death or serious physical harm or results in substantial risk that death or serious physical harm will occur.
 - B. Type B Violation – A violation by a facility of the regulations, standards and requirements set forth in G.S. 131D-21 and 131E-117 or applicable state or federal laws and regulations governing the licensure or certification of a facility which present a direct relationship to the health, safety or welfare of any resident, but which does not result in substantial risk that death or serious physical harm will occur.

8. **Penalty Amounts.** G.S. 131D-34 and 131E-129 specify penalty amounts for adult care homes and nursing homes as follows:

<u>Penalty for Type A Violations for:</u>	<u>Amount</u>
ACH licensed for nine (9) or fewer beds	\$250 - \$5,000
ACH licensed for 10 or more beds	\$500 - \$10,000
NH	\$500 - \$10,000

Penalty for Failure to Correct Violations within Time Specified in Plan of Correction for all ACH and NH:

Uncorrected Type A Violations – up to \$500 per day beyond specified time frame.

Uncorrected Type B Violations – up to \$200 per day beyond specified time frame without just reason for failure to correct

Note: Penalties for Type B Violations will only be reviewed by the Penalty Review Committee when recommended as daily penalties for the facility not having violation corrected within time frame specified in the plan of correction.

Other

Refusal to allow inspection of facility premises or records	\$1,000 - \$10,000
---	--------------------

9. **Factors to be Considered in Determining Amount of Initial Penalty.** G.S. 131D-34 and 131E-129 specify that the following factors shall be considered in determining initial penalty amount for adult care homes and nursing homes:

- A. The gravity of the violation, including the fact that death or serious physical harm to a resident has resulted; the severity of the actual or potential harm and the extent to which the provisions of the applicable statutes or regulations were violated;
 - B. The gravity of the violation, including the probability that death or serious harm to a resident will result; the severity of the potential harm and the extent to which the provisions of the applicable statutes or regulations were violated;
 - C. The gravity of the violation, including the probability that death or serious harm to a resident may result; the severity of the potential harm and the extent to which the provisions of the applicable statutes or regulations were violated;
 - D. The reasonable diligence exercised by the licensee to comply with G.S. 131E-256 (Health Care Personnel Registry) and G.S. 131E-265 (Criminal History Record Checks) and other applicable state and federal laws and regulations;
 - E. Efforts by the licensee to correct violations;
 - F. The number and type of previous violations committed by the licensee within the past 36 months;
 - G. The amount of assessment necessary to ensure immediate and continued compliance; and
 - H. The number of patients put at risk by the violation.
10. Penalty Guidelines. The following table of penalties for Type A violations may be used by the committee as a guideline for assessing the amount of the penalty for ACH and NH. However, nothing in this section should be interpreted to remove or interfere with the committee’s discretion to determine penalty amounts under the facts of each particular case.

<u>Description of Type A Violation</u>	<u>Amount</u>	
	ACH-9 or Fewer Beds	ACH (10+) and NH Beds
One (1) violation involving one (1) resident with substantial risk of death or serious physical harm.	\$250-\$1,000	\$500-\$2,000
One (1) violation involving one (1) resident where serious physical harm has occurred.	\$500-\$1,500	\$1,000-\$3,000
One (1) violation involving one (1) resident where serious harm has occurred as a result of aggravating circumstances by staff.	\$750-\$3,000	\$1,500-\$6,000
Death has occurred or appears imminent as a consequence of the violation.	\$3,000-\$5,000	\$6,000-\$10,000

11. Staff Training in Lieu of Penalty Assessment. G.S. 131D-34 and 131E-129 allow staff training to be required of a facility in lieu of assessing an administrative penalty if:
 - A. Training costs do not exceed \$1,000;
 - B. The penalty would be for the facility's only violation within a 12 month period preceding the current violation and while the facility is under the same management; and
 - C. The training is specific to the violation, approved by the DHHS and taught by someone approved by the DHHS and other than the provider.

The Penalty Review Committee will review recommendations for training in lieu of assessing a recommended penalty amount or can make recommendations for training in lieu of a penalty assessment.

APPROVED

Lanier M. Cansler, Secretary
Department of Health and Human Services