



OHIO DEPARTMENT OF HEALTH

246 North High Street
Columbus, Ohio 43215

614/466-3543
www.odh.ohio.gov

John R. Kasich/Governor

Lance Himes/Director of Health

January 9, 2019

Administrator
Capital Care Network
1160 West Sylvania Avenue
Toledo, Ohio 43612

Re: Adjudication Order -- Capital Care Network of Toledo

Dear Administrator:

Enclosed is the Adjudication Order in the above-referenced case.

If you have any questions, please contact me at the above address or at (614) 466-4882.

Sincerely,

A handwritten signature in blue ink, appearing to read 'Lisa Eschbacher', with a long horizontal flourish extending to the right.

Lisa Eschbacher
Senior Legal Counsel

LE:bma

Enclosure

Certified Mail, Return Receipt Requested: 7015 1520 0001 1308 4796



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ADJUDICATION ORDER

Capital Care Network of Toledo (“CCNT”) is a licensed ambulatory surgical facility (“ASF”) that performs surgical abortions. At the time of the events in this matter, the facility’s license had been revoked but the revocation was stayed by a court. On August 21, 2017 the Director of Health proposed to impose a civil money penalty in the amount of \$40,000 against CCNT due to violations of Revised Code Chapter 3702 and Ohio Administrative Code Chapter 3701-83. In addition to the proposed civil money penalty, CCNT was directed to submit a plan of correction to the Department within ten calendar days of receipt of the letter. On September 7, 2017, CCNT submitted a plan of correction and on that same day submitted a written request for hearing.

Hearing Officer Karl Schedler was appointed to hear the matter. By agreement of the parties, a hearing was ultimately held on June 27-28, 2018. The Department of Health was represented by Assistant Attorney General Henry Appel. At the hearing, the Department moved to present the testimony of Assistant Medical Director, Dr. Mary Kate Francis, in rebuttal to the testimony presented by CCNT. The Department’s request was denied. In lieu of closing arguments, the parties submitted written briefs on August 17, 2018. CCNT moved the Hearing Officer for leave to file a reply to the Department’s brief. The Department filed a memorandum contra. CCNT’s motion was denied on September 21, 2018.

The Hearing officer issued his Report and Recommendation on October 10, 2018. The Hearing Officer found the evidence presented at the hearing did not support four of the five citations leveled against CCNT and that applying the seven factors in OAC 3701-83-05.2(D), the civil money penalty should be reduced from \$40,000 to \$3,000. CCNT did not file Objections to the Report and Recommendation.

Pursuant to Ohio Revised Code 119.09, the Hearing Officer’s Report and Recommendations can be approved, modified or disapproved by the agency. Upon consideration of the file, exhibits admitted in the administrative hearing, post-hearing briefs, and Hearing Officer’s Report and Recommendation, I hereby approve in part and disapprove in part the Hearing Officer’s Report and Recommendation.

I approve the Hearing Officer’s recommendations as to the following:

- 1) CCNT was cited for a violation of OAC 3701-83-03(F) for failing to follow its emergency transfer policy when Patient 1 required an admission to the hospital to determine if the physician had perforated the uterus during the procedure. Dr. Nunnally, the attending physician, testified that in her medical opinion the situation was not an emergency. The Hearing Officer found the evidence presented at the hearing did not prove a violation occurred because the matter was not an emergency; CCNT was not required to follow the Emergency Transport Policy.
- 2) CCNT was cited for violating OAC 3701-83-17(F) when it failed to ensure that Patient 1 was transported to the hospital with medical records that are of a sufficient content to ensure continuity of care. While CCNT did not provide records at the time of the survey, the exhibits admitted into evidence at the hearing demonstrate the physician did provide the hospital with a progress note with information and instructions. The Hearing Officer found the evidence presented at the hearing did not support this violation.

- 3) CCNT was cited for violating OAC 3701-83-17(H) because it failed to document it provided Patient 1 with proper discharge instructions following her procedure on April 1, 2017. The Hearing Officer found there was no evidence presented at the hearing that Patient 1 was given written or verbal discharge instructions when she left CCNT on April 1, 2017 and was driven by CCNT staff to Toledo Hospital.

I disapprove the following findings and recommendations and therefore find CCNT did violate the following citations:

- 1) CCNT violated OAC 3701-83-09(C) when it failed to provide documentation to demonstrate that the facility had documented and reviewed any complication or adverse event that occurred during the provision of the facility's service.
- 2) CCNT violated OAC 3701-83-12(C) when it failed to provide documentation that the facility had a policy for reviewing unusual incidents and that it maintained a log of transfers or unusual events.

During the hearing, the ODH surveyor testified consistently regarding her site visit and that she requested the policies or other documents to demonstrate CCNT's compliance with Rules 3701-83-09(C) and 3701-83-12(C). She testified she documented on the survey form her discussions with staff as well as her findings. Her testimony was consistent with her written report, specifically that during the site visit on April 11, 2017, RN Flores stated there is no facility policy for reviewing unusual incidents and there is no log kept of transfers or unusual events. In contrast, RN Flores testified inconsistently. She initially denied making the statement "there is no facility policy for reviewing unusual incidents and there is no log kept of transfer or unusual events." But upon further questioning from the Hearing Officer she backed away from her original testimony and ultimately stated she could not recall making that statement [to the ODH surveyor]. The Hearing Officer exceeded his authority with his findings that "the most logical explanation is that she [Flores] did not understand what she was being asked to produce." There was no testimony to support this finding that she was confused and unsure of what records and/or policies ODH requested.

Furthermore, the Hearing officer's reliance upon admissions made by the ODH surveyor on cross-examination was inappropriate. The surveyor's admissions that she would not have cited the facility had it provided her with a copy of the policy or log she requested is not evidence that the facility had the required documents on April 11, 2017. It is without question had the facility provided the surveyor with the policy required by OAC 3701-83-12 or shown her the log for complication or adverse events as it is required to have by OAC 3701-83-09 that the Department would not have cited the facility for violating these rules. However, the facility did not provide these items on April 11, 2017 and therefore were cited for it.

OAC 3701-83-06(B) provides: "immediately upon request, each HCF shall provide the director access to its premises, facility and patient records, including medical records and staff to enable the director to determine compliance with section 3702.30 of the Revised Code and the applicable requirements of Chapter 3701-83 of the Administrative Code." This rule requires the facility to cooperate with the surveyors which includes the staff asking questions to clarify any confusion they may have about what is needed. No evidence was presented that RN Flores asked the surveyor to clarify what documents or information was needed. Rather, the testimony from the surveyor was RN Flores denied the facility had a policy to review unusual events nor did it have a log to document those events. Moreover, no policies or logs of any kind were provided to the surveyor.

Based upon the foregoing I find CCNT in violation of OAC 3701-83-09(C) and 3701-83-12(C) and 3701-83-17(H). Therefore, in consideration of the factors set forth in OAC 3701-83-5.2, I find a civil money penalty in the amount of \$15,000.00 is warranted for the remaining violations against CCNT.

In accordance with R.C. 119.12 you may appeal this final finding by filing a notice of appeal with the agency setting forth the order appealed from and stating that the agency's order is not supported by reliable, probative, and substantial evidence and is not in accordance with law. The notice of appeal may, but need not, set forth the specific grounds of the party's appeal beyond the statement that the agency's order is not supported by reliable, probative and substantial evidence and is not in accordance with law. The notice of appeal shall also be filed with the court of common pleas of the county in which the place of business of the licensee is located or the county court of common pleas where the licensee resides. In filing a notice of appeal with the Department or court, the notice that is filed may be either the original notice or a copy of the original notice. Such notices of appeal shall be filed within fifteen (15) days after the mailing of the notice of the Department's order as provided in RC. 119.12.



Lance D. Himes, Director
Ohio Department of Health

1-9-19

Date

I hereby certify this to be a true and correct copy of the Adjudication Order of the Director of the Ohio Department of Health.

1-9-19

Date



Custodian of the Director's Journals
Ohio Department of Health