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Navigating Health Department Disciplinary Proceedings

State offers multiple opportunities to address allegations of misconduct

Paul E. Knag and Taruna Garg , The Connecticut Law Tribune

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The Connecticut Department of Public Health (DPH) is charged with regulatory oversight of health service providers. In addition to issuing licenses and certifications to providers, the DPH has the authority to investigate and take disciplinary action against providers who are in violation of the law or otherwise pose a risk to public health and safety. Disciplinary proceedings can be lengthy and complex and may have devastating consequences on a licensee's ability to practice. In particular, under Connecticut General Statutes §19a-17, the relevant regulatory authority may, after notice and a hearing, revoke or suspend a license, issue a letter of reprimand, censure a licensee, place a licensee on a period of probation or take other actions against providers where there is a substantial failure to comply with the Public Health Code, other licensing regulations or the Connecticut statutes. This article provides an overview of the process for disciplinary hearings and offers tips on navigating that process to present the most effective defense.

The Complaint: The process can start in a variety of ways. Under Section 19a-9-9 of the Regulations of the Department of Public Health, a petition may be filed by any person having cause to believe that a licensee has violated a statute or regulation. The DPH website has a form and telephone number that can be used to file a complaint. Patients, co-workers, employers and health care facilities are possible sources of a complaint. DPH may also learn of an issue due to the filing of an adverse event or other report by the hospital, from another governmental body, from a lawsuit or based on media reports.

The Investigation: The investigation process ordinarily begins with a letter from a DPH investigator notifying the practitioner or facility of the investigation. The letter may request particular records, although the DPH may already have records from the party who filed the complaint. The DPH may also request a statement of the care and treatment that was provided to the patient.

On receiving and reviewing the necessary records, a DPH investigator may send a subsequent letter setting forth the specific allegations being made, either by a complaining party or the DPH itself. The practitioner will be asked to provide a written response to the allegations within 30 days. In other cases, the DPH investigator may seek to interview the practitioner or practitioners involved before sending the allegation letter. The practitioner's response to the DPH is a critical step in the process for the practitioner and may have a substantial effect on whether the DPH closes the matter or proceeds further. The practitioner's response may also be an important event for the facility in which he or she works. For example, the responses of a physician and the findings of the DPH may be used in a malpractice case against not only the physician, but also against the hospital in which he or she practices.

For these reasons, the individual practitioner's response to the DPH should be prepared with care. This is an opportunity to explain why actions were taken, bring extenuating circumstances to the DPH's attention, demonstrate support from relevant professional literature, letters from other personnel and colleagues and possibly the opinion of an expert in the field as to whether the practitioner's actions met the applicable standard of care. It is sometimes possible to have the DPH close the case based solely on a practitioner's response. Under 19a-9-15(b) of DPH regulations, the DPH may dismiss any alleged violation if there is insufficient evidence to proceed.

In other cases, the DPH will send the records and the practitioner's response to its own expert for review. If the DPH expert finds no violation of any standard of care, the DPH proceeding with respect to the practitioner will be closed. If a violation of

a standard of care is found, the matter will be referred to the DPH legal office for a "compliance conference" with a DPH staff attorney.

The Compliance Conference: The compliance conference is an unrecorded informal hearing not subject to the rules of evidence in which the provider has an opportunity to present his or her defense. Counsel is permitted to attend the compliance informal hearing and to offer additional documents (such as an expert's report) on the provider's behalf. A practitioner need not attend a compliance conference, but failure to do so will result in the commencement of formal proceedings.

The compliance conference is another critical step in the process and the last opportunity to convince the DPH to dispense with formal proceedings. If there is merit to some violation of state law or regulation, it may be the practitioner's last opportunity to work out a resolution before a hearing. Many cases are resolved through a consent order, which may call for admissions of wrongdoing on the part of the practitioner.

A compliance conference may result in the matter being closed, a settlement with the practitioner imposing professional discipline or a formal hearing either before a DPH hearing officer or a professional board such as the Medical Examining Board or Board of Examiners for Nursing.

In considering whether to enter into a consent order, the practitioner must be aware of the possible collateral consequences. The consent order might impact credentialing with payors, including Medicare, Medicaid and private payors and may affect credentialing with hospitals and other facilities. Other states in which licenses are held may take action as a result of a consent order. It also may affect malpractice coverage. Finally, any consent order is likely to be reportable to the National Data Bank.

The Administrative Hearing: If the matter cannot be resolved on an informal basis and the DPH determines that there is probable cause to invoke further proceedings, the DPH will issue a formal statement of charges and set the matter for a formal administrative hearing. In the most severe cases, a motion for summary suspension of license may be requested if, in the opinion of the DPH, the practitioner's ongoing practices place the public in imminent danger. In such cases, the respondent and DPH may agree to an interim consent order pending a final determination by the agency.

The statutes confer jurisdiction over different types of professionals to boards and commissions which include professionals of that type as well as public members. These entities are listed in C.G.S. §19a-14 and include the Medical Examining Board, the Dental Commission and a long list of other entities regulating other types of providers. The DPH itself handles matters relating to professionals for which no board or commission is set up. Interestingly, in *North Carolina Board of Dental Examiners v. FTC*, 135 S. Ct. 1101 (2015), the U.S. Supreme Court held that members of these types of boards are not entitled to antitrust immunity unless certain state supervision is provided. The Connecticut attorney general has stated that he is studying the impact of this decision.

Formal hearings conducted by the DPH are governed by the procedures set forth in the Uniform Administrative Procedure Act (Conn. Gen. Stat. §4-166 et seq.) and the DPH's Rules of Practice under the Public Health Code, §19a-9-1 et seq. Before the formal hearing, the DPH sends a notice outlining the specific conduct under investigation. Counsel may move, if necessary, for a more specific statement of the conduct. At the hearing, the practitioner will have the opportunity to present any documents and witnesses (including expert witnesses) supporting his or her position and cross-examine witnesses presented by the DPH.

Since the hearing authority may include public members, a defense should be structured using witnesses, documents and language that may be understood by members outside of the licensee's area of practice. It is also critical at the formal hearing to make a complete record of the practitioner's legal defense for purposes of appeal.

At the conclusion of the hearing, the hearing authority will issue proposed findings of fact, conclusions of law citing specific provisions of the applicable statutes or regulations and a recommended decision. Under C.G.S. §4-179, if the decision has not been reviewed by a majority of the members of the board authorized to render a final decision on the matter, the practitioner will have the opportunity to review the decision, file exceptions and present briefs to the full board. The board, after due review, may dismiss some or all of the charges for lack of sufficient evidence, or adopt the agency's decision and impose disciplinary sanctions against the practitioner under C.G.S. §19a-17. If the decision is adverse, the practitioner has the right pursuant to C.G.S. §4-183 to appeal the decision to the Superior Court within 45 days of its mailing. However, any such appeal does not act as a stay of the decision and penalties. Accordingly, counsel must seek such a stay promptly after the board's decision is rendered.

Institutions: Complaints against hospitals, nursing homes and other institutions follow a similar pattern under state law.

Such institutions are regularly inspected by DPH and as such the inspections themselves are the most common cause of DPH action. In addition to taking action against a licensee under state law, DPH acts on behalf of Medicare in its capacity as the state survey agency, as provided under Public Health Code §19-13-D. Under the Social Security Act, a hospital accredited by the Joint Commission on Accreditation of Healthcare Organizations will in general be deemed to meet the Medicare "conditions of participation," minimum health and safety standards established by the U.S. Department of Health and Human Services that are found to be necessary and in the interest of the health and safety of individuals who receive services in health care institutions.

However, if the hospital is found to have significant deficiencies which may affect the health and safety of patients, deemed status may be lost until it is determined that the hospital is in compliance with the conditions of participation. This in turn could result in loss of Medicare certification. The key response from the institution is to take corrective action when problems occur and to prepare and implement an effective plan of correction. Enforcing state law, DPH will sometimes require a "consent order" in addition to a plan of correction. Often these require the retention of an independent nurse consultant at the facility's expense, to perform assessments of the institution in areas of concern. There may also be a reprimand and/or monetary penalties.

In conclusion, although the DPH affords licensees several layers of due process to address allegations of misconduct that may result in sanctions, licensees should seek counsel as early as possible in the process to preserve their rights and present a complete defense on their behalf.

Paul E. Knag is a partner in the litigation department of Murtha Cullina and co-chairman of the health care practice group. Taruna Garg is an associate in the firm's litigation department.
